Cornell International Law Journal

Volume 16
Issue 1 *Winter 1983*

Article 4

Forum Non Conveniens in International Maritime Collision Litigation in the Federal Courts: A Suggested Approach

Edwin W. Dennard

FORUM NON CONVENIENS IN INTERNATIONAL MARITIME COLLISION LITIGATION IN THE FEDERAL COURTS: A SUGGESTED APPROACH

International admiralty claimants are beginning to lose their traditional privilege of suing in U.S. courts.[1] Congested dockets have prompted the U.S. admiralty courts to apply the doctrine of forum non conveniens (FNC) more frequently to decline jurisdiction over disputes having substantial foreign connections.[2] U.S. claimants, for example, formerly only needed to assert their citizenship for

---

1. *See* Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, [1980] Am. Mar. Cas. 309 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980) (U.S. admiralty plaintiff dismissed under forum non conveniens despite adverse change of law). Other recent cases dismissing U.S. claimants include: Bielefeld v. Walleniusrederierna and Karl Geuther & Co., [1977] Am. Mar. Cas. 119 (S.D.N.Y. 1976); Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A., Panama, 437 F. Supp. 331, [1977] Am. Mar. Cas. 1727 (S.D.N.Y. 1977); Bernuth Lembcke, Co. v. Siemens Aktiengesellschaft, [1976] Am. Mar. Cas. 2175 (S.D.N.Y. 1976).

Cf. Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980) (non-admiralty U.S. plaintiff dismissed for forum non conveniens); Mizokami Bros., Inc. v. Boychem Corp., 556 F.2d 975 (9th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978) (non-admiralty U.S. plaintiff dismissed); Panama Processes, S.A. v. Cities Service Co., 500 F. Supp. 787 (S.D.N.Y. 1980) (non-admiralty U.S. plaintiff dismissed); Shepard Niles Crane & Hoist Corp. v. Fiat S.p.A., 84 F.R.D. 299 (W.D.N.Y. 1979) (non-admiralty U.S. plaintiff dismissed). *See generally* Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts,* 17 VA. J. INT'L L. 775 (1977) [hereinafter cited as *Convenient Forum Revisited*].

2. See, *e.g.,* Domingo v. States Marine Lines, Inc., [1972] Am. Mar. Cas. 937, 943 (S.D.N.Y. 1972), where the majority expressed serious concern with the docket problem:

> It is scarcely necessary to dwell on the fact that this Court is the most heavily burdened Federal District Court in the country. The Civil Calendar grows more congested all the time. The priority now properly given to the disposition of criminal cases tends to increase this congestion. Moreover, the substantial number of vacancies on a bench of 27 emphasizes the seriousness of the congestion problem. In all likelihood it will be several years, at least, before these cases can be reached for trial in this district. There is no indication that there would be any difficulty in obtaining prompt disposition in the Philippine courts.
>
> I see no reason why this Court, with its heavy burdens and responsibilities, should be burdened with cases like these which, from every point of view, should be tried in the courts of the nation where all the relevant events occurred and whose own citizens are primarily involved. Certainly, this district and the Metropolitan area in which it is situated have no conceivable relation to this litigation except for the fact that the defendant happens to be doing business here.

See also Home Insurance Co. v. S.S. Cuidad de Cumana, [1975] Am. Mar. Cas. 355, 357 (S.D.N.Y. 1974); Del Monte Corp. v. Everett S.S. Corp., S/A, 402 F. Supp. 237, 243, [1974] Am. Mar. Cas. 1880, 1886 (N.D. Cal. 1973).

the U.S. admiralty courts to retain jurisdiction;[3] today, not even U.S. citizenship is enough to avoid an FNC dismissal.[4]

Because FNC is a discretionary doctrine, the U.S. admiralty courts have had difficulty applying it in a consistent manner.[5] They have cited dictum with regularity and have often ignored prior holdings.[6] The outcome of this treatment is a confused FNC doctrine that is causing litigants to waste time and money because they cannot predict with certainty the outcome of a motion to dismiss on FNC grounds.[7] Clearly, the courts and the admiralty bar need a more reasoned FNC doctrine that will produce more predictable results.

This Note proposes a more consistent doctrinal approach to FNC by articulating the factors that U.S. admiralty courts should consider when deciding whether to decline jurisdiction of international maritime collision cases.[8] First, the Note provides a general discussion of FNC doctrine, highlighting the current confusion in the application of FNC to international maritime collision cases. The Note then describes those aspects of admiralty law and maritime collision litigation with which an effective FNC doctrine must comport. Finally, the Note considers the propriety of current FNC

3. *See, e.g.,* States Marine Lines, Inc. v. M/V Kokei Maru, 180 F. Supp. 255, 257, [1960] Am. Mar. Cas. 887, 889 (N.D. Cal. 1960) (damage action by U.S. steamship owner against Japanese ship and her owner following collision in Japanese harbor). *See also* Recent Decisions, 19 VA. J. INT'L L. 690, 697-98 (1979).

4. Del Monte Corp. v. Everett S.S. Corp., S/A, 402 F. Supp. 237, [1974] Am. Mar. Cas. 1880 (N.D. Cal. 1973) (U.S. claimant in a contract action dismissed under FNC); Texaco Trinidad, Inc. v. Astro Exito Navegacian S.A., Panama, 437 F. Supp. 331, [1977] Am. Mar. Cas. 1727 (S.D.N.Y. 1977) (U.S. collision claimant dismissed under FNC). *See generally* Recent Decisions, *supra* note 3.

5. *Compare, e.g.,* Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, [1957] Am. Mar. Cas. 57 (5th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957) (jurisdiction retained) *with* Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908, 912, [1959] Am. Mar. Cas. 511, 516 (E.D. Va. 1959) (jurisdiction declined, the court noting that "[t]he recent case of Motor Distributors . . . is admittedly somewhat analogous to the facts herein submitted."); *cf.* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,* 35 CORNELL L.Q. 12, 19 (1949) ("[T]he development [of FNC] has been much like that of the proverbial Topsy, and the cases have often seemed to observers to defy analysis and rational classification."); Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts,* 69 GEO. L.J. 1257, 1261 (1981) [hereinafter cited as Note, *Foreign Plaintiffs*] (despite *Gilbert, see infra* notes 27-33 and accompanying text, the lower courts have failed to develop standards for balancing private and public interests so as to ensure reliable and predictable FNC decisions).

6. *See infra* note 46.

7. Bickel, *supra* note 5, at 19.

8. This Note focuses on collisions because they give rise to more litigation than any other aspect of the shipping industry, except personal injury claims. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 485 (1975) (discussing the frequency of collision).

doctrine in international maritime collision cases and suggests a more workable and doctrinally consistent alternative.

I

BACKGROUND

A. FNC DOCTRINE

FNC is both an equitable and discretionary doctrine.[9] It permits a court to decline jurisdiction of a suit that could have been brought in another, more appropriate, forum.[10] FNC presupposes that jurisdiction and venue are proper where the plaintiff brought suit, but that at least one additional forum exists where jurisdiction and venue also would have been proper.[11] Courts considering its use presume that the plaintiff's choice of forum is fair. Thus, FNC should be used rarely and then only to prevent harassment of defendants,[12] or to resist imposition on the court's docket of disputes having no connection with the forum state.[13]

1. Early History

FNC originated in the Scottish courts and gradually made its way into American decisional law.[14] Initially, U.S. admiralty courts applied FNC only in actions between foreigners.[15] *The Belgenland*[16] and *Canada Malting Co. v. Paterson Steamships, Ltd.*,[17] two early cases involving actions between foreigners, established the rules that

9. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947).

10. *See id.* at 506-07.

11. *Id.* at 507.

12. *Id.*

13. *Id.* at 504. There is some suggestion in *Gilbert* that FNC primarily was directed at misuses of venue statutes, except in the admiralty courts. In admiralty there are no venue statutes, and FNC has been used to decline jurisdiction of foreign disputes. *Id.* at 507.

14. The earliest reported Scottish case to discuss the notion of FNC was McMaster v. McMaster, 1833 S. Sess. Cas. 685 (2d Div. Scotland). *See* Barrett, *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380 (1947); Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908 (1947). *See generally* Paulsen & Burrick, *Forum Non Conveniens in Admiralty: The Availability of the U.S. Courts for Trial of Maritime Cases Arising Outside U.S. Territorial Waters,* 17 FORUM 1350, 1352-59 (1982). U.S. admiralty courts originally applied FNC as a means to control admiralty's broad jurisdiction and unlimited venue. Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 154, [1980] Am. Mar. Cas. 309, 319 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980).

15. *Compare* Recent Decisions, *supra* note 3, at 697 ("The older view was that a U.S. plaintiff suing in his own right had an absolute right of access to U.S. courts.") *and* Bolden v. Jensen, 70 F. 505 (D. Wash. 1895) (a U.S. citizen is "entitled to redress in a court of his own country") *with* Swift & Co. Packers v. Companie Columbiana Del Caribe, 339 U.S. 684, 697 (1950) (Court declined to answer the abstract question of whether a U.S. admiralty court may *ever* decline jurisdiction over actions brought by U.S. citizens).

16. 114 U.S. 355 (1885).

