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The Bases and Range of Federal Maritime Law: Indicia of Maritime Competence

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Notes

THE BASES AND RANGE OF FEDERAL MARITIME LAW: INDICIA OF MARITIME COMPETENCE

I. INTRODUCTION

> Forasmuch as a great and common Clamor and Complaint hath been oftentimes made before this Time, and yet is, for that the Admirals and their Deputies hold their Sessions . . . in prejudice of our Lord the King, and the common Law of the Realm, . . . it is accorded and assented, That the Admirals and their Deputies shall not meddle from henceforth of anything done within the Realm, but only of a Thing done upon the Sea . . . .[1]

The Constitution[2] and federal statutes of the United States establish three forms of jurisdiction for the federal judiciary—diversity,[3] federal question,[4] and admiralty and maritime.[5] This scheme of multibased jurisdiction necessarily raises a fundamental problem in our federal judicial system: the interrelation of these grants of power.

Mr. Justice Story, the author of the opinion in *Swift v. Tyson*,[6] viewed the grants of diversity, federal question, and maritime competence as complementary, and utilized this concept in an attempt to create a uniform body of federal commercial common law.[7] In *Erie Railroad Company v. Tompkins*,[8] however, the Supreme

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1. Statute of 1389, 13 Rich. 2, c. 5.
2. U.S. CONST. art. III, § 2, cl. 1.
3. 28 U.S.C. § 1332 (1970).
4. 28 U.S.C. § 1331 (1970).
5. 28 U.S.C. § 1333 (1970). *See also* RESTATEMENT OF JUDGMENTS § 7, comment *a* at 41 (1942).

The Restatement uses the term "competency"; the majority of common law courts, however, speak in terms of "subject matter jurisdiction." "Competency" is a term borrowed from the civil law system in which jurisdiction defects are considered procedural and, therefore, usually curable. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 73 (1962). In a common law jurisdiction, however, an "incompetent" court cannot render a valid judgment. *See* RESTATEMENT OF JUDGMENTS § 7, comment *a* at 41 (1942). *See also* Cleary, *The Length of the Long Arm*, 9 J. PUB. L. 293, 296 (1960); Ehrenzweig, *Ehrenzweig in Reply*, 9 J. PUB. L. 328, 334-36 (1960). While the reader may consider the use of civil law terms appropriate in any discussion of admiralty, the use of the civil verbalization is intended to stress the organizational aspect of the use of power by the judiciary. *See generally* Smit, *The Terms Jurisdiction and Competence in Comparative Law*, 10 AM. J. COMP. L. 164 (1961).

6. 41 U.S. (16 Pet.) 1 (1842).
7. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 160.
8. 304 U.S. 64 (1938).

Court rejected the principle that the federal courts could "apply the traditional common-law technique of decision"[9] to create a uniform body of federal commercial common law without a specific pronouncement from Congress. Nonetheless, the *Erie* decision did not result in a collateral retraction of federal maritime competence or in a limitation of the Court's power to develop the body of federal maritime law.[10]

General maritime law embraces a framework of decisional law that is distinct and separate from that of the common law. For example, in *Pope & Talbot, Inc. v. Hawn*[11] the Court held the right to recover for unseaworthiness to be "rooted in federal maritime law."[12] In addition, the breach of a maritime duty resulting in death gives rise to a cause of action under the general federal maritime law.[13] If the conduct of which a party complains is within the maritime competence of the federal court, the "legal rights and liabilities arising from that conduct . . . [are measured] by the standard of maritime law [and] [i]f [the] action [has] been brought in a state court, reference to admiralty law would [be] necessary to determine the rights and liabilities of the parties."[14]

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9. D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp., 315 U.S. 447, 472 (1942).

10. *See, e.g.,* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970). *See also* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), in which the Court indicated the source of federal judicial power to develop a body of federal maritime law: "The Constitution itself adopted and established, as a part of the laws of the United States, approved rules of the general maritime law . . . ." 253 U.S. at 160. *See* Recent Development, 6 VAND. J. TRANSNAT'L L. 224 (1972).

Whether the Court by interpreting the constitutional grant, the Congress by enacting specific legislation, or the President by exercising his foreign relations power can limit the federal judiciary's power to maintain the "seasoned body" of general maritime law remains problematical. In practice, however, the Court is the sole arbiter of its own competence in maritime affairs. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 375-77 (1959); *cf.* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). *See also* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 43-46 (1957).

11. 346 U.S. 406 (1953).

12. 346 U.S. at 409.

13. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970).

14. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959) (citations omitted). *See also* Hess v. United States, 361 U.S. 314, 327, 328 n.9 (1960) (Harlan, J., dissenting).

In 1950, before the amendment of the Federal Rules of Civil Procedure eliminated the admiralty side of the federal bench,[15] Professor Black described federal maritime competence as follows:

> [It is] a matter of interest and concern for at least two main reasons. First in general appeal, though probably not in practical importance, the institution of the maritime court must in itself be an experiment of interest; it constitutes the only major attempt in our law to set up a separate judicial tribunal, even in the attenuated form of the "side of court," for the policing of a single industry. It is [a] . . . repudiation of the fundamental idea . . . that judicial proceedings and rules of law ought to be as nearly as possible the same regardless of the nature of the concerns to which they are applied. True, this repudiation is in greatest part a matter of substance, and hence the maritime law rather than the court of admiralty constitutes the most significant differentiating factor. . . . [T]he administrative segregation of the admiralty side . . . aided in keeping clear and undiluted the specific characteristics of the maritime law. . . .
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> Secondly, . . . the relevant constitutional provision recognizes with the clarity of necessary implication that the United States has a deep national concern in the business of navigation and shipping upon the high seas and upon the lakes and rivers of the country, and declares that that concern is to be expressed and made articulate primarily through the judicial branch of the federal government. This national interest is . . . in the control and regulation of a complex of affairs. The jurisdiction which is the means of articulation of this interest ought to be shaped and its parts so distributed as best to serve the practical interest itself.[16]

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15. The admiralty side of the federal judiciary was "veiled in mystical words, phrases, rules and forms of practice which no outsider could confidently penetrate." Crutcher, *Imaginary Chair Removed from the United States Courthouse; or, What Have They Done to Admiralty?,* 5 WILLAMETTE L. J. 367, 375 (1969). As the dissenters in *Romero* indicated, the entire question whether maritime competence is federal question competence is "whether a few more seamen can have their suits for damages passed on by federal juries instead of judges." 358 U.S. at 388 (Black, J., dissenting). Subsequently, in *Fitzgerald v. United States Lines,* 374 U.S. 16 (1963), the Court concluded that Jones Act, unseaworthiness, and maintenance and cure claims should all be given to the jury. Coupled with the merger of federal civil and federal admiralty rules and the availability of pendent jurisdiction for federal and state claims, the *Fitzgerald* clean-up doctrine should present an even more compelling basis for evaluating maritime competence as a choice of law rather than a choice of forum problem. *See* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, at 226-27 (1968) [hereinafter cited as ALI, FEDERAL COURTS].

16. Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 259, 260-61 (1950) (footnotes omitted).

A claim of federal maritime competence over a particular case—regardless of whether such competence is predicated on the Constitution [17] or on 28 U.S.C. § 1333—presents a choice more of applicable law than of competent forum. The court must decide whether maritime competence exists through a determination of the applicable body of law. [18] As a practical matter, however, the scope of federal maritime competence, as distinguished from that of diversity jurisdiction or federal question competence, can be best articulated as a set of conceptual parameters drawn to effectuate the policy considerations and balance the interests between uniform and nonuniform regulation of the commercial maritime industry. These policy considerations and interests, therefore, determine whether maritime competence exists, and the court is presented with a choice of law question to decide a choice of law problem. [19] The vast majority of cases, however, are not "borderline cases on jurisdiction; . . . the main business of the court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra." [20]

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17. The Constitution extends the subject matter jurisdiction of the federal courts to "all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1. Congress has implemented this provision, giving the district courts "original jurisdiction, exclusive of the courts of the States, of: . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1970).

18. In a maritime case the court will apply federal decisional and statutory maritime law. *See* cases cited note 10 *supra*. *See also* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 196-204 (1967). This federal law will include the applicable maritime choice of law rule, which may point to the maritime law of a foreign country. *See, e.g.*, A. EHRENZWEIG, *supra*, at 219-23. In the famous "maritime but local" exception to uniform treatment of cases arising under federal maritime law, the common law of a state may be selected as controlling. *See, e.g.*, Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). In a diversity case, the court will apply state decisional and statutory law. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In a federal question case, the court will apply federal decisional and statutory law. *See generally* Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

19. The initial choice of law problem is whether the federal or state forum will apply federal maritime law including maritime choice of law. The second choice of law problem is whether the forum sitting in admiralty will apply the substantive rules of maritime law or the maritime choice of law rules. If the court adopts the latter and selects state common law a *renvoi* type situation has developed which, in reality, amounts to no more than an exercise to choose a "choice of law" law.

20. G. GILMORE & C. BLACK, *supra* note 10, at 24 n.88; *accord* ALI, FEDERAL COURTS, *supra* note 15, Commentary § 1316(a) at 230.

The bases and range of "the main business of the court" nonetheless provide a conceptual foundation for determining what kinds of cases can be characterized appropriately as maritime for purposes of the competence or subject matter jurisdiction of the court. Competence to hear a cause does not mean that there is, in fact, a cause of action.[21] Rather, the bases and range of the causes of action collaterally define the competence of the court to hear certain kinds of causes of action, or any kind of cause of action between certain parties. Furthermore, an examination of the kinds of cases over which a court has subject matter jurisdiction is helpful in delineating the policy reasons behind the existence of the court's power to adjudicate those cases.

This mutually definitional interaction between a court's competence and the kinds of cases it hears may be less apparent in a common law system than in a civil law system. For example, in the recent case of *Tresor Public c. Galakis* the Cour de Cassation reviewed a decision in which the Court of Appeal had considered "whether [a] rule, enacted for internal contracts, should be applied as well to international contracts made to suit the needs of, and under conditions conforming to the usages of, maritime commerce . . . ."[22] The Cour de Cassation held that "the judgment [of the Court of Appeal was] justly that the rule denying validity does not apply to such a contract."[23] Since the 1920's, the Cour de Cassation has regarded the special requirements of international commerce to be determined by French municipal law, including the commercial code and the *jurisprudence.*[24] Regardless of whether there exists a rule of international maritime law independent of municipal law,[25] however, the French Court has explicitly stated that the "needs of . . . maritime commerce" demand special consideration, and it implicitly recognized in *Tresor* that the function of the Court of Appeal is to provide, whenever appropriate, a forum in which the needs and usages of

21. *See, e.g.,* Romero v. International Terminal Operating Co., 358 U.S. at 359.

