

# INTERNATIONAL LAW SOCIETY – LAW OF THE SEA WEEK

## Conflict of Laws in U.S. Admiralty Law

October 11, 2010

1. Thanks for inviting me to speak. I understand that most of the attendees are law students. Many of you may not have taken a course on conflict of laws or admiralty, so I will try to keep that in mind in this presentation. I intend to allow time for questions, so you might want to hold them until I get to that point.

I have available a list of citations to the cases I mention, and you may feel free to pick one up at the podium.

2. U.S. admiralty law, of course, is a branch of federal law created by Art. III, § 2 of the U.S. Const., providing that the “judicial power” of the U.S. “shall extend” to, among other subjects, “all cases of admiralty and maritime jurisdiction.”
  - Congress implemented that const. provision by granting in the first Judiciary Act of 1789, and in all federal court jurisdictional statutes since, jurisdiction of federal courts over “admiralty and maritime cases.” The current jurisdictional statute is 28 USC § 1333.
  - But neither the framers of the U.S. Const. nor Congress has defined the term “admiralty and maritime.” Thus, except for a few instances where Congress has enacted admiralty jurisdiction over a specific subject matter, it has been left to the courts to flesh out the meaning of what is an “admiralty and maritime case.”
  - Case law has basically divided that term into three types of admiralty and maritime jurisdiction:
    1. Maritime contracts, defined generally as those having a subject pertaining to water-borne commerce, such as contracts for carriage of goods by water, insurance on vessels, seaman employment contracts, and the like.

2. Maritime torts, which have been held to be those which “occur” on navigable waters of the U.S., the high seas (international waters) or elsewhere; and
  3. A few statutes making admiralty law apply to particular matters. Examples are the U.S. Ship Mortgage Act creating instruments called preferred ship mortgages of vessels and providing for their enforcement in admiralty; lawsuits for injury or death of seamen (the Jones Act), claims for damage to shoreside structures like docks and bridges caused by vessels on navigable waters (the Extension of Admiralty Act).
3. My talk today is part of your International Law Society’s Law of the Sea Week. Somewhat curiously, in my view, U.S. admiralty law is generally *not* the governing substantive U.S. law on much traditional law of the sea subject matter, such as ownership of the seabed, regulation of ocean fishing, and high seas pollution. Instead, U.S. law on such law of the sea matters looks for applicable substantive law to international treaties and conventions and to U.S. statutory regulations and sometimes to common law principles of property law. When cases arise in the U.S. courts on such matters, the courts usually exercise jurisdiction under the so-called “federal question” head of federal court jurisdiction (28 USC § 1331), rather than under the admiralty and maritime jurisdiction conferred by 28 USC § 1333.

There are a few exceptions to that concept, such as admiralty substantive law applying to claims involving ownership and recovery of sunken vessels and cargo lying on the ocean floor.

4. All law regimes, of course, are called upon from time to time to address conflict of laws questions:
  - Will the courts of a particular nation exercise jurisdiction over a controversy involving contacts with two or more nations?
  - If so, what substantive law will the courts of the forum nation apply to resolve such controversies?

5. Similarly, admiralty law, perhaps more frequently than many other substantive law regimes, encounters such issues because it is often called upon to resolve disputes concerning matters of international commerce and other matters arising out of occurrences outside U.S. territorial waters or occurrences within U.S. territorial waters involving foreign-based parties and vessels. Thus, admiralty law has developed, primarily by judicial decision (case law), but occasionally by Congressional statute, its conflict of laws principles.
6. Conflict of laws issues arise in U.S. admiralty law in two contexts:
  1. Whether a particular controversy is controlled by U.S. substantive admiralty law or, instead, by the substantive law of a U.S. state;
  2. Whether U.S. substantive admiralty law or the substantive law of some other nation governs a particular controversy.
7. As to questions of determining whether U.S. admiralty substantive law or state law applies in a particular case, courts start with the U.S. Const. Supremacy Clause, Art. VI, § 2, making federal law, including admiralty law, prevail over any “contrary” state law. The prevailing substantive admiralty law may be either statutory or case law.
  - Issues of pre-emption of state law by substantive admiralty law have arisen frequently over the years, and will no doubt continue to arise in the future. Much of any law school admiralty course addresses that subject.
  - In general, admiralty courts apply the doctrine of *Southern Pacific Co. v. Jensen*, a 1917 U.S. Sup. Ct. case, that state law interfering significantly with the uniformity of maritime law throughout the U.S. is preempted, although the application of that doctrine in the *Southern Pacific* case has since been undermined (the court held that admiralty law preempted application of a state workers compensation law to an injury which occurred on navigable waters).
  - Examples of decisions holding that substantive admiralty law preempts state law include:

1. U.S. substantive law applies comparative negligence rule to personal injury and death cases, so state law applying c/neg as a complete bar to recovery in some cases is preempted if admiralty law governs the case. A leading case so holding is U.S. Sup. Ct.'s 1953 decision in *Pope & Talbot v. Hawn*.
2. There is no statute of frauds in substantive admiralty law, so application of the statute of frauds of a state in a contract case governed by substantive admiralty law is preempted. *Kossick v. United Fruit Co.*, a 1961 U.S. Sup. Ct. decision.
3. Substantive admiralty law limits recovery of punitive damages in maritime tort cases to a ratio of 1:1 to compensatory damages, so conflicting state law providing for treble damages for certain types of property damage claims is preempted. An example is *Norfolk etc. R. Co. v. M/V MARLIN*, a 2009 decision of the U.S. Dist. Ct. for E.D.Va.
4. State law statutory caps on compensatory damages, or limitations on liability for such damages, are preempted by substantive maritime law, where it applies, since admiralty law has no such caps and has its own standards of liability. Examples are the 1959 decision of U.S. Sup. Ct. in the *Kermerec* case, and the more recent decision in *Pike v. Woods Hole Oceanographic Institution*, a 2003 decision of the U.S. Dist. Ct. for Maine.

In the *Kermerec* case, the U.S. Sup. Ct. held that admiralty substantive tort law has one uniform standard of reasonable care, and not a different standard of care depending on the category of the injured person (invitee, licensee, etc.). In the *Pike* case, admiralty substantive tort law, which has no caps on recovery of compensatory damages, was held to preempt the state law providing a cap on compensatory damages which could be recovered against a charitable institution in a case involving injury to a seaman.

- But admiralty courts sometimes uphold the application of state law to particular kinds of maritime casualties on findings that the state law does not significantly disturb the uniformity of maritime law. A leading example is the *Ballard Shipping v. Beach Shellfish* case, a 1994 decision of the U.S. Ct. App. for the 1<sup>st</sup> Cir. There, the court held that application of state law providing for greater monetary recovery for pollution damage to navigable waters than U.S. statutory law provided did not significantly interfere with the uniformity of maritime law.
  - Thus, as I stress in my admiralty course, the choice of the law decision as to whether or not U.S. admiralty law applies sometimes means the result of a lawsuit will be different under admiralty law than if state law applied. That makes it important for practitioners to recognize a situation governed by admiralty law when such situations arise. Perhaps the most obvious example in Oregon is the contrast between Oregon state law that contributory negligence of a plaintiff of more than 50% bars any tort recovery, whereas admiralty tort law's substantive comparative negligence doctrine only diminishes recovery by the percentage of the plaintiff's fault, even if it is far more than 50%. Thus, an injured plaintiff who is over 50% negligent in the accident causing his injury recovers some damages under admiralty law, but nothing if Oregon law applies to his case.
8. As to conflict of laws issues involving questions of U.S. admiralty jurisdiction and choice of substantive law between U.S. admiralty law and the law of a foreign country, U.S. federal courts sitting in admiralty generally have jurisdiction to exercise their admiralty jurisdiction over any defendant who or which can be served with a summons and complaint within the United States. As to whether an admiralty court will exercise that jurisdiction, however, rather than dismiss the case and require the plaintiff to go to a foreign country for relief, depends on principles of *forum non conveniens*. I won't take the time to go into that doctrine today. I simply point out that just because an admiralty court may have jurisdiction over a given controversy, it may not be required to exercise it in a case involving significant foreign contacts.