17. 285 U.S. 413 (1932).

some U.S. admiralty courts still follow in such suits.[18] Other early decisions suggest that FNC did not apply to U.S. claimants because citizens enjoyed a right of access to U.S. admiralty courts.[19]

Although the Supreme Court alluded to the issue in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*,[20] it has never actually decided whether FNC applies to actions by U.S. citizens in the U.S. admiralty courts.[21] In *Swift,* the Court stated in dictum that some U.S. admiralty courts still quote[22] that the application of FNC against a U.S. citizen brings into force "considerations very different from those in suits between foreigners."[23] The Court seemed to say that FNC could apply to citizens' actions, but should be used rarely, and only after consideration of special factors. Since *Swift,* the Supreme Court has made no pronouncement concerning FNC in the context of citizens' actions. As a result, the district courts are uncertain as to the weight properly accorded U.S. citizenship under FNC; most courts currently consider it to be a significant but not determinative factor.[24]

2. *Modern FNC: Gilbert and Koster*

Three years before *Swift,* the Supreme Court had extended FNC to all federal courts by its decisions in two non-admiralty cases: *Gilbert v. Gulf Oil Corp.*[25] and *Koster v. Lumbermens Mutual Casualty Co.*.[26] *Gilbert* involved the application of FNC in a domestic

18. *E.g.,* Poseiden Schiffahrt, G.M.B.H. v. M/S Netuno, 474 F.2d 203, [1973] Am. Mar. Cas. 1180 (5th Cir. 1973) (citing *The Belgenland* to retain jurisdiction over a collision between foreign vessels on Lake Huron); Anglo-American Grain Co. v. S/T Mina D/Amico, 169 F. Supp. 908, [1959] Am. Mar. Cas. 511 (E.D. Va. 1959) (citing *Canada Malting* to decline jurisdiction of a collision claim brought by a British insurer of a British vessel against an Italian vessel arising from a collision off the coast of Spain). Both *The Belgenland* and *Canada Malting* involved actions between foreigners. In *The Belgenland,* the parties were of different flags. 114 U.S. at 356. Accordingly, the Court retained jurisdiction on the ground that, as between foreigners of different flags, the U.S. could offer a neutral forum. *Id.* at 369. By contrast, *Canada Malting* involved parties of the same flag. 285 U.S. at 423. The Court there declined jurisdiction, noting that because "the parties were not only foreigners, but were citizens of Canada" the litigation could be conducted more appropriately in a Canadian tribunal. *Id.*

19. The Epsom, 227 F. 158 (W.D. Wash. 1915); The Falls of Keltie, 114 F. 357 (D. Wash. 1902); Bolden v. Jensen, 70 F. 505 (D. Wash. 1895). *See also supra* note 15.

20. 339 U.S. 684 (1950).

21. *See* Recent Decisions, *supra* note 3, at 695.

22. *E.g.,* Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d 611, 614, [1966] Am. Mar. Cas. 1993, 1996 (3d Cir. 1966), *cert. denied,* 385 U.S. 945 (1966).

23. 339 U.S. at 697.

24. *E.g.,* John Fabrick Tractor Co. v. Penelope Shipping Co., 278 F. Supp. 182, 183 (S.D.N.Y. 1967) (jurisdiction retained in action brought by U.S. plaintiff against foreign ship arising out of a collision on the high seas).

25. 330 U.S. 501 (1947).

26. 330 U.S. 518 (1947).

tort suit.[27] There, plaintiff was a Virginia resident who sued in the federal district court in New York.[28] The Supreme Court affirmed a FNC dismissal upon defendant's showing that the balance of conveniences pointed to a trial in Virginia, the place the tort had occurred.[29] *Gilbert* listed the factors important to a FNC determination in the federal courts, dividing them into two groups: *private interest* factors and *public interest* factors.[30] The *private interest* factors included: (1) "the relative ease of access to sources of proof"; (2) the "availability of compulsory process for attendance of unwilling" witnesses; (3) "the cost of obtaining attendance of willing witnesses"; (4) possible "view of the premises," if appropriate; and (5) "all other practical problems that make a trial of a case easy, expeditious, and inexpensive."[31] The *public interest* factors included: (1) "administrative difficulties" caused when "litigation is piled up in congested centers instead of being handled at its origin"; (2) the imposition of jury duty "upon the people of a community which has no relation to the litigation"; (3) the "local interest in having localized [sic] controversies decided at home"; and (4) the court's difficulties with choice-of-law problems and the application of foreign law.[32]

Gilbert was silent about the relative weight to be accorded the public and private interest factors, and about which factors within each group are most important. The Court reiterated the traditional deference to the plaintiff's choice of forum, stating that a federal court should not invoke FNC unless the balance of conveniences strongly favors an alternate forum.[33]

Koster v. Lumbermens Mutual Casualty Co., Gilbert's companion case, also dealt with FNC in domestic litigation.[34] In *Koster,* plaintiff was a New York resident bringing a derivative action in the federal district court in New York.[35] The Supreme Court, presumably referring to the availability of multiple "home forums" in derivative actions, affirmed a FNC dismissal because of "special problems of [FNC] which inhere in derivative actions."[36] The Court noted that where there are only two parties to a dispute, a plaintiff suing in his home forum "should not be deprived of the presumed advan-

27. *Gilbert,* 330 U.S. at 501.
28. *Id.* at 502.
29. *Id.* at 509-12.
30. *Id.* at 508.
31. *Id.*
32. *Id.* at 508-09.
33. *Id.*
34. *Koster,* 330 U.S. 518 (1947).
35. *Id.*
36. *Id.* at 521.

tages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience,"[37] or (2) "make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems."[38]

Gilbert and *Koster* laid the foundation of modern FNC doctrine in U.S. admiralty courts; they represented a subtle but important change in the way U.S. admiralty courts viewed the doctrine. *Gilbert* appeared to encourage the admiralty courts to use FNC more readily by providing them with a list of factors to consider in each case.[39] Similarly, *Koster* appeared to signal a liberalization of prevailing doctrine insofar as it applied FNC for the first time in the federal courts to oust a plaintiff from his home forum.[40]

Shortly after *Gilbert* and *Koster,* Congress added section 1404(a) to the Judicial Code.[41] That section authorized the federal courts to transfer any civil action to a more appropriate district "for the convenience of parties and witnesses, in the interest of justice."[42] Thus, section 1404(a) replaced FNC in all situations where the alternative forum is in the United States.[43] FNC remained relevant in international litigation in the federal courts, where *Gilbert* and *Koster* articulated the concerns relevant to courts deciding whether to decline jurisdiction of actions having substantial foreign connections.[44]

---

37. *Id.* at 524.

38. *Id.*

39. *Gilbert,* 330 U.S. at 508-09. When the Supreme Court decided *Gilbert* and *Koster,* FNC dismissals in the federal courts were uncommon. *See id.* at 508. Before *Gilbert,* no authoritative FNC standard had been stated, so that federal courts retained jurisdiction partly to avoid reversal on appeal, and partly because "courts experience a certain degree of discomfort in 'abdicating' a jurisdiction which is theirs." Bickel, *supra* note 5, at 33. By extending FNC to all federal courts, the Court encouraged the use of FNC in non-admiralty cases, and seemed to approve a more liberal use of FNC in admiralty cases as well.

40. *Koster,* 330 U.S. at 518. *Koster* notwithstanding, the U.S. courts did not invoke FNC in international litigation against a citizen suing in his own right until the district court opinion in *Hoffman v. Goberman*. The decision was appealed and reversed. Hoffman v. Goberman, 420 F.2d 423 (3d Cir. 1970). *See Convenient Forum Revisited, supra* note 1, at 785 n.178.

41. 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district where it might have been brought." The courts have construed § 1404(a) to make transfers under it less harsh on plaintiffs than dismissals under FNC had been. *See, e.g.,* Van Dusen v. Barrack, 376 U.S. 612 (1964) (state law of transferor court will apply in the transferee forum).

42. 28 U.S.C. §1404(a) (1976).

43. *See* Recent Decision, *supra* note 3, at 691 n.9.

44. *See id.* at 692, 695.

3. *FNC in International Maritime Collision Cases: Doctrinal Confusion*

Since the *Swift* decision, the Supreme Court has not addressed the application of FNC in international admiralty litigation.[45] Instead, the Court has left it to the lower admiralty courts to cope with the conflicting array of FNC precedents.[46] The result has been a confused application of FNC, particularly in international maritime collision cases.[47]

---

45. In Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), the Court addressed FNC in a different international context. *Piper* involved a plane crash in Scotland that killed the Scottish pilot and five Scottish passengers. *Id.* at 238-39. The survivors hired an American administratrix to provide a basis for suing the plane's manufacturer in the United States. *Id.* at 239-40. In the U.S., the plaintiffs could avail themselves of strict liability law, which was unavailable in Great Britain. *Id.* at 240. The Supreme Court dismissed on the grounds of FNC, stating that an adverse change in applicable substantive law "should ordinarily not be given conclusive or even substantial weight in the [FNC] inquiry." *Id.* at 247. In the context of this Note, *Piper* can be distinguished on two grounds. First, the *Piper* decision does not concern international admiralty collision litigation. Second, the plaintiff in *Piper* was nominal. It must be noted, however, that to the extent this Note suggests evaluating the content of foreign substantive law as a part of the FNC inquiry, *see infra* notes 148-51 and accompanying text, it is inconsistent with *Piper*.

