

# AN INTERNATIONAL APPROACH TO MARITIME CONFLICT OF LAWS

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*This Essay seeks to answer two interrelated questions about regnant maritime choice-of-law analysis in the United States: Does it descriptively capture international law as the United States claims? And, if so, is such an approach a good one? In so doing, this Essay aims principally to provide national and international decision makers with a robust and fresh resource for resolving these disputes in a manner, I argue, beneficent to overall social welfare and peaceful relations among states. For only by analyzing the United States' claim can we tell whether it is true and thus, whether it needs to be adhered to or modified. The answer to this latter inquiry is directly informed by whether we think an international law analysis is the best way forward, what that way forward may look like, and perhaps even to make recommendations to that analysis based on emergent practices.*

*The Essay argues that U.S. maritime choice-of-law rules largely reflect international law and practice and that this approach is a normative good because it promotes peace and trade among nations. More specifically, an international approach takes into consideration not just the forum's interest in resolving the dispute according to its own parochial policies and choice-of-law methodologies, but also the interests of other involved states, thereby furthering the smooth working of the international system and peaceful relations among states. Furthermore, it provides a common choice-of-law methodology for all states, which increases primary predictability by legal actors engaged in behavior generally considered beneficent to overall social welfare, like international trade. These features of promoting peace and trade comport with a systems theory of international law under which rules evolve so as to perpetuate the system. Courts confronted with maritime conflicts cases should engage in deeper analysis of state and international interests with these objectives in mind.*

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### INTRODUCTION

Conflict-of-laws rules relating to maritime disputes hold massive implications for international relations and trade.<sup>1</sup> Yet they have been systematically ignored by scholars<sup>2</sup> and have received notoriously shallow treatment by courts.<sup>3</sup> With the drafting of the *Restatement (Third) of Conflict of Laws* underway,<sup>4</sup> the time is ripe to reevaluate these rules. Indeed, the previous *Restatement* barely mentions them at all.<sup>5</sup> What is so fascinating about maritime conflict-of-laws rules is that they purport to be international law, in contrast to other maritime law, which can be

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1. Eric Powell, *Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience*, 19 ANN. SURV. INT'L & COMP. L. 263, 263–64 (2013) (“Nearly 105,000 ships transport more than 90% of world trade, including oil, chemicals, consumer durables and non-durables, food, and people.”).

2. Symeon Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223, 223 (explaining that “this side of admiralty has been traditionally neglected by both admiralty lawyers and conflict specialists”). Especially telling is that a survey of admiralty law coursebooks contains only a passing description of the landmark maritime conflict-of-laws Supreme Court case *Lauritzen v. Larsen*, 345 U.S. 571 (1953). See discussion *infra* Part I.

3. See, e.g., *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151 (11th Cir. 2009).

4. RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. L. INST., Tentative Draft No. 1, 2020).

5. The *Restatement (Second) of Conflict of Laws* provides, in relevant part, “[b]ecause of the desirability of maintaining freedom of navigation, some limitations are imposed by public international law upon the power of a state to exercise judicial jurisdiction over a vessel in the course of innocent passage through its territorial seas.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 cmt. d (AM. L. INST. 1971) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 513 (AM. L. INST. 1987)). The *Restatement (First) of Conflict of Laws* contains a more detailed treatment with specific rules for specific types of torts. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 404 (AM. L. INST. 1934) (tort in territorial waters); *id.* § 405 (tort in territorial waters affecting only internal economy of vessel); *id.* § 406 (tort on high seas); *id.* § 407 (navigation in territorial waters); *id.* § 408 (navigation on high seas); *id.* § 409 (tort by collision in territorial waters); *id.* § 410 (tort by collision on high seas).

parochial in nature.<sup>6</sup> At least this is the stance taken by the U.S. Supreme Court in its controlling opinion, *Lauritzen v. Larsen*.<sup>7</sup> There, the Court explicitly stated that it was deriving a seven-factor choice-of-law test from international law.<sup>8</sup> Yet there is no substantiation of that claim in the opinion. This is odd and perhaps troubling because international law is a fundamentally empirical phenomenon.<sup>9</sup> Nonetheless,