A court's choice to exercise its admiralty jurisdiction does not, of course, mean that substantive U.S. admiralty law will be applied to resolve the case. Instead, admiralty law, like other law regimes, has developed choice of law principles for determination of what substantive law will be applied in particular circumstances.

9. The basic choice of law principles of U.S. admiralty law are set out in two lines of case law decisions. The first line consists of U.S. Sup. Ct. decisions in *Lauritzen v. Larsen* (1953) and *Hellenic Lines v. Rhoditis* (1970) and cases following them. That line may be limited to application in maritime tort cases. The two U.S. Sup. Ct. cases involved claims of foreign seamen against their foreign vessel owner/employers. Basically, these cases laid down 8 factors to be considered and weighed when choosing the applicable law:

1. The place of the wrongful act;
2. The law of the flag;
3. The allegiance or domicile of the injured person;
4. The allegiance of the defendant shipowner;
5. The place of contract;
6. The inaccessibility of a foreign forum;
7. The law of the forum;
8. The base of operations of the shipowner.

Other case law indicates that this list may not be exclusive, and that there may be additional factors bearing on choice of law in some cases.

The second line of cases, applied in maritime controversies other than tort claims, considers in choice of law issues the factors set forth in the Restatement of Conflict of Laws, including:

1. The needs of the international system;
2. Relevant policies of the forum;
3. Relevant policies of other interested states;
4. The protection of justified expectations;
5. The basic policies underlying the particular field of law;
6. Certainty, predictability and uniformity of result;
7. Ease in determination and application of the law to be applied.

A leading case following that approach, *Gulf Trading and Transportation Co. v. Vessel HOEGH SHIELD*, a 1961 decision of the U.S. Ct. App. for the 5<sup>th</sup> Cir. written by an eminent admiralty judge, the late John R. Brown. In that case, the court applied the Restatement factors to hold that U.S. substantive law controlled a claim for payment for bunker fuel delivered to a foreign vessel in the Canal Zone pursuant to a contract made abroad between two foreign companies.

Both lines of choice of law factors follow the general approach of the Restatement of Conflict of Laws to look at significant contacts in choosing the applicable law, rather than to emphasize a single factor such as where a tort may have occurred.

10. Now let's look at some other U.S. admiralty cases involving application of choice of law principles. First, I comment on maritime contract controversies.
  - U.S. courts will normally enforce choice of law clauses that the parties have included in a maritime contract. A typical example is *North End Oil, Ltd. v. M/V NORMAN SPIRIT*, a 1992 decision of the U.S. Dist. Ct. for the Central Dist. of Calif. There, the court determined that English law applied to a contract for supplies delivered in Los Angeles to a foreign-flag vessel pursuant to a contract between two foreign entities, which called for application of English law. The court found the contacts with England were “more pervasive, substantial and significant” than the contacts with the U.S.

- U.S. courts will also normally enforce a foreign forum clause in maritime contracts. The leading cases are two decisions of the U.S. Sup. Ct. in 1972 and 1995. The 1972 case is *M/S BREMEN v. Zapata Off-Shore Co.* That case involved a contract between an American company and a German company to have the American company's drilling rig towed from Louisiana to a point off the Italian coast in the Adriatic Sea. Shortly after the voyage got under way, the drilling rig was damaged in the Gulf of Mexico, and a claim was asserted in a U.S. admiralty court by the rig owner. The contract provided that any dispute arising under it would be resolved in the London Court of Justice. The U.S. Sup. Ct. enforced that provision, and said that such clauses will be enforced in admiralty unless they involve parties of greatly unequal bargaining power or circumstances making enforcement very unjust to one of the parties.

