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## A Brief Overview of the Enforceability of Forum Selection, Choice of Law, and Arbitration Clauses and the Doctrine of Forum Non Conveniens under the Admiralty Law of the United States

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Donald R. Abaunza\*

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*Forum selection, choice of law and arbitration clauses are of great significance in offshore contracts, where disputes may arise in locations far removed from the fora identified in those contracts. In this article, the author provides an examination of the enforceability of these clauses in the United States, together with an explanation of the operation of the doctrine of forum non conveniens in that country.*

*Le choix du tribunal et du droit de même que les clauses d'arbitrage revêt une grande importance dans les contrats relatifs aux opérations pétrolières et gazières en haute mer car des différends peuvent survenir loin des tribunaux visés dans le libellé des contrats. Dans cet article, l'auteur examine la force exécutoire de ces clauses aux États-Unis et explique en outre le fonctionnement de la doctrine de forum non conveniens (les tribunaux qui ne conviennent pas) dans ce pays.*

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### *Introduction*

The very nature of maritime business frequently subjects its participants to a bewildering array of jurisdictions and laws on a necessarily global scale. In an effort to impose some predictability and certainty on the universe of legal potentialities created by the nature of maritime commerce, the admiralty law of the United States generally recognizes and enforces contractual provisions in which parties agree up front as to what law will govern their relationship and how and where they will resolve disputes arising out of that relationship. Additionally, aside from the traditional protections afforded through the notion of personal jurisdic-

tion, which can be limited, the doctrine of *forum non conveniens* affords litigants some measure of protection from being subjected to suit in inconvenient locations which have little or no relation to the dispute itself. This article briefly addresses these important mechanisms.

### I. *Forum Selection, Choice of Law, and Arbitration under General Maritime Law*

In general, parties to a dispute within admiralty jurisdiction may contractually limit how that dispute will be resolved in advance of any litigation. At the outset, parties may designate the location at which disputes will be adjudicated (forum selection clauses),<sup>1</sup> the law to be applied in resolving those disputes (choice of law provisions),<sup>2</sup> and/or the parties may require that disputes be submitted to arbitration.<sup>3</sup> In sum, the parties may remove some of the uncertainty that surrounds the resolution of future disputes by designating where the disputes will be resolved, under what law they will be resolved, and by what method they will be resolved.

#### 1. *Party Autonomy*

Admiralty law affords these advance contractual selections great deference. To avoid the application of a forum selection or choice of law clause, a party must somehow show that the clause is “unreasonable under the circumstances.”<sup>4</sup> The Supreme Court of the United States has defined “unreasonableness” narrowly and has expressly held that forum selection clauses are presumptively valid.<sup>5</sup> “[T]he burden of proving unreasonableness is a heavy one, carried only by a showing (1) that the clause results from fraud or overreaching, (2) that it violates a strong public policy, or (3) that enforcement of the clause deprives the plaintiff of his day in court.”<sup>6</sup> In its seminal decision, *The Bremen*, the Supreme Court emphasized that by reducing the uncertainty surrounding the resolution of future disputes, such clauses encourage international trade.<sup>7</sup> Because the demands of international commerce subject parties to litigation around the globe, “the elimination of . . . uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade.”<sup>8</sup>

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1. See *The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1 at 15 (1972) [hereinafter *The Bremen*].

2. See *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287 at 1296-97 (9th Cir. 1997); *Milanovich v. Costa Crociere*, 954 F.2d 763 at 336-37 (D.C. Cir. 1992) [hereinafter *Milanovich*].

3. See *Vimar Seguros y Reaseguros, S.A. v. The Sky Reefer*, 515 U.S. 528 at 534-37 (1995) [hereinafter *The Sky Reefer*].

4. See *The Bremen*, *supra* note 1 at 15.

5. *Ibid.* at 14-15.

6. *Mitsui & Co. v. The Mira*, 111 F.3d 33 at 35 (5th Cir. 1997) [hereinafter *The Mira*] (citing *The Bremen*, *supra* note 1 at 12-13).

7. See *ibid.*

8. *The Bremen*, *supra* note 1 at 13-14.