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6. This was certainly not always the case. Maritime law used to largely be a branch of the *jus commune*—or the law common to all, and more specifically, *lex mercatoria* or the *law merchant*—a body of transnational private law relating to commercial transactions. William Tetley, *The General Maritime Law—The Lex Maritima (with a Brief Reference to the Ius Commune in Arbitration Law and the Conflict of Laws)*, 20 SYRACUSE J. INT’L L. & COM. 105, 107 (1994). “The *lex maritima* (the *ius commune* of maritime law) was quite uniform throughout Western Europe, until about the sixteenth century.” *Id.* at 109. As a result, “[e]arly maritime law was not characterized by conflicts, because until at least the end of the sixteenth century in Europe, there was considerable homogeneity in maritime law . . . In other words, the *ius commune* obviated the need for conflict of laws.” *Id.* at 113. Indeed, “that whole body of maritime law (*lex maritima*) existing in 1789 became part of U.S. law.” *Id.* at 122.

7. 345 U.S. at 578. Here, I take the view that international law contains a jurisdictional, as well as a substantive, component and that these jurisdictional rules are not simply about not offending comity but rather embody customary international law. Customary international law allows for “exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate.” RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 407 (AM. L. INST. 2018). Six recognized bases for such a genuine connection exist. The connection, and therefore the exercise of prescriptive jurisdiction, can be based on territoriality when the persons, property, or conduct sought to be regulated are or occur within the regulating sovereign’s borders. *Id.* § 408. Jurisdiction on the basis of effects—formerly referred to as objective territorial jurisdiction—permits jurisdiction to regulate when conduct not occurring in the regulating state’s borders nonetheless has “substantial effects within its territory.” *Id.* § 409. Active personality jurisdiction permits states to regulate their nationals when they are abroad. *Id.* § 410. Passive personality jurisdiction, conversely, allows states to “prescribe law with respect to certain conduct outside its territory that harms its nationals.” *Id.* § 411. Because this basis of jurisdiction poses some issues of legality, i.e., the offender may not be on notice that American law could be applied to her actions when she acts, its use has been limited to cases where nationals are targeted *because of* their nationality. The protective principle permits jurisdiction where security or another fundamental state interest is threatened. *Id.* § 412. Finally, universal jurisdiction permits even states that have no real connection to a defendant or her conduct to regulate and punish that conduct when it is especially abhorrent, such as “genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture.” *Id.* § 413. Thus, when *Lauritzen* explains that “statutes [must be] construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law,” it refers to the international law of jurisdiction, not merely comity. *See Lauritzen*, 345 U.S. at 577. This is consistent with the Court’s explicit reliance upon the *Charming Betsy* canon of construction, which requires that “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Id.* at 578 (citing *Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch) 64, 118 (1804)).

8. *Lauritzen*, 345 U.S. at 582–91; *see also infra* Section I.B.

9. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012).

a full-bodied jurisprudence has grown out of *Lauritzen*'s claim, having a powerful impact on the present and future of global commerce and interstate relations.<sup>10</sup>

This Essay seeks to answer two interrelated questions about regnant maritime choice-of-law analysis in the United States: Does it descriptively capture international law as *Lauritzen* claims? And, if so, is such an approach a good one? The Essay argues that the answers to these questions can reveal and encourage a more sophisticated choice-of-law jurisprudence that furthers international peace and trade.

As to the first question, although *Lauritzen* fails to substantiate its claim to be applying international law, the cases it birthed do exhibit *features* of the international legal system: namely, they expressly take into consideration the smooth working of the system and commerce among states. Yet there is no way to tell affirmatively whether *Lauritzen*'s international law claims are true without looking to the actual practice of other states—which is what this Essay does by surveying the choice-of-law rules of other nations. That is, the only real way to answer whether U.S. maritime conflict-of-laws rules are international law is to look at other states' choice-of-law rules and to evaluate those rules in light of the needs of the international system.

This Essay begins with an in-depth examination of *Lauritzen*'s test in light of its claim to be applying international law and then briefly turns to the laws of other major maritime nations to see if U.S. law reflects their maritime conflict-of-laws rules. If U.S. law does match up, it suggests that *Lauritzen*'s claim is true.

