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THE CONSTITUTIONALITY OF A RULE C ARREST UNDER
THE DUE PROCESS CLAUSE AND AFTER *SHAFFER V.*
HEITNER

ARMEN R. VARTIAN*

INTRODUCTION

A collision occurs on the high seas off the coast of Portugal between a Greek-flag vessel and one flying the British flag. The Greek ship is sailing from Italy to Holland, and the British ship is *en route* from Ireland to Pakistan. The British ship sinks with the loss of all cargo aboard, and the Greek ship limps into Portugal for repairs. Ten months later, the Greek ship is on a voyage from Europe to Ontario ports, and passes through the St. Lawrence Seaway. Although she remains at all times on the Canadian side of the channel, the ship must transit the Eisenhower Locks, which by international agreement are completely within the territorial waters of the United States. Prior to this, the vessel had never before entered United States waters, nor had her owner ever transacted business in the United States. While she is in the locks, she is served by a United States Marshal with a warrant of arrest obtained *ex parte* in a proceeding brought in the United States District Court for the Northern District of New York by two foreign owners of cargo aboard the ship with which she had collided ten months earlier. Plaintiffs' action is in rem against the vessel under Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims,¹ and in personam against the shipowner.

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1. Rule C provides:

ACTIONS IN REM: SPECIAL PROVISIONS

(1) When available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not

Under the law as interpreted by several courts and commentators,

affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) **Complaint.** In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) **Judicial Authorization and Process.** Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) **Notice.** No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) **Ancillary Process.** In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

no objection to the assertion of in rem jurisdiction over the vessel or in personam jurisdiction over her owner would lie under the scenario described above, despite the jurisdictional due process doctrine of "minimum contacts" developed by the Supreme Court from *International Shoe Co. v. Washington*² through *Shaffer v. Heitner*³ and *World-Wide Volkswagen v. Woodson*.⁴ Various rationales have been used to explain the relationship between this broad interpretation of Rule C jurisdiction and the Due Process Clause, including: 1) that Rule C arrests fall within the "exceptions" relating to in rem actions set out expressly in *Shaffer*; 2) that the doctrine of "personification" of vessels makes a vessel's presence in the forum satisfactory to confer jurisdiction; 3) that the presence of the vessel in a forum constitutes "doing business" in the forum; 4) that the doctrine of "foreseeability" makes jurisdiction proper where vessels call in the forum with knowledge and consent of the shipowner; 5) that "necessity" requires assertion of jurisdiction where no other United States forum is available, and 6) that the "autonomy of admiralty" from actions at law under article III of the Constitution, and centuries of practice, makes the *Shaffer* doctrines inapplicable.⁵

This article will analyze the above rationales, and conclude that they are not sufficient to justify an assertion of jurisdiction over the

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

FED. R. CIV. P., ADMIRALTY SUPP. RULE C.

2. 326 U.S. 310 (1945).

3. 433 U.S. 186 (1977).

4. 444 U.S. 286 (1980).

5. See, e.g., Bohmann, *Applicability of Shaffer to Admiralty in Rem Jurisdiction*, 53 TUL. L. REV. 135 (1978). This is the most comprehensive prior treatment of the subject. Other articles have included discussions of the effect of *Shaffer* on Rule C arrests. See Batiza & Partridge, *The Constitutional Challenge to Maritime Seizures*, 26 LOY. L. REV. 203 (1980); McNamara, *The Constitutionality of Maritime Attachment*, 12 J. MARIT. L. & COMM. 97, 107 n.88 (1980); Olsen, *Jurisdiction in Admiralty: Penoyer v. Neff in Ship's Clothing?*, 84 DICK. L. REV. 395, 404-13 (1980); Schwartz, *Due Process and Traditional Admiralty Arrest and Attachment Under the Supplemental Rules*, 8 MARIT. LAW, 229, 259-62 (1983); Note, *Constitutionality of Admiralty Arrest and Attachments Pursuant to Supplemental Rules B and C*, 12 VAND. J. TRANSNAT'L L. 421, 447-53 (1979).

defendants in the hypothetical situation. The article will argue that in in rem actions the Due Process Clause requires an examination of a shipowner's contacts with the forum. This requirement, however, will be satisfied if there are "minimum aggregate contacts" between the vessel, or her owner(s), and the United States.⁶

I. DISCUSSION

A. *Shaffer* "Exceptions"

It has been argued that the admiralty in rem action falls within two "exceptions" which were set forth expressly in *Shaffer*. The first of these so-called exceptions is the situation in which "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant."⁷ The second exception is "where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership."⁸ The argument is that because maritime liens (that is, claims against the vessels) are "in the nature of a property interest," ownership of the property is the source of disputes in in rem actions, or, alternatively, such disputes concern rights and duties incident to that ownership.⁹

This argument misconstrues *Shaffer* as well as the nature of maritime liens. It is clear from the passage in *Shaffer*, from which these

6. Another aspect of due process, that of protecting defendants against unjust deprivations of their property, has led some courts to strike down Rule C arrests because of their failure to provide for prior judicial review or post-arrest hearings. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974). This issue has been the subject of a great deal of scholarly attention, see *supra* note 5; Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?*, 3 FLA. ST. U.L. REV. 1 (1975); Robol, *Admiralty's Adjudicatory Jurisdiction Over Alien Defendants: A Functional Analysis*, 11 J. MARIT. L. & COMM. 395 (1980), and has led to amendments of Rule C. The amendments do not affect the *Shaffer* issue and are beyond the scope of this article.

7. 433 U.S. at 207.

8. *Id.* at 208.

9. See *A/S Hjalmar Bjorges Rederi v. Tug Boat Condor*, 1979 A.M.C. 1691, 1699 (S.D. Cal. 1979) (analogy to quiet title action); Maritime Law Ass'n, *Special Report of Committee on Practice and Procedure on Admiralty Arrest and Attachment Rules*, M.L.A. Doc. 610, Nov. 4, 1977, at 6780-81. See also *Ove Skou R/A v. Atlantic Mut. Ins. Co.*, No. 80 Civ. 6727 (S.D.N.Y. Oct. 7, 1981) (available on LEXIS, Genfed library, Dist. file): "Since plaintiff cannot assert its claim *in rem* as within the Admiralty jurisdiction of this Court, this case does not qualify as one where 'claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant. . . ." (quoting *Shaffer*, 433 U.S. at 207).

exceptions are derived, that the type of property being considered was real property, or at the very least, non-transitory property: "The State's strong interest in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State."¹⁰ A vessel that is in the jurisdiction only to call and then to depart does not represent the type of property that would create contacts sufficient to satisfy the Court's suggestion that "it would be unusual for the State where the property is located not to have jurisdiction."¹¹ Indeed, as discussed below,¹² the courts have held that the presence of a vessel in a particular jurisdiction, without more, is not sufficient to satisfy the "minimum contacts" requirement. Moreover, the nature of a maritime lien is not such that an enforcement action could be considered a dispute concerning ownership of the property. As stated by Gilmore and Black:

The maritime lienor is not a co-owner of the ship. He has no right to control the ship's use or movements in any way. It remains the owner's ship for all purposes—subject to the lienor's right to have it arrested, wherever he can find it, on process issuing from the admiralty court.¹³

10. 433 U.S. at 208.

11. *Id.* at 207. See also Bohmann, *supra* note 5, at 147 (citations omitted):

[T]he Court gave as an example the case where an absentee landowner is sued for injuries suffered on his land. In such a case the attached property is a fixed asset—the land. Since the asset is fixed, it is easier to assert that the defendant-landowner has invoked the benefit and protection of the laws of the state where the land is located. A ship, on the other hand, is not fixed. It can move from place to place and indeed relies on this movement for its profitability. Hence, it is more difficult to say that the ship's owner has availed himself of the benefits and protections of the laws of any given place where the ship happens to be.

Id.

12. See *infra* notes 45-49 and accompanying text.

13. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 9-2, at 588 (2d ed. 1978). *Ove Skou R/A v. Atlantic Mut. Ins. Co.*, No. 80-6727 slip op. (S.D.N.Y. Oct. 7, 1981) (available on LEXIS, Genfed library, Dist file) illustrates some of the confusion in this area. After ruling that in rem jurisdiction was not available, the court held that "[t]he jurisdiction which plaintiff seeks to assert is therefore 'jurisdiction over the interests of persons in a thing,' " which must be based on *International Shoe* minimum contacts. *Id.* This suggests that admiralty in rem jurisdiction does not adjudicate the interests of persons, directly contrary to the suggestion in *Shaffer* itself. As Judge C. Clyde Atkins pointed out in a Southern District of Florida case:

It seems probable that *Shaffer* will not be extended in the near future to true *in rem* proceedings, and that the often maligned—but still extant—ship

The fact that a maritime lien is a form of property right does not mean that an arrest procedure is an action where the ownership of property, or the rights and duties growing out of that ownership, are in dispute.¹⁴

In most in rem arrest cases, moreover, the vessel is released shortly after the arrest in return for the shipowner offering substitute security, usually in the form of a bond. Clearly, the ownership of the vessel is not at issue in such a case. The arrest is used simply as a security device, and once substitute security has been obtained, the vessel itself is no longer involved in the action.¹⁵ Likewise, if substitute

personification theory will suffice to confer true *in rem* jurisdiction on the Court having control over the offending res regardless of the contacts its owner may have with that district.