Although the facts of *The Bremen* concerned forum selection clauses, the court implied that the same analysis would apply to choice of law clauses and the lower courts in addressing choice of law (and arbitration clauses) have applied *The Bremen* analysis.<sup>9</sup> Therefore, as with forum selection clauses, when addressing a choice of law *The Bremen*'s "reasonable under the circumstances" test frequently provides a threshold issue.

a. *Fraud or Overreaching*

Courts will generally not invalidate a clause for fraud or overreaching unless the fraud or overreaching is specifically directed at the clause at issue.<sup>10</sup> Therefore, "allegations that the entire contract was procured as the result of fraud or overreaching are inapposite to [the forum-selection clause] enforceability determination, which must . . . precede any analysis of the merits [of the contract's validity]."<sup>11</sup> Parties must demonstrate "why they would not have agreed to the presence of a forum-selection clause," instead of why they would not have entered into the entire contract.<sup>12</sup> Under this analysis, a party will be bound by the forum selection clause, a portion of the larger contract, even if the entire contract was the result of fraud when the party cannot show fraud directly related to the clause. It is left to the forum which the parties chose in the contract itself to determine the validity of the contract as a whole in light of the allegations of fraud or overreaching.<sup>13</sup> If the court addressing the enforceability of the forum selection provision were to make a broad determination of fraud or overreaching with respect to the contract as a whole, it would be "making a merits inquiry that the Supreme Court has determined is best left to the forum selected by the parties."<sup>14</sup>

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9. See, e.g., *The Mira*, *supra* note 6 at 35-37; *Milanovich*, *supra* note 2 at 337; see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 at 519 (1974) (relying on *The Bremen* in analyzing an arbitration clause in a securities case and stating that "an agreement to arbitrate . . . is a specialized kind of forum selection clause").

10. See, e.g., *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 at 302-03 (5th Cir. 1998) [hereinafter *Afram Carriers*]; *Haynsworth v. The Corporation*, 121 F.3d 956 at 964 (5th Cir. 1997); *Sudduth v. Occidental Peruana, Inc.*, 70 F.Supp.2d 691 at 696-97 (E.D. Tex. 2000) [hereinafter *Sudduth*].

11. *Afram Carriers*, *ibid.* at 301.

12. *Afram Carriers*, *ibid.* at 302, n. 3.

13. See *ibid.* at 302-03.

14. *Ibid.*

### b. *Substantial Disparity in Bargaining Power*

The Supreme Court has indicated that unequal bargaining power is not sufficient reason to invalidate a clause.<sup>15</sup> In *Carnival Cruise Lines v. Shute*, the plaintiffs had purchased tickets for a cruise which contained a forum selection clause designating Florida as the location for the resolution of any disputes.<sup>16</sup> In analyzing the clause, the court acknowledged that “[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”<sup>17</sup> Nonetheless, the court enforced the clause, finding it to be reasonable in light of the public policies furthered by the enforcement of such provisions.<sup>18</sup> Specifically, the court stated that forum selection clauses reduce “any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding these motions.”<sup>19</sup> The efficiency that results from the use of these provisions outweighs concerns about unequal bargaining power.

A number of courts have expanded upon *Shute*, holding that the party against whom the provision is being enforced need not necessarily have had *actual* notice of the clause.<sup>20</sup> According to these decisions, as long as the clause is “reasonably communicated” to the party, it is unnecessary to demonstrate that the party actually read the contract.<sup>21</sup> Whether the clause was “reasonably communicated” turns on the conspicuousness and clarity of the provision, as presented in the contract, as well as on the surrounding circumstances.<sup>22</sup> Other decisions have expanded upon *Shute*’s determination that disparity in bargaining power should not necessarily affect the validity of a clause.<sup>23</sup> These decisions emphasize that in assessing the enforceability of such a clause, the proper focus is on the “reasonableness” of the clause itself.

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15. See e.g. *Carnival Cruise Lines v. Shute*, 499 U.S. 585 at 592-94 (1991) [hereinafter *Shute*].

16. See *ibid.*

17. *Ibid.*

18. See *ibid.*

19. See *ibid.*

20. See e.g. *Dempsey v. Norwegian Cruise Lines*, 972 F.2d 998 at 999 (9th Cir. 1992); *Walker v. Carnival Cruise Lines, Inc.*, 63 F.Supp.2d 1083 at 1087 (N.D. Cal. 1999).

21. See *ibid.*

22. See *ibid.*

23. See e.g. *Marinechance Shipping Ltd v. Sebastian*, 143 F.3d 216 at 221 (5th Cir. 1997); *Valle v. Chios Venture Shipping*, No. CIV.A 98-0748, 1999 WL 155942, at \*2-3 (E.D. La. 17 March 1999); *Orozco v. Trinity Ship Management*, No. CIV.A 99-2810, 2000 WL 343360, at \*1-3 (E.D. La. 31 March 2000).