22. Trésor Public c. Galakis, [1966] D. Jur. 575, [1966] J.C.P. II 14798 (Cass. Civ. 1re).

23. *Id.*

24. Batiffol, *Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties,* 7 COLUM. J. TRANSNAT'L L. 32, 35 (1968).

25. Batiffol, *supra* note 24, at 37-38, 44. *See* Etat Français c. Comité de la Bourse d'Amsterdam (affaire de l'emprunt des Messageries Maritimes), [1951] D. Jur. 749, [1950] J.C.P. II 5812 (Cass. Civ. 1re). *See also* Cheatham, *Conflict of Laws: Some Developments and Some Questions,* 25 ARK. L. REV. 9, 19 (1971).

maritime commerce can be articulated and properly—*i.e.* separately—considered. Whether the court is competent to render a decision in a particular case regarding the needs and usages of maritime commerce depends on whether the particular case concerns those needs. If it does, the court is competent to provide a forum to the parties. By inquiring into the bases and range of maritime usage, a pragmatic and practical means of identifying a court's competence in a particular case is available to both bench and bar.[26]

In comparison, the courts[27] and commentators[28] in the United States tend to equate the question whether a court has maritime competence in a particular case with the question whether the needs of maritime commerce require the application of a uniform interstate body of law. In addition, United States courts often confuse the question whether maritime competence exists with the question whether the complaint has stated a cause of action.[29] When will a court apply federal maritime law, including federal maritime choice of law rules, which indicate the body of law that has the most significant contact with the case? The simple answer is that the court is competent to hear a maritime[30] cause of action when the plaintiff asserts a maritime claim.

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26. *Cf.* Cook, *The Logical and Legal Bases of the Conflict of Laws,* 33 YALE L. J. 457, 485-86 (1924).

27. *See, e.g.,* Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). This point is discussed further at pp. 214-22 *infra.*

28. *See, e,g.,* Currie, *supra* note 7, at 160; Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law,* 64 HARV. L. REV. 246, 249-50 (1950).

29. *See, e.g.,* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). Mr. Justice Frankfurter, speaking for the Court in *Romero,* remarked: "'As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.' *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, 249. Petitioner asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights." 358 U.S. at 359.

30. Characterization itself is a choice of law method. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 140 (1968). The question whether a court is competent to apply its own law, including its choice of law rules, has not only been resolved by federal courts sitting in admiralty by the use of the characterization device, but also by federal courts seeking to determine whether to apply various other federal laws in a case. R. LEFLAR, *supra,* at 42. *See also* A. EHRENZWEIG, *supra* note 5, at 327-28.

Professor Leflar has submitted that "[a]ny case whose facts occurred in one or more than one state or nation, so that in deciding the case it is necessary to make a choice between the relevant laws of the different states or countries, is a conflicts case." [31] As a matter of terminology, the choice between relevant federal and state laws may be characterized as a vertical conflict of laws problem, while the choice among relevant federal laws, or among relevant state laws, may be characterized as horizontal. In either case, the only constitutional limit on the power of the forum to select its own law is that the forum must have a "sufficiently substantial contact with the activity in question." [32]

The classic tradition in maritime conflict of laws has been the use of the characterization device—*e.g.*, the "maritime" tort and the "maritime" contract. [33] The development of the most significant relationship test—or center of gravity and grouping of contacts—has effectively replaced the classic test, [34] but also has been sharply criticized. [35] Further modifications of the focus of the test have resulted in the policy-weighing, or interest-weighing, approach to the choice of law.[36] Additional refinement of this approach has led Professor Currie to develop the governmental interests theory as a means of analyzing the forum's interest or concern with the facts in relation to its law. [37] Regardless of the style of the approach or test which a judge or commentator adopts,

> [t]he history of choice of law is determined by two major themes: the changing relations between the rule of the forum and those foreign rules invoked to displace it; and the changing impact, on ideology and practice, of . . . the existence and . . . fiction of a super law. [38]

As a reflection of the status of current conflicts developments, Professors Reese and Cheatham enumerated in order of priority the

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31. R. LEFLAR, *supra* note 30, at 3.

32. Richards v. United States, 369 U.S. 1, 15 (1962). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1971).

33. *See* De Lovio v. Boit, 7 F. Cas. 418 (no. 3,776) (C.C.D. Mass. 1815). *See also* Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870); Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1944).

34. *See* Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1233 (1963).

35. *See* Currie, *supra* note 34, at 1237; A. EHRENZWEIG, *supra* note 5, at 464.

36. *See* R. LEFLAR, *supra* note 30, at 137, 222-23.

37. Currie, *The Constitution and the Choice of Law: Government Interests and the Judicial Function,* 26 U. CHI. L. REV. 9 (1958).

38. A. EHRENZWEIG, *supra* note 18, at 196 (footnotes omitted).

factors useful in solving a choice of law problem.[39] Professor Leflar, without priority considerations, reduced these factors to a manageable number and listed them as follows:

(a) predictability of results;
(b) maintenance of interstate and international order;
(c) simplification of the judicial task;
(d) advancement of the forum's governmental interests;
(e) application of the better rule of law.[40]

The first, third and fifth considerations directly concern the persons involved in the case—the parties, their lawyers and the judge. The second and fourth considerations refer to the development of an international legal order and the interests of the forum government in relating its policies and legal order to the international legal order.[41] If maritime law is unique among types of federal decisional and statutory law,[42] as the Supreme Court indicated in *Romero* and *Pope & Talbot*,[43] the bases and range of this *corpus juris maritime* should provide a set of conceptual parameters useful in determining the situations in which the federal government's interests in maritime affairs will require the application of a body of federal law. An inquiry into the bases and range of maritime law must be made with a view to functionality; rules of law are needed as practicable guides for advice, conduct and decision.[44]

II. THE BASES AND RANGE OF FEDERAL MARITIME LAW

While the Constitution does not give the federal courts express authority to create a body of maritime law,[45] a seasoned body of maritime principles and rules exists for use by federal and state courts. The sources of this law are as follows: (1) the historical usages of

39. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957), 48 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [REV. CRIT. D.I.P.] 1, 19-20 (1959).

40. R. LEFLAR, *supra* note 30, at 245.

41. *See* Cheatham, *supra* note 25, at 18-20.

42. Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 271, 279-80.

43. *See* cases cited notes 10 & 11 *supra; accord*, ALI, FEDERAL COURTS, *supra* note 15, Commentary at 225-28. *See also* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 544 (1828).

44. Cheatham, *supra* note 25, at 19.

45. *See* D. ROBERTSON, ADMIRALTY AND FEDERALISM 2 (1970). *But cf.* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

maritime commerce developed in Western Europe in commercial courts, as adopted and fragmentized by national courts;[46] (2) international conventions and treaties for promoting the standardization, unification and codification of commercial maritime law;[47] and (3) congressional legislation regulating the transportation of goods and passengers by water.[48] In addition, customs and usages of comparative, or foreign, maritime law may be employed by an American court sitting in admiralty within the common law system.[49]

A. *The Congressional Grant of Maritime Competence*

Section 1333 of Title 28 of the United States Code provides, in part: "The district courts shall have original jurisdiction . . . of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. (2) [Prize Cases]." This congressional grant of maritime competence, implementing article III, section 2, clause 1 of the Constitution,[50] is completely dependent for meaning on the considerable body of case law that has been developed on the subject.[51] The American Law Institute rejected a proposal that it draft a model statute defining the competence of the courts by an enumeration of specific classes of cases, similar to the English Administration of Justice Act of 1956.[52] The Institute, while realizing the inherent limitations and illogical methodology of the present legislation,[53] reaffirmed both the substance of the maritime enabling statute and

46. Yiannopoulos, *The Unification of Private Maritime Law by International Conventions,* 30 LAW & CONTEMP. PROB. 370, 370-71 (1965). *See* Derrett, Comment, 10 INT'L & COMP. L.Q. 637, 638 (1961).

47. *See* Mendelsohn, *The Public Interest and Private International Maritime Law,* 10 WM. & MARY L. REV. 783 (1969); Chauveau, *Conventions for Uniform Laws,* 83 J. DU DROIT INTERNATIONAL 571 (1956); Felde, *General Average and the York-Antwerp Rules,* 27 TUL. L. REV. 406 (1953).

48. *Compare* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) *with* The Tungus v. Skovgaard, 358 U.S. 588 (1959) *and* Braen v. Pfeifer Oil Transport Co., 361 U.S. 129 (1959). *See also* Wetherington, *Jurisdictional Bases of Maritime Claims Founded on Acts of Congress,* 18 U. MIAMI L. REV. 163 (1963); Deutsch, *Development of the Theory of Admiralty Jurisdiction in the United States,* 35 TUL. L. REV. 117 (1960); Currie, *The Silver Oar and All That: A Study of the Romero Case,* 27 U. CHI. L. REV. 1 (1959).

49. *See, e.g., In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971).

50. *See* note 17 *supra.*

51. ALI, FEDERAL COURTS, *supra* note 15, at 229-30.

52. 4 & 5 Eliz. 2, c. 46.