P.C. Int'l Inc. v. Susan, 1980 A.M.C. 2062, 2066 (S.D. Fla. 1980) (quoting 7A J. MOORE, MOORE'S FEDERAL PRACTICE § E.10 (2d ed. 1984)).

14. The argument has been made that because an in rem proceeding adjudicates the rights of all lienors worldwide, applying *Shaffer* to such a proceeding would be impossible; the likelihood being slim that all "interested parties" would have "minimum contacts" with the forum. See Note, *Maritime Attachment and Arrest: Facing a Jurisdictional and Procedural Due Process Attack*, 35 WASH. & LEE L. REV. 153, 166 (1978). Of course, the shipowner who stands to lose his vessel is more "interested" than a lienor whose in personam claim against the owner is unaffected by the sale or even destruction of the vessel. Requiring minimum contacts between the forum and owner, and not between the forum and lienors, is perfectly understandable.

15. An interesting point is raised by *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1959). The plaintiff sued a vessel in rem, and its owner in personam, for cargo damage. Before the vessel could be arrested, however, the owner tendered a letter of undertaking in which he agreed to appear on behalf of the vessel and pay any judgment against her, in consideration for the plaintiff's refraining from arrest and not requiring a bond. *Id.* at 29 (Whittaker, J., dissenting). The primary issue in the case was whether 28 U.S.C. § 1404(a) permitted transfer of the in rem action to a forum in which the vessel had not been present. See *infra* text accompanying notes 35-40. The majority of the Court treated the letter of undertaking implicitly as one ground for merging the in rem action into the in personam action for transfer purposes. See *id.* at 26-27. Justice Frankfurter, concurring, would have relied solely on the letter to justify transfer. *Id.* at 27. Justice Whittaker, dissenting, took another view:

The Barge itself being the "offending thing," and here being itself subject to suit, and having been sued, *in rem*, we think it may not be said that the giving by respondent, Federal Barge Lines, Inc., and the acceptance by petitioner, of the "letter undertaking," to prevent the physical arrest of the Barge, converted the *in rem* action into one *in personam* This Court has from an early day consistently held that a bond, given to prevent the arrest or to procure the release of a vessel, is substituted for and stands as the vessel in the custody of the court.

Id. at 38 (emphasis in original) (citations omitted).

Justice Whittaker relied on an admiralty fiction which is ancient, but a fiction nonetheless. Vessels do not give bonds, owners do. The security for a judgment comes from the owner. In theory, a bond or undertaking could be set up when the vessel is thousands of miles away from its next United States destination. In such cases the plaintiff's inter-

security is not offered, the vessel is sold and proceeds are then distributed to satisfy the plaintiff's claim. This is not the type of relationship, between res and forum, which *Shaffer* indicated would be constitutionally required for in rem jurisdiction.¹⁶

B. Personification

The "ship personification" concept was described by the Fifth Circuit majority in *Merchants Nat'l Bank of Mobile v. Dredge General G.L. Gillespie*:¹⁷ "[j]urisdiction is asserted over the vessel under the same circumstances that jurisdiction could be asserted over an individual."¹⁸ Thus, since in an in rem action the vessel is a defendant, service upon it in the forum confers the same jurisdiction as would service on an individual.

Commentators have noted that there is great confusion as to whether an in rem claim against the vessel actually adjudicates the rights of the owner of the vessel.¹⁹ The Supreme Court in *Shaffer* stated, in the context of civil in rem actions: "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would

est is clearly not in the vessel itself, but in "owner's pocket," *id.* at 26, from which all judgments will be paid.

16. See Olsen, *supra* note 5, at 405:

Property is, in theory, inanimate. "It" could not care who owns, conveys, leases, libels, or attaches their legal interest in it. The business of jurisdiction, however, *is* animate. It concerns the measuring and balancing in constitutional terms, of the relative convenience of parties involved in the controversy of trying a lawsuit one place as opposed to another. To the extent that the presence of certain property in a forum fits into this determination, it is relevant; otherwise, *Shaffer* seems to say, it is not.

Id.

17. 663 F.2d 1338, 1350 n.18 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982).

18. *Id.* at 1350 n.18. No *Shaffer* issue was raised by the parties, so the majority's statement is dictum. See also 663 F.2d at 1351 (Tate, J., dissenting).

19. See, e.g., Batiza & Partridge, *supra* note 5, at 239-40:

It is more difficult . . . to assess the impact of *Shaffer* and the *Sniadach-Fuentes* line of cases on Rule C, because of the confusing dual role of the vessel under Rule C as both person and thing The personification of the vessel theory, however, does not obscure the fact that vessels are also owned by people who are to be protected by the Constitution from the mistaken deprivation of their property. The fact that Rule C performs two functions (jurisdiction and security) and the fact that the vessel plays two roles (person and thing seized) hampers the application of due process guidelines and makes it difficult to predict the direction of future decisions concerning both *Shaffer* and *Sniadach-Fuentes* challenges.

Id.

serve only to allow state court jurisdiction that is fundamentally unfair to the defendant.”²⁰ The argument justifying the “personification” fiction in admiralty is two-fold. The first part is based on the distinction between maritime liens in the United States and those in the United Kingdom. In the United Kingdom, maritime liens are devices by which the shipowner is induced to appear in personam to defend the action.²¹ In the United States, however, a maritime lien is conceived of as a right against the vessel itself, enforceable against the vessel by sale and distribution of proceeds.²² The second part of the argument is that although the shipowner might have the right under the Due Process Clause not to have his property seized except by a court in a jurisdiction with “minimum contacts,” the vessel itself as defendant cannot assert such a right, because it is the property that is being seized.²³

Neither component of the argument is persuasive. A maritime lien in the United States carries with it only the right to proceed against the vessel in accordance with the procedure set forth by the federal rules, including sale of the vessel and distribution of proceeds. It does not authorize a court without jurisdiction to entertain a suit simply because it is an *in rem* admiralty action.²⁴ Thus, when the bases of jurisdiction are narrowed, it is perfectly logical to say that the bases for enforcement of maritime liens will be correspondingly narrowed.²⁵ The nature of the maritime lien, therefore, has no effect on the question of jurisdiction.

20. 433 U.S. at 212. See also *id.* at 207 n.22, quoting *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C.J.), *appeal dismissed*, 179 U.S. 405 (1900) (“All proceedings like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.”).

21. See, e.g., GILMORE & BLACK, *supra* note 13, at 589-90.

22. *Id.* See also *Claimants of the Brig Malek Adhel v. United States*, 43 U.S. (2 How.) 210, 233 (1844).

23. See *Bethlehem Steel Corp. v. S/T Valiant King*, 1977 A.M.C. 1719, 1721 (E.D. Pa. 1974): (“[I]t is difficult to understand how a *res* or thing which is itself the ‘property’ can allege that it has been deprived of its *property* without due process of law.” *Id.*) (emphasis in the original).

Batiza & Partridge, *supra* note 5, agree, suggesting that application of *Shaffer* to *in rem* seizure leads to this “logical conundrum.” *Id.* at 228-30.

24. For a discussion of the statutory basis for “minimum aggregate contacts, see *infra* notes 107-09 and accompanying text.

25. See *Olsen*, *supra* note 5, at 406:

[T]he long pedigree [of admiralty *in rem* seizure] seems to foreclose contemporary inquiry. The problem now, however, is that contemporary constitutional standards seem to dictate just such an inquiry, despite how impolite that traditionalists may think it to be. The historical pedigree of admiralty jurisdiction is, in this respect, of no importance, and one cannot doubt that analysis of the *in rem* libel under the *Shaffer* standard, is therefore, imminent.

Id.

Similarly, the argument that property itself has no rights would seem to be precisely the sort of argument that the Supreme Court rejected in *Shaffer*. The Court stated: "Traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."²⁶ It is impossible to adjudicate the rights of a vessel without simultaneously adjudicating the rights of its owner.²⁷ Although there are instances when a vessel may be liable in rem and its owner not liable in personam,²⁸ those few instances certainly do not justify the application, generally, of a rule ignoring the rights of shipowners with respect to in rem claims against their vessels.²⁹ The constitutional underpinning for Rule C must be found elsewhere.³⁰

This point is well made in *Karl Senner, Inc. v. M/V Acadian Valor*,³¹ in which the court stated, with respect to in rem claims joined to in personam ones: "Courts have time and again acknowledged the personification theory to be a fiction whose real value is simply as a mechanism to enforce the *in personam* liability of the owner."³² In re-

26. 433 U.S. at 212.

27. *See id.* at 207:

The case for applying to jurisdiction *in rem* the same test of "fair play, and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing".

Id. See also Merchants Nat'l Bank v. Dredge General G.L. Gillespie, 663 F.2d 1338, 1353 (5th Cir. 1981) (Tate, J., dissenting).