Nevertheless, some decisions have considered unequal bargaining power in invalidating clauses despite the Supreme Court's analysis in *Shute*.<sup>24</sup> In *LeBouef v. Gulf Operators*, for example, the court invalidated a forum selection clause in a seaman's employment contract, stating that that courts should use heightened scrutiny when evaluating such terms as applied to seafarers because seafarers were vulnerable to exploitation.<sup>25</sup> Likewise, in *Anderson v. Northcoast Seafood Processors, Inc.*, the court reached a similar conclusion, despite purportedly following *Shute*.<sup>26</sup> It is worth noting, however, that many of the employment contracts controlling the employment of seamen are the product of collective bargaining agreements which frequently involve government agencies. As *Marinchance* and *Lejano* noted, the Philippine government, as one example, actively participates in collective bargaining negotiations affecting its seamen employed on foreign vessels. Even disregarding for argument's sake the role of seamen's unions, this type of government intercession on behalf of seamen further counteracts what would otherwise be argued to be "dramatically unequal bargaining power."

*c. Inconvenient or Unfavourable Forum*

Under *The Bremen* a party can avoid the application of a clause if it can demonstrate that "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."<sup>27</sup> Mere inconvenience, however, is not the test. To void the provision, the forum, in effect, must be inaccessible. Again, *Shute* is illustrative. The plaintiffs were from Washington, but the ticket required litigation in Florida. There was some "evidence in the record to indicate that the [plaintiffs were] physically and financially incapable of pursuing the litigation in Florida."<sup>28</sup> Although they were some distance away, the Florida courts nonetheless were not remote and inaccessible. Additionally, the court emphasized that the forum selection clause in *Shute* did not involve "an agreement between two Americans to resolve their essentially local disputes in a remote alien forum."<sup>29</sup> The accident at issue was not "essentially local;" it took place off the coast of Mexico, and Florida, the designated forum, was not "a remote alien forum."<sup>30</sup>

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24. See *e.g. Sudduth*, *supra* note 10 at 695; *LeBouef v. Gulf Operators, Inc.*, 20 F.Supp.2d 1057 at 1061-62 (S.D. Tex. 1998); *Anderson v. Northcoast Seafood Processors, Inc.*, No. J95-006, 1995 WL 867128 at \*1 (D. Alaska 5 July 5 1995).

25. *LeBouef*, *ibid.* at 1061-62

26. 1995 WL 867128 at \*1.

27. *The Bremen*, *supra* note 1 at 18.

28. *Shute*, *supra* note 15 at 594.

29. *Ibid.*

30. *Ibid.*

The amount that a plaintiff stands to recover in the competing judicial systems does not bear on the reasonableness of those *fora*. The plaintiff still has a day in court even though the law that will be applied in the contractually chosen forum will be less favorable than the law of the forum in which he later chose to subject the defendant to suit.<sup>31</sup> As recognized by one court, the standard of “reasonableness” does not refer to whether the plaintiff would receive the maximum recovery in the contractually designated forum.<sup>32</sup> In fact, the plaintiff may not have an opportunity to recover at all, if, for example, there is a limitations bar looming in the designated forum.<sup>33</sup> As the majority of decisions that have addressed the validity of clauses indicate, “a valid . . . clause is given controlling weight in all but the most exceptional cases.”<sup>34</sup>

#### d. *Contract and Tort*

The applicable scope of a clause is dependent upon the language in the particular clause; if the language is written broadly enough to apply to torts, the clause will generally be applied to claims in both contract and tort.<sup>35</sup> In tort actions, parties seeking to avoid forum selection clauses will frequently argue that the clause applies only to disputes concerning the terms of the contract itself, not tort actions incident to the relationship created by the contract. Where the provision is written broadly enough, however, it will be held to encompass all disputes, including those sounding in tort, incidental to the contractual relationship. For example, in *Marinchance* the Fifth Circuit interpreted a forum selection clause in a seaman’s employment contract which stated that “any and all disputes or controversies arising out of or by virtue of this Contract” to apply to personal injuries sustained by a seaman.<sup>36</sup> The countervailing argument

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31. See, e.g., *General Electric Co. v. G. Siempelkamp GmbH & Co.*, 809 F.Supp. 1306 at 1314 (S.D. Ohio 1993); *Lejano v. Bandak*, 705 So.2d 158 at 170 (La. 1997).

32. See *Lejano*, *ibid.*

33. See, e.g., *New Moon Shipping Co. v. Man B&W Diesel*, 121 F.3d 24 at 32 (2d Cir. 1997) (stating that “consideration of a statute of limitations would create a large loophole for the party seeking to avoid enforcement of the forum selection clause”); *General Electric*, *supra* note 31 at 1314 (holding that consideration of a limitations bar is unnecessary in evaluating the “reasonableness” of the clause). As discussed further in this article, when entertaining motions for dismissal on *forum non conveniens* grounds, courts generally determine whether the “more convenient” forum’s law is “clearly inadequate.” The *forum non conveniens* analysis is similar to the “reasonableness” analysis in evaluating forum selection and choice of law clauses insofar as a party cannot avoid an alternate forum merely because the potential recovery in that forum will be less favorable to the plaintiff.