There are two ways to evaluate the practice of these states under generally accepted sources of international law: custom and what are called “general principles of international law.”<sup>11</sup> Custom derives from state practice accompanied by *opinio juris*, the belief that the practice stems from some sense of legal obligation or right.<sup>12</sup> General principles of international law, on the other hand, are principles common to legal systems around the world that may not necessarily have the imprimatur of custom as an internationally legally recognized right or obligation, but which can be recruited in international legal decision-making.<sup>13</sup> That U.S. practice claims to be applying custom is evidenced by the fact that it *says* it is applying international law—that is, the *opinio juris* element of the equation: a statement not only that it is acting in a certain way, but also that its action is the result of a sense of legal obligation or right. If we had only the practice, in the form of statutes, judicial application of rules, or otherwise, there would be only half the equation for customary law formation. The relevant source of international law would then be general principles, according to which cases are decided. Although a comprehensive global comparative analysis of other nations' choice-of-law rules is

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10. Although *Lauritzen* dealt only with the Jones Act, the Supreme Court has since extended it to all maritime tort cases whether brought under the Jones Act or general maritime law. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382–85 (1959).

11. See, e.g., *Eastern Extension v. United States*, 54 Ct. Cl. 108, 110 (Cl. Ct. 1919).

12. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001).

13. See Elena Carpanelli, *General Principles of International Law: Struggling with a Slippery Concept*, 46 IUS GENTIUM 125, 128 (2015).

outside the scope of this short Essay, a partial survey of other nations' maritime conflict-of-laws rules shows that U.S. law is largely consistent with these rules in placing primary emphasis on the law of the flag as the most significant factor, but that it also may represent an emergent trend in "piercing the flag" where other states have more significant contacts with the dispute. What is less clear is whether these rules grew out of a sense of *opinio juris*, although there is some support for that contention in some countries. Thus, while there is a clear general principle favoring the law of the flag, and emergently and alternatively, the law of the most significant relationship, it is less clear that this choice-of-law rule embodies customary international law. Moreover, the more flexible test, which sometimes looks through the law of the flag to, *inter alia*, the true ownership of the vessel and the links of plaintiffs and defendants to choose the applicable law, may represent an advancement of an international choice-of-law methodology because such a technique better captures true state interests rather than relying on formalities. This point ties directly into whether an international approach that takes into consideration all states' interests is the best way forward.

As to the second question, this Essay argues that an international law approach is the best way to deal with maritime conflict of laws. In line with *Lauritzen*'s progeny, it promotes peace and trade among nations. It is a choice of law methodology that takes into consideration other states' interests and the interests of the international community as opposed to only the forum's interests.<sup>14</sup> This weighing analysis is thus explicitly concerned with the health of the international system and is thus compatible and (one might even say) synergistic with the health of the system at large in certain respects. By contrast, a forum-centric approach would take into consideration only the forum's interest through its own choice-of-law methodology. According to some, even if the forum has a smaller interest compared to that of another state, a parochial approach would hold that the forum will still apply forum law.<sup>15</sup> By disregarding the interests of foreign nations, this latter approach promises more international friction and less stability, leading to less predictability for commercial actors.

In support of its argument that an international approach is better, this Essay draws from systems theory to explain international law generally and conflict-of-laws rules specifically as a normative good. It describes the international legal system as autopoietic; that is, it evolves to perpetuate itself and ensure its own survival.<sup>16</sup> Because war and anarchy signify the death of the system, a methodology that promotes peace and trade is necessarily in line with the overall health and objectives of the system. An international approach to maritime conflict of laws fits nicely into this narrative.

## I. U.S. MARITIME CHOICE OF LAW AS INTERNATIONAL LAW

This Part describes U.S. maritime conflict-of-laws rules as consistent with an international law designed to promote peace and trade among nations. These

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14. See *infra* Part II.

15. See Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893 (1988).

16. See *infra* note 132 and accompanying text.

characteristics comprise the major state interests guiding maritime choice-of-law analysis. In line with these objectives, the test articulated by the cases is a distinctly international approach to choice of law;<sup>17</sup> it takes into consideration interests not only of the forum but also of other states and the multistate system.<sup>18</sup> The discussion next examines the principal test put forth by U.S. courts for evaluating choice-of-law issues regarding potentially multiple overlapping laws on seaborne vessels in light of these international legal objectives.

As noted, the starting point for modern maritime choice-of-law analysis is the famous and prolific U.S. Supreme Court case *Lauritzen v. Larsen*.<sup>19</sup> *Lauritzen* made clear that “[t]he law of the sea is . . . international law,”<sup>20</sup> and under maritime law, the Jones Act (allowing seamen to recover for harms aboard vessels) could only be applied under principles “considered operative under prevalent doctrines of international law.”<sup>21</sup> Other courts have followed suit, observing that the Jones Act must be “given a construction in consonance with international maritime law.”<sup>22</sup> And in line with international law’s ultimate objectives,<sup>23</sup> incorporation of international law into maritime law is designed to facilitate peace and trade<sup>24</sup>—points to which we now turn.