In *Ove Skou R/A v. Atlantic Mut. Ins. Co.*, No. 80-6727, slip op. (S.D.N.Y. Oct. 7, 1981), plaintiff sought to attach, under Rule C, a trust fund which had been established by a cargo owner as security for a general average claim by the shipowner. Plaintiff's intention was to thereby obtain jurisdiction in rem against the fund. The court ruled that no in rem action against the fund was available, and that, consequently, "[t]he jurisdiction which plaintiff seeks to assert is therefore 'jurisdiction over the interests of persons in a thing' and must be based on contacts sufficient to serve as a predicate for *in personam* jurisdiction under [*International Shoe*]. The fund here cannot in itself serve as a substitute for such contacts." *Id.*

28. *See, e.g.*, *The China*, 74 U.S. (7 Wall.) 53 (1868) (owner not liable in personam for negligence of compulsory pilot; however, in rem suit against vessel will lie).

29. *See Olsen, supra* note 5, at 409.

30. *See infra* notes 60-65 and accompanying text. In *Continental Grain Co. v. Barge FBL-535*, 364 U.S. 19 (1960), Justice Whittaker, in dissent, questioned whether the owner of a vessel sued in rem could consent to jurisdiction in a particular forum. *Id.* at 39.

31. 485 F. Supp. 287 (E.D. La. 1980).

32. *Id.* at 292-93 (citation omitted). *See also* G. GILMORE & C. BLACK, *supra* note 13, § 9-18, at 616.

viewing the decision in *Bethlehem Steel Corp. v. S/T Valiant King*,³³ the *Karl Senner* court stated:

The *Bethlehem* Court had difficulty in understanding "how a res or thing which is itself the 'property' can allege that it has been deprived of its property without due process of law." [citation omitted] But that Court refused to consider the personification theory which transforms a vessel into a legal person for jurisdictional purposes. Inasmuch as the creation of that legal person endows the Courts with power over it, that power must be exercised as it would be exercised over other legal persons.³⁴

The issue was considered by the Supreme Court in *Continental Grain Co. v. Barge FBL-585*.³⁵ That case involved the partial sinking of a vessel in Memphis, with damage to her cargo. The shipowner sued the cargo shipper in Tennessee, claiming that the sinking was due to negligent loading by the shipper. The shipper, meanwhile, had sued the shipowner in personam and the vessel in rem in Louisiana, the vessel being located there at the time of the suit. The shipowner moved for transfer of the case to Tennessee under 28 U.S.C. § 1404(a),³⁶ and the motion was granted by the lower court, over the shipper's objection that section 1404(a) was unavailable because the in rem action could not have been brought originally in Tennessee.

The Supreme Court affirmed, the majority stating that although the in rem action could only have been brought in the district where the vessel was located, apart from the fiction of personification, both the in rem and in personam actions were really against the shipowner, and the shipowner was subject to suit in Tennessee.³⁷ After reviewing a

33. 1977 A.M.C. 1719 (E.D. Pa. 1974).

34. 485 F. Supp. at 294. In *Karl Senner* there was no question that personal jurisdiction existed over the shipowner with respect to the plaintiff's in personam claim. The plaintiff arrested the vessel solely for security purposes. This fact has been given great significance in one commentary on the case, see Batiza & Partridge, *supra* note 5, at 234-35. Its impact, however, was simply to make unnecessary an analysis of the troubling question whether the vessel as a juridical person may assert due process rights on behalf of itself and its owner.

35. 364 U.S. at 22-23.

36. 28 U.S.C. § 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

Under *Hoffman v. Blaski*, 363 U.S. 335 (1960), which pre-dated *Continental Grain* by two weeks, transfer under Section 1404(a) was improper, when, at the time of suit, defendant could not have been sued in the transferee court.

37. 364 U.S. at 26-27. To emphasize the point the Court noted: "the grain company's suit against the barge and its suit against the owner are in the same complaint for the loss of the same cargo in the same sinking of the same barge producing the same dam-

line of authorities wherein the Court had treated in rem and in personam actions in admiralty as essentially the same,³⁸ the Court declared:

Although the action in New Orleans was technically brought against the barge itself as well as its owner, the obvious fact is that, whatever other advantages may result, this is an alternative way of bringing the owner into court. And although any judgment for the cargo owner will be technically enforceable against the barge as an entity as well as its owner, the practical economic fact of the matter is that the money paid in satisfaction of it will have to come out of the barge owner's pocket—including the possibility of a levy upon the barge even had the cargo owner not prayed for "personified" *in rem* relief. The crucial issues about fault and damages suffered were identical, whether considered as a claim against the ship or its owner. The witnesses were identical. Thus, while two methods were invoked to bring the owner into court and enforce any judgment against it, the substance of what had to be done to adjudicate the rights of the parties was not different at all.³⁹

The case, therefore, although not settling the question (and preceding *Shaffer* by seventeen years), suggests that the "personification" concept may be without modern justification.⁴⁰

ages." *Id.* at 22.

38. *Id.* at 23-24. See *The City of Norwich*, 118 U.S. 468, 503 (1886):

To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated . . .

Id. See also *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 253 (1943):

Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.

Id.

39. 364 U.S. at 26.

40. See also *Bunge Corp. v. M/T Stolt Hippo*, 1980 A.M.C. 2611 (S.D.N.Y. 1979), in which an action for short/damaged cargo was brought in rem against the vessel and in personam against the shipowner. Owner moved for a stay pending arbitration, and the court granted the stay based on a charter party arbitration clause incorporated into cargo's bill of lading. Cargo contended that the in rem action was not affected by the arbitration clause nor, consequently, by the stay. The court disagreed, stating that "courts frequently order a stay in an action pending arbitration without allowing the suit

C. *Doing Business*

It has been said in the past that jurisdiction over a manufacturer or retailer may be established under a "doing business" rationale if that manufacturer/retailer's goods should happen to find their way into the jurisdiction, even without the manufacturer/retailer's knowledge. This theory has been rejected recently by the courts, based on the notion that a defendant does not "appoint [its] chattel his agent for service of process,"⁴¹ and the presence of a defendant's goods in a particular jurisdiction, unknown to the manufacturer/retailer, does not by itself constitute the sort of significant contact with that jurisdiction which would subject the defendant to jurisdiction under the "substantial justice and fair play" standard of *International Shoe*.

The theory sometimes employed in the case of a defendant-vessel, however, is that it is an income-producing instrumentality of the shipowner, and that the shipowner is present—in terms of "doing business"—wherever his vessel calls.⁴²

It is difficult to justify this line of thinking. Where the vessel itself is the only contact with the jurisdiction, it is unfair for the defendant-vessel to be subjected to unlimited personal jurisdiction.⁴³ In the case of real property, the property is continuously within the jurisdiction, and the contacts between the property and the forum are necessarily more significant. Without more, the mere presence of a vessel within

to proceed simultaneously against a vessel nominally a party to the lawsuit." *Id.* at 2616. This case flirts with the "personification" fiction, but the true concept of personification would have required the vessel's rights and liabilities to be determined independently of those of the shipowner. Because vessels cannot sign arbitration agreements, they cannot assert rights to arbitrate against others. Owner, in effect, petitioned for a stay on behalf of his vessel. The fact that it was granted may indicate only a desire by the court for judicial efficiency. It certainly suggests, however, that in rem and in personam claims can be merged procedurally, despite the "personification" of the vessel.

41. 444 U.S. at 296.

42. See Bohmann, *supra* note 5, at 142.

43. Although it could be argued that the in rem claim is limited in practical terms to the proceeds of the vessel upon sale, and not truly "unlimited," the vessel is nevertheless an extremely valuable commodity, and the jurisdiction against it must be constrained by principles applicable to in personam jurisdiction. See, e.g., 433 U.S. at 207 n.23 (1977):

It is true that the potential liability of a defendant in an *in rem* action is limited by the value of the property, but that limitation does not affect the argument. The fairness of subjecting a defendant to state court jurisdiction does not depend on the size of the claim being litigated.

Id.

In addition, on the basis of recent cases, it has been stated that the limitation rule is "breaking down," with courts issuing in personam judgments against owners in in rem cases in which those owners were not even served with process. See GILMORE & BLACK, *supra* note 13, at 802-805.

the jurisdiction is not sufficient to satisfy the "minimum contacts" requirement of *Shaffer*.⁴⁴

Indeed, several courts have so held. In *Grevas v. M/V Olympic Pegasus*,⁴⁵ in rem and in personam actions were brought in Virginia for personal injury, service being made under the Virginia long-arm statute. The district court concluded that the defendant's contacts with Virginia were insufficient to maintain service of process under the Virginia long-arm statute. The court noted that the defendant's sole contact with Virginia was the visit of its vessel Olympic Pegasus for a period of eight days, during which the vessel had loaded a cargo, taken on water, had its propeller inspected, and signed on a new crew member. The court stated: "These few activities deriving from a single visit of the vessel to Virginia do not amount to contacts sufficient to subject defendant to in personam jurisdiction in Virginia under [the long-arm statute]."⁴⁶

44. Judge Schwartz of the United States District Court for the Eastern District of Louisiana notes that "the presence of a vessel and most sets of facts which would give rise to a maritime lien would seem to provide ample contacts with a jurisdiction." Schwartz, *supra* note 5, at 260-62. This statement may be correct, although it assumes that the lienor is American and that the vessel had called in the United States previously. It begs the question, however, because for purposes of analysis the due process challenge must be assumed to come from an entity with few contacts with the forum. See *supra* hypothetical p. 1.

45. 557 F.2d 65 (4th Cir. 1977).