34. *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22 (1988) (Kennedy J., concurring).

35. See *Marinchance*, *supra* note 23 at 221-22.

36. *Ibid.*; see also *Lejano*, *supra* note 31 at 158 (interpreting a forum selection clause which was intended to apply to all “cases concerning the seafarer’s service on the ship” as encompassing torts).



had been that the clause was limited to disputes concerning the seaman's terms of employment, not tort claims against the employer. Likewise, *Shute*, which involved a personal injury negligence action, implicitly affirmed the notion that an appropriately crafted clause encompasses tort as well as contract claims arising under the relationship created by the contract.<sup>37</sup>

## 2. *Maritime Tort Cases*

A chief purpose of these clauses is to create some certainty or predictability between parties whose relationship would otherwise subject them to numerous jurisdictions and legal systems by establishing at the outset of that relationship the governing law and the place where disputes will be settled. Consequently, the traditional choice of law analysis applied in the absence of such clauses does not apply when the parties have made the decision for themselves beforehand.<sup>38</sup> If the same choice of law analysis were performed regardless of whether the parties had agreed in advance upon a choice of law provision, the purpose of the choice of law provision would be largely defeated.

The traditional maritime choice of law analysis for determining what body of law should apply to a tort claim within admiralty jurisdiction is set forth in the Supreme Court's decision *Lauritzen v. Larsen*.<sup>39</sup> Because maritime commerce often involves various international actors, the court set forth a list of factors reflecting the international considerations for courts to refer to when determining the applicable law.<sup>40</sup> The mere existence of the test, however, gave rise to an issue as to whether a choice of law clause should displace the factors test or merely supplement that test.

As the Ninth Circuit explained, however, a court should apply the principles set forth by *Lauritzen* only "in the absence of a contractual choice of law clause."<sup>41</sup> Even if the matter in litigation concerns something which the parties did not explicitly address in the contract, a choice of law provision should nonetheless control unless the "chosen state has

37. *Shute*, *supra* note 15 at 588.

38. See e.g. *Chan v. Society Expeditions, Inc.*, *supra* note 2 at 1297-98 (9th Cir. 1997); *Milanovich*, *supra* note 2 at 767-68 (D.C. Cir. 1992).

39. 345 U.S. 571 (1953).

40. See *ibid.* at 579-92. Specifically, the court delineated the following factors as relevant in determining the applicable law: (a) the place of the wrongful act, (b) the law of the flag, (c) the allegiance or domicile of the injured, (d) the allegiance of the defendant shipowner, (e) the place where the contract of employment was made, (f) the inaccessibility of a foreign forum, and (g) the law of the forum. In *Romero v. International Terminal Operating Co.*, the court made clear that the *Lauritzen* factors test applies to all maritime tort claims, 358 U.S. 354 at 356 (1959).

41. *Chan*, *supra* note 2 at 1296 (emphasis added).

no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."<sup>42</sup> The Ninth Circuit also concluded that a choice of law provision may not control if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest . . . and that state would be the state of applicable law in the absence of a choice of law clause."<sup>43</sup>

In sum, when a choice of law provision is at issue, courts should apply the chosen law without looking to *Lauritzen*. Nevertheless, *The Bremen* reasonableness criteria remain in the background ensuring that the choice of law clause satisfies certain minimum standards.<sup>44</sup>

### 3. Mandatory Pre-Dispute Arbitration Clauses

"The U.S. Supreme Court has taken an active interest in promoting party recourse to arbitration and in protecting the autonomy and operation of the arbitral process."<sup>45</sup> As a result, the court's decisions reflect an "emphatic federal policy in favor of arbitral dispute resolution."<sup>46</sup> The court's arbitration decisions are usually involved with interpreting the federal *Arbitration Act*<sup>47</sup> (which gives courts the authority to enforce arbitration agreements through specific performance).<sup>48</sup> The court has made clear that "parties are generally free to structure their arbitration agreements as they see fit."<sup>49</sup> Parties, therefore, may specify what issues will be arbitrated and the rules by which the arbitration will be conducted.<sup>50</sup>

#### a. Adhesion Contracts

Following its announcement in *Mitsubishi Motors* that courts should adjudicate with an eye toward encouraging arbitration, the Supreme Court has applied arbitration clauses to subject matters that traditionally have not been subject to arbitration such as consumer transactions and non-union employment.<sup>51</sup> Nevertheless, such arbitration provisions must

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42. *Ibid.*

43. *Ibid.*

44. See e.g. *Milanovich*, *supra* note 2 at 767 (stating that "courts should honor a contractual choice of law provision . . . unless the party challenging the enforcement of the provision can establish that enforcement would be unreasonable and unjust").