53. ALI, FEDERAL COURTS, *supra* note 15, at 230.

the notion that admiralty and maritime cases are not necessarily "wet": "The admiralty and maritime jurisdiction extends to and includes all claims arising out of any maritime transaction or occurrance *irrespective of where the claim arose or the damage or injury occurred.*" [54]

The Administration of Justice Act of 1956 vests the English High Court of Admiralty with competence over nineteen specified classes of cases in addition to any other competence previously vested. Section one provides that the Court may hear claims:

(a) to the possession or ownership of a ship . . . ;
(b) between the co-owners of a ship as to possession, employment or earnings of that ship;
(c) in respect of a mortgage of or charge on a ship . . . ;
(d) for damage done by a ship;
(e) for damage received by a ship;
(f) for loss of life and personal injury in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act . . . of the owners, charterers or persons in possession or control of a ship are responsible, . . . in the *navigation* or *management* of the ship, in the *loading, carriage* or *discharge* of goods . . . or . . . persons from the ship;
(g) for loss of or damage to goods carried in a ship;
(h) [regarding] the carriage of goods in . . . or . . . the use or hire of a ship; [55]
(j) [sic] in the nature of salvage; [56]
(k) in the nature of towage;
(l) in the nature of pilotage;
(m) in respect of goods or materials supplied to a ship for her operation or maintenance;
(n) in respect of the *construction, repair* or *equipment* of a ship . . . ;
(o) by a master or member of the crew of a ship for wages . . . ;
(p) in respect of disbursements made on account of a ship;
(q) [of] general average . . . ;
(r) arising out of bottomry;
(s) [arising in respect to the libel in rem of a ship or cargo] for droits of Admiralty. [57]

54. *Id.* (emphasis added).

55. Section 1-(1)(h) applies to any cause of action whether characterized as contract or tort. Schwartz & Co., Ltd. v. The St. Elefterio, [1957] 1 L.L.R. 283, 286 (Admiralty Div.).

56. Sections 1-(1)(j)-(l) also apply to aircraft.

57. *See also* ALI, FEDERAL COURTS, *supra* note 15, Appendix at 502-03; 1 STEVENS BRITISH SHIPPING LAW § 23 (1964) (emphasis added) [hereinafter cited as STEVENS].

Additionally, section 504 of the English Merchant Shipping Act of 1894[58] provides exclusive competence in the High Court of Admiralty for collision, limitation of liability cases, and hypothecation of a vessel. Finally, the 1956 Act defines a ship as "any description of vessel used in navigation."[59]

Comparison of the respective American and British legislative methods of vesting their judiciaries with competence over maritime cases demonstrates three significant distinguishing features. First, the Administration of Justice Act is a legislative grant of power while 28 U.S.C. § 1333 is a legislative implementation of a constitutional grant of power.[60] Practically, both courts are faced with a legislative interpretation problem;[61] however, the constitutional underpinnings of the United States congressional grant enable United States courts to act as the final arbiters of their own power, since they are the final arbiters of questions arising under the Constitution.[62] Secondly, the different legislative approaches to defining maritime competence reinforce the conclusion that the United States courts are the final arbiters of their own adjudicative power because United States courts are implicitly relied upon to define and delimit the range of their own competence.[63] In effect, Congress has said that those cases are maritime that the courts say are maritime.[64] Finally, while the British enabling statute implicitly refers to municipal decisional or statutory law,[65] the American statute, by paralleling the wording and intent of the original constitutional grant, indicates that the grant may have been made in reference to a body of transnational law[66] that transcends the specific statutory or decisional rules codified or adopted by United States lawmakers.[67]

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58. 57 & 58 Vict., c. 60.

59. 4 & 5 Eliz. 2, c. 46, § 8(1).

60. *Compare* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) *and* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) *with* Schwartz & Co., Ltd. v. The St. Elefterio, [1957] 1 L.L.R. 283 (1957).

61. *Cf.* 1 STEVENS, *supra* note 57, at 23.

62. *See generally* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

63. *Compare* Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) *with* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) *and* Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924).

64. *Accord* ALI, FEDERAL COURTS, *supra* note 15, at 229-30.

65. *See generally* 4 & 5 Eliz. 2, c. 46, §§ 1(1), 5(2).

66. *Cf.* Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924).

67. *See, e.g.,* D. ROBERTSON, *supra* note 45, at 2-3.

The jurisprudential problem of whether there can be a rule of international law developed in national forums independent of national or municipal law is beyond the scope of this note.[68] The more practical problem of defining the sources of rules of maritime law developed by our national legislature and courts, however, is essential and necessitates a determination of the reasons for initiating and preserving a distinctive body of national maritime law.[69]

Hamilton, commenting on the original constitutional grant of maritime competence, concluded:

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime cases. They so generally depend on *the laws of nations,* and so commonly affect *the rights of foreigners,* that they fall within the considerations which are relative to *public peace* . . . .[70]

Two aspects of this statement indicate the jurisprudential significance of the constitutional grant of maritime competence to the federal judiciary. First, the cases arising under this grant were to be decided by the laws of nations. The ancient laws of Oleron, Wisbuy and the Hanseatic League, as well as the Marine Ordinances of Louis XIV,[71] constituted the basic source material for the Colonial and Vice-Admiralty courts during the late 18th century.[72] Furthermore, commentators of the period considered the law of the sea and the law of nations, as Grotius popularized the term, jurisprudentially related[73] and dependent on the size and significance of a military and

68. *See generally* Etat Français c. Comité de la Bourse d'Amsterdam (affaire de l'emprunt des Messageries Maritimes), [1951] D. Jur. 749 (Cass. Civ. 1re); P. JESSUP, TRANSNATIONAL LAW (1956).

69. A relevant question today is to what extent the old General Admiralty Rules, 5 Stat. 516 (1842), were an aid in keeping maritime law pure and distinctive. *See* Crutcher, *supra* note 15, at 375-76.

70. THE FEDERALIST No. 80, at 491 (H. Lodge ed. 1908) (A. Hamilton) (emphasis added).

71. *See* 30 F. Cas. 1174-1216. De Lovio v. Boit, 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815).

72. *See, e.g.,* 4 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY 439-41 (6th ed. 1940); Currie, *supra* note 48, at 2-4. "The laws of *Oleron,* as they were called, might constitute a national code of maritime law, for the direction of the admiral, and whatever was defective therein was supplied from that great fountain of jurisprudence, the civil law . . . ." 3 J. REEVES, HISTORY OF THE ENGLISH LAW 198 (1787, 2d ed. reprint 1969); *accord* 2 A. BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY 39 (1802).

73. 2 A. BROWNE, *supra* note 72, at 43.

merchant marine.[74] Likewise, the principle of freedom of the seas had found wider currency in the late 18th and early 19th century as an essential element of international law: "*Le principe de la liberté de la haute mer . . . demure ça base essentielle de tout le droit international public maritime.*"[75] Perhaps, as a necessary corollary to the territorial principle that no nation owned the sea and, therefore, no nation governed the sea, there developed the principle that national vessels were floating portions of the nation and therefore subject to the law of the nations and of the sea.[76] During the period of the Articles of Confederation, however, the founding fathers envisioned the jurisprudential solution of the problem; the state courts were to adjudicate maritime cases according to "the maritime law and the law of nations, and the ordinances of . . . Congress . . . and the laws of this state;"[77] "the Laws of Oleron or the Sea Laws;"[78] the "laws of Oleron, the Rhodian and Imperial laws . . . ;"[79] and "the maritime law and the law of nations . . . ."[80] At the time of the constitutional grant "maritime law" was conceptualized as a body of public and private transnational principles and rules governing commerce on the high seas.[81] The second aspect of Hamilton's statement that indicates the jurisprudential significance of the constitutional grant of maritime competence to the federal judiciary is its reference to the public nature of maritime causes, which "commonly affect the rights of foreigners . . . relative to the public peace"—indicating that the grant of competence in the federal courts was a means of legalizing international disputes. Therefore, the federal courts sitting in admiralty were intended to perform a quasi-regulatory function in the foreign affairs area.[82] Interestingly, the removal of maritime competence in

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74. *Id.* at 23.

75. Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 242 (1965) *citing* 3 G. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER; LE TEMPS DE PAIX 632 (1934).

76. *Cf.* C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 285-88 (1967).

77. Laws of New Jersey (1781), 4 E. BENEDICT, *supra* note 72, at 439.

78. Laws of the General Assembly of Rhode Island, 4 E. BENEDICT, *supra* note 72, at 441.

79. Laws of Virginia, c. 26 (1779) cited in Waring v. Clarke, 46 U.S. (5 How.) 474 (1847); *see* 4 E. BENEDICT, *supra* note 72, at 440.

80. Laws of Pennsylvania (1778), 4 E. BENEDICT, *supra* note 72, at 439. *See generally* D. ROBERTSON, *supra* note 45, at 95-103.

81. *Accord* Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924); *cf.* D. ROBERTSON, *supra* note 45, at 16, 103.

82. *See* note 70 *supra* and accompanying text. *See also* Moore, *supra* note 42, at 260.

England from the port courts around the middle of the 14th century and the subsequent grant to the admirals' courts as branches of the royal prerogative were occasioned by foreign relations considerations. [83] Complaints of piracy and numerous spoils claims made by or against foreign sovereigns occasioned the initial establishment of an admirals' court with more than local competence. [84]

At the time of the initial legislative grant of power to the federal courts over maritime cases, the function of the court was to adjudicate private disputes that contained a marked propensity to embroil nations in public international conflicts. The court adjudicated such claims by reference to a transnational body of principles and rules regarding commerce on the high seas and navigable waterways that was independent of and a source for municipal decisional and statutory law. [85] Ironically, the Judiciary Act of 1789 accomplished through the inclusion of the saving to suitors clause what even "the most bigoted idolizers of State authority" could not: the concurrent grant of maritime cognizance to state courts. [86]

B. *The Historical Usages of Maritime Commerce*

The substantive rules of law, developed over a number of centuries and used as sources and evidence of the general maritime law, [87] cover a multitude of activities relating to persons engaged in the transportation of goods and persons by water. The Laws of Oleron, or *Les Us et Coutumes de la Mer*, [88] is the foremost compilation of these rules. Generally, the scope of these substantive rules is the regulation of the relationships between the shipowners (or their agents) and either

83. *See* 4 E. BENEDICT, *supra* note 72, at 360.

84. *Id.*

85. In addition to the merchant or commercial cases which engendered foreign relations considerations, the grant of competence of Prize Cases presented the courts with a unique international function in time of war. *See, e.g.*, Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 1 (1794); Penhallow v. Doane, 3 U.S. (3 Dall.) 54 (1795). Prize law and prize jurisdiction may continue to be of some significance in modern naval warfare. For example, in October of 1950 the Office of the Judge Advocate General, Department of the Navy, published a manual of Instructions for Prize Masters and Special Prize Commissioners (Navexos P-285). *See also* Act of August 10, 1956, c. 1041, 70A Stat. 474, 10 U.S.C. §§ 7651-81 (1970).

