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THE MOST SIGNIFICANT CIRCUIT SPLITS IN ADMIRALTY AND MARITIME LAW

By: Christine M. Walker[1]

INTRODUCTION

Admiralty and maritime law, supplemented by federal maritime statutes, endeavors to provide a uniform body of law applicable to all admiralty and maritime cases. The complexities of admiralty and maritime law weigh against the goal of uniformity, especially when coupled with the hierarchy of federal judicial review. The Supreme Court of the United States (SCOTUS) rarely chooses to resolve federal circuit splits affecting the maritime industry and, when addressed, rulings often result in a set of complexities more extensive than those at issue prior to SCOTUS review.

As such, this article explores important differences in analysis and outcomes in federal admiralty and maritime law case law. First, this article addresses circuit splits derived from statues. Second, a split that developed from federal common law (judge made law) is discussed. Third, a maritime contract construction split is analyzed.

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1 *Editor's Note: Christine's article was the winning submission for the* ***2014 ABA TIPS AMLC and SEALI Young Lawyer's Writing Competition***. Christine Walker is an associate at *Fowler White Burnett, P.A.*, which full service law firm located at 1395 Brickell Ave, 14th Floor, Miami, Florida 33131. Christine received her B.B.A. from University of Miami in 2008, her J.D. from Nova Southeastern University in 2012 and joined Fowler White Burnett's maritime group after completing her LL.M. in Admiralty Law from Tulane University Law School in 2013. She can be contacted at CWalker@fowler-white.com.

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STATUTORY ADMIRALTY LAW

Death on the High Seas Act: Jurisdictional Boundary

Congress enacted the Death on the High Seas Act (DOHSA) in 1920.[2] Subsequently, Congress amended DOHSA as it relates to commercial aviation accidents.[3] A DOHSA action is predicated on tort theory. Survivors of a decedent may recover for pecuniary losses, which includes loss of support, services, nurture, guidance, care, instruction, inheritance, and funeral expenses.[4] Pecuniary and punitive damages are not available.[5] Recently, circuits have split over DOHSA's jurisdictional boundaries; specifically, whether DOHSA preempts state and federal common law actions when deaths occur between three and twelve nautical miles from the United States coast.[6]

Second Circuit.

The Second Circuit first considered a maritime casualty occurring between three and twelve nautical miles in *TWA Flight 800*.[7] In *TWA Flight 800,* a commercial airliner crashed approximately eight nautical miles off the New York coast.[8] Two hundred and thirty people died as a result.[9] Survivors of the deceased claimed non-pecuniary damages, including pre-death pain and suffering and survivor's grief in a civil case against the airline.[10] In response, Trans World Airlines, the owner and operator of the airliner, filed a Motion to Dismiss on the basis that DOHSA preempted the survivors' claims and DOHSA does not permit non-pecuniary damages. More specifically, DOHSA limits a survivor's recovery to "fair and just compensation for the pecuniary loss sustained by the person for whose benefit the suit is brought."[11] The District Court found that Congress intended DOHSA to apply to international waters *not subject* to the dominion of any single nation, including federal waters.[12]

On appeal, the Second Circuit reconsidered the District Court's analysis.[13] The Second Circuit took issue with seemingly ambiguous language contained in DOHSA.[14] Originally, DOHSA provided a cause of action to the personal representative of a decedent killed "on the *high seas beyond a marine league* from the Shore of a State, or the District of Columbia, or the Territories or dependencies of the United States." (emphasis added)[15] The Second Circuit looked at the plain meaning of "high seas" and "beyond a marine league", finding that a plain reading of DOHSA renders the language "high seas" superfluous.[16] But, Congress' decision to retain that phrase in subsequent drafts reflected an acute desire not to preempt existing state remedies.[17] In the Second Circuit's view. Congress added "beyond a marine league" to a later version of DOSHA to ensure state remedies survived.[18]

Also, the Second Circuit articulated skepticism that Congress intended to displace the general maritime law's more generous remedial scheme.[19] In support, the Second Circuit referenced a SCOTUS decision that provided "the state remedies that were left undisturbed not only were familiar but allowed far higher damages than provided in the new Act."[20] The Second Circuit concluded that the legislative history of DOHSA demonstrated that Congress assigned a higher priority to preserving the pre-existing remedial schemes

2 *See* Death on the High Seas Act, Pub. L. No. 66-165, 41 Stat. 537 (1920) (codified as amended at 46 U.S.C. §§30301-30308 (2012)).