45. T. E. Carbonneau, *Cases and Materials on the Law and Practice of Arbitration*, 2d ed. (Hungtington, N.Y.: Juris, 2000) at 199.

46. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 at 631 (1985).

47. 9 U.S.C. § 1 (1947) [hereinafter *FAA*].

48. See generally Carbonneau, *supra* note 45 at 199-267 (summarizing the court's recent arbitration decisions).

49. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 at 56 (1995).

50. See *ibid.*

51. See e.g. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

be “clear and unmistakable.”<sup>52</sup> In *Wright v. Universal Maritime Servs. Corp.*, which dealt with a collective bargaining agreement between the employer and longshoremen, the court held that the arbitration provision was “too general” and therefore did not require a longshoreman to relinquish his right to bring his discrimination claim before a court.<sup>53</sup> Specifically, the provision stated that arbitration would govern “matters under dispute,” which, according to the court, could be “understood to mean matters in dispute under the contract.”<sup>54</sup> Although arbitration clauses contained in contracts of adhesion are enforceable, an intent to arbitrate which would cover the given dispute must be clearly expressed in the contract.

#### b. *Arbitration Clauses in Admiralty*

In light of the strong federal policy encouraging arbitration and the specific dictates of the *FAA*, the courts routinely uphold arbitration clauses in admiralty cases.<sup>55</sup> In *The Sky Reefer*, the Supreme Court enforced an arbitration clause in a bill of lading, concluding that “the *FAA* requires enforcement of arbitration agreements . . . in maritime transactions, including bills of lading, where there is no independent basis in law or equity for revocation.”<sup>56</sup> An “independent basis” for revocation may exist if the clause is “unreasonable,” as defined in *The Bremen*, or if the clause is not “clear and unmistakable,” as required by *Wright*.

The *FAA*, however, expressly provides that its application shall not extend to “contracts of employment of *seamen*, railroad employees, or any other class of worker engaged in foreign or interstate commerce.”<sup>57</sup> “The inapplicability of the *FAA* does not mean, however, that arbitration provisions in seaman’s employment contracts are unenforceable, but only that the particular enforcement mechanisms of the *FAA* are not available.”<sup>58</sup> An arbitration clause may not be imposed on a seaman insofar as wage claims are concerned because “a seaman has a statutory

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52. See *Wright v. Universal Maritime Servs. Corp.*, 525 U.S. 70 at 75-77 (1998).

53. See *ibid.*

54. *Ibid.* at 390-91.

55. See e.g. *The Sky Reefer*, *supra* note 3; *O’Dean v. Tropicana Cruises Intern, Inc.*, No. 98 CIV 4543, 1999 WL 335381 at \*1-3 (S.D.N.Y. May 25, 1999); see also *Wright*, *supra* note 5 at 75-77 (declining to enforce an arbitration clause in a contract between longshoremen and their employer only because the clause was “too general”); *Lamont v. United States*, 613 F. Supp. 588 at 592, n. 1 (S.D.N.Y. 1985) (stating that “a seaman’s claim of an employer’s discriminatory conduct arising out of a disciplinary action or a claim of unfair discharge would be proper subjects for arbitration”).

56. *The Sky Reefer*, *supra* note 3 at 540.

57. *Supra* note 47.

58. *O’Dean*, *supra* note 55 at \*1.

right to vindicate such wage claims in federal court.”<sup>59</sup> According to at least one court, however, when the *FAA* is inapplicable, “the concomitant federal policy favoring arbitration agreements” is also inapplicable.<sup>60</sup> In any event, the case law makes clear that, as with forum selection and choice of law clauses, parties have substantial authority in applying and determining the scope of arbitration clauses.