86. *See* ALI, FEDERAL COURTS, *supra* note 15, at 229-34.

87. 30 F. Cas. at 1203 (referring to the Marine Ordinances of Louis XIV).

88. 30 F. Cas. at 1171.

employees of the shipowner or shippers of cargo. For example, article 1 regulates the powers of the master to sell the ship or its tackle, and article 2 gives the owner the power to control the times of departure. Articles 3 and 5 deal with the duties of seamen concerning the vessel and cargo:

> Mariners are obligated to look carefully after everything that relates to the preservation of the ship and goods. The obligation of the mariner to the master, begins as soon as he is hired . . . and ends when the voyage is finished, and they are returned. The obligation to the merchant is from the beginning of his charge, and the mariner is obligated to stow and unstow the goods . . . [and] keep them from damnifying . . . .[89]

Articles 6 and 7 obligate the owners to provide the seamen with maintenance and cure for injuries and sickness while "in the service of the ship." Articles 8 and 9 relate to general average of the ship to the cargo and vice versa. Article 10 deals with the master's duty to furnish seaworthy tackle and to make it available for inspection by the shippers. Article 11 imposes upon the shipowner the duty of seamanship, which is the duty of safe carriage at sea for the benefit of the shippers. Article 14 provides rules for mutual fault collisions, and articles 15 and 22 through 26 regulate pilotage. Finally, articles 23, 30 and 31 refer to the salvaging of property at sea and ashore.

The Laws of Wisbuy, or the *Visby Sjörält*, had a marked influence on the development of the English maritime law, the Scandinavian maritime codes[90] and the laws of the Hanse towns.[91] The substantive rules are more complex than those of *Oleron.* They deal with master-crew relationships, the maritime duties of the crew to the ship, cargo and freight,[92] general average, contracts to repair ships, maintenance and cure, the duty of care in the loading and unloading of cargo by means of the ship's tackle,[93] navigation, pilotage, salvage, the ship's discipline, deviation and the duty of transshipment, specific average, and collisions. As in the Laws of Oleron, the conceptual focal point is the carrier-shipper relationship.

The Laws of the Hanse Diets,[94] first enacted in 1597 at Lubeck as a maritime law merchant, were substantively based on the *Visby*

89. 30 F. Cas. at 1173.

90. Pineus, *Sources of Maritime Law Seen from a Swedish Point of View*, 30 TUL. L. REV. 85, 87-89 (1955).

91. 30 F. Cas. at 1197.

92. These articles are comparable to the Laws of Oleron. *See* 30 F. Cas. at 1189-97.

93. *Visby Sjörält*, art. 22.

94. 30 F. Cas. at 1197.

Sjörält and Laws of Oleron.[95] In addition, the laws governed the contract for the construction of a vessel. For example,

> [n]o master shall undertake to build a ship, unless he is assured that his owners... are agreed upon what model it shall be built...; which... owners shall be burghers and inhabitants of any one of the Hanse towns.[96]

Articles 3, 4 and 5 related to the repairing and provisioning of a vessel. The Hanse laws also governed bottomry bonds, ship's mortgages and pledges, and affreightments. In addition to providing for maintenance and cure, article 19 provided that masters were obligated to give mariners certificates of their faithful service. Finally, article 30 provided a more complex method of ship's discipline than reliance on the master for summary justice in more serious matters: "If one mariner kills another the master is bound to seize him, and keep him in safe custody till he arrives at his port, and then to deliver him up to the justice to be punished."

The Hanse laws reflect both the complexity of financing, operating and manning a 16th century merchant vessel and the relative complexity of the 16th century North Sea merchant marine industry. The central focus around which the legal system was built was the carrier-shipper, vessel-cargo relationship. Furthermore, the enactment of laws reflected a public concern over private maritime affairs, although the most notable provision was a monopolistic restraint of trade.[97] In addition, the issuance of certificates of faithful service indicated a public consciousness that good seamen should be readily identifiable for the benefit of the seamen themselves, ship and cargo owners, and the maritime economy of the league.

The last compilation of maritime usages and customs that served as a source of the law of the sea and of nations for the early admiralty courts of the United States was the Marine Ordinances of Louis XIV, 1681.[98] The Ordinances were influenced by the prior *Visby Sjörält* and Laws of the Hanse Diets.[99] Subsequently, in 1807, the *Ordennance de la Marine* was codified in the Code Napoléon, and it remains a substantial element of the present French maritime law.[100] Substantively, the rules of law expounded in the *Ordennance* are as commercially feasible and fair as are those codified in France or

95. Pineus, *supra* note 90, at 87; 30 F. Cas. at 1197.
96. Laws of the Hanse Diets, art. 2.
97. *Id.*
98. 30 F. Cas. at 1203.
99. 30 F. Cas. at 1203; Pineus, *supra* note 90, at 88.
100. Pineus, *supra* note 90, at 88.

available in the United States today, and the methodology of its construction—its bilateral focus, first, on persons and interpersonal relationships and obligations and, secondly, on the subject matter of the relationships—illuminates the range of activity characterized as maritime.[101] First, the primary focus of the Code is on those persons who move goods (cargo) by means of ships on water for a living—masters, seamen and owners—and their relationships among themselves and with the state. Secondly, the rules focus on the nature of the relationship between the carrier and the owner of the goods to be carried—the shipper—as the primary personal relationship to be regulated. Finally, the substantive rules regulate the carrier-shipper

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101. The commercial nucleus of *L'Ordennance* is found in two sections entitled "Mariners and Ships" and "Maritime Contracts"; each of these sections is further subdivided into titles and articles. "Mariners and Ships" deals first with the qualifications, duties, rights and authority of masters. For example, title 1, article 9 provides that the master "shall be answerable for all the goods laded aboard his ship, which he shall be obligated to deliver according to the laws of lading." Secondly, titles 2 and 3 deal with the duties, rights and obligations of the mate and seamen (*un homme de mer*). Thirdly, title 4 concerns the owners of ships; article 1 provides that anyone "may cause ships to be built or bought, fit them out themselves, freight [or charter] them to others, and drive a trade at sea." Finally, title 5—"of ships and vessels"—deals with maritime liens and the hypothecation of a vessel, as well as registry with the "officers of the admiralty" and "secretary of state, who has the management of the maritime affairs . . . ."

While the focus of the first section is on persons and interpersonal relationships and obligations, the focus of "Maritime Contracts" is the regulation of the subject matter of these relationships by means of characterization. For example, title 1 is "of charter Parties and Freighting of Ships"; title 2 is "of Bills of Lading"; title 3 is "of Freight" and covers general average, the duty of safe and speedy carriage with deviation, and defenses for failure to fulfill this duty, *e.g.*, restraint of prices. Further, article 23 gives the master a preferred lien on "goods of his lading; as long as they are in the ship, in lighters, or upon the quay [dock]; or wherever the goods may be, within fifteen days after the delivery . . . ." Title 4 is "of Contracts and Wages of Seamen" and title 5 is "of Contracts of Bottomry." Title 5, article 2 provides that "money may be given upon the body and keel of the ship . . . rigging and tackle, munitions and provisions . . . and . . . loading, for one whole voyage . . ."; however, article 4 forbids anyone "to take up any money upon the freight . . . to be made, . . . the profit expected . . . or even upon the seaman's wages." Title 6, article 1 allows "all our subjects . . . to insure, and cause to be insured . . . the ship's goods and effects, which shall be transported by sea or by navigable rivers . . . ." Title 6, articles 70-74 provide for arbitration agreements with an appeal to the courts of parliament. *See* materials cited notes 24 & 25 *supra*. Title 7—"of averages"—and title 8—"of Ejections and Constitutions"—deal with the causes of specific and general average between the carrier and the shipper.

relationship from "lading" until "delivery . . . upon the quay, or wherever" for fifteen days. As long as the carrier is responsible for the safety of the goods as a matter of law, the law that imposes and regulates that duty is the law of water transportation.

C. *International Conventions and Treaties*

The Constitution provides that the treaties of the United States are the law of the land.[102] Competence of a cause of action regarding such a treaty would be federal question competence.[103] Commentators,[104] members of the admiralty bar[105] and the courts[106] regard treaties directly and indirectly regulating the transportation of goods and people by water to be within the maritime competence of the courts. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading,[107] or the Hague Rules,[108] as enacted into United States positive law by the Carriage of Goods by Sea Act (COGSA),[109] is the most commercially important body of rules and principles of international origin in force in the United States as municipal law.

The major portion of commercial common carriage[110] activity is governed by COGSA[111] and, through contractual reference, the

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102. U.S. CONST. art. VI, cl. 2; 1 L. OPPENHEIM, INTERNATIONAL LAW 41-42 (8th ed. 1955); *cf.* The Scotia, 81 U.S. (14 Wall.) 170, 188 (1871).

103. 28 U.S.C. § 1331(a) (1970); *accord* ALI, FEDERAL COURTS, *supra* note 15, at 5.

104. *See, e.g.,* G. GILMORE & C. BLACK, *supra* note 10, at 124-27, 125 n.23.

105. *See generally,* Mendelsohn, *supra* note 47, at 783-84.

106. *See generally,* Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959).

107. *See generally,* The International Convention for the Unification of Certain Rules Relating to Bills of Lading, August 25, 1924, 51 Stat. 233, T.S. 931, L.N.T.S. 155, codified as 46 U.S.C. §§ 1300-15 (1970) (COGSA).

108. The International Convention is also known as the 1924 Hague Rules Convention. *See* Mendelsohn, *supra* note 47, at 784 (discussing the 1968 Protocol to the 1924 Hague Rules Convention).

109. *See* note 107 *supra.*

110. The need for predictability, uniformity and certainty in international private carriage has been secured by the use of standard form charter parties. *See, e.g.,* THE UNIFORM GENERAL CHARTER, *rev.* 1922, THE DOCUMENTARY COUNCIL OF THE BALTIC AND WHITE SEA CONFERENCE (GENCON) (voyage charter), G. GILMORE & C. BLACK, *supra* note 10, at 796-801; TIME CHARTER, N.Y. PRODUCE EXCHANGE, *amend.* 1946, *id.* at 802-09.