3 Robert Force & Niels F. Johnsen, Admiralty and Maritime Law 118 (2004).

4 *Id.* at 119-120.

5 *Dooley v. Korean Airlines Co.*, 524 U.S. 116 (1998).

6 *See In re Air Crash Off Long Island, New York, on July 17, 1996 (TWA Flight 800),* 209 F.3d 200, 202 (2d Cir. 2000); *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986 (9th Cir. 2011).

7 *TWA Flight 800,* 209 F.3d at 202.

8 *Id.*

9 *Id.*

10 *Id.*

11 46 U.S.C. § 762 (2012).

12 *TWA Flight 800,* 209 F.3d at 202.

13 *Id.* at 200-03.

14 *Id.*

15 DOHSA, *supra* note 2 at 41.

16 *TWA Flight 800,* 209 F.3d at 222-25.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

over securing uniformity in admiralty law and held it impermissible to construe DOSHA'S territorial limits in a manner invalidating pre-existing remedies for deaths in United States waters.[21]

The dissent of then Circuit Court Judge Sonia Sotomayor, argued that the Congressional intent was to preserve state remedies and provide a statutory remedy for waters outside state jurisdiction.[22] Since the majority opinion excluded DOHSA from to the case at bar, the dissent hypothesized that the majority wanted to provide a more generous remedial scheme to the survivors and that the majority's laudable intention did not reflect Congressional intent.[23] As the author of the staunch dissent has since joined the SCOTUS, Justice Sotomayor's opinion will certainly factor in should an analogous case seek certiorari.

Ninth Circuit.

The Ninth Circuit addressed the identical issue faced in *TWA Flight 800* in *Helman v. Alcoa Global Fasteners, Inc.*[24] In *Helman,* a US Navy helicopter crashed nine and a half nautical miles (nm) off the California coast during a training exercise. The crash resulted in three deaths.[25] In the Superior Court of California, survivors of the deceased took actions against Sikorsky, the helicopter manufacturer, on theories of strict products liability, negligence, failure to warn, breach of warranty, and wrongful death under California and general maritime law.[26] Sikorsky filed a Motion for Judgment on the Pleadings alleging DOHSA preempted all other causes of action because the casualty occurred beyond three nautical miles off the United States coastline.

In a concise opinion, the trial court reviewed legislative intent along with general maritime law, concluding DOHSA preempted the survivors' claims. The Ninth Circuit affirmed, creating a clear split between the Ninth and Second Circuit.[27]

On appeal, the Ninth Circuit evaluated whether DOHSA preempted all noncommercial aircraft claims for wrongful deaths more than three miles seaward of the United States coastline. Specifically, the Ninth Circuit evaluated the preemption of DOHSA while considering a Presidential Proclamation that extended the territorial sea limit to twelve nautical miles.[28] In determining this issue, the Ninth Circuit examined whether a Presidential Proclamation, originating in the executive branch of the federal government, can or should alter a statute, originating in the legislative branch.[29] In affirming the trial court decision that DOHSA preempted the survivors' claims, the Ninth Circuit recognized an opinion issued by the United States Justice Department that a Presidential Proclamation cannot alter statutory law.[30]

Carriage of Goods by Sea Act: Background

In 1936, Congress enacted the Carriage of Goods by Sea Act (COGSA), which effectively implemented the Hague Rules in the United States.[31] COGSA applies to contracts for the carriage of goods by sea, to and from foreign and United States ports.[32] The parties to a carriage contract are the carrier and the shipper.[33]

Pursuant to COGSA, bills of lading must show the quantity, weight, or number of packages furnished by the shipper and the apparent condition of the goods.[34] COGSA also mandates that before and at the commencement of the voyage, the carrier exercise due diligence to: provide a seaworthy ship; properly equip, man, and supply the ship; and make refrigerated areas fit and safe for goods reception, preservation, and carriage.[35] The carrier is also required to properly and carefully load, handle, stow, care for, and discharge the goods carried.[36]

To that end, COGSA provides the carrier with immunities for any loss or damage of cargo not arising