## II. *Forum Non Conveniens*

*Forum non conveniens* is a procedural doctrine by which a court can dismiss a claim even though proper jurisdiction and venue have been established<sup>61</sup> if “trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience; or the chosen forum is inappropriate because of considerations affecting the court’s own administrative problems.”<sup>62</sup> The threshold requirement under the federal analysis is that the available remedies in the alternative forum must not be “clearly inadequate or unsatisfactory” and the defendants must be “amenable to process” in that forum.<sup>63</sup> The Supreme Court in *Piper Aircraft* noted that the foreign forum need not recognize a cause of action or a quantum of recovery identical to that available in the U.S. forum; rather, this prong of the analysis is satisfied if the claimants would not “be deprived of a remedy or treated unfairly.” The court added that the only “rare circumstances” in which an alternative forum would be held inadequate would be when “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>64</sup>

### 1. *Forum Non Conveniens Generally*

As noted, the threshold issues, in considering a motion for *forum non conveniens*, are whether the alternate forum’s remedies are adequate and whether the defendant is amenable to process in the alternative forum.

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59. *Ibid.* (citing *United States Bulk Carriers v. Arguelles*, 400 U.S. 351 at 356-57 (1971)).

60. *Bynes v. Ahrenkiel Ship Management*, 944 F. Supp. 485 at 487 (W.D. La. 1996).

61. In light of Section 1404(a), which was enacted by Congress to permit changes of venue between federal courts, the doctrine of *forum non conveniens* is used only for transfers from a domestic forum to a foreign forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 at 253 (1981). See *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 at 524 (1947)).

62. *Ibid.* (citing *Piper Aircraft Co. v. Reyno*, *ibid.* at 241).

63. *Piper Aircraft Co. v. Reyno*, *ibid.* at 254-55 (1981). See also *Alpine View Co. v. Atlas Capco AB*, 205 F.3d 208 at 221-22 (5th Cir. 2000).

64. *Piper Aircraft*, *supra* note 61 at 254 & n. 22.

a. *Relevance of Foreign Remedies*

The alternative forum need not provide the same level of relief, or even the same theories of recovery, as the American forum in which the plaintiff brought suit. For example, in *Piper Aircraft*, “[a]lthough the relatives of the decedents [could] not rely on a strict liability theory, and although their potential damages award [would have been] smaller, there [was] not danger that they [would] be deprived of any remedy or treated unfairly.”<sup>65</sup> The courts have generally looked to whether the alternate forum provides for “any remedy” and whether the plaintiff would be “treated unfairly” in that forum.

More specifically, a foreign forum is “adequate” if it “provides an impartial trier of fact and supplies an avenue to recover some measure of compensatory damages.”<sup>66</sup> Especially when the potential recovery for compensatory damages arises from the exact causes of action on which the plaintiff relied in the American forum, a plaintiff faces a difficult challenge in convincing a court that the alternate forum’s remedies are “clearly inadequate.”<sup>67</sup> Again, the defendant need not demonstrate that the foreign forum recognizes the exact theories of recovery on which the plaintiff relies.<sup>68</sup> In sum, the foreign forum must provide some remedy. Ultimately, the true test of whether an alternative forum is adequate and available under federal *forum non conveniens* law is whether the foreign court permits “litigation of the subject matter of the dispute.”<sup>69</sup>

In addition to the substantive law of the foreign forum, courts also evaluate the procedural adequacy of the foreign forum. “Absent a showing of inadequate procedural safeguards, principles of comity, however, weigh in favor of concluding that a foreign forum is adequate.”<sup>70</sup> As indicated by *Piper Aircraft*, when evaluating the proce-

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65. *Ibid.*

66. *Delgado v. Shell Oil*, 890 F.Supp. 1324 at 1357 (S.D. Tex. 1995) [hereinafter *Delgado*].

67. See e.g. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 at 835 (5th Cir. 1993) (dismissing claim under *forum non conveniens* and emphasizing that the foreign forum had articles in its Civil Code for the exact theories of recovery on which the plaintiffs were relying); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512 at 1527 (D. Minn. 1996) [hereinafter *Polanco*] (dismissing claim under *forum non conveniens* because the foreign forum recognized the theory of recovery asserted by the plaintiff, although the theory of recovery in that forum was far from “well-developed”).

68. See e.g. *Warn v. The Maridome*, 961 F. Supp. 1357 at 1376 (S.D. Cal. 1997) (dismissing claim under *forum non conveniens*, even though the foreign forum did not recognize a cause of action in products liability, because it “allowed for other potential theories of recovery”); *Wolf v. Boeing Co.*, 810 P.2d 943 at 948-49 (Wash. Ct. App. 1991) (dismissing claim under *forum non conveniens*, even though the foreign forum had a \$10,000 recovery limit which would significantly reduce plaintiff’s potential recovery).

69. *Piper Aircraft*, *supra* note 61 at 265, n. 22.