The 1995 U.S. Sup. Ct. decision was *Vimar Seguros etc. v. M/V SKY REEFER*. That case involved damage to a cargo carried from Morocco to the U.S. under a bill of lading issued by the Japanese operator of the vessel. The bill of lading provided that any claim must be resolved by arbitration in Japan. The U.S. Sup. Ct. ruled that U.S. admiralty law will enforce such foreign forum claims in most cases. The case is notable for finding that the additional expense of a claimant to go to a foreign country to resolve a dispute, even though it may involve a great deal more than the cost of a U.S. lawsuit, does not lessen the liability of the carrier contrary to the U.S. Carriage of Goods by Sea Act (COGSA), even though many fewer claims may be asserted against a carrier because of that additional cost of proceeding in a foreign forum.

- There are many admiralty cases involving employment contracts of U.S. workers hired to perform maritime work abroad. An example is *Coats v. Penrod Drilling Corp.*, a 1993 decision of the U.S. Ct. App. for the 3<sup>rd</sup> Cir. The case involved an injury claim of a U.S. worker hired in the U.S. by a foreign corporation to work on oil drilling vessels operated by the foreign employer in foreign waters. The worker was hurt on the job on foreign waters, and attempted to assert a claim under U.S. law. The court,

applying the factors described in Judge Brown's decision in the *Gulf Trading* case, found that U.S. law applied. It distinguished an earlier 1991 decision of the same 5<sup>th</sup> Cir. court in *Fogleman v. Aramco*, which held that foreign law applied when the U.S. worker was hired in the foreign country and signed the employment contract there.

11. U.S. admiralty courts are frequently called upon to resolve jurisdictional and choice of law questions concerning claims to enforce a maritime lien against a vessel found in a U.S. port for fuel or other supplies or services rendered to the vessel in a foreign country. A major factor creating such choice of law issues is the difference in U.S. law from that of many foreign countries concerning suing a vessel *in rem*, even if there is no personal jurisdiction in the U.S. court over the vessel's owner or operator. In the U.S., that is permissible to enforce a maritime lien arising by statute or maritime case law, but not in many other countries. Thus, when a vessel is sued *in rem* in a U.S. federal court (*i.e.*, to enforce a maritime lien) to recover payment for services or supplies rendered to the vessel abroad, the resolution of the claim turns on what country's law applies. If it is the law of a foreign country, does that law allow suit *in rem* to enforce the maritime lien claim? If not, a suit *in rem* will not be allowed in the U.S. admiralty court.

Such issues are usually resolved by looking at the various factors mentioned above to resolve a choice of law issue. A leading recent example is the 2006 decision of the U.S. Ct. App. for the 11<sup>th</sup> Cir. in *Dresdner Bank v. M/V OLYMPIA VOYAGER*. That case involved services performed by a Greek entity for a Greek owner of a vessel while the vessel was in a U.S. port. The Greek company providing the services sought recovery against the vessel *in rem* for what was owed for its services. Applying the choice of law factors discussed above, the court held that Greek law applied, and under Greek law there was no right to a maritime lien or to sue a vessel *in rem* to enforce the claim.

12. Looking at U.S. admiralty conflict of laws decisions in tort cases, such issues arise frequently in damage claims growing out of vessel collisions. Lawsuits are frequently brought in U.S. admiralty courts even though the collision occurred outside the U.S. and may not involve any U.S.-based party or U.S. vessel. An old

decision of the U.S. Sup. Ct. in 1881 in *The Scotland* appears to remain good law, and holds that U.S. substantive law will be applied if the collision occurred in international waters unless both vessels fly the same flag, in which case the applicable substantive law will be that of the flag nation. An example of the latter type of case is *In Re K.S. Line Corp.*, a 1984 decision of the U.S. Dist. Ct. for the Dist. of Alaska. There, the court determined that Korean law applied to claims growing out of a collision between two Korean-flagged vessels which collided on the high seas in the Bering Straits. The court chose to apply Korean law as to both liability and the amount of damages recoverable on proof of liability.