21 *See TWA Flight 800*, 209 F.3d at 204.
22 *TWA Flight 800*, 209 F3d. at 216 (Sotomayor, J., dissenting).
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 Carriage of Goods By Sea Act, Pub. L. No. 521, ch. 229 §§1-16, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. §§30701-30707 (2012)).
32 *Id.* § 30702(a).
33 *Id.*
34 *Id.* § 30703(b).
35 *Id.* § 30705.
36 *Id.* § 30704.

from the fault of the carrier.[37] Generally, when loss or damage to cargo arises from an enumerated immunity in COGSA, the carrier can claim COGSA's $500 package damages limitation.[38] When cargo damage or loss does not fall under the carrier immunities, the shipper is entitled to recover damages based on the market value of goods.[39] Accordingly, whether the carrier qualifies for immunity often becomes as a point of contention in a COGSA case.

Carriage of Goods by Sea Act: Burden of Proof.

Under COGSA, a shipper has the prima facie burden of proof that the carrier damaged the cargo.[40] Basically, the shipper must prove the cargo was delivered to the carrier in good condition, but, by the time of discharge, the cargo sustained damaged.[41]

Second Circuit

In *M. Golodetz Export Corp. v. S/S LAKE ANJA*, the carrier agreed to transport a bulk load of a sensitive chemical cargo.[42] The chemical had no color unless contaminated.[43] The shipper sued under COGSA, alleging the chemical was colorless when loaded and colored when discharged.[44] The carrier replied that the coloration derived from an inherent vice of the chemical as the color level was increasing before it was loaded on the vessel.[45]

COGSA §1304(2)(m) provides that a carrier is not liable when goods have sustained damages derived inherently from the characteristics of the goods.[46] An inherent vice is "any existing defect, disease, decay or the inherent nature of the commodity which would cause it to deteriorate over a lapse of time."[47] Typically, inherent vice applies to food products or other materials such as metal or chemicals which are highly reactive to their environment.[48] In the aforementioned case, the Second Circuit considered whether the shipper or carrier had the burden of proof for inherent vice and held that the carrier must assert inherent vice, but the shipper has the burden of proof that an inherent vice of the cargo does not exist.[49]

Fifth Circuit

In *Quaker Oats,* a container sustained damage during transit.[50] The carrier asserted a defense based on COGSA's inherent vice and the Q clause.[51] Under a Q clause defense, the carrier asserts the cargo damage was not the carrier's fault because the carrier exercised due diligence and reasonable care.[52] In evaluating burden of proof, the District Court found that the carrier exercised due diligence as required by the Q clause defense and shifted its analysis to whether the shipper proved no inherent vice existed in the cargo.[53]

On appeal, the Fifth Circuit considered whether the shipper or carrier has the burden of proof for unexplained damage to cargo.[54] In making its determination, the Fifth Circuit looked to COSGA for rights and liabilities of the parties to the carriage contract when cargo is damaged or lost. The Fifth Circuit found that the District Court had wrongly placed the burden of proving inherent vice on the carrier, when, according to COGSA, the shipper bears this burden.[55]

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37 *Id.* § 30706.

38 *See Fireman's Fund Ins. Co. v. Tropical Shipping and Constr. Co.*, 254 F.3d 987, 997 (11th Cir. 2001).

39 *Id.*

40 *Id.; Quaker Oats Co. v. M/V TORVANGER,* 734 F.2d 238, 240 (5th Cir. 1984).

41 *M. Golodetz Export Corp. v. S/S LAKE ANJA*, 751 F.2d 1103, 1107-09 (2nd Cir. 1985).

42 *Id.* at 1107.

43 *Id.* at 1108.

44 *Id.*

45 *Id.*

46 46 U.S.C. §30706(b)(5) (2012).

47 *United States Steel International, Inc. v. Granheim,* 540 F.Supp. 1326, 1329–1330 (S.D.N.Y. 1982) (citing *Missouri Pacific Railroad v. Elmore & Stahl,* 377 U.S. 134, 139 (1964)).

48 *See Vana Trading v. S/S "METTE SKOU,"* 556 F.2d 100, 104.

49 *S/S LAKE ANJA*, 751 F.2d at 1109.

50 *Quaker Oats Co. v. M/V Torvanger,* 734 F.2d 238, 240 (5th Cir.1984).

51 *Id.*

52 The Q clause exempts the carrier from liability if it proves" [a]ny other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." *Id.; see also US v. Ocean Bulk Ships, Inc.*, 248 F. 3d 331, 338 (5th Cir. 2001).