111. *Cf.* Mendelsohn, *supra* note 47, at 784; Yiannopoulos, *supra* note 46, at 371-72. The impact of COGSA or the Hague Rules is clearly evident in the

York-Antwerp Rules of 1950.[112] Section 1301(e) of COGSA provides that the range of substantive coverage ". . . covers the period of time when the goods are loaded on to the time when they are discharged from the ship"—from "tackle to tackle." Section 1303(2) provides that "[t]he carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."[113] The York-Antwerp Rules, which regulate the adjustment of general average between carrier and shipper, are not statutory but are incorporated by reference in virtually all contracts of common carriage.[114] They cover successful sacrifices of the ship or cargo[115] at sea or while stranded ashore,[116] including jettison, fire, cutting away,[117] voluntary stranding and lightening, as long as the sacrifice was made for the common safety. The range of coverage is the regulation of the carrier-shipper relationship regarding the vessel, cargo and freight.[118]

Traditionally the international maritime community has been interested in three aspects of the carriage of goods by water—navigation, safety and the unification of commercial maritime law. Generally, navigation and safety may be characterized as matters of "public" international concern, and the unification of commercial[119] maritime law may be characterized as a "private" international matter.

Since many nations have previously invested large sums of money in their own lighthouses and navigation systems, governments tend to be antagonistic toward uniform navigational aids.[120] Nonetheless, con-

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Maritime Code of the U.S.S.R. *See* Dobrin, *The Soviet Maritime Code,* 16 J. COMP. LEGIS. & INT'L L. 252, 253 (1934).

112. Yiannopoulos, *supra* note 46, at 372. The complete text of the rules is available in 8 STEVENS, *supra* note 57, at 1105-11.

113. Compare this text with the text of the Marine Ordinances of Louis XIV (1681) *supra* at p.

114. *See* Govare, *Les Régles d'York et d'Anvers 1950,* [1950] DROIT MARITIME FRANCAIS 3, 4-6 (1950).

115. Rule A, quoted in 8 STEVENS, *supra* note 57, at 1106.

116. Rules I-IV, quoted in 8 STEVENS, *supra* note 57, at 1106-07.

117. Rules V, VIII, quoted in 8 STEVENS, *supra* note 57, at 1107.

118. Rules C, D, quoted in 8 STEVENS, *supra* note 57, at 1106.

119. *See generally* 8 STEVENS, *supra* note 57, at 58-101. See Jambu-Merlin, *Réflexions sur le Droit Social Maritime,* [1961] DROIT MARITIME FRANCAIS 131 for an excellent discussion of the International Labour Organization's Maritime Conventions and Recommendations. For a text of these conventions see 8 STEVENS, *supra* note 57, at 877-1032. The Conventions cover the employment, welfare and status of seamen, as well as the safety of longshoremen who are processing vessels.

120. 8 STEVENS, *supra* note 57, at 3.

ventions regarding maritime signals,[121] manned lightships[122] and buoyage[123] have been signed and ratified by many countries. Concerning ships' safety, the International Convention Respecting Load Lines,[124] which the United States has signed but not ratified, and the International Convention for the Safety of Life at Sea,[125] which the United States has both signed and ratified, are the two basic conventions regulating the carrier and his vessel operating in international and national waterways.

The *Comité Maritime International* in Antwerp has rendered invaluable service in promoting maritime law as a body of law of transnational significance and uniformity.[126] In addition to producing the York-Antwerp Rules and the Hague Rules, the *Comité* initiated the movement for standardization, unification and codification of maritime law at its first convention in 1910 by producing the draft texts of the Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea.[127] The Convention applies to all vessels, whether or not state-owned,[128] and provides, in article 1, that:

> Assistance and salvage of seagoing vessels in danger, of any things on board, of freight and passage money, and also services of the same nature rendered by seagoing vessels to vessels of inland navigation or vice-versa, are subject to the ... provisions [of this convention] ... in whatever waters the services have been rendered.

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121. Agreement Concerning Maritime Signals, Lisbon, Oct. 23, 1930, 125 L.N.T.S. 95.

122. Agreement Concerning Manned Lightships Not on Their Stations, Lisbon, Oct. 23, 1930, 112 L.N.T.S. 21.

123. Agreement for a Uniform System of Maritime Buoyage and Rules Annexed Thereto, Geneva, May 13, 1936, quoted in 8 STEVENS, *supra* note 57 at 13.

124. For the text of this convention see 8 STEVENS, *supra* note 57, at 58-101. The United States has not ratified this convention.

125. 16 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 27 (effective May 26, 1965).

126. 8 STEVENS, *supra* note 57, at 1047.

127. 37 Stat. 1658, T.S. 576. *See also* 8 STEVENS, *supra* note 57, at 1112-16.

128. *See also* the International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships, Brussels, April 10, 1926, 8 STEVENS, *supra* note 57, at 1121. While neither the United States nor the Soviet Union have ratified this Convention, the United States announced that it would accept the terms of the Convention for purposes of U.S. public vessels.

The *Comité* also produced the text drafts for the conventions regarding collisions,[129] the carriage of passengers, maritime liens and mortgages,[130] limitation of liability,[131] and the immunity of state-owned vessels.[132]

The methodology of the *Comité* has been to focus primarily on the carrier and his relationships with the rest of the world, including and especially the shipper, other carriers and insurers regarding the risks and losses of commercial carriage by sea. Further, the conventions themselves generally are the result of the negotiations between the carriers, shippers and cargo insurers. For example, during the 1968 Protocol to the Hague Rules negotiations, ". . . each of the competing interests was professional, in the sense that each understood and should have fully appreciated what was at stake. Hence, they had at least an equal opportunity to exert their own pressures and influence . . . ."[133] Thus the International Convention Relating to the Arrest of Seagoing Ships[134] indicates the range of relationships governed by international maritime law just as the Administration of Justice Act[135] indicates the range of relationships conceived to be governed by national law:

> (a) damage caused by any ship either in collision or otherwise[136] [carrier v. injured, carrier];

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129. International Convention for the Unification of Certain Rules of Law with Regard to Collisions Between Vessels, Brussels, Sept. 23, 1910, 8 STEVENS, *supra* note 57, at 1067; 10 AM. J. COMP. L. 445 (1961).

130. International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, 8 STEVENS, *supra* note 57, at 1087. The United States is not a signatory to the Convention; however, the .Foreign Ship's Mortgage Act of 1954, 46 U.S.C. § 951 (1970) provides that a foreign mortgage which is valid under the Convention will be recognized in U.S. courts.

131. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, Brussels, Aug. 25, 1924, replaced by the Convention of 1957, Brussels, Oct. 10, 1957, 8 STEVENS, *supra* note 57, at 1058. See Mendelsohn, *supra* note 47, at 789-91 for an excellent comparison of United States municipal law and the provisions of the 1957 Convention in light of the *Yarmouth Castle* disaster.

132. *See* note 128 *supra*. *See also* J. CASTEL, INTERNATIONAL LAW 658-73 (1965).

133. Mendelsohn, *supra* note 47, at 785.

134. 8 STEVENS, supra note 57, at 1126. The United States has not ratified the Convention.

135. *See* text pp. 196-97 *supra*.

136. The text of the Convention is related to and built upon prior existing conventions and generally contemplates a unified body of national law based on

(b) loss of life or personal injury caused by any ship or occuring *in connection with the operation of any ship* [carrier v. world] [emphasis added];
(c) salvage [carrier v. shipper, insurer, salvor];
(d) [contracts for the use of the ship including charter parties] [carrier v. carrier];
(e) [contracts for carriage of goods] [carrier v. shipper, insurer];
(f) loss of or damage to goods [carrier v. shipper, insurer];
(g) general average [carrier v. shipper, insurer];
(h) bottomry [carrier v. financier, insurer];
(i) towage;
(j) pilotage [carrier v. pilot];
(k) goods or materials wherever supplied to a ship [carrier v. supplier];
(l) construction, repair or equipment of any ship [carrier v. builder, financier, insurer];[137]
(m) [seamen's wages] [carrier v. crew];
(n) master's disbursements [carrier v. disbursee];
(o) disputes as to the title . . . of any ship [carrier v. carrier, financier];
(p) [disputes to ownership, possession, employment or earnings of any ship] [carrier v. carrier];
(q) the mortgage or hypothecation of any ship [carrier v. financier, lienholders].

While the carrier is the basic maritime litigant, the subject matter of the litigation is his relationship with someone else regarding the operation, construction, financing, repair, supplying or insurance of the vessel.

D. *Congressional Enactments*

In addition to COGSA[138] and the specific grant of maritime competence,[139] Congress has enacted legislation that has been traditionally interpreted and litigated in the federal and state courts sitting in admiralty as part of the general maritime law.[140] The constitutional grant of power to enact substantive maritime rules

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the conventions in order to achieve a codification of international maritime law.

137. *See* discussion of American law at pp. 214, 217 *infra.*

138. 46 U.S.C. §§ 1300-15 (1970).

139. 28 U.S.C. § 1333 (1970).