70. *Flynn v. General Motors*, 141 F.R.D. 5 at 8-9 (S.D.N.Y. 1992).

dural scheme of a foreign forum, the emphasis should be on whether the plaintiff will be “treated unfairly.”<sup>71</sup> As a result, an inability to pursue the litigation because of reasons that do not arise from the foreign forum’s procedural framework likely will not affect a court’s decision.<sup>72</sup> Also, the fact that the recovery in a foreign forum may be less than in the United States on the same claim made by the plaintiff does not mean that the plaintiff somehow stands to be treated unfairly.<sup>73</sup>

#### b. *Consent*

In addition to the “adequacy” of the remedies, the defendant must be “amenable to process” in the foreign forum before a court may invoke *forum non conveniens*.<sup>74</sup> However, amenability to process will generally be satisfied by the defendant’s consent to the jurisdiction of the foreign forum.<sup>75</sup>

#### c. *Conditional Dismissal*

A court is more likely to grant a *forum non conveniens* dismissal when the defendant assents to certain conditions that would ensure it remains amenable to suit in the designated forum.<sup>76</sup> For example, before granting dismissal courts may require that a defendant agree to submit to jurisdiction and service of process in the foreign forum.<sup>77</sup> As for the “adequacy” requirement, some courts have required defendants to agree not to raise statute of limitations defenses in the foreign forum,<sup>78</sup> and to agree to abide

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71. *Supra* note 61 at 254-55.

72. See e.g. *Polanco*, *supra* note 69 at 1525, 1527 (stating that “if plaintiff’s efforts to pursue litigation in [the foreign forum] are ultimately thwarted by that [forum’s] one-year prescription period, it is so because plaintiff waited nearly three years to file suit).

73. See e.g. *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F. 2d 147, 159 (2nd Cir. 1980) (“It is abundantly clear, however, that the prospect of a lesser recovery does not justify refusing to dismiss on the ground of *forum non conveniens*.”); *Polanco*, *ibid.* at 1526 (D. Minn. 1996) (“Adequacy of the alternative forum does not require equivalence of result, but the existence of some meaningful remedy.”); *Wolf v. Boeing Co.*, *supra* note 68 at 948-49 (Wash. Ct. App. 1991) (dismissal appropriate even though foreign forum had a recovery limit that would significantly reduce the plaintiffs’ potential recovery); 17 J.W. Moore *et al.*, *Moore’s Federal Practice* §111.74[2][c][iii] (3d ed. 1999).

74. See *Piper Aircraft*, *supra* note 61 at 254, n. 22.

75. See e.g. *Delgado*, *supra* note 66 at 1356; *Ministry of Health v. Shiley*, 858 F. Supp. 1426 at 1441, n. 21 (C.D. Cal. 1994).

76. See e.g. *Proyectos Orchimex de Costa Rica, S.A. v. DuPont*, 896 F. Supp. 1197 at 1199-1200 (M.D. Fla. 1995); *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117 at 1119-20 (S.D.N.Y.1995); *Delgado*, *ibid.* at 1373; *Stangvik v. Shiley, Inc.*, 819 P.2d 14 at 17, n. 2 (Cal. 1991).

77. See e.g. *Delgado*, *ibid.* at 1373; *Doe*, *ibid.* at 1133.

78. See e.g. *Proyectos Orchimex v. E.I. Dupont & Co.*, 896 F. Supp 1197 at 1204 (M.D. Fla. 1995).

by any judgment rendered in the foreign forum.<sup>79</sup> One court dismissed a case after the defendant agreed that discovery in the foreign forum would be governed by the more liberal *Federal Rules of Civil Procedure*.<sup>80</sup>

## 2. *The Gilbert Factors*

The Supreme Court in *Gulf Oil Corp. v. Gilbert* set forth various private and public interest factors for courts to consider when determining whether to dismiss a case on grounds of *forum non conveniens*.<sup>81</sup> The private factors to be considered are as follows:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and cost of obtaining attendance of willing, witnesses; possibility to view premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.<sup>82</sup>

Under federal jurisprudence, a court is to accord “great deference” to a United States’ plaintiff’s choice of forum when balancing these private interest factors.<sup>83</sup> That deference, however, is not appropriate when a foreign claimant is attempting to pursue claims in a United States forum.<sup>84</sup> As the Fifth Circuit aptly explained,

convenience is the ultimate consideration for a district court in balancing private interest factors, including the forum choice of the plaintiff. When a plaintiff chooses a foreign forum for its claims, courts are reluctant to assume that convenience motivated that choice.<sup>85</sup>

The plaintiff’s choice of forum is given a measure of deference insofar as is necessary to afford him a reasonable opportunity to have his day in court, not to maximize his recovery. Ultimately, a court should be guided by the policy that trial should be conducted in a forum that makes litigation “easy, expeditious, and inexpensive.”<sup>86</sup>

The public interest factors established by the Supreme Court in *Gilbert* involved an analysis of whether the controversy’s connection to the domestic forum justifies the administrative burdens that would result from trying it.<sup>87</sup> The *Gilbert* court delineated the following “public interest” factors for judges to consider: (a) the administrative difficulties

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79. See e.g. *Stangvik*, *supra* note 78 at 17, n. 2.