### A. *Peace and Trade*

#### 1. *Peace*

Courts have been insistent that incorporating international law into maritime choice-of-law rules avoids friction with foreign nations. Thus, *Lauritzen* explained that maritime choice of law “has the force of law . . . from acceptance by common consent of civilized communities of rules designated to foster amicable and workable commercial relations”<sup>25</sup> and that “[i]nternational or maritime law . . . aims at stability and order through usages which considerations of comity, reciprocity and long range interest have developed to define the domain which each nation will claim as its own.”<sup>26</sup> The Supreme Court subsequently elaborated that choice of law must consider “[t]he interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations.”<sup>27</sup> Similarly, the Courts of Appeals have found that application of U.S. law must obey “‘the necessity of mutual forbearance’ to avoid international retaliation.”<sup>28</sup> And under maritime law, “one sovereign power is bound

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17. *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

18. *See infra* Part III.

19. *Lauritzen*, 345 U.S. at 571.

20. *Id.* at 578 (quoting *Farrell v. United States*, 336 U.S. 511, 517 (1949)).

21. *Id.* at 577.

22. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 440 (2d Cir. 1959).

23. *See supra* note 132.

24. *See infra* Part III.

25. *Lauritzen*, 345 U.S. at 581–82; *see also* *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 318 (1970) (Harlan, J., dissenting) (quoting *Lauritzen*, 345 U.S. at 582).

26. *Lauritzen*, 345 U.S. at 582.

27. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 383 (1959).

28. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 440 (2d Cir. 1959) (quoting *Lauritzen*, 345 U.S. at 582).

to respect the subjects and rights of all other sovereign powers outside its own territory.”<sup>29</sup>

## 2. Trade

Implicit and sometimes explicit in the language above is the quite salient point that the smooth working of the international system advances trade through application of a single international choice-of-law rule as opposed to a multiplicity of parochial laws. *Lauritzen* could not have been clearer:

If, to serve some immediate interest, the courts of each [nation] were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a nonnational or international maritime law of impressive maturity and universality.<sup>30</sup>

Subsequent cases emphasize the point,<sup>31</sup> as do cases noting that ideally maritime choice-of-law analysis furthers “uniformity,”<sup>32</sup> a feature that advances trade because actors can predict how law will treat their behavior and therefore feel more comfortable engaging in certain behavior.<sup>33</sup>

In sum, U.S. courts consider maritime choice-of-law rules as international law; courts see these rules as seeking to avoid international friction and promoting trade among nations. I next address the test for determining how to choose among multiple potentially applicable laws under U.S. maritime law.

### ***B. The Maritime Choice-of-Law Test***

Drawing from “a seasoned body of maritime law”<sup>34</sup> and “usage as old as the Nation,”<sup>35</sup> *Lauritzen* extracted seven factors to be considered when choosing the operative law for shipboard events or transactions: the place of the wrongful act; the law of the flag; the allegiance or domicile of the injured seaman; the allegiance of the defendant shipowner; the place where the contract of employment was made; the inaccessibility of a foreign forum; and the law of the forum.<sup>36</sup> In applying these, *Lauritzen* instructed courts to “weigh[] . . . the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.”<sup>37</sup> In doing so, courts must “reconcil[e]

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29. *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1173 (11th Cir. 2009) (quoting *Lauritzen*, 345 U.S. at 578).

30. *Lauritzen*, 345 U.S. at 581.

31. *See, e.g., Romero*, 358 U.S. at 383 (using international law to facilitate “maritime commerce as part of the legitimate concern of the international community”).

32. *Cf. Gonzales v. Naviera Neptuno A.A.*, 832 F.2d 876, 880 n.3 (5th Cir. 1987). *Gonzales* involved the application of a federally uniform choice-of-law rule; I use it here to illustrate simply that an internationally uniform choice-of-law rule would exhibit the same desideratum.

33. Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 IND. L.J. 719, 722 (2016).

34. *Lauritzen*, 345 U.S. at 577.

35. *Id.*

36. *Id.* at 583–92.

37. *Id.* at 582.

our own with foreign interests and . . . accommodat[e] the reach of our own laws to those of other maritime nations,<sup>38</sup> thus protecting peace and equality with foreign nations.