46. The major Supreme Court FNC decisions include: Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684 (1950); Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Canada Malting Co. v. Paterson Steamships, 285 U.S. 413 (1932); and The Belgenland, 114 U.S. 355 (1885).

The Belgenland and *Canada Malting* govern suits between foreigners. *Swift* and *Koster* govern suits involving U.S. claimants. If limited to its facts, *Gilbert* applies only to suits by foreigners; however, it has been cited in cases involving U.S. claimants. *E.g.*, Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, [1980] Am. Mar. Cas. 309 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980). *Swift* and *The Belgenland* resulted in the retention of jurisdiction, while *Gilbert, Koster,* and *Canada Malting* each resulted in the Court's declining jurisdiction. With respect to their facts, then, these cases are rather incoherent. No court has attempted to reconcile all these decisions. Instead, lower courts indiscriminately cite these cases to support wildly varying outcomes. *Compare* Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, [1957] Am. Mar. Cas. 57 (5th Cir. 1956) (jurisdiction retained) *with* Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908, 912, [1959] Am. Mar. Cas. 511, 516 (E.D. Va. 1959) (jurisdiction retained, the court noting that "[t]he recent case of Motor Distributors is admittedly somewhat analagous to the facts herein submitted.").

Gilbert's public and *private interest* factors may have played a large role in muddying the waters of FNC in international maritime collision cases. *Cf.* "The broad and indefinite discretion left to the federal courts to decide the question of convenience from a welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible." Gulf Oil Corp. v. Gilbert, 330 U.S. 510, 516 (1947) (Black, J., dissenting).

47. The *M/V Nordic Regent* history provides an excellent example of how the courts dispute the proper FNC standard in international marine collision cases. The district court handed down the first *M/V Nordic Regent* opinion in 1978. 453 F. Supp. 10, [1978] Am. Mar. Cas. 365 (S.D.N.Y. 1978). On appeal the Second Circuit affirmed the plaintiff's dismissal in a split panel decision, one judge concurring and the third dissenting. [1979] Am. Mar. Cas. 13 (2d Cir. 1978). Later, the Second Circuit granted plaintiff's petition for rehearing and subsequently reversed the dismissal, with the judge who wrote the original affirmance writing a vigorous dissent. [1979] Am. Mar. Cas. 1 (2d Cir. 1979).

In international maritime collision cases involving foreign plaintiffs, the courts have traditionally used a number of FNC standards which tend to be less analytical than descriptive of an attitude favoring retention of jurisdiction.[48] This strict view of FNC has resulted in few dismissals,[49] and has become a virtual *per se* rule in the Fifth Circuit.[50] It reflects a judicial attitude that retention is the rule and dismissal the rare exception.[51] According to the strict view, mere inconvenience is not grounds for an FNC dismissal.[52]

In contrast, recent court decisions evince a more liberal approach to FNC in international maritime collision suits involving foreign claimants.[53] This liberal approach reflects a judicial view

---

The Second Circuit granted a second rehearing, this time on defendant's petition, and reversed its previous decision, once again affirming the dismissal. 654 F.2d 147, [1980] Am. Mar. Cas. 309 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980).

48. *E.g.,* Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal, 210 F.2d 754, 755-57, [1954] Am. Mar. Cas. 643, 645 (2d Cir. 1954) ("[W]here such controversies are *communis juris,* — that is, where they arise under the common law of nations, — special grounds should appear to induce the court to deny its aid to a foreign suitor.") (quoting The Belgenland, 114 U.S. 355, 365 (1884)); Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, 465, [1957] Am. Mar. Cas. 57, 60 (5th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957) ("[T]he rule is . . . that jurisdiction should be taken unless to do so would work an injustice."); Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529, 2532 (D.S.C. 1973) (In the course of dismissing a foreign plaintiff, the court summarized as follows: "[T]he burden is upon the defendant . . . to prove that the interests of justice . . . require that the case be heard elsewhere, and . . . if the defendant meets that burden, it is within my discretion, taking all factors into account, either to retain jurisdiction or decline it.").

49. *See* Bickel, *supra* note 5, at 33, 39. *Cf.* Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 63 (1967) ("Contrary to the development noted by Professor Bickel, the recent trend is toward increased willingness to dismiss alien—alien commercial actions for forum non conveniens grounds."). Dismissals of foreign claimants include: Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529 (D.S.C. 1973); Transomnia, G.M.B.H. v. M/S Toryu, 311 F. Supp. 751, [1970] Am. Mar. Cas. 1686 (S.D.N.Y. 1970); Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908, [1959] Am. Mar. Cas. 511 (E.D. Va. 1959).

50. *See, e.g.,* Poseidon Schiffahrt, G.M.B.H. v. M/S Netuno, 335 F. Supp. 684 (S.D. Ga. 1973), *rev'd,* 474 F.2d 203, [1973] Am. Mar. Cas. 1180 (5th Cir. 1973). On remand, the district court retained jurisdiction but transferred the case, pursuant to 28 U.S.C. §1404(a), to the U.S. District Court for the Eastern District of Michigan, 361 F. Supp. 412 (S.D. Ga. 1973).

51. Magnolia Ocean Shipping Corp. v. M/V Marco A Zul, [1981] Am. Mar. Cas. 2971, 2975 (E.D. Va. 1981).

52. Most of the strict view decisions come from the Fifth Circuit. *E.g.,* Poseidon Schiffahrt, G.M.B.H. v. M/S Netuno, 474 F.2d 203, [1973] Am. Mar. Cas. 1180 (5th Cir. 1980); Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463 (5th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957). These cases may be compared with Second Circuit cases that retain jurisdiction over a foreigner's action, but arrive at that result by balancing convenience factors. *E.g.,* Latif Bawany Jute Mills, Ltd. v. Hellenic Lines, Ltd., [1976] Am. Mar. Cas. 2408 (S.D.N.Y. 1976). *Cf.* A/S Hjalmar Bjorges Rederi v. Tug Boat Condor, [1979] Am. Mar. Cas. 1696 (S.D. Cal. 1979) (distinguishing the *Koster* standard from the strict view of *Motor Distributors*].

53. *See, e.g.,* Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529 (D.S.C. 1973) (court declined jurisdiction); A/S Hjalmar Bjorges Rederi v. Tug Boat Condor, [1979] Am. Mar. Cas. 1696 (S.D. Cal. 1979) (court retained jurisdiction).

that U.S. admiralty courts should not permit suits between foreigners to impose burdens on court time and resources.[54] U.S. admiralty courts adopting this view invoke FNC more readily, often upon respondent's showing that a foreign forum would be more convenient for the litigants.[55] In addition, these courts often cite *Gilbert*'s *public interest* factors to support their decisions to decline jurisdiction.[56]

In international maritime collision suits involving U.S. claimants, different considerations exist.[57] As with suits between foreigners, however, the predominant practice is for the court to retain jurisdiction unless the respondent shows that retention of jurisdiction will result in substantial injustice.[58] Similar to the trend involving foreign claimants, recent decisions articulate a decidedly more liberal view of FNC doctrine in cases where U.S. collision claimants have sued in U.S. admiralty courts.[59]

The balance of this Note addresses the analytical foundations and the proper content of a reasoned FNC doctrine that will produce predictable outcomes in international maritime collision cases. The current confusion in FNC application stems largely from the failure of the U.S. admiralty courts to analyze the cases that they cite as precedent,[60] and a failure to articulate the relevant FNC considerations which comport with the realities of modern maritime collision

54. *See* Paper Operations Consultants Int'l, Ltd. v. Hong Kong Amber, 513 F.2d 667, [1975] Am. Mar. Cas. 2349 (9th Cir. 1975) (action for cargo damage during shipment); Del Monte Corp. v. Everett S.S. Corp., 402 F. Supp. 237, [1974] Am. Mar. Cas. 1880 (N.D. Cal. 1973) (contract action); Deutsche Rhodiaceta A.G. v. M/V Mississippi, [1974] Am. Mar. Cas. 236, 236 (W.D. Wash. 1974) ("It is unfortunate that this overburdened court is asked to litigate matters wholly between foreigners . . . .").

55. *See, e.g.,* Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529 (D.S.C. 1973); Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908 (E.D. Va. 1959).

56. *See supra* notes 53-55 and accompanying text.

57. *See supra* note 23 and accompanying text; *see also infra* notes 63-81 and accompanying text.

58. *See, e.g.,* Texaco Trinidad, Inc. v. Afran Transport Co., [1981] Am. Mar. Cas. 1701 (E.D. Pa. 1981); John Fabrick Tractor Co. v. Penelope Shipping Co., 278 F. Supp. 182 (S.D.N.Y. 1967); Isbrandtsen Co. v. Lloyd Brasiliero Patrimonio Nacional, 85 F. Supp. 740, [1949] Am. Mar. Cas. 684 (E.D.N.Y. 1949).

59. *See supra* notes 53-55 and accompanying text.