140. *See, e.g.,* The Delaware, 161 U.S. 459 (1896) (interpreting the Harter Act, 46 U.S.C. §§ 190-95 (1970) as a "suit in admiralty").

emanates from the "admiralty clause"[141] rather than the "commerce clause."[142] While the distinction between interstate or international commerce and interstate or international maritime commerce[143] is illusory, the courts have made the distinction and have unilaterally determined what legislation is valid as either a maritime or a commerce clause exercise of power. For example, in *Southern Pacific Company v. Jensen*[144] the Supreme Court held that a state was without power to extend its workmen's compensation remedy to a longshoreman injured on the gangplank between the vessel and the pier since that area was exclusively[145] within the maritime legislative jurisdiction of the United States.[146] Therefore, the subsequently enacted Longshoremen and Harbor Workers' Compensation Act[147] had to be defined by Congress[148] and by the Court[149] as a valid exercise of congressional maritime, rather than commerce clause, legislative power.[150] Notwithstanding the general pronouncement in *Romero*[151] that maritime competence is not federal question competence and that by implication maritime legislative jurisdiction is not commerce clause legislative jurisdiction, a great deal of litigation developed in the federal courts prior to *Nacerima Operating Company v. Johnson*,[152] in which longshoremen unsuccessfully contended that maritime commerce and commerce clause powers were complementary concepts.[153]

While the distinction is procedurally relevant for purposes of jury trials in the United States,[154] it is not discernible in other legal systems; furthermore, politico-economic and jurisprudential considerations demonstrate that the maritime-commerce clause dichotomy is

141. U.S. CONST. art. III, § 2, cl. 1.
142. U.S. CONST. art. I, § 8, cl. 3.
143. *See, e.g.*, O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571, 575 (9th Cir. 1965).
144. 244 U.S. 205 (1917).
145. *See* Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924).
146. 244 U.S. at 216-17.
147. 33 U.S.C. §§ 901 *et seq.* (1970).
148. *See* S. REP. No. 973, 69th Cong., 1 Sess., at 16.
149. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 217 (1969). *See also* Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946).
150. 396 U.S. at 218-19.
151. Romero v. International Terminal Operating Co., 358 U.S. 354, 375-77 (1959).
152. 396 U.S. 212 (1969).
153. *See, e.g.*, O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571 (9th Cir. 1965).
154. *Cf.* 349 F.2d at 575. *See also* cases cited note 15 *supra*.

not practically significant in the United States. Mr. Boyd, speaking on the Department of Transportation's ranges of activity, stated that

> [t]he only major federal promotional activity in the field of transportation outside of the Department is the Federal Maritime Administration. Initially, it was proposed that the ... Administration be included in the Department.... [T]he maritime forces organized successfully to keep the maritime Administration out. I believe this was an error.... A comprehensive systems approach to transportation simply cannot end abruptly at the water's edge. Policy developed for domestic and international transportation will necessarily have an impact on this intermediate leg of the journey. Conversely, the impact of maritime policy will be felt in domestic transportation.[155]

The truisms implicit in Mr. Boyd's comments belie any rational basis for an administrative separation of maritime commerce from nonmaritime commerce within the Executive's supervisory and regulatory functions. However successful the "maritime forces" may have been in the past, the time probably will come when they will be forced to unite with nonmaritime interests in order to effect a comprehensive system of regulation of international commerce and transportation for the benefit of all United States carriers.

The comparative method of civilian law nations is to treat all commercial law, including commercial transportation law, as a *lex speciales.*[156] The German Commercial Code is demonstrative of the more general civil law treatment of commercial transactions.[157] The Code is divided into four books: Book I concerns commercial regulation in general; Book II is concerned essentially with partnerships, limited partnerships and stock corporations; Book III governs commercial transactions, specifically including land and rail transportation;[158] and Book IV deals with maritime commerce.[159] The Code distinguishes between maritime commerce and non-maritime commerce on the basis of substantive rules to be applied to the transaction being regulated—not on the basis of the concept that commerce as a scope of activity to be regulated is distinct from maritime commerce. The statutory intent of the Federal Republic was

155. Boyd, *The United States Department of Transportation,* 33 J. AIR L. & COM. 225, 228 (1967).

156. R. SCHLESINGER, COMPARATIVE LAW 405, 405 n.4 (1970).

157. *Cf. id.* at 377-78, 383-84.

158. BGB §§ 407-460 (Kohlhammer 1949).

159. BGB §§ 474-905 (Kohlhammer 1949). The code is especially reflective of the 1924 Hague Rules, by the revisions of 1937 and 1940. R. SCHLESINGER, *supra* note 156, at 378.

to promulgate a single commercial code that regulates all commercial transactions.

Within the common law sphere the same conceptual frame of reference concerning the legislative allocation of jurisdiction within a federal system appears in the British North America Act of 1867 (BNA).[160] Section 92, paragraph 10 gives the Canadian provincial legislatures exclusive jurisdiction in all works and undertakings except with respect to "Lines of Steam . . . ships," interprovince and international commerce.[161] Section 91, paragraph 29 allocates exclusive jurisdiction over these matters to the federal legislature,[162] and includes within its scope the regulation of navigation and shipping,[163] interprovince and international ferries,[164] navigation aides[165] and quarantine and marine hospitals.[166]

In the case of *Reference re Validity of the Industrial Relations & Disputes Investigation Act*[167] the Supreme Court of Canada held that the act regulating collective bargaining and unfair labor practices as applied to disputes between stevedores and their employers under BNA section 91 was a constitutional regulation of interprovince and international commerce. Justice Taschereau remarked:

> Regulation of employment of stevedores is . . . an essential part of navigation and shipping and is essentially connected with the carrying on of the transportation by ship. Even if . . . the [new] law may affect provincial rights, it is nevertheless valid [as] it is . . . in relation to a subject within the federal legislative power under [BNA] S.91.[168]

Justice Locke, who dissented on the grounds that the Act should have been held inapplicable to office workers, noted that the Act was a valid exercise of constitutional power to regulate international commerce because:

> [R]egulation of the relationship between persons engaged in shipping and those employed by them at sea has . . . been recognized necessary for the

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160. 30 & 31 Vict., c. 3.

161. 30 & 31 Vict., c. 3, § 92 (10).

162. 30 & 31 Vict., c. 3, § 91 (29); *see* Montreal v. Montreal Street Ry., [1903] A.C. 482.

163. 30 & 31 Vict., c. 3, § 91 (10).

164. 30 & 31 Vict., c. 3, § 91 (13).

165. 30 & 31 Vict., c. 3, § 91 (9).

166. 30 & 31 Vict., c. 3, § 91 (11). *See generally* McNairn, *Transportation, Communication and The Constitution: The Scope of Federal Jurisdiction*, 47 CAN. B. REV. 355, 356-57 (1969).

167. Reference re Validity of the Industrial Relations and Disputes Investigation Act (R.S.C. 1952, c. 152), [1955] Can. S. Ct. 529.

168. [1955] Can. S. Ct. at 541.

> effective regulation . . . of the operations of ships. . . . [and] is legislation in relation to shipping . . . .[169]

While the theory of the dissenting justices seems to indicate that maritime jurisdiction is unique, the theory of the majority appears to adopt the view that the regulation of interprovince and international commerce is a comprehensive jurisdiction that does not recognize the independence of admiralty. Citing *Harris v. Best Ryley & Co.*[170] for the proposition that loading is the joint act of the carrier and the shipper, Taschereau concluded that this process was done pursuant to contracts for international commercial carriage and, therefore, that the Act was valid as a regulation of international commerce.[171]

Considering the admiralty clause-commerce clause dichotomy of congressional legislative jurisdiction as distinct and separate bases of congressional power to regulate commercial maritime affairs, the courts have heard cases arising under several statutes on the basis of maritime competency. The classic congressional enactment is the Fire Statute or Fire Act;[172] coverage extends to "any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel." The Limitation of Liability Act,[173] which includes the Fire Statute, generally applies to "all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation including canal boats, barges, and lighters."[174] The limitation of liability acts and revisions extend coverage to "commercial seagoing vessels."[175] In addition to the "tackle to tackle" coverage provided by COGSA[176] for vessels engaged in international carriage, the Harter Act[177] applies to all bills of lading covering merchandise transported on "any vessel . . . from or between ports of the United States and foreign ports." The scope of coverage extends to "liability for loss or damage caused by [im]proper loading, storage, custody, care or . . . delivery."[178]

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169. [1955] Can. S. Ct. at 573.
170. (1) [1892] 7 Asp. M.C. 272, 274.
171. [1955] Can. S. Ct. at 543.
172. 46 U.S.C. § 182 (1970).
173. 46 U.S.C. §§ 181-89 (1970).
174. 46 U.S.C. § 188 (1970).
175. *Cf.* 46 U.S.C. § 183; *see* McCaughan, *Federal Maritime Jurisdiction over Inland Intrastate Lakes,* 26 WASH. & LEE L. REV. 1, 11 (1969).
176. 46 U.S.C. §§ 1300-15 (1970).
177. 46 U.S.C. §§ 190-96 (1970).
178. *Compare* COGSA and the Harter Act *with* The Marine Ordinances of Louis XIV, Mariners and Ships, title 1, art. 9, Maritime Contracts, title 2, art. 23, discussed at pp. 202-04 *supra,*

In response to Justice Story's opinion in *The Steam-Boat Thomas Jefferson*,[179] Congress enacted the Great Lakes Act.[180] The Act provides for jury trials in the United States courts sitting in

> admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed to the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes . . . .[181]

While the Great Lakes Act extended judicial competence to the navigable waters of the United States, the Admiralty Extension Act[182] extended the preexisting legislative[183] and decisional law to "all cases of damage or injury, to persons or property, *caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land."[184]

In response to *The Harrisburg*,[185] Congress enacted the Jones Act[186] and the Death on the High Seas Act (DOHSA).[187] The Jones Act adopted by reference the provisions of the Federal Employers Liability Act[188] as an exercise of its admiralty clause jurisdiction.[189] The scope of coverage extends to any seaman[190] who is injured or killed in the course of his employment. DOHSA grants a cause of action in admiralty for the death of any person, which is caused by negligence or default on the high seas beyond a marine league from shore.[191] The district court in *Echavarria v. Atlantic & Caribbean Steam Navigation Company*[192] considered DOHSA a valid exercise of Congress' admiralty and commerce clause legislative power.[193]

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179. 23 U.S. (10 Wheat.) 428 (1825).
180. 28 U.S.C. § 1873 (1970).
181. For an interpretation of how the Great Lakes Act did not extend admiralty jurisdiction, but limited it by providing jury trials see The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) (Taney, C.J.).
182. 46 U.S.C. § 740 (1970).
183. *See* Victory Carriers, Inc. v. Law, 404 U.S. at 209.
184. 46 U.S.C. § 740 (1970).
185. 119 U.S. 199 (1886).
186. 46 U.S.C. § 688 (1970).
187. 46 U.S.C. §§ 761-62 (1970).
188. 45 U.S.C. §§ 51-60 (1970).
189. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).
190. *See* Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970); 4 VAND. INTERNAT'L 148 (1971).
191. 46 U.S.C. § 761 (1970).
192. 10 F. Supp. 677 (S.D.N.Y. 1935).
193. 10 F. Supp. at 678.