53 *Quaker Oats*, 734 F.2d at 240.

54 *Id.* at 242-43.

55 *Id.* at 243.

The Fifth Circuit emphasized that COGSA requires litigants engage in a *ping-pong* style burden shift.[56] The Fifth Circuit held COGSA required a shipper to establish a *prima facie* case that the cargo was loaded in an undamaged condition and discharged in a damaged condition.[57] The carrier then has the opportunity to raise defenses, including a Q clause defense, that the carrier was free of fault.[58] Here, the shipper demonstrated that the cargo was undamaged during loading and damaged upon discharge. At that point, the burden of proving inherent vice should have shifted to the carrier, which it did not because the District Court incorrectly directed the burden of proof for inherent vice to the shipper.[59]

Carriage of Goods by Sea Act: Fire Defense

Both the Hague Rules and COGSA provide a defense to a carrier if a vessel experiences a fire resulting in cargo damage.[60] Fire is not an absolute defense. Both regulatory schemes require the carrier to exercise reasonable care.[61] However, neither scheme specifies who holds the burden of proof that the carrier exercised reasonable care.[62] Thus, circuits have split in interpreting this ambiguity.[63]

Ninth Circuit

In *Nissan Fire,* during a trip from the United States to Korea, a carrier engine room caught fire due to an improperly connected coupling on a fuel line.[64] As a result of the bad connection, oil sprayed around the engine room and eventually ignited.[65] The carrier required a tow back to port. In the interim, the refrigerated cargo spoiled.[66] The shippers sued the carrier for the loss of the refrigerated cargo.[67]

When a fire is caused by unseaworthiness of a vessel, to receive immunity under the fire defense in COGSA, the carrier must have exercised due diligence to make the ship seaworthy.[68] A carrier is defined as high-level crewmember, such as the master, and the ship-owner.[69] Here, a member of the crew was responsible for a repair to the fuel line coupling.[70] Because a member of the crew had responsibility for the fuel line coupling, the issue became if the improper connection that made the vessel unseaworthy was the result of a lack of due diligence on the part of the carrier.[71] "The District Court concluded the carrier had the burden of proving it exercised due diligence to make the [v]essel seaworthy before invoking the fire defenses. Further, the District Court held that the carrier's duty of due diligence was "absolute or non-delegable" and the carrier failed to meet its burden."[72]

On appeal, Ninth Circuit considered whether the carrier's initial burden to invoke the fire defense of COGSA was as strict as the District Court ruled.[73] The Ninth Circuit reversed the District Court, holding that a carrier only bears the burden of showing personal due diligence up to the beginning of the voyage.[74] Here, even though the carrier admitted the employee negligently repaired the fuel line that caused the fire, the carrier still satisfied its burden.[75] Because a low-level crew member made the repair, outside management's purview, and

56 *See generally* Tubacex, Inc. v. M/V RISAN, 45 F. 3d 951, 954 (5th Cir. 1995).

57 Quaker Oats, 734 F.2d 238 at 240.

58 *Id.*

59 *Id.*

60 11 § U.S.C. app. 1304(2)(b) (1975); The Hague Rules as amended by the Brussels Convention were, in turn, based in part upon the pioneering Harter Act of 1893, 27 Stat. 445, 46 U. S. C. §§ 190-195, H. R. Rep. No. 2218, 74th Cong., 2d Sess. 7, which was repealed and now is contained in COGSA.

61 *See Id.*

62 *Id.*

63 *See e.g.* Nissan Fire & Marine Ins. Co. v. M/V HYUNDAI EXPLORER, 93 F.3d 641, 643 (9th Cir. 1996); In re Ta Chi Navigation (Panama) Corp., S.A., 677 F.2d 225, 228 (2d Cir. 1982).

64 Nissan Fire, 93 F.3d 641 at 643.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 645-46.

69 46 U.S.C. §30701 (2012).

70 Nissan Fire, 93 F.3d 641 at 646.

71 *Id.*

72 *Id.* at 645.

73 *Id.* at 647.

74 *See Id.* (court considered personal due diligence satisfied when the carrier proved compliance with all class mandated maintenance, noting that class certification was not necessarily dispositive in all cases).