Several admiralty courts have dismissed U.S. claimants on FNC grounds. *See* Del Monte Corp. v. Everett S.S. Corp., S.A., 402 F. Supp. 237, [1974] Am. Mar. Cas. 1880 (N.D. Cal. 1973) (dismissing U.S. claimant noting that courts should not give special weight to corporate plaintiff's place of incorporation); Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A., Panama, 437 F. Supp. 331, [1977] Am. Mar. Cas. 1727 (S.D.N.Y. 1977) (U.S. allision claimant dismissed despite adverse change of liability law); Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, [1980] Am. Mar. Cas. 309 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980) (U.S. admiralty plaintiff dismissed under FNC despite adverse change of law).

60. *See supra* note 46.

litigation.[61] Accordingly, the Note next examines modern maritime collision litigation and articulates the considerations which should be most relevant to courts facing a motion to dismiss on FNC grounds.[62]

B. THE ADMIRALTY CONTEXT

1. General Principles of International Maritime Collision Law

Maritime law comprises the private law that deals with the shipping industry, or more particularly, with the carriage of goods and people over water.[63] In the United States, substantive maritime law is federal, with the U.S. admiralty courts having primary jurisdiction.[64] Further, because the shipping industry is international, U.S. admiralty courts often adjudicate disputes with substantial foreign connections.[65]

U.S. maritime law includes a broad spectrum of substantive law.[66] Marine collisions occur with great frequency and, except for personal injury, give rise to more litigation than any other area of substantive maritime law.[67] Because of the need to limit the scope of discussion, this Note focuses on international maritime collisions, and the following comments apply exclusively to collision liability.

Three features of maritime law are particularly important when analyzing FNC doctrine in international maritime collision cases. First, U.S. admiralty courts recognize a broad jurisdiction,[68] and no

61. *See infra* notes 82-98 and accompanying text.

62. *See infra* notes 68-81 and accompanying text.

63. G. GILMORE & C. BLACK, *supra* note 8, at 1.

64. *Id.* at 2. The state courts are not entirely excluded, however, from trying admiralty suits. The U.S. Constitution extends "the judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2. The Judiciary Act of 1789 implemented the constitutional grant, giving the federal district courts original jurisdiction, but "saving to suitors, in all cases, the right of common law remedy, where the common law is competent to give it." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (current version, in somewhat altered language, at 28 U.S.C. § 1333 (1976)). The "saving clause" has enabled admiralty suitors to bring their actions in state courts and on the civil side of the federal courts. G. GILMORE & C. BLACK, *supra* note 8, at 37.

65. *E.g.,* The Belgenland, 114 U.S. 355 (1885). *See also* G. ROBINSON, HANDBOOK OF ADMIRALTY LAW 14 (1939) (discussing extent of admiralty jurisdiction over actions having substantial foreign connections).

66. *See generally* G. GILMORE & C. BLACK, *supra* note 8, at 22-31 (enumerating major types of admiralty actions). The principal types of admiralty actions include suits on contracts for the carriage of goods; in tort for collision damage; for wrongful death; for personal injury; to foreclose ship mortgages; to limit shipowners' liability; for salvage and average; and for maintenance and cure; and on charter parties. *Id.*

67. *See* G. GILMORE & C. BLACK, *supra* note 8, at 485.

68. *See* 28 U.S.C. § 1333 (1976) (granting district courts original jurisdiction over a "civil case of admiralty or maritime jurisdiction"). *See generally* G. ROBINSON, *supra* note 65, at 14-22 (discussing international reach of admiralty courts).

venue restriction.[69] The major reason for unlimited venue and broad jurisdiction[70] is the perceived need to permit a collision claimant to sue wherever the offending vessel is found.[71] When a collision occurs, the owner of the negligent vessel is liable to the owners of the innocent vessel and the owners of the cargo.[72] In order to sue, however, the innocent parties must find and serve process on the negligent vessel's owner. This can be a difficult task due to the international character of the shipping industry. Thus, the difficulties of finding and serving process on the offending vessel's owner are avoided in the U.S. admiralty courts by permitting innocent parties to attach and to sue the offending vessel itself.[73]

Broad jurisdiction and unlimited venue serve U.S. interests in several ways. U.S. cargo and vessel owners may attach foreign vessels and enforce their claims in the United States. Plaintiffs may thus take advantage of U.S. substantive[74] rules and the more sophis-

69. Atkins v. The Disintegrating Co., 85 U.S. (18 Wall.) 272 (1873). *See* Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 153, [1980] Am. Mar. Cas. 309, 319 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980). *See also* Bickel, *supra* note 5, at 32 ("[I]t is in the nature of things for the usual defendant in admiralty, or at least for the libellant's only security, that is the ship, to be extremely elusive, and it is therefore part of the fairness to let the libellant sue wherever he has found his security, rather than force him to chase it over an area that might be as wide as the seven seas.").

70. *See supra* notes 68 & 69. "The admiralty courts have always considered themselves to be international courts rather than arms of the state in which they happen to be sitting." Bickel, *supra* note 5, at 32 n.86.

71. Bickel, *supra* note 5, at 32.

72. In most collisions, more than one vessel is at fault. *E.g.,* Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal, 210 F.2d 754, [1954] Am. Mar. Cas. 643 (2d Cir. 1954), *appeal dismissed per stipulation,* 348 U.S. 801 (1954). In that situation, negligent parties share damages. *See* United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (damages to be allocated among the parties proportionately to comparative fault). Collision liability involves incidental issues such as joint and several liability, contribution, and imputation of fault to cargo. The law on these issues may vary among nations and influence a collision claimant's choice of forum. *See* Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529, 2534-35 (D.S.C. 1973). *See generally* Brown, *General Principles of Liability,* 51 TUL. L. REV. 820 (1977); Kasanin, *Cargo Rights and Responsibilities in Collision Cases,* 51 TUL. L. REV. 880 (1977).

73. Admiralty libels are either *in personam,* against the vessel owner and asserting his personal liability, or *in rem,* against the vessel itself. Bickel, *supra* note 5, at 35. *See generally* G. GILMORE & C. BLACK, *supra* note 8 at 18-40. Admiralty libels may combine *in rem* and *in personam* claims. *E.g.,* Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529 (D.S.C. 1973).

74. This assumes that applicable conflicts of law principles would permit U.S. courts to apply U.S. substantive law. Generally, U.S. substantive law would apply to collisions in U.S. territorial waters. The Scotland, 105 U.S. 24, 29 (1881). *See* Mobil Tankers Co. S/A v. Mene Grande Oil Co., 366 F.2d 611, [1966] Am. Mar. Cas. 1983 (3d Cir. 1966), *cert. denied,* 385 U.S. 945 (1966). *See also* Berlingieri, *Jurisdiction and Choice of Law in Collision Cases and An Overview of the Concept of Fault and its Apportionment,* 51 TUL. L. REV. 866, 870-71 (1977). In collisions on the high seas, the forum state usually applies its own law. *Id.* A high seas collision claimant could thus invoke U.S. substantive law by suing in the United States. The Belgenland, 114 U.S. 355, 362 (1885). *See, e.g.,* Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908, [1959] Am. Mar. Cas. 511 (E.D. Va. 1959). Moreover, U.S. admiralty courts will apply U.S. limitation of liability

ticated procedures of U.S. admiralty courts.[75] Additionally, jurisdiction and unlimited venue permit the U.S. admiralty courts to entertain foreign claims, and thereby promote international comity.[76] International comity indirectly promotes U.S. shipping interests by encouraging other maritime nations to adjudicate American claims.

The second relevant feature of maritime law is that collision liability and limitation of liability rules may vary from nation to nation, so that a claimant's choice of forum may affect his recovery.[77] All maritime nations recognize negligence as the basis for imposing collision liability on vessels and their owners.[78] No such uniformity, however, prevails with regard to incidental issues such as defenses, joint and several liability, contribution, and imputation of fault to cargo.[79] Additionally, the liability ceiling varies significantly among maritime nations.[80] Thus, a collision claimant's choice of

---

rules regardless of where the collision occurred. The Titanic, 233 U.S. 714 (1914) (holding that limitation of liability rules are procedural). *See* G. GILMORE & C. BLACK, *supra* note 8, at 944.

75. *See infra* notes 91-94 and accompanying text.

76. Bickel, *supra* note 5, at 31; Note, *Foreign Plaintiffs, supra* note 5, at 1276.

77. *See generally* Brown, *supra* note 72; Kasanin, *supra* note 72; Owen, *The Origins and Development of Marine Collision Law,* 51 TUL. L. REV. 759 (1977). Even where two nations follow similar rules, their interpretations and applications of the rule may vary so as to produce different results on the same facts. *See* G. GILMORE & C. BLACK, *supra* note 8, at 52.

78. *See generally* Owen, *supra* note 77, at 781.

79. Many nations have ratified the Brussels Collision Liability Convention of 1910 and the Limitation of Liability Convention of 1957. The United States has adopted neither. *See id.* at 798, 807 n.284. U.S. law thus varies significantly from the maritime law of other nations. For example, nations adhering to the 1910 Convention usually permit proportional recovery of damages and several liability. *Id.* at 795-98. Until the Supreme Court's decision in United States v. Reliable Transfer, 421 U.S. 397 (1975), the U.S. followed a "divided damages" rule under which offending vessels split the damages, regardless of the varying degree of comparative fault. Owen, *supra* note 77, at 798. The Court's adoption of a proportional recovery rule in *Reliable Transfer* has brought U.S. law more in line with the rest of the maritime world. *Id.* Nevertheless, important variances remain. For example, U.S. law recognizes the compulsory pilot defense, inscrutable fault, and some unique non-statutory presumptions. *Id.* at 799, 802. More importantly, U.S. law recognizes joint and several liability and does not impute fault to cargo. Kasanin, *supra* note 72, at 883; G. GILMORE & C. BLACK, *supra* note 8, at 173. This means that cargo owners can sue any vessel involved in the collision for the entire loss. *See also* Kasanin, *supra* note 72, at 892-95 (addressing the problem of forum shopping resulting from significant variances in substantive law).