46. *Id.* at 68. A report of the Maritime Law Association has stated that personal jurisdiction over a shipowner will be found under *International Shoe*: "[i]f a ship enters a port of the United States, except as a port of refuge, to do business there." Maritime Law Ass'n, *supra* note 9, at 6781. ("In most situations, shipowners, charterers and cargo interests who send their vessels and/or cargo into a given port will be considered to be 'doing business' there, thus submitting themselves to the state's long arm jurisdiction.") *Id.* at 6786 n.1.

These statements, and the decisions cited in support thereof, evince a misunderstanding of the applicable law, and of the term "doing business."

For purposes of state long-arm jurisdiction, "doing business" generally requires a "systematic and continuous" relationship between defendant and the forum. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). The *Olympic Pegasus* decision is perfectly consistent with the doctrine in this area, as expounded by the Supreme Court. In fact, the recent decision in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), reflects a further expansion by the Court of the scope of protections afforded to defendants by the Due Process Clause. In *Helicopteros*, a foreign helicopter line was sued in Texas as a result of a crash of one of its helicopters in Columbia. Defendant had purchased helicopters and parts in Texas for many years, had trained its pilots and management personnel in Texas, consulted on technical matters in Texas, and had negotiated in Texas the contract, during the performance of which the crash took place. These contacts were held insufficient under *International Shoe*.

Of course, if the cause of action arises out of even a single contact in the forum, jurisdiction may be asserted. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

If the contacts are substantial and/or frequent enough, however, the "doing business" standard will be met. In *Nesset v. Christensen*,⁴⁷ a vessel owned by a single-ship corporation had made fourteen calls to New York in seventeen months, all while on time charter. A personal injury action was brought against the shipowner. The defendant contended that the contacts with New York were insufficient under *Inter-*

Thus, the Second Circuit has held that a vessel/owner may be sued for cargo damage in the port of discharge. *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 209 (2d Cir. 1970); *Mitsubishi Shoji Kaisha, Ltd. v. M.S. Galini*, 323 F. Supp. 79 (S.D. Tex. 1971) (suit brought at loadport where cargo damage arose from contaminated grain feeders on vessel). This doctrine would seem to apply as well to in rem actions, provided the activities giving rise to the lien occurred in the forum. *Cf. Gkiasis v. S.S. Yiosanas*, 342 F.2d 546 (4th Cir. 1965).

For an example of a vessel entering the forum only as a port of refuge, see *United States v. Tug Parris Island*, 215 F. Supp. 149 (E.D.N.C. 1963).

On the other hand, it has been said that where a ship is the only or primary asset of a shipowner, the shipowner may be said to be "doing business" wherever his ship may go. In *Gkiasis*, 342 F.2d 546, the cause of action was for personal injury suffered while the vessel was calling at Baltimore. The court found that the only contacts between the defendant and Maryland were six "unscheduled visits" by the vessel over a period of nine years. The ship was a tramp steamer and defendant owned no other vessels. The court looked at the quality of defendant's contact with Maryland and the relationship between the contact and the cause of action. On the first point the court ruled that, because defendant owned only one ship when that ship entered Maryland, the respondent was doing all of its business there. *Id.* at 556; *accord*, *Szabo v. Smedvig Tank-Rederi A.S.P.*, 95 F. Supp. 519 (S.D.N.Y. 1951) ("the defendant's sole business consists of the operation of the vessel on which plaintiff was injured and one other, and so it would appear that a very substantial portion of its business and activities is carried on for and on behalf of defendant within this state.").

The court implied that had the vessel belonged to a shipowner with a large fleet, that shipowner would not have been deemed to be doing business in Maryland. The court noted that "while in Maryland the ship loaded or unloaded valuable cargoes and the owner supplied sizable quantities of fuel and stores, hired tugs and contracted for berths. The visits were thus significant both to the respondent and to the state." Second, the court seemed to be saying that because the injury occurred while the vessel was in Maryland, the case satisfied the requirement of *McGee*, 355 U.S. 220, which held that a single contact with the forum state is sufficient if that contact gives rise to the cause of action involved in the suit. Finally, the court rejected the argument that a tramp steamer's contacts with a port were insufficient because its stops were not scheduled, quoting from the opinion of the Supreme Court of North Carolina in *State Highway and Public Works Comm'n. v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 978, 981 (1945), the *Gkiasis* court stated:

Under the construction of the statutes contended for by the appellant, the Severence might ply its trade in every port from Seattle to Bangor and back again, leaving a trail of obligations in its wake, and never "do business" in any state, or become subject to any statute designed to bring it into court upon that basis.

342 F.2d at 557.

47. 92 F. Supp. 78 (E.D.N.Y. 1950).

national Shoe, because inter alia, the vessel was on charter and its ports of call were determined by the time charterer. The court rejected this argument, stating that such matters as provisions, wages, stores, hiring and discharging crew, and maintaining the vessel were all the owner's responsibility under the time charter, and "[i]t is reasonable to assume, since the N/[SS] *Hermund* was engaged in transatlantic trips rather than in short coastal traffic, that these activities required the owner's attention when the vessel called at the Port of New York."⁴⁸ The court also emphasized that the vessel was owned by the defendant, and that fourteen calls to New York within a period of seventeen months "can be regarded as establishing a regular pattern of visits rather than irregular or haphazard calls."⁴⁹

Nevertheless, the point is that the conventional "minimum contacts" analysis has been applied to vessels calling in particular forums, and it is appropriate to do so.

D. Foreseeability

As noted above, a nonresident foreign corporation does not appoint its products as "agents for service of process wherever they go."⁵⁰ A vessel, however, bears a different relationship to its owner than does a product to its manufacturer. To the extent that a shipowner directs or is aware of the vessel's movements, he might foresee suit in any forum in which the vessel calls. In *World-Wide Volkswagen*, the Court stated:

It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."⁵¹

This principle is applicable to a purchaser who transports the product—after sale—without the knowledge or consent of the manufacturer/retailer. It should not be applicable, however, in the case of a vessel whose location is always known to its owner, because the "uni-

48. *Id.* at 82.

49. *Id.* See also *Cook Indus. Inc. v. Tokyo Marine Co. Ltd.*, 1978 A.M.C. 1979 (D. Alaska 1978) (four calls in six months prior to suit, with contract lasting another six months, sufficient); *Murphy v. Int'l Freighting Corp.*, 182 F. Supp. 204 (D. Mass. 1960), *aff'd sub nom. Murphy v. A/S Sobral*, 283 F.2d 392 (1st Cir. 1960) (eight calls in two years sufficient); *Murphy v. Arrow S.S. Co.*, 124 F. Supp. 199 (E.D. Pa. 1954) (seven calls in four years preceding suit, including three calls in previous year sufficient).

50. See *supra* text accompanying note 41.

51. 444 U.S. at 298 (citation omitted).

lateral activity" aspect is not present.

On the other hand, if the vessel is under bareboat charter or long-term time charter, the charterer of the vessel will control its movements, subject only to geographical range limitations in the charter party. Thus, a vessel will find itself in a particular port with the owner's knowledge, but without the owner's express consent. It is unlikely that the Supreme Court in *World-Wide Volkswagen* considered this fact possibility, but the reasoning of the decision is such that an owner should not be held to submit to personal jurisdiction when the presence of the vessel is not at the owner's instance, and the claim does not arise out of the presence of the vessel in that particular forum.⁵²

Moreover, "foreseeability" is not an exception to the minimum contacts doctrine. A company which trades knowingly in 100 countries cannot be held to consent to jurisdiction in all of them simply because of those trades. *A fortiori*, a foreign company should not be required to defend in the United States an action by a foreign claimant simply because its vessel is in the United States. To say such a suit is "foreseeable" is somewhat circular; and moreover it ignores the greater

52. See *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The case concerned an oil spill off the coast of Puerto Rico. Defendants included the vessel in rem, its owner and the insurance underwriters—West of England Shipowner's Mutual Protection and Indemnity Association. The club contended that personal jurisdiction was lacking over it, arguing that *World-Wide Volkswagen* required more than mere "foreseeability." 628 F.2d at 669. The court distinguished *World-Wide Volkswagen*:

[T]he seller of a product such as the automobile in [*World-Wide Volkswagen*] ordinarily has no control over where the buyer takes the product after it is sold. If the mere fortuity of the presence of the seller's product in another jurisdiction subjected the seller to suit in that forum, the seller "would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." By contrast, an insurer such as West of England has the power through its contracts of insurance meaningfully to influence the course taken by insured vessels. By limiting coverage to specified jurisdictions, West of England could be reasonably certain it would not be haled into court in an undesired forum. In other words, an insurer is not at the mercy of the insured owner's unilateral choice of destination in the same way a seller of chattels is at the mercy of the buyer.

Id. at 669-70.

In *Zoe Colocotroni*, of course, the cause of action arose as a result of the vessel's presence in the forum, Puerto Rico, which happens to be a "direct action" jurisdiction. The court's analysis, nevertheless, is problematic because it broadens the scope of foreseeability so far as to suggest that an international operator must restrict indirect business contacts in an almost impossible way simply to avoid jurisdiction. For example, West of England could not realistically instruct its members not to trade in Puerto Rico. Such a burden would also effectively leave shipowners appointing ships as agents for service of process.

function of the due process doctrine—to protect defendants from being hauled into forums with little or no relationship to the parties or the action.