80. See *Dowling v. Hyland Therapeutics Div.*, 767 F. Supp. 57 at 59 (S.D.N.Y. 1991).

81. 330 U.S. 501 at 508-09 (1947).

82. *Ibid.*

83. See *Piper Aircraft*, *supra* note 61 at 255.

84. *Ibid.*

85. *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau -Unterwester, A.G.*, 955 F.2d 368 at 373 (5th Cir. 1992).

86. *Piper Aircraft*, *supra* note 61 at 261, n. 6.

87. See *Gilbert*, *supra* note 83 at 508-09.

flowing from court congestion; (b) the local interest in having localized controversies decided at home; (c) the interest in having the trial in a forum that is at home with the law that must govern the action; (d) the avoidance of unnecessary problems in the application of foreign law; and (e) the unfairness of burdening citizens in an unrelated forum with jury duty.<sup>88</sup> Like the “private interest” factors, the “public interest” factors are stated in terms that grant the courts some flexibility in evaluating a motion for dismissal on grounds of *forum non conveniens*. The general policy behind these considerations is to prevent courts from being burdened by controversies that have little or no relation to the community in which the court presides. Ultimately, a court should be guided by the policy that the trial should be conducted in a forum that makes litigation “easy, expeditious, and inexpensive.”<sup>89</sup>

### 3. Importance of Forum Non Conveniens in Admiralty

As the Supreme Court has noted, “forum non conveniens is an essential and salutary feature of admiralty law. It gives ship owners and operators a way to avoid vexatious litigation on a distant and unfamiliar shore.”<sup>90</sup> For example, a vessel may sail under a foreign flag, employ foreign employees, be owned by a foreign entity, and “come to [an American port] to do no more than refuel.”<sup>91</sup> In light of the fact that admiralty disputes often arise in locations far removed from the United States, the *Gilbert* factors are well-suited for screening out admiralty cases that would more “conveniently” be heard elsewhere.

As previously discussed, the deference to be given a plaintiff’s forum choice is far less when the plaintiff is foreign.<sup>92</sup> Affording respect to a foreign plaintiff’s decision to sue in an American forum is less justified, since any presumption that the forum was chosen out of “convenience” is weakened when the plaintiff is foreign.<sup>93</sup> Of course, foreign plaintiffs find American courts extremely attractive for a number of reasons. American jurisdictions offer “malleable choice of law rules,” jury trials as a general rule, and unlike most countries, contingent fee arrangements,

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88. *Ibid.*

89. *Piper Aircraft, supra* note 61 at n. 6.

90. *American Dredging Co. v. Miller*, 510 U.S. 443 at 449 (1994) (Kennedy J., dissenting).

91. See generally Bickel, “The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,” (1949) 35 *Cornell L.Q.* 12 at 20-21 (discussing the importance of the doctrine of *forum non conveniens* to the law of admiralty because the doctrine ensures that the United States does not become an “undue interference” on the commerce of other nations).

92. See *Piper Aircraft, supra* note 61 at 257.

93. See *ibid.*



as well as more extensive discovery practices.<sup>94</sup> If foreign plaintiffs were given the same liberal invitation to American courts as that given to American plaintiffs, “[t]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive.”<sup>95</sup> Because plaintiffs in admiralty cases are often foreign seamen, the doctrine of *forum non conveniens* is an important aspect of American admiralty law.

### *Conclusion*

By its very nature, maritime commerce potentially subjects its participants to litigation world-wide in a large variety of different jurisdictions employing different laws and remedies. Certainty is enhanced, costs are decreased, and commerce is expedited and encouraged by allowing parties to decide in advance where and under what laws any disputes that arise between them will be argued and decided. The maritime law of the United States recognizes the benefits that inure to maritime trade *vis-à-vis* this increased certainty and has afforded great deference to contractual provisions which promote this type of certainty. Absent compelling reasons, clauses which spell out in advance where or under what laws disputes will be decided, or which require arbitration, are routinely enforced. Likewise, the doctrine of *forum non conveniens* enhances certainty by ensuring that disputes are not litigated in jurisdictions not chosen in advance by the parties which have little or no relation to the dispute at hand.

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94. See *ibid.* at 252, n. 18.

95. *Ibid.*