80. *See, e.g.,* Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 147-59, [1980] Am. Mar. Cas. 309, 327 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980). Alcoa's claim against Norcross was for $8 million. Under Trinidad law, Alcoa could recover at most $576,000. *Id.* Alcoa's actual recovery in the U.S. would have been $3.5 million, the value of the M/V Nordic Regent after the collision. Volk & Cordrey, *Forum Non Conveniens: Two Views on the Decision of the Court of Appeals for the Second Circuit in Alcoa S.S. Co. v. M/V Nordic Regent,* 12 J. MAR. L. & COM. 123, 126 n.16 (1981).

Limitation of liability statutes protect shipowners from catastrophic collision liability and, therefore, encourage entrepreneurs to enter the shipping industry. According to the theory of respondeat superior, collision liability runs directly to the vessel owner. *See*

forum may affect his recovery. It determines how liability is established, how damages are divided among the parties at fault, and how limitation of liability is computed.

Third, U.S. admiralty courts are in a position to advance U.S. shipping interests by recognizing broad jurisdiction and unlimited venue in collision cases, and by applying U.S. law to collisions that implicate American policies. Presumably, to the extent that a court applies U.S. law, it advances the U.S. policy underlying that law. In every case before it, a U.S. admiralty court may weigh the U.S. interests involved and choose to apply U.S. law.[81] Thus, the more cases that come before the U.S. admiralty courts, the greater the opportunity that the courts have to further U.S. shipping interests. Further, if U.S. admiralty courts are open to all international maritime collision claimants, then U.S. cargo and vessel owners are more likely to receive the benefit of a U.S. policy of international comity in the

---

supra notes 68-69 and accompanying text. Without limitation statutes, risks to shipowners would discourage maritime commerce, as total damages in marine collisions can far exceed the value of the vessel and the cargo.

Many maritime nations adhere to the Limitation of Liability Convention of 1957, which establishes a liability ceiling based on the gross tonnage of the vessel. The English text of the Convention is reprinted at [1975] Am. Mar. Cas. 1971 and in an appendix to Comment, *Limitation of Shipowner's Liability—The Brussels Convention of 1957,* 68 YALE L.J. 1676, 1714 (1959). The United States follows its own limitation statute, 46 U.S.C. § 183 (1976), which fixes a liability ceiling equal to the vessel's after-collision value. Conceivably, then, under the U.S. statute, a vessel's sinking could result in no liability for its owner in the U.S. courts.

Because limitation statutes are instruments of a nation's shipping policy, they represent the most significant variance of maritime law among nations. "In 1958 the Maritime Law Association of the United States. . . concluded that the 'proposed Brussels Convention . . . is not acceptable to or in the best interests of American shipowners, passengers, maritime labor, or shippers.' " G. GILMORE & C. BLACK, *supra* note 8, at 823. "The purpose of the [Limitation of Liability Act] had been to put American shipowning interests on a competitive equality with British interests . . . By judicial manoeuver, the Supreme Court . . . erected by 1900 . . . a structure of limitation law which gave shipowners much *more* protection than the British counterpart." *Id.* at 820-21. *See also id.* at 958-59 ("[s]hipping is a matter of close and often anxious governmental concern").

81. This is not to suggest that interest analysis by the U.S. admiralty courts is unfettered or produces results radically different from more traditional choice of law rules. For example, U.S. admiralty courts probably would apply foreign law in cases involving collisions that occurred in foreign territorial waters, even though the parties are U.S. citizens and despite the likelihood that the foreign rule would impose different standards of conduct than would be applied had the collision occurred in U.S. territorial waters. *See* G. GILMORE & C. BLACK, *supra* note 8, at 489-90; *see also* A/S Hjalmar Bjorges Rederi v. Condor, [1979] Am. Mar. Cas. 1696, 1701 (S.D. Cal. 1979) (application of Mexican law); States Marine Lines, Inc. v. M/V Kokei Maru, 180 F. Supp. 255, 257 (N.D. Cal. 1960) (application of Japanese law). On the other hand, a U.S. admiralty court would apply U.S. law to a collision on the high seas, *see* G. GILMORE & C. BLACK *supra* note 8, at 489-90, and would apply U.S. limitation rules, see *supra* note 80, as well as U.S. rules concerning joint and several liability, contribution, and imputation of fault to cargo, *see supra* note 72. Thus, to the extent that broad jurisdiction and unlimited venue permit international collision litigants to sue in the United States, U.S. substantive law is being applied more than it would be otherwise.

event that they sue or are sued abroad. Thus, the combination of broad jurisdiction, unlimited venue, and U.S. laws that advance American shipping policy, enables U.S. courts to protect and promote U.S. shipping interests.

2. *Modern International Maritime Collision Litigation*

Four features of modern international maritime collision litigation are especially important when considering FNC in that context. First, the shipping industry is international in character. In the more obvious sense, the shipping industry is international because twentieth century commerce is truly global and, therefore, ships sail throughout the world. In a less obvious sense, the shipping industry is international because a single vessel may have various national ties.[82] The various nationalities of the owners, crew, and vessel may, for example, establish multiple national connections.[83]

Second, most maritime collision witnesses are mobile. The most important witnesses are those that actually see the collision. If the collision occurs in a harbor or on a river, some witnesses may be local residents. Crew members on a tug, pier workers, or pilots may, for example, witness a collision, and they are likely to reside near the harbor.[84] Most of the witnesses, however, come from the crews of the colliding vessels, or from crews of passing vessels. These witnesses, by contrast, are mobile. They reside on the ships and travel throughout the world with them. In those collisions that occur beyond sight of land, in coastal waters or in international shipping

82. *See, e.g.,* Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529, 2536-37 (D.S.C. 1973) (vessel flying Greek flag owned by Liberian corporation controlled by Greek and American shareholders).

83. *See, e.g.,* Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 160, [1980] Am. Mar. Cas. 309, 330 (2d Cir. 1981) (en banc), *cert. denied,* 449 U.S. 890 (1980) (Liberian flag vessel with Italian crew), Texaco Trinidad, Inc. v. Astro Exito Navegacion, S.A. Panama, 437 F. Supp. 331, 333, [1977] Am. Mar. Cas. 1727, 1728 (S.D.N.Y. 1977) (Greek flag vessel with Greek and Indonesian crew owned by Panamanian corporation having principal place of business in Greece); Peoples Insurance Co. of China v. Theokeetor, [1975] Am. Mar. Cas. 1711 (C.D. Cal. 1974) (crew manning Greek-owned Panamanian corporation's vessel made up of Greek and Indonesian sailors). *See generally* Osieke, *Flags of Convenience Vessels: Recent Developments,* 73 AM. J. INT'L L. 604 (1979).

84. The pilot may be a temporary crewmember on one of the colliding vessels, or on a passing vessel. Vessels hire pilots to navigate them through unfamiliar waters. *See* Lugenbuhl & Maki, *River Navigation,* 51 TUL. L. REV. 1157, 1178 (1977). Port regulations often require entering and leaving vessels to hire a local pilot familiar with the harbor. *See* G. GILMORE & C. BLACK, *supra* note 8, at 520. Even if regulations do not require it, many vessels choose to hire pilots. *Id.* If a local pilot is on board and in charge at the time of collision, he is likely to be the most significant and helpful witness from the vessel's crew. First, he is likely to be a seasoned mariner and more familiar with the harbor conditions than other crew members. Second, because he was in charge, he is likely to have known the tactical situation immediately before collision. Interview with David A. Olsen, Esq., admiralty attorney, Lemle, Kelleher, Kohlmeyer and Matthews, in New Orleans (Aug. 17, 1982) [hereinafter cited as Olsen interview].

lanes,[85] none of the witnesses are locals; they come exclusively from the crews of the vessels themselves.

The other significant witnesses in a maritime collision case are damage experts.[86] These so-called "surveyors" are usually either naval architects or marine engineers.[87] Although generally hired from the major port nearest to the collision scene, they are accustomed to world-wide travel.[88] After a collision, either the vessel owner or his marine underwriter contacts legal counsel and arranges to have the collision investigated. The investigation includes finding the witnesses and hiring the surveyors.[89] Thus, it is conceivable that in major collisions overseas, vessel owners or underwriters could engage legal counsel far from the collision situs.[90]

Third, both the bench and bar rely heavily upon preserved testimony and documentary evidence in modern collision litigation. Attorneys for collision litigants can depose[91] key witnesses anywhere in the world and introduce the depositions as evidence at trial.[92] Moreover, many relevant facts in collisions can be ascertained from logs, dead-reckoning traces, radio voice recordings, and nautical almanacs,[93] which can be used at trial under the Federal Rules of Evidence.[94]

Finally, in U.S. admiralty courts, the litigants try collision cases

85. *E.g.,* Kloeckner Reederei und Kohlenhandel, G.M.B.H. A/S Hakedal, 210 F.2d 754, [1954] Am. Mar. Cas. 643 (2d Cir. 1954), *appeal dismissed per stipulation,* 348 U.S. 801 (1954) (English channel); Peoples Insurance Co. of China v. Theokeeter, [1975] Am. Mar. Cas. 1711 (C.D. Cal. 1974) (high seas off Baja, California); Esso Transport Co., Inc. v. Terminales Maracaibo C.A., 352 F. Supp. 1030, [1975] Am. Mar. Cas. 709 (S.D.N.Y. 1972) (eight nautical miles off Venezuelan coast); Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908, [1959] Am. Mar. Cas. 511 (E.D. Va. 1959) (high seas off Spanish coast).