E. Necessity

It is often intimated, and sometimes stated explicitly, that a court will not decline jurisdiction where no other United States forum exists in which jurisdiction can be maintained against the defendant.⁵³ Particularly in admiralty, it has been said that plaintiffs should not be required to go abroad to obtain redress:

To compel suitors in admiralty when the ship is abroad and cannot be reached by a libel *in rem*, to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.⁵⁴

53. See, e.g., McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST. L.J. 19, 44 (1967) ("Where the identity of the responsible party is unknown to the party wronged, or where the responsible party is known to reside overseas, the maritime remedies of arrest *in rem* or attachment *in personam* are indispensable means of redress in United States courts.") *Id.* See also 1979 A.M.C. at 1698, a case in which the court noted the "difficulty of acquiring jurisdiction over foreigners" as one justification for Rule C arrests. *Id.*

54. *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890); *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 655 (2d Cir. 1979); *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 453 (W.D. Wash. 1978). See also Bohmann, *supra*, note 5, at 148-49:

In admiralty actions . . . the plaintiff's only alternative forum might be in a foreign country. A foreign suit can cause considerable inconvenience, and the judgment obtained would not be as readily enforceable in the United States as a state court's judgment would be in a sister state. Moreover, depriving a plaintiff of an *in rem* action might put the plaintiff at a disadvantage vis-a-vis claimants in foreign countries. Foreign lienholders could execute their liens in *in rem* proceedings in foreign countries while United States claimants would be precluded from instituting their own such suits in the United States. Thus, foreign lienholders could protect their interests more easily than could domestic lienholders.

Given such results, United States courts may determine that the United States' interest in providing an admiralty forum outweighs a defendant vessel owner's jurisdictional claims. Despite the language of *Shaffer* the courts may find that this interest in providing a forum, where the failure to do so would place the residents of this country at a disadvantage vis-a-vis residents of other countries, is sufficient to supply the requisite contacts between the *in rem* litigation and the forum.

Id.

This argument may be criticized on a number of grounds. First, as discussed above, although admiralty jurisdiction and in rem procedures are plaintiff-oriented in that they serve to increase the number of fora available for suits in admiralty, due process protects defendants' rights, and convenience to plaintiffs is of far less significance. Second, the argument assumes a case of United States plaintiffs suing foreign defendants, which is not always the situation.⁵⁵ Third, and perhaps most important, it ignores the extensive developments in the past forty years in international commerce, communication and technology. Moreover, these developments have been accompanied by an equally extensive development in the jurisprudence of international commercial disputes, overturning parochial attitudes in favor of recognition that many cases brought in the United States should actually proceed

Shaffer raised the possibility that jurisdiction by necessity, based on an in rem action against defendant's property, might satisfy due process: "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. at 211 n.37 (1977). In *Continental Grain*, discussed *supra* at text accompanying notes 35-40, the Court suggested that it approved of admiralty in rem jurisdiction in cases in which the shipowner is not amenable to suit: "A purpose of the [personification] fiction, among others, has been to allow action against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still." 364 U.S. at 23. The issue in *Continental Grain* was whether admiralty in rem jurisdiction which the Court viewed as a mechanism for increasing the number of fora available to a plaintiff, should be "transferred into a weapon to defeat that very purpose." *Id.* The Court was faced with the choice of ignoring the fiction or else countenancing inconvenient and duplicative litigation, namely, an in rem action in one forum and an identical in personam action in another. Given the options, it is not surprising that the Court chose to set aside the fiction.

The Court's comment in *Continental Grain* concerning the utility of in rem jurisdiction when the ship owner cannot be reached, should be seen in light of the later development of *Shaffer*, when the Court made crystal clear its unwillingness to subject defendants to deprivation of their rights in the absence of minimum contacts. The *Shaffer* court cited *Continental Grain* for the proposition that "an adverse judgment in rem directly affects the property owner by divesting him of his rights in the property before the court." 433 U.S. at 206. In the context of *Shaffer*, however, this statement means more than it did in *Continental Grain*. It suggests that admiralty in rem actions are no different from the civil actions to which "minimum contacts" doctrine must be applied. Although there is no harm in looking at Rule C as a means of expanding the permissible reach of United States courts, it must be remembered that the Due Process Clause protects the rights and convenience of defendants, not plaintiffs.

55. Plaintiffs in the following cases were foreign: *Grand Bahama Pet Co., Ltd. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978); *A/S Hjalmar Bjorges Rederi v. Condor*, 1979 A.M.C. 1696 (S.D. Cal. 1979); *Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Ove Skou R/A v. Atlantic Mut. Ins. Co.*, 80 Civ. 6727 (LWP) (S.D.N.Y. Oct. 7, 1981) (slip op.).

elsewhere.⁵⁶ The court in the *Nordic Regent* stated it best:

In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.⁵⁷

56. See, e.g., *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (dismissal of in rem admiralty action brought by a United States plaintiff against a vessel by virtue of the forum selection clause in an underlying contract directing parties to litigate in United Kingdom); *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1980) (en banc) (dismissal of an admiralty action by a United States plaintiff against a shipowner on grounds of forum non conveniens).

57. 654 F.2d at 156, quoting *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977) (per curiam), cert. denied, 434 U.S. 1035 (1978).

Some parochial attitudes, however, may remain. In *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630 (D. Conn. 1977), a United States plaintiff attached the debt of a Connecticut corporation to the Kuwaiti defendant, relying on the Connecticut attachment statute. A *Shaffer* objection was raised, and the court upheld personal jurisdiction, even though it conceded that minimum contacts under *International Shoe* might have been lacking:

The Supreme Court's opinion in *Shaffer* explicitly left open the question whether the presence of a defendant's property in a state is a sufficient basis for jurisdiction "when no other forum is available to the plaintiff." Presumably, the Court had in mind a case such as this, where the defendant is outside the territorial jurisdiction of any of the fifty states, in the sheikdom of Kuwait. While *Shaffer* leaves the issue open, its rationale does not support application of a minimum contacts test to a case such as this. The Court was persuaded to apply the standards of *International Shoe* to quasi-in-rem jurisdiction in part because an *in personam* judgment could be obtained "in a forum where the litigation can be maintained consistently with *International Shoe*," and because the state in which the property is located would then be obliged to honor such a judgment under the full faith and credit clause. These arguments plainly contemplate a defendant over whom *in personam* jurisdiction can be obtained in one of the fifty states.

Id. at 633 (citations omitted). The court makes too much of *Shaffer's* reservation concerning jurisdiction by necessity. The "necessity" doctrine is somewhat parochial, as noted above whenever it is applied, but it is particularly narrow when it is applied to a case like *Louring*. In light of *McGee*, failure to meet the requirements of due process in any state of the United States means that (1) defendant has too few contacts with any state to satisfy *International Shoe* and (2) plaintiff's cause of action does not arise from activities in or affecting any United States state. There is no reason in such a case—in which the activities giving rise to the suit occurred abroad—for any plaintiff to expect a United States forum. The existence of the forum non conveniens doctrine, far from supporting the exercise of jurisdiction, argues against such an exercise.

F. *Autonomy of Admiralty*

A number of courts and commentators have concluded that due to the particular requirements of admiralty, and the "autonomy" of admiralty over other types of jurisdiction, the exercise of personal jurisdiction in rem under Rule C is not subject to the due process strictures of *International Shoe*.⁵⁸ One argument is that admiralty jurisdiction has a distinct basis in article III of the Constitution,⁵⁹ giving constitutional sanction to such procedures as in rem arrest which were in practice at the time the Constitution was drafted and ratified.⁶⁰ This argument also stresses the long history of in rem arrests throughout American history, and states that the courts have approved of such procedures consistently.⁶¹

58. See *Amoco Overseas Oil Co. v. Compagnie Nationale Algeriene*, 605 F.2d 648, 655 (2d Cir. 1979), in which the court stated: "[S]ince the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III § 2, suits under admiralty jurisdiction involve separate policies to some extent." See also *Grand Bahama*, 450 F. Supp. at 453.

The autonomy of admiralty from the common law is of constitutional magnitude. The constitutional grant of judicial power conferred jurisdiction over admiralty and maritime matters independent of jurisdiction over matters in law and equity. This constitutional autonomy has been reaffirmed in recent times. See also *A/S Hjalmar Bjorges Rederi v. Condor*, 1979 A.M.C. 1696, 1698 (S.D. Cal. 1979) ("Admiralty's separation from courts of law and equity is a constitutional distinction."); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi*, 732 F.2d 1543, 1547 (11th Cir. 1984) ("The framers considered admiralty jurisdiction so significant that they awarded Federal Courts the power to sit in Admiralty under a separate constitutional delegation.") *Id.*

59. U.S. CONST. Art. III, § 2, states:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls: to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

Id. (emphasis added).

60. See, e.g., *Grand Bahama*, 450 F. Supp. at 452-55, citing *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473 (1825).

61. See *id.* at 455, where Judge Beeks stated: "I am convinced that maritime attachment is constitutionally permissible. The recognized autonomy of admiralty jurisprudence, although not absolute, and the long constitutional viability of maritime attachment compel me to conclude that *Shaffer* does not reach Rule B(1) attachment." *Id.* see also *Sideris Shipping Co v. M/V Caribbean Arrow*, 1980 A.M.C. 1296, 1298 (M.D. Fla. 1979).