Beyond the substantive provisions of COGSA, Congress has been caught in the Court's intricate and not always logical interpretations of what is maritime and what is nonmaritime. The best example is the Ship Mortgage Act of 1920,[194] which was enacted in response to the Court's intransigent position that a ship's mortgage is not a maritime contract.[195] A contract to build a ship is still held to be a nonmaritime contract.[196] In comparison, the Federal Maritime Lien Act[197] was in response to a Supreme Court that would not give a maritime lien for homeport repairs and supplies when the charter party disclaimed liability for such a lien.[198]

III. Toward a Functional Choice of Law Rule

United States courts have failed to articulate precisely a choice of law rule for distinguishing maritime competence from state common law, federal diversity, and federal question competence over causes of action that arise in connection with the transportation of persons and goods by water. Rather, the courts have been preoccupied with three classic characterizations—maritime tort, navigable water and vessel—that have assumed a significance independent of the purposes for which these concepts were articulated originally.

In the first characterization—that of the maritime tort—the maritime competence of the federal courts is predicated on the locality of the accident: "Maritime torts are those committed on the high seas, or on waters within the ebb and flow of the tide."[199] When this rule was first announced by Mr. Justice Story, it had been accepted in no system of maritime law other than in England.[200] Unfortunately, however, succeeding courts accepted Story's scholarship with little hesitation and, finally, the Court considered the rule to be settled.[201] The use of the locality choice of law rule early presented the Court with the conduct-injury dichotomy—the controlling law is either that

194. 46 U.S.C. §§ 911 *et seq.* (1970).

195. *See, e.g.,* Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934).

196. Tucker v. Alexandroff, 183 U.S. 424, 438 (1901).

197. 46 U.S.C. §§ 971 *et seq.* (1970).

198. *See, e.g.,* The General Smith, 17 U.S. (4 Wheat.) 438 (1819); *cf.* The Lottawanna, 88 U.S. (21 Wall.) 558, 581-82 (1874).

199. Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13, 902) (C.C. Me. 1813).

200. *Compare* 404 U.S. at 205-07 *with* Administration of Justice Act of 1956, 4 & 5 Eliz. 2, c. 46, § 1 (d)-(f), The Marine Ordinances of Louis XIV, discussed at pp. 202-04 *supra, and* The International Convention Relating to the Arrest of Seagoing Ships, discussed at pp. 207-08, *supra.*

201. 404 U.S. at 206.

of the place of injury or that of the place of the conduct giving rise to the injury.[202] Absurd results obtaining from the application of the law of the place of the injury and a suggestion from Congress[203] led the Court to conclude that the law of the place of the injurious conduct—regardless of the place of injury—would better serve the needs of maritime commerce.[204]

A number of reasons other than Story's reputation as an admiralty scholar explain the continued vitality of the locality test. The locality test had become by 1802 so firmly entrenched in English and American jurisprudence that Professor Browne could state:

> We may therefore hold it as ruled, that civil or private injuries to the person, committed on the seas, are remediable in this court [admiralty]; but here, and in all matters of tort, locality is the strict limit. There can be no variety in the subject matter of torts. They cannot, like contracts, relate some to terrene, some to marine affairs. . . . In *torts,* locality ascertains the judicial power.[205]

English jurists, however, are somewhat less culpable than their American counterparts for this state of affairs. Instructive on this point is the fact that the Statute of 1389[206] on its face was clearly the result of political—rather than legal—considerations. In comparison, the Marine Ordinances of Louis XIV refer to locality only insofar as the subject matter of the Ordinances is commercial carriage of goods by water; moreover, neither the Laws of Oleron, the *Visby*

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202. *Cf.* Cavers, *Legislative Choice of Law: Some European Examples,* 44 S. CAL. L. REV. 341, 352 (1970).

203. 46 U.S.C. § 740 (1970). The House Report on the Extension of Admiralty Jurisdiction Act stated that the Act was being passed to remedy the "inequities" of such cases as Martin v. West, 222 U.S. 191 (1911), The Troy, 208 U.S. 321 (1908), and Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908), which had held there was no admiralty jurisdiction to provide a remedy for damage done by ships on navigable waters to land structures. H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948), at 2. Congress also passed the Jones Act, 46 U.S.C. § 688 (1970), providing a statutory remedy for members of a ship's crew injured in the course of their employment. The Act covered crewmen injured ashore as well as aboard and was considered by the Supreme Court to be an extension of the ancient remedy of maintenance and cure, which itself was a traditional and important exception to the usual rule that maritime law does not provide remedies for injuries on land. *See* O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). Longshoremen, of course, are not covered by the Jones Act.

204. *See, e.g.,* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

205. 2 A. BROWNE, *supra* note 72, at 110 (emphasis in original).

206. *See* note 1 *supra* and accompanying text.

Sjörält, nor the Laws of the Hanse Diets measures the range of activity that is governed by locality. Furthermore, the Administration of Justice Act of 1956 does not limit the competence of the English High Court of Admiralty to the locality of the event but rather defines its competence by reference to the causative factor.[207]

The second characterization with which United States courts have been preoccupied is that of "navigable waters." This characterization, however, was derived initially from the more fundamental notion that the seas are free from any one nation's control.[208] The principle that a nation's territorial sovereignty ends at the water's edge tended to create a correlative concept of "sea" as a separate legal entity—also delimited by the water's edge and with a legal significance independent of terrestial matters.[209] The classification of "navigable waters within the ebb and flow of the tide," therefore, had great practical significance in the 14th century because of the foreign relations function of admiralty law. However, the notion of the seas' sovereignty is embedded firmly in modern public international law[210] and no longer justifies the existence of such a rigid and arbitrary division in the courts between maritime and nonmaritime matters that the use of the classification "navigable waters" creates. Moreover, it is difficult to envisage a physical injury to a person or property caused by an instrumentality on the "navigable waters" that is not a vessel, its gear or a member of its crew or passenger list. By defining competence by reference to locality, therefore, the Court is to a large measure presently defining competence according to subject matter.

The final characterization with which United States courts have been preoccupied is that of the "vessel." The word "vessel" is not merely a symbol that corresponds to the objective reality of a ship; it has many facets of legal significance. A vessel is an object over which a nation exercises its sovereignty for purposes of personal, legislative and subject matter jurisdiction over the persons and property on board, and for purposes of international relations if the vessel is flying its flag.[211] A vessel also is an object upon which maritime liens are given because the debt was incurred for its maintenance.[212] In addition, a vessel is a vehicle for transporting persons and goods by

207. 4 & 5 Eliz. 2, c. 46, § 1 (f), at 248.
208. Y. BLUM, *supra* note 75, at 242.
209. C. COLOMBOS, *supra* note 76, at 285.
210. Y. BLUM, *supra* note 75, at 242.
211. C. COLOMBOS, *supra* note 76, at 285-86.
212. 46 U.S.C. § 971 (1970).

water for profit, an activity regulated by a special body of law—maritime law.[213] While the preceding legal implications seem simple and obvious, "vessels" also have acquired a conceptual existence of their own, *i.e.* one without an external characterization. For example, in *Tucker v. Alexandroff*,[214] the Court concluded that a contract to build a ship is not governed by maritime law because a "ship is *born* when she is launched, and *lives* so long as her identity is preserved."[215] While the Court in *Thames Towboat Co. v. The Schooner Francis McDonald*[216] modified the excess of the prior decision by concluding that "contracts to construct entirely new ships are nonmaritime because [they are] not nearly enough related to any rights and duties pertaining to commerce and navigation,"[217] the Court still concerned itself with the rights and duties pertaining to transportation of persons or goods by water for profit by means of an object called a "vessel." In effect, the Court repeated its thought in *Tucker*: a contract does not concern the transportation by water of persons or goods for profit until there exists a vessel, and a vessel does not exist until it is launched, because prior to that time it cannot navigate or make a profit.

These are the characterizations with which United States courts have been concerned; but with what, functionally, is maritime law concerned? The bases of present law and the range of activity that its substantive rules and principles govern indicate that the focus of concern and locus of activity is the person who controls the vessel used to move persons and cargo[218] by water from one place to another. This person is called the shipowner, the charterer, or the carrier. The person who controls, or places into the control of the carrier, the cargo is called the shipper. The entire body of principles and rules of water transportation law, including federal maritime law, is built upon these two individuals and the needs of their relationship.

The carrier-shipper relationship is formed without reference to water, except to the extent that water identifies the physical element to be traversed. The relationship is formed without reference to a vessel, except to the extent that vessel identifies the physical means of traversing the water. The relationship is similarly formed without

213. Black, *supra* note 16, at 274.
214. 183 U.S. 424 (1902).
215. 183 U.S. at 438 (emphasis added).
216. 254 U.S. 242 (1920).
217. 254 U.S. at 244.
218. Cargo includes the concept of people, in which case the thing that is controlled may be identical with the person controlling it.

reference to navigability, except to the extent that navigability identifies the physical location of the vessel in relation to the water. The only other legal significance of these terms is their use in choice of law—either the choice between maritime law and nonmaritime law or the choice between one rule of maritime law and another.

The substantive rules of maritime law, however, were developed to satisfy the needs of the carrier-shipper relationship and focus on the carrier as the locus of activity. The rule of law, therefore, should be that the complaint is cognizable in admiralty if the alleged cause of action is based on a relationship that is as follows:

(1) between two or more parties, one of whom is a carrier; and,
(2) that creates a consensual or legal obligation, the object of which is activity to regulate either the profits produced by the use of the vessel or the losses to which the use of the vessel is subject.

The terms "carrier" and "vessel" are used above in their descriptive context. A consensual obligation is a contractual obligation; a legal obligation is an obligation imposed by the rules of federal maritime law including rules of other bodies of law selected by the maritime choice of law rule. The object of the obligation can be either affirmative—an obligation to act—or negative—an obligation to refrain from acting. "Regulate" connotes control or planning.[219] "Profit" connotes the commercial nature of the obligation as well as pecuniary gain itself; "loss" includes the hazards and risks.