86. Olsen interview, *supra* note 84; *e.g.,* Peoples Insurance Co. of China v. Theokeeter, [1975] Am. Mar. Cas. 1711, 1712 (C.D. Cal. 1974). *See generally* McCoy, *The American Law of Collision Practice, Procedure, and Evidentiary Matters,* 51 TUL. L. REV. 1002, 1003-05 (1977) (discussing importance of marine surveyors in collision cases).

87. Olsen interview, *supra* note 84.

88. *Id.*

89. *Id.* Interview with Marie L. Hagen, admiralty attorney, formerly with Dickerson, Reilly, and Mullen, in Ithaca, N.Y. (Oct. 29, 1982) [hereinafter cited as Hagen interview]. *See also* McCoy, *supra* note 86, at 1003-05.

90. Hagen interview, *supra* note 89.

91. FED. R. CIV. P. 32. *See* Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, 464, [1957] Am. Mar. Cas. 57, 59 (5th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957) (vessel attached *in rem* and the crew deposed); Isbrandtsen Co. v. Lloyd Brasiliero Patrimonio Nacional, 85 F. Supp. 740, 741, [1949] Am. Mar. Cas. 684, 685 (E.D. N.Y. 1949) ("[I]t is notoriously true in the admiralty that in many cases the attendance of witnesses is not to be had at the trials and that trials are very largely by deposition for that very reason.").

92. FED. R. EVID. 804(b)(1).

93. *See* McCoy, *supra* note 86, at 1005-06.

94. FED. R. EVID. 803(6).

to a judge.[95] As a result, the trial is usually faster and less expensive than a jury trial,[96] the importance of live testimony is reduced,[97] and to the extent that admiralty judges are more sophisticated and better able than the juries to deal with the legal and factual subtleties of international maritime collision litigation, fairer results are produced.[98]

3. Advantages of Suit in the U.S. Admiralty Courts

In view of the special features of admiralty law and international marine collision litigation, it is not difficult to understand why collision claimants might desire to sue in the U.S. admiralty courts. Foreign claimants may want to take advantage of favorable U.S. substantive rules[99] or procedural devices, such as liberal discovery and the admissibility of preserved testimony and records.[100] Additionally, they may believe that U.S. admiralty courts are more sophisticated than alternative forums.[101] Further, it may be more convenient for them to sue in the United States than in a more remote alternative forum.[102] And finally, foreign claimants may prefer to sue elsewhere, but are forced to bring actions in U.S. admiralty courts to attach particularly elusive vessels.[103]

Similarly, U.S. claimants may also want to take advantage of the more favorable law, greater sophistication, and *in rem* attachments available in the U.S. admiralty courts.[104] Moreover, it may be more convenient for them to sue in the United States if their corpo-

---

95. G. GILMORE & C. BLACK, *supra* note 8, at 35.

96. Time is saved merely by not having to select the jury.

97. The value of live testimony is that the jury can judge for itself the witness' credibility. Arguably, the judge, because of his legal training, can make that assessment equally as well from depositions.

98. The facts of a collision may have to be pieced together from relevant logs, traces, and almanacs, particularly where the testimony of various witnesses is conflicting or contradictory. *Cf.* G. GILMORE & C. BLACK, *supra* note 8, at 500 (Even judges have difficulty "getting at the truth as to what happened in a collision case.").

99. *See* Note, *Foreign Plaintiffs, supra* note 5, at 1267-68; *see also supra* notes 72 & 79.

100. Olsen interview, *supra* note 84. *See, e.g.,* Metallgesellschaft, A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529, 2534 (D.S.C. 1973) (U.K. law does not provide for use of depositions); Note, *Foreign Plaintiffs, supra* note 5, at 1267 n.60 (U.K. does not allow contingent fees). U.S. courts treat limitation of liability as procedural. The Titanic, 233 U.S. 718 (1914). Thus, foreign claimants may seek the protection of the U.S. limitation statute. *See supra* notes 74 & 80.

101. Olsen interview, *supra* note 84. Such relative attributes include more liberal discovery, greater use of preserved testimony, and more numerous causes of action and defenses.

102. Many foreign corporations and shipowners maintain offices or significant business contacts in the United States. *See, e.g.,* Metallgesellschaft A.G. v. M/V Larry L., [1973] Am. Mar. Cas. 2529 (D.S.C. 1973). The United States may be relatively more convenient than some third world forums. *See infra* note 135.

103. *See supra* notes 71-73 and accompanying text.

104. Olsen interview, *supra* note 84.

rate headquarters are located there.[105] These U.S. claimants will be more familiar with the U.S. legal system, and trial in the United States may be less expensive than it would be in a more remote alternative forum.[106] Finally, U.S. claimants may want to avoid the potential bias of a foreign court against large U.S. corporations.[107]

II

GULF OIL v. GILBERT: ITS RELEVANCE TO INTERNATIONAL MARINE COLLISION CASES

A. *Alcoa Steamship Co. v. M/V Nordic Regent*

The liberal view[108] of FNC in international litigation culminated in *Alcoa Steamship Co. v. M/V Nordic Regent,* a marine collision case decided in the U.S. Court of Appeals for the Second Circuit.[109] Alcoa, a New York corporation, owned an ore pier and conducted business in Trinidad.[110] Norcross Shipping Company, a Liberian corporation, chartered the vessel M/V Nordic Regent to Alcoa for the purpose of carrying ore.[111] On January 2, 1977, the M/V Nordic Regent entered Point Trembladora Harbor, Trinidad, and crashed into Alcoa's pier causing $8,000,000 in damage.[112] At the time of the accident, the vessel was not carrying a pilot, as required by local regulation.[113]

Alcoa filed suit in the U.S. District Court for the Southern District of New York and served process on Norcross' general agent.[114] Norcross moved for dismissal on the ground of FNC, alleging inconvenience of trial in the United States and possible prejudice because of inability to serve the Trinidad Pilot's Association.[115] Alcoa alleged conveniences in its own favor and indicated that Trinidad law would allow Norcross to limit its liability to approximately

105. Olsen interview, *supra* note 84. *But see generally,* Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts,* 47 U. CHI. L. REV. 373 (1980) (U.S. citizenship does not serve as an adequate proxy for convenience in FNC analysis).

106. Olsen interview, *supra* note 84.

107. *Id. See also* Note, *supra* note 105, at 385; Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 162-63, [1980] Am. Mar. Cas. 309, 331-32 (2d Cir. 1980) (van Graafeiland, J., dissenting), *cert. denied,* 449 U.S. 890 (1980).

108. *See supra* notes 53-56 & 59 and accompanying text.

109. 654 F.2d 147, [1980] Am. Mar. Cas. 309 (2d Cir. 1980).

110. *Id.* at 149, [1980] Am. Mar. Cas. at 311.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 149, [1980] Am. Mar. Cas. at 312.

115. 453 F. Supp. at 11, [1978] Am. Mar. Cas. at 366. Norcross alleged that the Trinidad Pilots Association may have been liable and that Norcross intended to implead it as a third party defendant. *Id.*

$570,000.[116]

The trial judge ruled that convenience factors made trial in Trinidad more appropriate and dismissed Alcoa's libel subject to reinstatement if Norcross failed to submit to jurisdiction in Trinidad.[117] After a lengthy appeal, the Second Circuit affirmed.[118] The Court of Appeals applied *Gilbert's private* and *public interest* factors to the case and decided that litigation in Trinidad would be more appropriate.[119] A two-judge dissent argued that *Koster,* rather than *Gilbert,* provides the proper FNC standard in international admiralty cases brought by a U.S. plaintiff.[120]

The *Nordic Regent* decision generated controversy among commentators; most of them agreeing with the decision.[121] The decision is troublesome, however, because it used convenience factors to justify declining jurisdiction over a U.S. citizen. Moreover, the decision produces an anomoly because some circuits use a stricter FNC standard than *Gilbert's* for foreigners seeking access to U.S. admiralty courts.[122]

The following section presents two arguments for rejecting the use of convenience factors to decline jurisdiction in international maritime collision cases. First, the Supreme Court in *Gilbert* gave no indication that it intended that case to govern international actions, particularly where the claimant is a U.S. citizen. Second, the *Gilbert* convenience factors are inapposite to the international marine collision context.

B. THE INAPPLICABILITY OF *GULF OIL CORP. V. GILBERT* IN THE INTERNATIONAL MARITIME COLLISION CONTEXT

First, the *Gilbert* Court gave no indication that it intended its decision to extend to international litigation. Dismissal was considered harsh enough even in the context of domestic litigation where

116. 654 F.2d at 159, [1980] Am. Mar. Cas. at 327.