See also *Bottacchi*, 732 F.2d at 1547:

The legacy of admiralty's legal heritage is the deep-rooted historical basis

This argument is problematic for several reasons. First, the fact that admiralty has a separate constitutional basis (as does diversity jurisdiction), does not mean that the exercise of that jurisdiction is not subject to other constraints of the Constitution, especially due process. *Shaffer* made no specific exception for admiralty cases, as was discussed above,⁶² and prima facie, all exercises of in rem jurisdiction would be governed by the *Shaffer* analysis.⁶³ The separate reference to admiralty in Article III does not immunize a suit brought under that heading from the restraints applicable to all other exercises of federal jurisdiction.⁶⁴

surrounding its procedural rules. Maritime attachments, dating back to our nation's fledgling days, preceded the promulgation of specific admiralty rules. Congress authorized the Supreme Court to develop such rules in 1792. It reiterated the peculiar nature of admiralty law and instructed adherence to rules and usages of admiralty rather than those of common law courts. Rule B is a sterling example of the Court's respect for that advice. Its focus has changed little in 140 years. The practice was officially codified in 1844, and refined in 1920, as Admiralty Rule 2. With the addition of Admiralty procedure as supplemental rules to the Federal Rules of Civil Procedure, it became Supplemental Rule B in 1966. According to the Advisory Committee charged with unifying admiralty and civil procedure, Rule B merely restates the traditional 19th Century attachment method.

Id. See also *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 459 F. Supp. 1242, 1249 (S.D.N.Y. 1978), *aff'd*, 605 F.2d 648 (2d Cir. 1979). ("*Shaffer* does not destroy the venerable tradition of maritime action commenced quasi in rem."). *Bottacchi*, *Grand Bahama* and *Amoco* were Rule B cases, but the reasoning concerning admiralty's tradition is obviously applicable to Rule C as well.

62. See *supra* text accompanying notes 13-16.

63. See *Merchants Nat'l Bank v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1353 (5th Cir. 1981) (Tate, J., dissenting) ("I can see no logical or pragmatic reason, nor any based upon the [Supreme] Court's decisions in the area, why a uniform standard of procedural due process should not apply to all private litigants, whether in admiralty or otherwise"). *Id.*

64. See Olsen, *supra* note 5, at 399 n.24:

At the time of the 1792 act (predecessor to 28 U.S.C. § 1333 authorizing admiralty jurisdiction), this country was comprised of people of numerous nationalities, e.g., French, English, Scots, Irish— each nationality having a different history and often radically different approaches to admiralty law. This country had been comprised of thirteen independent and sovereign states—each having its own approach to admiralty law. Neither the United States Constitution nor the Act indicate which history and approach were intended to be incorporated in the words 'admiralty' and 'maritime.' Legislative history is also murky on this point. Therefore, Justice Johnson's choice of the English history and approach in *Manro* seems rather arbitrary.

Id.

Both *Grand Bahama* and *Condor* cite *Romero v. Int'l Term. Oper. Co.*, 358 U.S. 354 (1959), for the proposition that admiralty is constitutionally autonomous from other Federal law. In *Romero*, a foreign seaman was injured in United States waters aboard a

Second, the fact that a certain practice has a long history does not make it constitutional. As the Due Process Doctrine has evolved, certain practices of the past are no longer permitted. A perfect example is *Pennoyer v. Neff*,⁶⁵ which stood 100 years for the proposition that quasi in rem jurisdiction could be based simply on the presence of defendant's property in the forum. *Pennoyer*, however, was overruled by *Shaffer*.⁶⁶ The exercise of admiralty jurisdiction, therefore, cannot be removed from the Due Process Clause doctrine simply on a textual basis.

Policy arguments are often made to the effect that "the unique character and context of the maritime lien" justifies the use of Rule C procedures without regard to the Due Process Clause.⁶⁷ This argument stresses the transient nature of ships, the uncertainties of litigation in foreign countries, and the reasonable expectation of maritime actors that they will be sued wherever they are found.⁶⁸

This argument, too, is unpersuasive. Because the argument is meant to justify a departure from due process rules applicable in practically every other type of proceeding, there is a substantial burden imposed on those who would lessen due process protections in admiralty to show that such a lessening is necessary and fair. With respect to necessity, clearly when the defendant and the controversy are so unconnected with the forum that *International Shoe* does not support an assertion of jurisdiction, when the cause of action probably occurred abroad, and when plaintiff himself may be a foreigner,⁶⁹ there is no

foreign vessel, and sued, among others, the foreign shipowner. The Court held that maritime causes of action do not fall within the term "arising under the Constitution, [or] laws of the United States" for purposes of Federal question jurisdiction under 28 U.S.C. § 1331. The Court's analysis of article III was that because the Framers chose to set forth two separate categories of cases of which Federal judicial power would extend, the categories could not be identical. See 358 U.S. at 361-68.

This analysis in *Romero* sheds no light on whether the Due Process Clause applies to Rule C, unless one assumes one's conclusion. That is, unless it is assumed that the Due Process Clause applies only to diversity, Federal question, and other heads of jurisdiction, the fact that admiralty is "autonomous," vis à vis those heads of jurisdiction, has no significance. The mere fact that separate categories are set forth in article III does not prove that *Shaffer's* broad language was not meant to apply to each category.

65. 95 U.S. 714 (1877).

66. 433 U.S. at 212 & n.39 (1977).

67. See *Merchants Nat'l Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1345-51 (5th Cir. 1981), cert. dismissed, 456 U.S. 966 (1982).

68. *Id.* See also *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne*, 605 F.2d 648, 655 (2d Cir. 1979); *A/S Hjalmar Bjorges Rederi v. Condor*, 1979 A.M.C. 1696, 1698 (S.D. Cal. 1979); *Merchants Nat'l Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d at 1347.

69. See *supra* note 55.

reason why a United States court should alter its constitutional analysis in order to provide jurisdiction in such a case.

Moreover, although maritime defendants may be "peripatetic,"⁷⁰ plaintiffs are equally mobile, and as noted above,⁷¹ international transportation/communication is sufficiently sophisticated that international litigation is no longer as difficult or as uncertain as it once may have been.

II. A THEORY OF "AGGREGATE MINIMUM CONTACTS"

The discussion above presents arguments made by the courts and other authorities both for and against the constitutionality of Rule C in light of Supreme Court doctrine concerning the Due Process Clause. The arguments on both sides are occasionally technical, and always somewhat simplistic. They rarely address the fundamental issues in analyzing jurisdiction under the Due Process Clause. Although the courts generally search for "minimum contacts" in order to satisfy concerns of due process, it must be remembered that this rather mechanical process is done in order to insure that fundamental fairness to defendants is respected. Such concerns for fairness do not recognize the distinction between civil cases and admiralty cases. Nor do they acknowledge the distinction between an in rem action against a vessel and an in personam action against its owner.

This is not to say, however, that those distinctions are completely irrelevant. As the courts have noted, due process and fundamental fairness are flexible concepts,⁷² and must be adapted to the circumstances of each case. What is unfair in one circumstance becomes fair in another. Thus, cases involving admiralty jurisdiction can be examined under the standard announced in *International Shoe* without reference to legalistic notions such as personification, or by the simple assumption that civil due process principles have no application to admiralty.

Certainly there is no requirement that a defendant have numerous contacts with the jurisdiction in which he is sued. In *McGee v. International Life Ins. Co.*,⁷³ the defendant insurance company simply

70. *Amoco*, 605 F.2d at 655; *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890).

71. *See supra* text accompanying notes 56-57.

72. *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [citations omitted] "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."), quoting with approval *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

73. 355 U.S. 220 (1957).

mailed a letter to the plaintiff in California. No other contacts were alleged between defendant and the State of California. Nevertheless, the Court held that it was fair to subject the defendant to jurisdiction in the California court. Similarly, in the case of a vessel, it might be considered fair for a shipowner to be subject to jurisdiction in any forum where his vessel might find itself.⁷⁴

In *McGee*, however, the cause of action arose from the single contact with the jurisdiction.⁷⁵ This is not generally the case when a vessel is sued in rem and arrested. Nevertheless, an intermediate standard of contacts can be fashioned in the admiralty area which would satisfy the fairness requirement, but not necessarily require the existence of minimum contacts with a particular forum.

The proper approach is the "national aggregate contacts" theory. Under this theory, when the action is based on federal substantive law rather than state law, and when the defendant is a non-United States entity, contacts for purposes of the *Shaffer* standard will be aggregated from all of defendant's contacts with the United States as a whole.⁷⁶ Thus, a defendant, with otherwise insufficient contacts with the forum state, will be subject to jurisdiction by virtue of its contacts there and its aggregated contacts with the rest of the United States.

This theory has been applied in a number of circuits, primarily in cases involving Federal securities, tax or other statutes.⁷⁷ It has been said, however, that the national aggregate contacts theory is a minority one⁷⁸ and, until very recently, it had not been used in admiralty cases.⁷⁹

74. This, of course, is the logic of the "personification" doctrine. See generally *supra* notes 17-40 and accompanying text.