What is important for our purposes is that this test is distinctly international.<sup>39</sup> Again, this means that the test purports to take into consideration not only U.S. interests but also the interests of other involved states and the international community at large. As the Supreme Court stated in *Romero v. International Terminal Operating Co.*, maritime law commands “respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.”<sup>40</sup> Lower courts have similarly observed the need to balance “legitimate interests of the United States against the policies underlying international comity,”<sup>41</sup> and maritime law “weighs and balances the interests at play in a given case . . . [and] allows for the law of the country with the greatest interest in the dispute to govern.”<sup>42</sup> This analysis “will always take into consideration both the U.S. and the foreign interests in a given action.”<sup>43</sup>

### 1. *The Factors*

Now that we have established the international nature of the maritime choice-of-law test, we can apply it by describing when and how courts have found (or not found) interests for the factors. A broad reading of the cases reveals that courts seem to focus on only four out of the seven factors in tort cases, brushing aside the law of the place of the contracting,<sup>44</sup> the inaccessibility of the foreign

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38. *Id.* at 577.

39. *See infra* Part III.

40. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383 (1959).

41. *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426, 427 (2d Cir. 1966).

42. *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1172 (11th Cir. 2009).

43. *Id.* at 1173.

44. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 588 (1953) (“The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen.”); *Romero*, 358 U.S. at 383 (“[W]e do not mean to qualify our earlier view that the place of contracting is largely fortuitous and of little importance in determining the applicable law . . .”).

What is perhaps more interesting is that courts have also basically ignored what were explicit choice-of-law clauses. *See infra* Section I.D. In a large number of cases, foreign seamen were subject to foreign collective bargaining agreements under foreign law that conflicted with the broad remedial provisions of the Jones Act. *Lauritzen*, 345 U.S. at 573; *Cruz v. Chesapeake Shipping Inc.*, 738 F. Supp. 809, 814–15 (D. Del. 1990). Yet these schemes rarely if ever factored into the choice-of-law analysis. *See Lauritzen*, 345 U.S. at 588–89; *Cruz*, 738 F. Supp. at 817–18. However, it is not to say they never did. *See Tsakonites*, 368 F.2d at 429 (finding that Greek collective bargaining agreement weighed in favor of application of Greek law because “[i]nternational comity requires respect for such agreements”). One possible reason for this could be the strong public policy and state interests at play and the international nature of the dispute, for party autonomy will be overridden when a state has a strong public policy to the contrary. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (AM. L. INST. 1971).



forum,<sup>45</sup> and the law of the forum.<sup>46</sup> Accordingly, this Section limits itself to: the law of the place of the wrong,<sup>47</sup> the law of the flag,<sup>48</sup> the allegiance or domicile of the injured seaman,<sup>49</sup> and the allegiance of the defendant shipowner.<sup>50</sup> Importantly, the test is not a mere counting exercise; on the contrary, “in determining whether [a state] has an interest in applying its law, we must review the substance of those contacts by analyzing both the policies underlying the issues on which the dispute centers and the factual contexts under which the dispute arose.”<sup>51</sup>

#### a. Place of the Wrongful Act

Unsurprisingly, courts have found that the place of the wrongful act has little or no bearing on state interests. It should probably be said that when courts refer to the place of the wrongful act they are referring not to the ship (which is governed by the law of the flag), but rather to the waters where the ship is located.<sup>52</sup> One immediate problem is the high seas—waters that belong to no state.<sup>53</sup> They are in effect a legal void unregulated by any law.<sup>54</sup> Hence the law of the place of the wrong basically ceases to exist, and no law would govern events or transactions that occur at sea as a matter of territoriality.

But even with respect to acts taking place in territorial waters, U.S. courts have discarded the law of the place of the wrong. There are three principal reasons for this: one, the law to be applied is fortuitous, triggering no state interests;<sup>55</sup> two, the use of territorial waters as a choice-of-law factor could frustrate commerce by subjecting ships to a multiplicity of laws depending upon where ships happen to be

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45. *Lauritzen*, 345 U.S. at 589–90.

46. *Id.* at 590–91.

47. *Id.* at 583–84.

48. *Id.* at 584–86.

49. *Id.* at 586–87.

50. *Id.* at 587–88.

51. *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1179 (11th Cir. 2009).