117. 453 F. Supp. at 13, [1978] Am. Mar. Cas. at 369.

118. For the procedural history of the case, see *supra* note 47.

119. 654 F.2d at 152, [1980] Am. Mar. Cas. at 316.

120. *Id.* at 162-63, [1980] Am. Mar. Cas. at 333-34.

121. *See generally* Recent Decisions, *supra* note 3; Volk & Cordrey, *supra* note 80; O'Brien, *Admiralty Commentary,* 46 BROOKLYN L. REV. 575 (1980); Note, *Federal Courts: Forum Non Conveniens,* 20 HARV. INT'L L.J. 404 (1979).

122. *See, e.g.,* Poseidon Schiffahrt, G.M.B.H. v. M/S Netuno, 474 F.2d 203, [1973] Am. Mar. Cas. 1180 (5th Cir. 1973), *on remand,* 361 F. Supp. 412 (S.D. Ga. 1973) (federal courts should exercise jurisdiction over *in rem* libels involving foreign vessels of different nationalities unless defendant can establish that to do so would work an injustice); Damodar Bulk Carriers v. A/S Det Dansk-Franske D/S, [1981] Am. Mar. Cas. 1734 (S.D. Tex. 1979) (in an action arising out of a North Sea collision between foreign flag vessels in which *in personam* jurisdiction had been obtained over defendant, court should not dismiss on FNC grounds even though defendant had already "won the race to the courthouse" by suing in a foreign forum).

the case could still be heard within the boundaries of the United States.[123] It appears unlikely, then, that the Court wanted *Gilbert*'s *private* and *public interest* factors to dictate the results in international litigation, where dismissal is harsher because it requires renewing the action in another country.[124]

It is even less likely that the *Gilbert* Court meant for its decision to govern actions brought by U.S. plaintiffs in international maritime collision cases.[125] The FNC standards in *Gilbert* had been established in an action by a plaintiff outside his home state.[126] *Koster, Gilbert*'s companion case, purported to state a stricter standard when the plaintiff sues at home.[127] More importantly, neither *Gilbert* nor *Koster* was an international admiralty case.[128] Even with the stricter *Koster* standard, a court could still dismiss a home-town plaintiff. In admiralty, by contrast, the prevailing view was that U.S. claimants had a constitutional right to sue in the United States.[129] Even three years after the *Gilbert* and *Koster* decisions, Justice Frankfurter's dictum in *Swift* indicated that the Court had not rejected the prevailing view of guaranteed access[130] in admiralty cases. Accordingly, the *Gilbert-Koster* Court probably did not intend that its FNC standards apply to U.S. plaintiffs in international admiralty cases.[131]

Second, *Gilbert*'s *public* and *private interest* factors are inapposite to FNC analysis in international maritime collision litigation. Assuming two possible forums, balancing *private* convenience factors will rarely point to one forum as clearly more convenient than the other.[132] The majority of eyewitnesses in harbor collisions, and all of the eyewitnesses in coastal-water and shipping-lane collisions,

123. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 516 (1947) (Black, J., dissenting). *Cf.* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (Congress enacted § 1404(a) in order to mitigate some of FNC's harshness).

124. Dismissal is harsher in the international context because the plaintiff is remitted to a foreign forum. In international admiralty cases, dismissal may frustrate a legitimate desire to sue in the United States, *see supra* notes 99-107 and accompanying text, and it requires plaintiff to incur the expense of starting over in another forum. Lauritzen v. Larsen, 345 U.S. 571, 589 (1953); Note, *Foreign Plaintiffs, supra* note 5, at 1258. The plaintiff denied access to U.S. courts may face difficulties similar to those alleged by a defendant in a FNC motion. *Convenient Forum Revisited, supra* note 1, at 757.

125. *See* Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 161-63, [1980] Am. Mar. Cas. 309, 330-33 (2d Cir. 1980) (en banc), *cert. denied,* 449 U.S. 890 (1980).

126. *See supra* note 28 and accompanying text.

127. 330 U.S. 518, 531-32 (1947).

128. *See supra* notes 25-27 & 34 and accompanying text.

129. *See supra* note 19 and accompanying text.

130. *See supra* note 23 and accompanying text.

131. *See* Alcoa Steamship Co. v. M/V Nordic Regent, [1979] Am. Mar. Cas. 1, 3 n.3 (2d Cir. 1979).

132. *See, e.g.,* Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal, 210 F.2d 754, [1954] Am. Mar. Cas. 643 (2d Cir. 1954), *appeal dismissed per stipulation,* 398 U.S. 801 (1954) (convenience is about the same in either forum); Latif Barrany Jute Mills, Ltd. v. Hellenic Lines, Ltd., [1976] Am. Mar. Cas. 2408 (S.D. N.Y. 1976) (no forum

are mobile.[133] Surveyors and marine investigators are also mobile. Although they are usually located in major ports, surveyors and marine investigators are accustomed to extensive travel because collisions occur and claims are litigated all over the world.[134] Thus, for the majority of witnesses, travel may be necessary regardless of the forum that the plaintiff chooses. Moreover, the United States is the world's transportation hub, and travel to it may be easier than to other forum nations.[135]

Additionally, collision claims can be litigated in the U.S. admiralty courts without the appearance of all witnesses. Litigants frequently use depositions and often reconstruct complex collisions using documentary evidence and pertinent records.[136] Also, the United States is a global communications center. Thus, counsel in the United States are often better positioned to obtain information and to coordinate pre-trial activities. Finally, the amounts of money at stake in major marine collision litigation far exceed the costs of transporting witnesses and documents to trial in the United States.[137]

Gilbert's *private interest* factors thus have little relevance in measuring "convenience" in international marine collision cases. Most witnesses in maritime collision cases are mobile, and the cost of obtaining them is not significant. Often, no one forum provides better access to sources of proof than any other. Further, a view of the premises is not always necessary in collision cases, and may be rendered insignificant in harbor-collision cases by the use of logs, charts, photographs, and nautical almanacs.

Gilbert's *public interest* factors, on the other hand, are inadequate to measure the United States' interest in adjudicating a particular collision case. First, there is no imposition on the community to provide jurors because admiralty cases are tried to a judge.[138] Second, few admiralty judges consider foreign law so difficult to untangle as to provide a reason for changing the forum.[139] Moreover, U.S.

---

would be more convenient for all parties). *Cf. supra* note 85 and accompanying text (individual ship may have disparate national ties).

133. *See supra* notes 80-85 and accompanying text.

134. *See supra* notes 86-90 and accompanying text.

135. *See* Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 164-65, [1980] Am. Mar. Cas. 309, 337 (2d Cir. 1979) (Oakes, J., dissenting), *cert. denied,* 449 U.S. 890 (1980).

136. *See supra* notes 91-94 and accompanying text.

137. 654 F.2d at 164, [1980] Am. Mar. Cas. at 336 (Van Grafeiland, J., dissenting).

138. *See supra* note 92 and accompanying text.

139. *See, e.g.,* Mann International, S.A. v. Avon Products, Inc., 641 F.2d 62, 67-68 (2d Cir. 1981); Magnolia Ocean Shipping Corp. v. M/V Farco Azul, [1981] Am. Mar. Cas. 2071, 2076 (E.D. Va. 1981); Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 454 n.37 (D. Del. 1978) (federal courts experienced in applying foreign law). *Cf.* G. GILMORE & C. BLACK, *supra* note 8, at 478 (In seamen injury cases to which foreign law

admiralty courts will apply U.S. substantive law in many collision cases, and will always apply U.S. limitation of liability rules.[140] Finally, many collisions occur at sea and involve parties of different nationalities.[141] Thus, in such cases there is no single community having an overriding interest in the litigation *qua* litigation.[142]

Of the *Gilbert public interest* factors, only one is relevant to international maritime collision litigation: docket-crowding.[143] The United States has an interest in relieving its courts of the administrative difficulties caused by collision litigation piling up in a few popular admiralty courts.[144] Nonetheless, that interest is minor in comparison with other U.S. interests that are implicated when a marine collision claimant sues in the U.S. courts.

Unfortunately, U.S. admiralty courts have not addressed, in the context of FNC analysis, the U.S. interests that are implicated in international marine collision cases; failure to articulate these interests has led to the misguided reliance upon *Gilbert*'s *private and public interest* factors. Moreover, this failure has contributed to the current confusion in FNC as applied to international marine collision litigation. The following section articulates some of the U.S. interests that should be relevant in FNC analysis in international marine collision litigation, and suggests a more reasoned and predictable approach to FNC in that context.

III

FNC IN INTERNATIONAL MARITIME COLLISION LITIGATION: A SUGGESTED APPROACH

A. *U.S. National Interests to be Promoted Through FNC*

The U.S. admiralty courts should apply FNC in international maritime collision cases so as to advance U.S. shipping interests. These interests are best promoted by (1) applying U.S. substantive

applies, U.S. courts often assume that U.S. and foreign maritime law are similar and thus apply U.S. law.).

140. *See supra* note 74.

141. *See supra* notes 82-83 and accompanying text.

142. *See supra* text at note 32. Presumably, the U.S. courts would apply U.S. law for want of a better alternative.