75 *Id.*

management ensured all appropriate safety precautions, the carrier could assert the fire defense.[76]

Second Circuit

In *Ta Chi* a ship caught fire while in transit from Japan to the United States.[77] The fire started when a spark ignited in the ship's engine room after acetylene gas escaped from a welding hose.[78] The shippers brought suit against the carrier for part of the value of the lost cargo.[79] The carrier asserted immunity under the COGSA fire defense.[80] The District Court found the carrier could not prove its lack of fault, and thus held the carrier liable, despite the fire defense.[81]

On appeal, the Second Circuit questioned whether the *ping-pong* burden shifting analysis employed in *Nissan Fire* and followed by the District Court here even applied to the fire defense.[82] In doing so, the Second Circuit looked to the Hague Rules, where the shipper must show the carrier's fault to satisfy an initial burden of proof. The Second Circuit found that Congress did not intend for the COGSA to change the burden of proof required by the Hague Rules fire defense.[83] The Second Circuit further supported its finding by the language of COGSA, opining that the language "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from [COGSA defenses]" clearly allocates the burden of fault to the shipper to show fault because the COGSA defenses require the absence of fault.[84]

Therefore, the Second Circuit held that when cargo damage results from fire, the burden belongs to the shipper to show the carrier's negligence or that actual fault caused the fire, rather than the COGSA *ping-pong* test.[85] The shipper satisfies its burden of proof through demonstrating that the negligent act or omission of the carrier caused or prevented the fire's extinguishment.[86] As a result, in the Second Circuit the fire statute exonerates the ship owner from liability for fire damage to cargo unless the fire resulted from the design or neglect of the carrier.[87]

ADMIRALTY COMMON LAW

Fair Opportunity Doctrine

As discussed previously, COGSA provides in §30705 that, generally, when loss or damage is not due to its own fault, a carrier can limit its liability for loss or damage to $500 for each package specified on the bill of lading.[88] The $500 package limit applies unless the nature and value of goods are otherwise declared in the bill of lading.[89] While courts generally agree that the shipper is entitled to declare a higher value, the extent of the what opportunity to declare a higher value differs based upon the circuit.[90] A carrier who fails to provide a shipper with the right to declare a higher value loses its ability to limit liability under COGSA carrier immunities.[91] Seven circuits have considered what this opportunity to declare value requires, and, all but one, the Third Circuit, applied the common law fair opportunity doctrine to frame the analysis of what qualifies as opportunity to declare a higher value.[92]

Third Circuit

In *Ferrostall,* a carrier time chartered a vessel.[93] The *Ferrostall* carrier transported cargo of metal coils.[94] Two

76 *Id.*

77 *In re Ta Chi Navigation (Panama) Corp., S.A.*, 677 F.2d 225, 228 (2d Cir. 1982).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 229; *see also Nissan*, 93 F.3d at 646.

83 *Ta Chi Navigation*, 677 F.2d at 229-30.

84 *Id.*

85 *Id.* at 230.

86 *Id.* at 229; *see Am. Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 450 (2d Cir. 1951).

87 *Ta Chi Navigation, 677 F.2d* at 229.

88 46 U.S.C. §30705 (2012).

89 *Id.*

90 *Ferrostaal, Inc. v. M/V SEA PHOENIX*, 447 F.3d 212, 214 (3d Cir. 2006).

91 *Id.*

92 *See e.g. Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY*, 408 F.3d 1250,1255 (9th Cir. 2005); *Brown & Root, Inc. v. M/V PEISANDER*, 648 F.2d 415, 424 (5th Cir. 1981); *Nippon Fire & Marine Ins. Co. v. M V TOURCOING, 167 F.3d 99, 102* (2d Cir. 1999); *Gen. Elec. Co. v. MV NEDLLOYD*, 817 F.2d 1022, 1028-29 (2d Cir. 1987); *Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND*, 784 F.2d 1161 (4th Cir. 1986) (*rev'd on other grounds en banc*, 804 F.2d 837 (4th Cir. 1986)); *Acwoo Int'l Steel Corp. v. Toko Kaiun Kaish, Ltd.*, 840 F.2d 1284, 1288 (6th Cir. 1988); *Gamma-10 Plastics v. Am. President Lines*, 32 F.3d 1244, 1251-54 (8th Cir. 1994); *but see Ferrostaal, Inc. v. M/V SEA PHOENIX*, 447 F.3d 212, 224 (3d Cir. 2006).

93 *Ferrostaal*, 447 F.3d at 224.