75. 355 U.S. at 222-23.

76. See, e.g., *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982) and *Cyromedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975).

77. See, e.g., Clayton Act, 15 U.S.C. § 22 (1981) and Securities Exchange Act, 15 U.S.C. § 78u (1981 & Supp. 1985). These statutes provide specifically for extraterritorial service of process, so that a non-United States entity that does not have an agent for service in the United States may be served abroad.

78. See *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414 (E.D. Pa. 1979).

79. In *Szabo v. Smedvig Tank-Rederi A.S.*, 95 F. Supp. 519 (S.D.N.Y. 1951), and *Paragon Oil Co. v. Panama Ref. & Petrochem. Co.*, 192 F. Supp. 259 (S.D.N.Y. 1961), the courts applied a "minimum contacts" theory to satisfy any constitutional concerns, but did not apply a "national contacts" theory to the due process question. Moreover, in *Scott v. Middle East Airlines Co., S.A.*, 240 F. Supp. 1 (S.D.N.Y. 1965), the court specifically rejected "national contacts" as a substitute for minimum contacts with the forum state. The court concluded:

[I]n order to acquire jurisdiction over the respondent it must be found that the respondent has sufficient ties not merely with the United States but with the state of the forum to make jurisdiction over it consistent with "our traditional

In *Engineering Equipment Co. v. S.S. Selene*,⁸⁰ the plaintiff's claim was for cargo misdelivery and damage arising out of a voyage that commenced in Philadelphia. Suit was brought in New York against the shipowner, and an attachment was attempted under Rule B(1) against the charter hire due to the owner from its agents in New York.⁸¹ The shipowner claimed to have no contacts with New York under *Shaffer*, but the court held that contacts with the United States as a whole were sufficient to satisfy the "national contacts" test:

The constitutionality of this act of Congress [Rule B(1)] must be tested under the standards of the due process clause of the Fifth Amendment, not those of the Fourteenth Amendment. The defendants' contacts with the forum state are quite beside the point under the Fifth Amendment. The relevant constitutional inquiry under the Fifth Amendment is whether the defendants have minimum contacts with the United States as a whole sufficient to make our assertion of jurisdiction fair and reasonable under the circumstances. There can be no doubt that the contacts between the defendants, their property and the United States are sufficient to permit us to assume jurisdiction.⁸²

conception of fair play and substantial justice." [*International Shoe*]. There is, furthermore, an additional reason for not abandoning this test here. MEA [Middle East Airlines] is a Lebanese corporation and, unlike an American corporation, there is the possibility that it is not "present" in the United States at all. Thus, it is not simply a question of in which state shall the respondent be sued but whether it should be sued in the United States at all. In such a case there should certainly be required a finding that MEA has the necessary contacts with the United States to allow suit and, for the reasons noted, with New York as well.

Id. at 4. The above reasoning, of course, is contrary to that in one of the earlier cases, in which the question of "jurisdiction by necessity" influenced the admiralty court in deciding to retain jurisdiction of the matter. See *Amoco*, 605 F.2d at 655. In *Scott*, the court apparently felt that the defendant's lack of contacts with the United States should be looked at in a manner favorable to dismissal.

80. 446 F. Supp. 706 (S.D.N.Y. 1978).

81. It does not appear that the agents were physically located in New York, because, had this been the case, the court would probably have mentioned it. The agents, however, submitted to New York jurisdiction, and the court ruled that "Since the . . . garnishees are subject to our in personam jurisdiction, the debts are deemed to have their situs within the district." *Id.* at 708-09.

82. *Id.* at 709-10. This reasoning is perhaps more complex than it appears to be. Because Rule B(1) requires that "the defendant shall not be found within the district," the effect of "finding" minimum contacts should be to invalidate an attachment based on Rule B(1). In personam jurisdiction would exist in such a case. See Olsen, *supra* note 5, at 413: "Requiring a defendant's absence for one purpose (Rule B attachment) and presence for another (minimum contacts for jurisdiction) is plainly untenable, if not

More recently, the First Circuit applied a "national contacts" analysis in an admiralty attachment case. *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*,⁸³ involved a Missouri corporation whose debt in Puerto Rico was attached by a Panamanian corporation under Rule B in an action to recover demurrage. The defendant raised *Shaffer* as a ground for vacating the attachment, contending that it lacked minimum contacts with Puerto Rico.

The district court upheld the attachment,⁸⁴ and the First Circuit affirmed. With deference to *Shaffer*, the court quoted *World-Wide Volkswagen* with respect to the functions of the "minimum contacts" test:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant [from] litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁸⁵

The court noted that the second of these functions was inapplicable in an admiralty case, because "[f]ederal jurisdiction being national in scope, due process only requires sufficient contacts within the United States as a whole."⁸⁶ Since defendant was a United States corporation headquartered in Missouri, it had sufficient contact with the United States to satisfy the "sovereignty" purpose of minimum contacts.

With respect to the policy of protecting defendants from suits in inconvenient fora, the court noted that the doctrines of forum non con-

schizophrenic."

The court in *Selene* did not acknowledge this paradox for the simple reason that in theory none exists. So long as "national contacts" is the applicable standard, a defendant may satisfy that due process jurisdictional standard without having sufficient contacts with the forum to constitute "presence" there for B(1) purposes. The shipowner in *Selene* provides an example of just a situation. See also *LaBanca v. Ostermunchner*, 664 F.2d 65 (5th Cir. 1981), a case in which a B(1) attachment was upheld against a defendant with "minimum contacts" because service within the district was impossible.

The Rule C problem case, of course, arises out of a "dearth" of contacts, not a "surfeit." That is to say, Rule C is applied unconstitutionally only when even a vessel's physical presence in the forum is insufficient to satisfy *Shaffer*. *Selene*, however, warns us that where the defendant has *too many* contacts with the forum, in personam jurisdiction may make Rule B(1) attachment unavailable.

83. 743 F.2d 956 (1st Cir. 1984).

84. 604 F. Supp. 4 (D.P.R. 1983).

85. *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st Cir. 1984), quoting *World Wide Volkswagen*, 444 U.S. at 291-92 (1980).

86. *Trans-Asiatic Oil*, 743 F.2d at 959.

veniens and change of venue were always available.⁸⁷ In addition, however, the court invoked the *International Shoe* standard of "traditional notions of fair play and substantial justice," and held, first, that admiralty plaintiffs should be able to bring suit wherever defendants' goods/credits are found, and second, that admiralty defendants may expect to be sued in all such fora.⁸⁸ Thus, the court concluded that the exercise of personal jurisdiction against the defendant was not improper.

The court reached the right result but for the wrong reasons. As discussed earlier, *International Shoe* and *Shaffer* do not protect plaintiffs, but rather ensure that defendants' due process rights are protected.⁸⁹ Any suggestion to the contrary in *Trans-Asiatic* is most certainly incorrect. With respect to the so-called "need for special procedures" in admiralty, the court falls into the same trap as did the courts in *Grand Bahama* and other cases. Moreover, the need to protect plaintiffs from having to litigate in inconvenient fora is not strong where the plaintiff is not American but Panamanian, as was the plaintiff in *Trans-Asiatic*.

Trans-Asiatic's application of the "national contacts" analysis, though perhaps unnecessary, was certainly proper and correct even though defendant was a United States corporation. Although the national contacts doctrine usually presumes a foreign defendant, there is no reason why a distinction should be made on that basis. The arguments in favor of "national contacts" as an approach to Rule C arrests are, therefore, equally applicable, and defendant's contacts with the United States made the assertion of quasi in rem jurisdiction in *Trans-Asiatic* reasonable.

There are, therefore, two significant precedents in admiralty for the application of the "national contacts" theory. The theory is the only mechanism for dealing with due process problems where a defendant has too few contacts with any one forum to satisfy the state-court jurisdictional standards set forth in *International Shoe*, *Shaffer* and *McGee*.

A vessel (and owner) with no prior contacts with the United States should not be subject to in rem or in personam jurisdiction as a result

87. *Id.*

88. *Id.* at 960.

89. See generally *supra* text accompanying note 55. Cf. *Grand Bahama*, 450 F. Supp. at 458, quoting *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972): "Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Id.* Although *Grand Bahama* applied this statement to the validity of Rule B attachment under *Sniadach*, the statement could equally be applied to Rule C arrests under *Shaffer*.

of the first contact, unless, of course, the cause of action arises from that contact.⁹⁰ If, however, the vessel or owner had had prior contacts with other fora in the United States, it certainly could be argued that suit in the United States was not completely unforeseeable from the perspective of the owner.⁹¹ Because in rem arrest actions under Rule C require the presence of the vessel within the jurisdiction of the district court,⁹² there is no danger of jurisdiction being sought in a distant state with which the owner has no contacts whatsoever. In other words, only the ports of the United States that handle international commerce—and to which the vessel has called—can host such lawsuits. A transfer under 28 U.S.C. § 1404(a) is even available when convenience of parties or witnesses warrants such transfer.⁹³ Thus, the application of a “national aggregate contacts” theory would seem to be quite appropriate in Rule C cases.

90. Thus, in the hypothetical set out above, the arrest in rem and action in personam would be dismissed for lack of jurisdiction.