52. *Lauritzen*, 345 U.S. at 583–84; *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 383–84 (1959); *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426, 427 n.1 (2d Cir. 1966). However, at least one court has found that the wrongful act occurred where the conduct leading to the ultimate harm took place instead of the place of the ultimate harm. *Cooper*, 575 F.3d at 1175 (finding that the negligence on land and not the injury at sea resulting from that negligence was the wrongful act).

53. *Lauritzen*, 345 U.S. at 583 (stating that the law of the sea “includes, of course, the high seas as to which the law was probably settled and old when Grotius wrote that it cannot be anyone’s property and cannot be monopolized by virtue of discovery, occupation, papal grant, prescription or custom”).

54. *Id.*

55. *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392, 1396–97 (2d Cir. 1976) (“That the Plaintiff’s injuries occurred off the coast of the United States is purely fortuitous, and a factor of minimal importance in supporting application of the Act. Standing alone we believe that it is not a substantial contact with the United States, and accordingly we uphold the dismissal of Plaintiff’s Jones Act claim on the ground of insufficiency.”); *Romero*, 358 U.S. at 384 (“The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of the injury.”).

in their voyages;<sup>56</sup> and three, the use of the law of the place of the wrong could create international friction.<sup>57</sup>

Courts have not elaborated much on the fortuity point other than to discard the place of the wrongful act as arbitrary and perhaps somewhat unfair.<sup>58</sup> As to frustration of trade, the law of the place of the wrong serves the interests of no state and certainly not the interests of the international community. As *Romero* powerfully put it:

To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country.<sup>59</sup>

The law of the place of the wrong could also create foreign-relation tensions because “such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulations of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations.”<sup>60</sup>

#### b. Law of the Flag

In contrast to the law of the place of the wrong, “the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag.”<sup>61</sup> Under this principle, a vessel is essentially (if somewhat fictionally) deemed a floating piece of a state.<sup>62</sup> Unlike the law of the place of the wrong, courts have found that the law of the flag promotes, rather than stifles, consistency in the law, a feature that tends to facilitate trade.<sup>63</sup> As *Lauritzen* explained, “the law of the flag [applies] on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.”<sup>64</sup> Finally, it is also rather obviously protective of international comity.<sup>65</sup>

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56. *Lauritzen*, 345 U.S. at 584 (stating that “the territorial standard is . . . unfitted to an enterprise conducted under many territorial rules and under none”); *Romero*, 358 U.S. at 384.

57. *Romero*, 358 U.S. at 384.

58. *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426, 427 n.1 (2d Cir. 1966); see also *Romero*, 358 U.S. at 384 (“The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury.”).

59. *Romero*, 358 U.S. at 384; *Tsakonites*, 368 F.2d at 427 n.1.

60. *Romero*, 358 U.S. at 384.

61. *Lauritzen*, 345 U.S. at 584.

62. *Id.* at 585; S.S. “*Lotus*” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) no. 10, at 26 (Sept. 7).

63. See Colangelo, *supra* note 33, at 722.

64. *Lauritzen*, 345 U.S. at 585.

65. *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426, 429 (2d Cir. 1966).

However, this is not to say that the law of the flag *necessarily* applies in all situations<sup>66</sup> (if that were the case, this would be a very short Section indeed). The very fact that courts engage in extensive analyses of multiple factors belies that conclusion. And more concretely, courts have found that certain combinations of circumstances render the law of the flag inapplicable, explaining that it can be displaced by a “heavy counterweight.”<sup>67</sup> Thus, in some cases, “though the flag of the ship and the owners of the vessel were foreign, the American citizenship or domicile of the seaman and the occurrence of the tort in the waters of the United States still led the courts to apply [U.S. law].”<sup>68</sup> In another prominent example, where U.S. shipowners have used “foreign flags of convenience” to avoid U.S. law, “courts have often ignored the law of the flag in order ‘to enforce against American shipowners the obligations which our law places upon them.’”<sup>69</sup> In other words, courts have been willing to “look through” the law of the flag to impose U.S. law on “American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag.”<sup>70</sup> In addition, courts have indicated that “sufficient presence and intent to be deemed a resident and domiciliary of a state” also may displace the law of the flag,<sup>71</sup> as well as situations where parties own all of the stock in a shipping corporation in one state but have selected another state’s flag.<sup>72</sup>

In this vein, the Supreme Court in *Hellenic Lines, Ltd. v. Rhoditis*—a case in which a shipping company’s base of operations was determinative over the law of the flag—observed, “the flag that a ship flies may, at times, alone be sufficient . . . [but] the significance of one or more factors must be considered in light of the national interest served by the assertion of [U.S. law].”<sup>73</sup> Ultimately, although “the flag is to be given paramount consideration,” allegiance of the shipowner and allegiance of the injured seaman “are of such import that they may override the law of the flag of the vessel.”<sup>74</sup> This observation brings us to those two factors, elaborated to a large extent already.