94 *Id.*

hundred and eighty of the metal coils allegedly rusted from exposure to sea-water.[95] The shipper asserted a damages claim and the carrier responded by moving to limit its liability based on the $500 package limitation in COGSA.[96] The shipper replied that the fair opportunity doctrine mandates notice to the shipper when the carrier intends to invoke the $500 package limitation.[97] The District Court granted partial summary judgment to the carrier, limiting liability to $500 per package.[98]

On appeal, the Third Circuit considered the consistency of the fair opportunity doctrine with COGSA.[99] Under the common law, a carrier assumed liability for all damages caused by its negligence and could only reduce liability through a showing of a valid cargo valuation clause.[100] The common law therefore developed the fair opportunity doctrine, which permitted the carrier to invoke the $500 package limitation in COGSA if the carrier provided the shipper with notice of the limit and an opportunity to declare a higher value.[101] Historically, a bill of lading mentioning COGSA met the carrier's threshold burden of proof to show that the shipper had notice of the limit and an opportunity to declare a higher value.[102] If the carrier provided an appropriate bill of lading that mentioned COGSA, the burden of proof shifted to the shipper to prove a declaration of a higher value existed in the bill of lading making the ultimate issue not the opportunity to declare, but the declaration itself.[103]

In evaluating the consistency of the fair opportunity doctrine with COGSA, the Third Circuit determined the fair opportunity doctrine as inconsistent with COGSA §30705 because Congress intended the statute to warn parties when departing from the default liability scheme, protect unsophisticated parties, and provide parties with equal bargaining power.[104] Accordingly, the Third Circuit held fair opportunity doctrine does not apply to transactions governed by COGSA.[105]

Other Circuits

The majority of circuits require a carrier to provide a shipper with notice of the $500 package limitation.[106] Occasionally, the presence or absence of space on a bill of lading for the declaration of a higher value will impact the court's evaluation of the fair opportunity doctrine.[107] Other precedent in the Second Circuit provides that because the fair opportunity doctrine is common law, COGSA, as a statute, displaced the fair opportunity doctrine.[108]

In contrast, the Ninth Circuit specifically requires a carrier to include the text of the liability and valuation provision of COGSA, or similar language, in the bill of lading to benefit from COGSA immunity.[109] Consistent with requiring inclusion of text from COGSA, the Ninth Circuit also rejected the Second Circuit's sentiment that simply incorporating COGSA places the shipper on notice of the $500 package limitation.[110] On the other hand, the Fifth Circuit focused on the carrier's willingness to offer different freight quotes for different declared values as evidence of notice and opportunity to declare a higher value.[111]

MARITIME CONTRACT CONSTRUCTION

Safe Port and Safe Berth Provisions

Time and voyage charters contain express or implied obligations that a charterer will not require the vessel to go to an unsafe port or enter an unsafe berth. Typically, under a safe port and safe berth clause, the Master of the vessel is granted the right to refuse to enter an unsafe location nominated by the charter.[112] Notwithstanding,

95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 220.
100 *Id.* at 200-21.
101 *Id.* at 221.
102 *Id.*
103 *Id.*
104 *Id.* at 221-22.
105 *Id.*
106 *Ferrostaal*, 447 F.3d at 224; *see also Tessler Bros*, 494 F.2d 438 (9th Cir. 1974).
107 See *Nippon Fire & Marine Ins. Co. v. M V TOURCOING, 167 F.3d 99, 101* (2d Cir. 1999).
108 *See e.g., Gen. Elec. Co. v. MV NEDLLOYD,* 817 F.2d 1022, 1028 (2d Cir. 1987).
109 *See Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY,* 408 F.3d 1250, 1255 (9th Cir. 2005).
110 *See Pan Am. World Airways, Inc. v. Calif. Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977).
111 *Brown & Root, Inc. v. M/V PEISANDER,* 648 F.2d 415, 424 (5th Cir.1981).
112 Force & Johnsen, *supra* note 3, at 118.

a circuit split has developed as to what level of care the charterer must exercise in selecting a safe port and safe berth.