Thus, choice of law in a maritime collision case still seems to turn mostly on a single factor -- where the tort occurred, rather than a significant contacts analysis.

In practice, the choice of law issues may be less significant in cases involving collisions in international waters because the substantive law of the nations whose law could apply may be substantially the same. Although the U.S. is not a signatory to the Brussels Collision Convention of 1910, it is a party to the 1972 COLREGS Convention which lays down the rules of navigation for vessels in international waters, and to which most seagoing nations are also signatories. Since most vessel collision claims involve alleged violation of one or more of these navigational rules, it is often likely to be immaterial which nation's law is being applied.

13. In other kinds of maritime tort claims, the *Lauritzen v. Larsen* (1953) and *Hellenic Lines v. Rhoditis* (1970) cases mentioned above lay down the significant contacts criteria for choice of law. Both cases involve determination of whether U.S. substantive law applied to the claim of a seaman for personal injury who was employed by a foreign employer aboard a foreign flag vessel. In the *Lauritzen* case it was held that foreign law applied, in a situation where the nationality of the seaman, the location of the owner of the foreign vessel, and the place of injury were all outside the U.S. In *Rhoditis*, the court held that U.S. law applied on similar facts, except that the injury to the seaman occurred in U.S. waters.

14. Finally, I would like to mention a couple of observations about choice of law principles followed by U.S. admiralty law cases.
- First, choice of law has sometimes been determined by Congress, rather than by the courts in admiralty cases. An example is the U.S. Carriage of Goods by Sea Act (COGSA), which applies to any shipment to or from a U.S. port by vessel to or from a foreign port, thereby making the substantive law of that Act applicable to claims growing out of such carriage of goods.
  - Admiralty courts have usually declined to invoke or apply the *renvoi* doctrine (if foreign law applies, a court will look to the foreign country's choice of law principles, as well as its substantive law, which might result in reference back to U.S. substantive law). An example of a U.S. admiralty case rejecting the application of *renvoi* is the 1983 decision of Judge Belloni of the U.S. Dist. Ct. for Oregon in *Comoco Marine Services v. M/V EL CENTRO AMERICANO*.
15. Thanks for your attention. Questions?

**Cases Cited In Carl Neil's Address On  
Conflict of Laws in U.S. Admiralty Law**

**October 11, 2010**

*Southern Pacific Co. v. Jensen*, 244 US 205, 61 L.Ed. 1086 (1917)

- U.S. admiralty law preempts application of state law to claim for injury to worker occurring on navigable waters.

*Pope & Talbot v. Hawn*, 346 US 406, 98 L.Ed. 143 (1953)

- Admiralty comparative fault law applies to claim of worker injured on navigable waters, and preempts a state law contributory negligence bar to recovery.

*Kossick v. United Fruit Co.*, 365 US 731, 6 L.Ed.2d 56 (1961)

- There is no statute of frauds in substantive admiralty law, so application of state statute of frauds in a maritime contract case is preempted.

*Norfolk etc. R. Co. v. M/V MARLIN*, 209 AMC 1135 (E.D. Va. 2009)

- Substantive admiralty law limiting recovery of punitive damages to a ratio of 1:1 with compensatory damages preempts application of conflicting state law providing for treble damages for certain types of property damage claims.

*Kermarec v. Compagnie Generale Transatlantique*, 358 US 625, 3 L.Ed.2d 550 (1959)

- Substantive admiralty law has a single uniform standard of reasonable care, and does not differentiate in standard of care owed to categories of persons (invitees, licensees, etc.), thereby preempting application of contrary state law.

*Pike v. Woods Hole Oceanographic Institution*, 233 F.Supp.2d 198 (D. Me. 2003)

- Substantive admiralty law, which has no cap on compensatory damages, preempts state law cap on such damages recoverable against a charitable institution in case involving injury on navigable waters to an employee of the institution.