More simply, if a carrier is not a plaintiff, a cross-claimant or a defendant, admiralty competence is not established. Moreover, while it is not to say that a 12(b)(6) motion is the equivalent of a 12(b)(1) motion,[220] the alleged facts must indicate a substantial probability of recovery either against or by the carrier. In *Victory Carriers, Inc. v.*

219. The means of articulating the rule is taken from the French Civil Codes. *See* 2 M. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL §§ 156-59, 863B, 947 (12th ed. 1939). The object of an obligation is that which is to be done or not done in response to the obligation. *Id.* § 156. The obligation is, analytically, a "juridical" relationship between two persons, one of whom is entitled to something and the other is required to furnish that thing. *Id.* § 157. The cross obligations are the basis of a synallagmatic contract, similar, as a concept, to a common law bilateral contract. *Id.* § 948. *See* C. CIV. art. 1102-03 (64e Petits Codes Dalloz 1965); HGB art. 273, para. 1, §§ 320, 322 (C. H. Beck) (*Erfullung Zug um Zug*—execution each for each).

220. FED. R. CIV. P. rule 12(b)(1)—a motion to dismiss for lack of subject matter jurisdiction; rule 12(b)(6)—a motion to dismiss for failure to state a claim upon which relief can be granted.

Law,[221] for example, admiralty jurisdiction was held not to exist under the facts alleged because the carrier was not responsible either contractually or legally for the maintenance or control of the forklift that injured the plaintiff longshoreman;[222] nor was the carrier responsible for the condition of the pier. He was responsible for the condition of the ship; if the injury had occurred there, he would have been liable and the cause of action, therefore, would have been governed by maritime law.[223]

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA),[224] however, is within the maritime competence of the federal courts since it does not place the carrier in conflict with someone else; a cause of action under LHWCA is between the stevedore-employer (a noncarrier)[225] and the employee longshoreman or harbor worker. The enactment of LHWCA was a direct result of the Court's decision in *Jensen*, which held that a state workmen's compensation act was inapplicable to a longshoreman injured on the gangplank because the injury took place over the navigable waters of the United States and stevedoring is a maritime profession.[226] Congress and the courts were restrained by a judge[227] who had used the locality choice of law rule[228] to strike down enlightened state laws. In the process, the "Jensen line"[229] was created, which is marked by the gangplank. In an attempt to make some sense of this morass of confusion, Mr. Justice White in *Nacirema Operating Co. v. Johnson*[230] concluded that the injuries of three longshoremen, one of whom was killed, loading a vessel were not compensable under

221. 404 U.S. 202 (1972).

222. 404 U.S. at 213-14.

223. *See, e.g.*, Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1913); *accord*, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *cf.* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). A recent congressional modification in the law governing injuries to longshoremen would change this result if the same factual circumstance occurred today. *See* note 232 *infra*.

224. 33 U.S.C. §§ 901 *et seq.* (1970).

225. The Court held that although the charterer of the vessel and the employer of the stevedore were one and the same, the stevedore could still recover for damages on the basis of seaworthiness, notwithstanding LHWCA to the contrary. *See* Reed v. The Yaka, 373 U.S. 410, 415 (1963).

226. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

227. Mr. Justice McReynolds. *See* note 245 *infra*.

228. *See* Currie, *supra* note 7, at 161.

229. Victory Carriers, Inc. v. Law, 404 U.S. at 208 n.7.

230. 396 U.S. 212 (1969).

LHWCA because the injuries took place on the pier, although a vessel's cargo hoist was a causal instrumentality.[231] Since the decision in *Jensen*, in which the law of the place of the tort rule was used without reference to the carrier, the subsequent tendency in LHWCA actions has been for courts to validate state law whenever possible—to correct the initial error and mitigate the harsh results of *Jensen*.[232]

Other relationships, however, are easily categorized as maritime or nonmaritime by reference to the needs of the carrier-shipper relationship. A contract to employ a seaman is maritime because it relates to the carrier's operation of the vessel. A contract to procure marine insurance is nonmaritime because it purports to regulate the agency relationship between a carrier and an insurer, and not the risk that the ship will not have marine insurance coverage.[233] The chartering of a vessel is maritime, but the contract to make a charter party is not.[234] The contract to sell a ship should be a maritime contract and has been held to be such in *Flota Maritima Browning v. The Ciudad de la Habana*.[235] A contract to build a ship, while not currently recognized as within the admiralty competence, should be a contract cognizable in admiralty and adjudicated according to the federal maritime law, including maritime choice of law rules.[236] The distinction between a contract to repair[237] and a contract to build a ship for purposes of the competence of a court to hear a case is jurisprudentially unsound. While the terms of the former have always been adjudicated by the substantive rules of federal maritime law, the terms of the latter have been adjudicated by state law. Both contracts, however, create an obligation designed to control the hazards of employing a vessel that is structurally unsound without regard for the cause of the structural defect—faulty construction or faulty repairs. The decisions holding that contracts to build ships to be registered in coastal or international

231. 396 U.S. at 213-14.

232. Problems concerning the law applicable to longshoremen's and harbor workers' injuries and deaths—irrespective of the location of the injuries on the pier or on the ship—no longer arise in the courts. Unless the shipowner was negligent, the exclusive remedy of the injured longshoreman or harbor worker (either on the pier or on the deck) is against his employer under LHWCA. For further discussion of the recent amendment to the LHWCA see 6 VAND. J. TRANSNAT'L L. 257 (1972).

233. *Cf.* Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870).

234. *See* 1 E. BENEDICT, *supra* note 72, at 133-42.

235. 181 F. Supp. 301 (D. Md. 1960).

236. *See* text at p. 217 *supra*.

237. *See* North Pacific S.S. Co. v. Hall Bros. Marine R.R. & Shipbuilding Co., 249 U.S. 119 (1919).

trade are not governed by maritime law[238] perhaps are based on, or influenced by, two related and unspoken premises: first, since the contracts are written within a state and to be performed substantially within a state, state law should govern the terms and performance of the contract;[239] secondly, the common law of contracts is sufficiently uniform to assure uniform results in application.[240] By holding that the contract to build a ship was to be governed by state law, the Court was avoiding a *renvoi* situation; the same result could have been reached by holding that the contract was governed by maritime law, including maritime choice of law, which, through considerations of significant contacts and de facto uniformity, would indicate state law as the applicable law. While the same result obtains, the reasoning in terms of competence obscures the true nature and range of maritime jurisprudence.[241] By reversing the above reasoning, *Jensen* decided that maritime law was uniform law and uniform workmen's compensation for longshoremen was needed; therefore, workmen's compensation for longshoremen was to be governed by maritime law. This, however, is a confusion of the reason for having a federal maritime law with the reason for having a uniform federal maritime law.[242]

The same confusion also works to produce the opposite result. For example, the Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*[243] —that state law governs the effect of warranties in marine insurance policies—could have been made on the grounds that the Court was without maritime competence, rather than on the grounds cited by the Court—that the federal maritime choice of law rule indicated that the state statute governed the transaction. The only basis for denying the availability of the former reasoning was Justice Story's prior opinion in *De Lovio v. Boit,*[244] which held that a policy of marine insurance was to be governed by maritime law. As a result, the *Wilburn* Court was forced to adopt the latter reasoning.

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238. *See* notes 215 & 216 *supra.*

239. *Cf.* Thames Towboat Co. v. The Schooner Francis McDonald, 254 U.S. 242 (1920).

240. The contract law of the states need not be uniform but the general principles of contract interpretation are fairly uniform throughout the United States. It is sufficiently uniform for Professor Corbin to write a treatise and find a "majority" rule for any given proposition of law.

241. *See* text at p. 217 *supra.*

242. These same considerations apply to the decisions that ship's mortgages, prior to the Ship Mortgage Act of 1920, were not maritime contracts. *See, e.g.,* Bogart v. The John Jay, 58 U.S. (17 How.) 399 (1854).

243. 348 U.S. 310 (1955).

244. 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815).

In addition, the home port doctrine announced in *The General Smith*[245] and repudiated by the Federal Maritime Lien Act[246] was not grounded on the theory that the Court lacked competence to adjudicate the claim according to federal maritime law. Rather, it was grounded on the theory that a maritime remedy—a libel in rem to hypothecate the vessel—was not needed for supplies and repairs furnished in the home port.

IV. CONCLUSION

A court should have competence in admiralty to render a decision in a particular case if the case concerns the needs and usages of maritime commerce. The bases and range of federal maritime law indicate that a case concerns the needs and usages of maritime commerce if it is one in which the cause of action is based on a relationship that is as follows:

(1) between two or more parties, one of whom is a carrier; and,
(2) that creates a consensual or legal obligation the object of which is activity to regulate either the profits produced by the use of the vessel or the losses to which the use of the vessel is subject.

This proposed choice of law rule is articulated in accordance with the five considerations set forth by Professor Leflar.[247] First, it is a rule that achieves predictability of result, subject to the following caveats: it reflects not what past courts have said, but rather what they have done; and, often courts have confused maritime competence—whether maritime law governs the cause—with the question whether maritime law should be uniform in application. Secondly, the rule is formulated with regard for the maintenance of interstate and international order. The rule is an articulation of the bases and range of substantive maritime law as it has developed to satisfy the needs of interstate and international maritime commerce and order over almost one thousand years. Thirdly, it is a rule that is simple to apply. The Court in *Victory Carriers* applied the rule sub silentio and obtained the correct result

245. "The General Smith, which held that no lien is given by the general maritime law for supplies and repairs furnished to a ship in her home port, runs neck and neck with Southern Pacific Co. v. Jensen . . . for the distinction of being the most ill-advised admiralty decision ever handed down by the Supreme Court." G. GILMORE & C. BLACK, *supra* note 10, at 526.

246. 46 U.S.C. § § 971 *et seq.* (1970).

247. *See* note 40 *supra* and accompanying text.

with a great deal more precision than heretofore witnessed in an admiralty court. Fourthly, the rule advances the government's interests in utilizing the federal maritime law, including federal maritime choice of law rules, because it separates policy considerations regarding the use of the federal maritime law by the state and federal courts from policy considerations regarding the use of the particular rule of maritime law that will obtain uniform results. Finally, the rule will point to the better rule of substantive law; for purposes of choosing between federal maritime law and state or federal common law, the better rule of substantive law is the rule that accounts for the safety, convenience, needs and usages of maritime commerce. It is upon this basis that the rules of general maritime law were developed, and the choice of law rule proposed by this note is based on the relationships governed by the substantive rules themselves.

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