In *Witham v. The James E. McAlpine*, 96 F. Supp. 723 (E.D. Mich. 1951), a vessel en route from Superior, Wisconsin to Buffalo, New York was boarded by a United States Deputy Marshal as she was abeam of St. Clair, Michigan, and was served with an arrest warrant and required to proceed to a dock in Detroit. St. Clair and the waters adjacent thereto are within the boundaries of the Eastern District of Michigan. The court sustained the arrest, finding that the shipowner did business in Michigan, based on the regular purchase of bunkers and other supplies, and the hiring of crew, in the state. *Id.* at 728. Although the court did not cite *International Shoe*, its holding would no doubt survive the application of *Shaffer's* due process analysis.

91. Application of “national contacts” in an in personam admiralty case is illustrated by *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973). Plaintiff sued the owner of a cruise line (NCL) for the death of his wife while both were on a Caribbean cruise aboard defendant's vessel. The court analyzed NCL's contacts with Michigan (plaintiff's residence) and found them insufficient under *International Shoe*. *Id.* at 358 n.5. The court, however, turning to NCL's contacts with other states, found that NCL derived 42% of its passenger traffic from Florida, had branch offices in Miami, New York, Chicago, Cleveland, Dallas, and Los Angeles, and had other contacts with the United States as well. *Id.* at 358. The court concluded that “[t]aken as a whole, defendant's contacts with the United States, both qualitatively and quantitatively, are constitutionally sufficient to enable this court to render a binding judgment against it.” *Id.* The court then granted NCL's motion to transfer the case to the Southern District of Florida.

The difficulty here is that maritime liens may be asserted against a vessel even after ownership of the vessel has passed to a third party without knowledge of the lien's existence. See GILMORE & BLACK, *supra* note 13, § 9-5 to § 9-8, 594-97. Here, it must be said that no real due process problem arises, because the defendant shipowner's contacts are still the operative factor.

92. See Rule C, *supra* note 1.

93. An in rem action may be transferred along with an in personam action even if the vessel was not in the transferee forum, and, thus, could not have been sued there. *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1959).

CONCLUSION

Any owner who does not satisfy a "national aggregate contacts" standard should not fairly be subject to jurisdiction in the United States. Conversely, an owner who does satisfy the standard, as it has been developed through *Shaffer* and its progeny,⁹⁴ can fairly be so subjected.

Perhaps the main thread in the arguments opposing the application of *Shaffer* to Rule C proceedings is that it is somehow essential that the admiralty arrest procedure be kept as free from constraint as possible for the protection of maritime lienors.⁹⁵ Clearly, there is an intent among courts and commentators to ensure that United States courts are always available to both United States and foreign creditors who have liens against vessels which call in the United States.⁹⁶ Some of the justifications offered for this view have been presented above, but one which appears more often than any other is that in some way a plaintiff would be deprived of justice or remedy if not allowed to arrest (or attach) property in the United States. This point was offered eloquently by the court in *Schiffahrtsgesellschaft v. Bottachi*,⁹⁷ as follows: "A ship may be here today and gone tomorrow . . . ' Worse yet, as the ship sails, so does the debtor. The frustrated creditor, much like Evangeline, the poor Acadian girl separated from her lover, is tragically left to roam the shores awaiting the debtor's next arrival."⁹⁸ The suggestion is that by applying Due Process Clause doctrine to admiralty proceedings the value of United States courts would diminish to the international maritime community.

94. See *supra* note 46 for a discussion of *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

95. See, e.g., *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi*, 732 F.2d 1543, 1547 (11th Cir. 1984) in which the court stated: "Traditional procedural due process analysis does not take place in a vacuum; relevant commercial and legal considerations provide the backdrop for review . . ." *Id.*

"In this atmosphere, Rule B restores order and attempts to protect the creditor's rights. It draws debtors from otherwise impenetrable fortresses . . . Otherwise, pursuit of such unresolvable disputes, as the Court long ago acknowledged, 'would in many cases amount to a denial of justice.'" *Id.* at 1548 (emphasis in original) (citations omitted). Although *Bottacchi* was concerned with *Sniadach* objections to Rule B, the reasoning has been applied to *Shaffer* analysis of Rule C as well. See *A/S Hjalmar Bjorges Rederi v. Condor*, 1979 A.M.C. 1696, 1698 (S.D. Cal. 1979).

96. See, e.g., *Bohmann*, *supra* note 5, at 149: "[C]ourts may conclude that in admiralty actions *in rem*, where the existence of a maritime lien provides contacts between the defendant and the litigation, the country's general interest in providing a forum for maritime disputes constitutes the requisite connection between the forum and the litigation." *Id.*

97. 732 F.2d 1543 (11th Cir. 1984).

98. *Id.* at 1547-48.

This argument overstates the importance of United States courts as sites for maritime litigation. In rem actions against vessels are available in courts throughout the world to enforce maritime liens.⁹⁹ Even if such extraneous circumstances were constitutionally relevant, however, there are no grounds for saying, as did the court in *Bottacchi*, that “[o]btaining jurisdiction over *Bottacchi* [in Georgia] is appellant’s only means of enforcing these two contractual provisions [in the charter party].”¹⁰⁰

In *Bottacchi*, plaintiff was a German corporation which owned vessels, and *Bottacchi* was an Argentine corporation which also owned vessels.¹⁰¹ It makes no sense to argue that the United States is an essential forum for litigation between a German and an Argentine.¹⁰² The admiralty tradition, such as it is, is honored in the fact that 28 U.S.C. § 1333 permits foreigners to sue other foreigners in United States Federal courts on admiralty claims, subject only to the requirement that personal jurisdiction be obtained over the defendant. This jurisdictional requirement does not force a major change in admiralty practice in the United States. It simply says that the Due Process Clause is applicable to all forms of jurisdiction, in accordance with the “traditional notions of fair play and substantial justice.”

The argument also ignores the existence of in personam remedies against the shipowners. Except in rare instances as noted above,¹⁰³ wherever there is an in rem liability of the vessel, there is also an in personam liability of her owner. If the vessel leaves the jurisdiction, never to return, the owner may still do business in the United States, and be amenable to service of an in personam complaint. In addition, as stated earlier, where the owner has so few contacts with the United States as not to satisfy even the aggregate contact standard, it is most unlikely that the cause of action (or the plaintiff) has any connection with the United States whatsoever.¹⁰⁴ Although the argument has been made that looking to the owner’s contacts will simply lead to “intricate corporate shells . . . employed to disguise the ownership of shipping

99. See, e.g., International Convention Relating to the Arrest of Sea-Going Ships, May 10, 1952, 439 U.N.T.S. 193. The United States is not a party to this Convention, but a great many foreign states are.

100. *Bottacchi*, 732 F.2d at 1544.

101. *Id.*

102. This, of course, is especially true when, as in *Bottacchi*, the cause of action arises out of events entirely unconnected with the United States, between parties whose international operations cause them to have agents (and attorneys) throughout the world. *Id.*

103. See *supra* note 28.

104. See *supra* note 91 and accompanying text.

assets,"¹⁰⁵ the question remains whether the party who has wronged the plaintiff, so as to give plaintiff a lien on the vessel, is present in the jurisdiction. Courts have long ago learned to deal with the peculiar problems of unraveling shipowning corporations.

It is uncertain whether Rule C must be amended to incorporate the "aggregate contacts" approach to *Shaffer*. Some courts that have declined to adopt the aggregate contacts rationale in other, non-maritime contexts have stated that they declined solely because the principle has not been incorporated into the Federal Rules or Federal jurisdictional statutes.¹⁰⁶ These courts would appear to be more concerned with service of process than amenability to suit, because there have never been federal rules or statutes governing the nature of minimum contacts required for jurisdiction.¹⁰⁷ Service is not a problem in the Rule C context, however, since service is on the vessel, which must be in the district.¹⁰⁸ There is no difficulty with the courts, as those in *Trans-Asiatic* and *Selene*, applying "aggregate contacts" without specific congressional authority. The interpretation of due process standards in this area, therefore, is a subject for judicial analysis, not legislative action.

105. *Cf. Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956, 960 (1st Cir. 1984), quoting *Bottacchi*, 732 F.2d at 1548.

106. *See, e.g., Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 295 (3d Cir. 1985) ("We are . . . unaware of any Federal statute which presently authorizes district courts to [find] personal jurisdiction upon such aggregated contacts."); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967) ("Unfortunately, this course has not been left open to us by the Federal rules or statutes"); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 664 (D.N.H. 1977) ("Congress could well have passed statute stating that jurisdiction over aliens will be based on their contacts with the nation as a whole . . ."); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) ("[T]he Federal Rules should be amended to authorize such a practice. Such a step is, however, not ours to take.").

107. *See, e.g., Clayton Act*, § 12, 15 U.S.C. § 22 (1981 & Supp. 1985) (authorizing service on a corporation "wherever it may be found"). In *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982), the court construed that provision as authorizing assertion of "personal jurisdiction over foreigners not present in the United States to but, of course, not beyond the bounds permitted by the due process clause of the Fifth Amendment." *Id.* at 1043. The court applied "national aggregate contacts" theory, but did so by virtue of its own interpretation of the Due Process Clause, not on the basis of any statute.

108. *FED. R. CIV. P. E(3)(a)*: "Process in rem and of maritime attachment and garnishment shall be served only within the district."