*Ballard Shipping v. Beach Shellfish*, 32 F.3d 623 (1<sup>st</sup> Cir. 1994)

- State statute providing greater monetary recovery of damages for ocean pollution than provided by U.S. statutes does not significantly interfere with uniformity of maritime law, and therefore is not preempted.

*Lauritzen v. Larsen*, 345 US 571, 97 L.Ed. 1254 (1953)

- Applying specified factors to be considered on choice of law issues, admiralty law will apply foreign law to claim for injury of seaman employed by a foreign employer aboard a foreign-flag vessel when injury occurred outside the U.S.

*Hellenic Lines v. Rhoditis*, 398 US 306, 26 L.Ed.2d 252 (1970)

- Admiralty law will apply U.S. law to claim of seaman for injury on U.S. waters against his foreign employer and owner of foreign-flag vessel.

*Gulf Trading and Transportation Co. v. Vessel HOEGH SHIELD*, 658 F.2d 365 (5<sup>th</sup> Cir. 1961)

- Applying choice of law factors, U.S. law was chosen to apply to claim for payment for bunkers delivered to a foreign vessel in the Canal Zone pursuant to a contract between two foreign companies made abroad.

*North End Oil Ltd. v. M/V NORMAN SPIRIT*, 1993 AMC 88 (C.D. Cal. 1992)

- Court found substantial contacts with foreign country more pervasive, substantial and significant than with U.S., so foreign law applied to claim based on contract for supplies delivered in Los Angeles to a foreign-flag vessel where contract was between two foreign entities and called for application of foreign law.

*M/S BREMEN v. Zapata Off-Shore Co.*, 407 US 1, 32 L.Ed.2d 513 (1972)

- Admiralty will enforce a foreign forum clause in contract for towage of a U.S. vessel from a U.S. port to a point off the Italian coast.

*Vimar Seguros etc. v. M/V. SKY REEFER*, 515 US 528, 132 L.Ed.2d 462 (1995)

- Admiralty will enforce foreign arbitration clause in bill of lading covering shipment carried from Morocco to U.S. port, even though pursuing a claim in a foreign forum may be more expensive to the claimant than pursuing it in a U.S. court.

*Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5<sup>th</sup> Cir. 1993)

- Admiralty chose foreign law to apply to injury claim of U.S. worker against employer, where worker was hired in the U.S. by a foreign corporation to work on oil drilling vessels operated by a foreign employer in foreign waters.

*Fogleman v. Aramco*, 920 F.2d 278 (5<sup>th</sup> Cir. 1991)

- Court chose foreign law on similar facts to the *Coats* case, except that the U.S. worker was hired in the foreign country and signed the employment contract there.

*Dresdner Bank v. M/V OLYMPIA VOYAGER*, 446 F.3d 1377 (11<sup>th</sup> Cir. 2006)

- Applying Restatement of Conflicts factors, admiralty court held foreign law controlled whether a foreign company providing services to a foreign-flag vessel while the vessel was in a U.S. port could enforce a maritime lien by a lawsuit *in rem* against the vessel, and dismissed the case because foreign law provided no such maritime lien or right to sue the vessel *in rem*.

*The Scotland*, 105 US 24, 26 L.Ed. 1001 (1881)

- Admiralty applies U.S. law to claims arising out of a collision in international waters between vessels flying different flags.

*In Re K.S. Line Corp.*, 596 F.Supp. 1268 (D. Alaska 1984)

- Admiralty court applied Korean law to claims growing out of a collision between two Korean-flagged vessels which collided on the high seas in the Bering Straits.

*Comoco Marine Services v. M/V EL CENTRO AMERICANO*, 1984 AMC 1434 (D. Or. 1983), Belloni, J.

- Admiralty court declined to apply *renvoi* doctrine, in which a court choosing to apply foreign law would look to foreign country's choice of law principles as well as its substantive law.