143. *See supra* text at note 32.

144. *See supra* cases cited at note 2. For a more detailed discussion of federal court congestion, see Carrington, *Crowded Dockets and the Courts of Appeal: The Threat to the Function of Review and the National Law,* 82 HARV. L. REV. 542 (1969); Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century,* 55 S. CAL. L. REV. 65, 73-88 (1981); Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in the American Courts,* 29 BUFFALO L. REV. 487, 522 (1980).

rules to the extent acceptable under current international conflict of law principles, (2) making U.S. procedural advantages available to all U.S. citizens and to other claimants who contribute directly to the vitality of the U.S. economy, and (3) promoting international comity so as to secure for U.S. citizens a favorable reception in foreign courts.

B. FNC Analysis: Promotion of U.S. National Interests

1. The Foreign Claimant

The U.S. admiralty courts should retain jurisdiction of foreign claimants' international collision actions only where the plaintiff's desire to sue in the United States coincides with U.S. shipping interests.[145] In general, U.S. shipping interests would be advanced by entertaining actions by foreign claimants where the result would be the maintenance of high navigational standards in U.S. territorial waters, the application of U.S. substantive and procedural rules to all U.S. shippers and shipowners, and the promotion of international comity. Accordingly, the U.S. admiralty courts should retain jurisdiction of foreign claims where: (1) the foreign plaintiff is actually a U.S. shipper or shipowner, as is true of flag-of-convenience vessels substantially or wholly-owned by U.S. citizens; (2) the defendant is a U.S. shipper or shipowner; (3) the collision occurred in U.S. territorial waters; or (4) retaining jurisdiction is necessary to promote international comity. In those cases involving only foreign parties or collisions outside U.S. territorial waters, FNC analysis should focus solely on considerations of international comity and should be used to retain jurisdiction only where the U.S. forum is necessary to enforce a foreigner's maritime lien in a vessel attached in the United States.[146]

2. The U.S. Claimant

In the case of a U.S. claimant, the primary objective is, again, advancing U.S. shipping interests. Admiralty courts, regardless of their nationality, advance U.S. shipping interests when they apply U.S. substantive law or similar foreign law. U.S. claimants' access to

145. For the reasons that foreign claimants seek access to U.S. courts, see *supra* notes 99-103 and accompanying text. For the most part, they are similar to the reasons citizen claimants bring suit in the United States. *See infra* notes 148-49 and accompanying text.

146. In many instances, the court can protect the claimant's security interest in the attached vessel by making the defendant post bond and submit to jurisdiction in the alternate forum before dismissal. *See, e.g.,* Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908, [1959] Am. Mar. Cas. 511 (E.D. Va. 1959) (court dismissed for FNC on a showing of inconvenience where the defendant, an Italian shipowner, agreed to post security and submit to jurisdiction in the British plaintiff's home forum).

sophisticated forums and favorable procedural devices similarly promotes U.S. shipping interests. Thus, citizen claimants' desires to take advantage of favorable U.S. substantive and procedural law largely coincide with the United States' interest in advancing them. Accordingly, as a general formula, U.S. admiralty courts should dismiss on FNC grounds only where such dismissal will neither subject U.S. claimants to the application of an unfavorable foreign law nor relegate them to an unsophisticated forum lacking favorable procedural devices.

U.S. claimants may desire to sue in U.S. courts for diverse reasons. Not all of these reasons warrant judicial recognition.[147] Primarily, U.S. claimants seek to take advantage of U.S. substantive law, procedural devices, and court sophistication.[148] They also may need to enforce maritime liens in attached vessels, desire the convenience of litigating at home, or wish to avoid the potential bias of foreign courts.[149]

Assuming the defendant has made a colorable showing that U.S. shipping interests are not implicated,[150] U.S. citizens seeking to litigate their international marine collision cases in U.S. courts because they desire to take advantage of U.S. substantive law, procedural devices, or court sophistication, *should be required to show either*: (1) that a dismissal will subject them to an adverse change of substantive law *or* (2) that they require certain procedural devices (e.g. liberal discovery; admissibility of recorded testimony and records) unavailable in the alternative forum.

With respect to the question of sophistication, to some extent the availability of advanced procedural devices suggests a court's sophistication. Beyond that, a foreign court's level of sophistication is conjectural. Perhaps it would be desirable from a policy standpoint to retain jurisdiction to protect U.S. claimants from unsophisticated foreign courts. As a practical matter, however, U.S. admiralty courts have a limited ability to determine whether a claim will be

147. As an equitable doctrine, FNC should not permit one party to harass the other. *See generally* H. MCCLINTOCK, PRINCIPLES OF EQUITY 55 (1948) ("He who seeks equity must do equity . . . . One who seeks the affirmative aid of a court of equity will be required, as a condition to the granting of such relief, to do such acts as equity requires with respect to that matter.").

148. *See supra* notes 99-104 and accompanying text.

149. *See supra* notes 105-07 and accompanying text.

150. An international admiralty collision plaintiff should come into court with a presumption that his choice of forum is fair (at least as regards private party conveniences). The defendant is thereby saddled with a burden of showing that the court should not exercise jurisdiction. To discharge this burden, the defendant must make a showing that no U.S. shipping interests are implicated by the facts of the case. If the defendant is successful, the burden shifts to the plaintiff to show that U.S. shipping interests *are* involved, and that retention is necessary to advance those interests.

subjected to an unsophisticated foreign court and when a lack of sophistication will operate to prejudice a U.S. citizen's claim. Thus, the courts should not attempt to decide whether the alternative court's level of sophistication permits an FNC dismissal.

U.S. claimants also may desire to enforce a maritime lien on a vessel attached in a U.S. port. Usually, the need to enforce a maritime lien will be incidental to a U.S. claimant's desire to take advantage of the various characteristics of U.S. admiralty courts discussed above. Occasionally, however, the only factor weighing in favor of retaining jurisdiction will be a maritime attachment. In such a case, jurisdiction should be declined only where the dismissal is conditioned on the moving party's posting bond and agreeing to submit to jurisdiction in the alternative forum.[151]

The U.S. claimant may also want to sue in the United States in order to litigate at home, where lawyers and courts are familiar, or to avoid the potential bias of foreign courts. In cases where the defendant has made a colorable showing that U.S. shipping interests are not implicated, and where no other factors weigh toward retention, courts should decline jurisdiction. The U.S. claimant's desire to be in familiar surroundings has no relation to shipping policy. Thus, the U.S. admiralty courts' interest in trimming its docket would take precedence over a U.S. claimant's desire simply to be in familiar surroundings. On the other hand, the U.S. claimant's desire to be protected from the bias of foreign courts arguably implicates U.S. shipping interests insofar as biased foreign courts may frustrate otherwise valid claims. Nevertheless, the U.S. admiralty courts only have limited ability to protect U.S. claimants from foreign court bias. For these reasons, U.S. admiralty courts usually should dismiss when a U.S. claimant desires to sue in the United States solely to be in familiar surroundings or to avoid foreign bias and the defendant has shown that no U.S. shipping interests are implicated.

Finally, a U.S. admiralty court should decline jurisdiction if it finds that a U.S. claimant brought an action in the United States solely to coerce a settlement. Declining jurisdiction in such cases will promote international comity and, thereby, indirectly promote U.S. shipping interests by securing for U.S. collision claimants a more favorable reception in foreign courts.

151. The Second Circuit required the defendant in *M/V Nordic Regent* to submit to jurisdiction in Trinidad by conditionally dismissing the plaintiff. 654 F.2d at 159, [1980] Am. Mar. Cas. at 329.

CONCLUSION

Current FNC doctrine, as applied in international maritime collision cases, is confused and changing. Some U.S. admiralty courts have adopted a virtual *per se* rule against dismissal.[152] Others have adopted a liberal *rule of reason* approach, using *Gilbert*'s *private* and *public interest* factors.[153] Neither approach is adequate.

The *per se* approach is inadequate because in some international maritime collision cases there are legitimate reasons for declining jurisdiction. The *rule of reason* approach is inadequate because it is not clear that the Supreme Court in *Gilbert* intended a liberal use of FNC in the international context, particularly where the plaintiff is a U.S. citizen, and because the *Gilbert* factors are inapposite. The *private interest* factors do not adequately measure convenience in modern international maritime collision litigation. The *public interest* factors are inadequate to measure the U.S. interest, in terms of shipping policy, in adjudicating particular collision cases.

This Note recommends that the U.S. admiralty courts replace current FNC doctrine in international maritime collision cases with the following three policy considerations. The considerations are listed in decreasing order of significance: (1) advancing U.S. shipping interests by applying U.S. substantive law to the extent possible under conflicts of law principles; (2) protecting U.S. citizens by affording them access to liberal procedural mechanisms, and (3) promoting international comity.

Applying these considerations, U.S. admiralty courts should decline jurisdiction to non-citizen claimants whose cases do not implicate U.S. shipping interests. Where claimants are U.S. citizens, however, U.S. admiralty courts should retain jurisdiction if dismissal would result in a foreign court's applying less favorable substantive law or would subject the U.S. claimant to less favorable procedural protections.

Edwin W. Dennard

152. *See supra* notes 48-52 & 58 and accompanying text.
153. *See supra* notes 53-56 & 59 and accompanying text.