Second Circuit

In *Venore,* a vessel sustained damage after colliding with a pier.[113] Pontoons on the pier were supposed to protect the vessel, but due to an earlier accident, one pontoon was missing.[114] The time charterer alleged the voyage charterer breached its non-delegable duty to provide a safe berth to the vessel, and the District Court agreed.[115]

On appeal, the Second Circuit considered if, absent negligence of the time charterer, the voyage charterer is strictly liable to provide a safe berth to the vessel.[116] To determine the voyage charterer's liability, the Second Circuit looked to the language of the charter party and the conduct of the voyage charterer.[117] The language of the charter party provided an express assurance of the safety of the berth on which the Master, a representative of the time charterer, had a right to rely.[118] Regarding the conduct of the voyage charterer, the voyage charterer's authorized agent had knowledge that the pier only contained one pontoon and that the pier needed two pontoons for the vessel to be safely berthed.[119] Even with this knowledge the agent allowed the berthing to commence.[118] Based on these facts, the Second Circuit held that absent negligence of the time charterer, a voyage charter is liable for the safe berth of a vessel.[120]

Fifth Circuit

In *Orduna,* a crane damaged a ship during a loading operation.[121] The voyage charterer argued no liability to ship owner, Orduna, based on the safe berth clause in the charter party.[122] The District Court found the crane operator, the crane tower operator, and the voyage charterer liable for the damage.[123] Based on Second Circuit precedent, the District Court found the voyage charterer to have liability because the charter party designated the voyage charterer as the warrantor of the safety of the berth selected.[124]

On appeal, the Fifth Circuit considered whether a voyage charter who controls and directs the vessel and procures the berth warrants the safety of the berth.[124] As its defense, the voyage charterer argued that the safe port and safe berth provision of the charter party imposed, at most, an obligation to use due diligence in berth selection.[125] The Fifth Circuit agreed with the voyage charterer and held that a charter party's safe port and safe berth provision imposes upon the charterer only a duty of due diligence to select as safe berth.[126] As justification for its position, the Fifth Circuit found no legitimate policy furthered by making the charterer warrant the safety of the selected berth because placing the warranty on the charterer removes responsibility from the Master.[127] The Fifth Circuit noted substantial criticism of the Second Circuit's decision which imposed liability on the charterer even in the absence of fault.[128] The Fifth Circuit found the criticisms in commentary and case law persuasive and held that the party directing the vessel need only show due diligence in selecting a berth to avoid liability under a safe berth clause.[129]

Third Circuit

Most recently, the Third Circuit ruled on the issue of safe berth warranty. In *Frescati,* a vessel struck an abandoned anchor approximately nine hundred feet from the intended berth and spilled two hundred and sixty-three gallons of heavy crude

113 *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 470 (2d Cir. 1974).
114 *Id.* at 471.
115 *Id.* at 472.
116 *Id.* at 471.
117 *Id.* at 472.
118 *Id.*
119 *Id.* at 473.
120 *Id.*
121 *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1951).
122 *Id.* at 1152.
123 *Id.*
124 *Id.*; *see also Theriot v. Bay Drilling Corp.*, 783 F.2d 527,540 (5th Cir. 1986).
125 *Orduna*, 913 F.2d at 1156.
126 *Id.* at 1157.
127 *Id.*
128 *Id.* at 1156.
129 *Id.*

into the waterway.[130] The District Court followed the Fifth Circuit's rationale and found that the Master of the vessel had the burden to accept or reject the port selected in the charter party.[131]

On appeal, the Third Circuit considered the application of the safe berth and safe port warranty in the charter party.[132] The court adopted the position of the Second Circuit, and rejected the Fifth Circuit's position.[133] The *Frescati* decision was appealed to the SCOTUS. On February 24, 2014, the SCOTUS denied certiorari.[134]

CONCLUSION

Despite the goal of a uniform body of admiralty maritime law, federal circuits still divide over key admiralty and maritime questions of law. For example, a death the same distance from shore is governed by DOHSA in California and common law New York. Likewise, COGSA defenses, the maritime common law and maritime contract construction may vary jurisdictionally. Thus, forum shopping will likely remain prevalent in admiralty and maritime until SCOTUS chooses to consider a major maritime case addressing any of the aforementioned issues.

130 *Frescati Shipping Co. v. Citgo Asphalt Ref. Co.*, 718 F.3d 184,189 (3d Cir. 2013).
131 *Id.* at 199.
132 *Id.*
133 *Id.*
134 *CITGO Asphalt Refining Co v. Frescati Shipping Co* , 134 S.Ct. 1279 (2014) (denying certiorari).