### c. Domicile of the Injured

In keeping with an interest methodology, the Supreme Court has found that “each nation has a legitimate interest that its nationals and permanent inhabitants be not” harmed or deprived of a remedy.<sup>75</sup> This is classic conflict-of-laws analysis:

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66. See generally T.D.S., *Admiralty Choice of Law: Lauritzen v. Larsen Applied*, 47 VA. L. REV. 1400, 1409–10 (1961) (noting “a liberal path to be followed by the courts” in applying U.S. law over the law of the flag).

67. *Tsakonites*, 368 F.2d at 427–28.

68. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 440 (2d Cir. 1959).

69. *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir. 1974) (quoting *Lauritzen*, 345 U.S. at 587).

70. *Bartholomew*, 263 F.2d at 442.

71. *Id.*

72. *Moncada*, 491 F.2d at 473.

73. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308–09 (1970).

74. T.D.S., *supra* note 66, at 1406, 1406 n.34 (collecting cases).

75. *Lauritzen v. Larsen*, 345 U.S. 571, 586 (1953); see also *Uravic v. F. Jarka Co.*, 282 U.S. 234, 238–39 (1931); *Gambera v. Bergoty*, 132 F.2d 414, 416 (2d Cir. 1942); *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93, 95 (S.D.N.Y. 1953).

states have an interest in their domiciliaries and will apply their laws to allow recovery.<sup>76</sup> Of particular import here is the nature of the law at issue. Hence the Jones Act, mentioned above,<sup>77</sup> has “liberal purposes”<sup>78</sup> that were “designed for the protection of seamen”<sup>79</sup> aboard seafaring vessels. And thus, courts apply it liberally to afford relief.<sup>80</sup> More broadly, “the inquiry should be directed toward determining what jurisdiction is primarily concerned with plaintiff’s welfare.”<sup>81</sup> Finally, it should be stressed that this factor does not require citizenship; domicile or residence is enough.<sup>82</sup>

#### d. Allegiance of the Defendant

Perhaps the most expounded upon factor is the allegiance of the defendant. Interestingly, this factor runs both ways. That is to say, it sometimes protects defendants from liability, and it sometimes imposes liability to vindicate state interests. In line with standard international law principles of jurisdiction,<sup>83</sup> a state “is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.”<sup>84</sup>

As explained above, where U.S. citizens or domiciliaries have attempted to use a foreign flag to deflect the application of U.S. law, courts have “pierced the flag” to get at the underlying U.S.-based ownership to allow recovery under U.S. law.<sup>85</sup> By contrast, and sensitive to foreign relations frictions—a concern that should be familiar by now—courts have used a ship’s foreign status as a reason to deny application of U.S. law based explicitly on an interest analysis.<sup>86</sup> Thus, in *Rhoditis*, the shipping company’s U.S. allegiance outweighed the law of the foreign flag.<sup>87</sup>

76. See *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464, 467 (5th Cir. 1966) (“In the context of this case, we believe the most significant choice of law factor to be the nationality of the injured and deceased seamen.”).

77. See cases cited *supra* notes 21–22.

78. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 441–42 (2d Cir. 1959) (describing the Jones Act as “a broadly worded, liberally construed statute designed for the protection of seamen”); see *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1171 (11th Cir. 2009) (describing “the pro-plaintiff nature of federal maritime law”).

79. *Bartholomew*, 263 F.2d at 442.

80. See, e.g., *id.* at 449 (Lumbard, J., concurring); *Cooper*, 575 F.3d at 1171 (allowing third-party complaint to proceed under federal maritime law).

81. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 318 (1970) (Harlan, J., dissenting).

82. See *Bartholomew*, 263 F.2d at 442 (“We also think the evidence overwhelmingly establishes that Bartholomew had sufficient presence and intent to be deemed a resident and domiciliary of the United States for the purpose of determining whether or not the Jones Act is applicable.”).

83. See S.S. “*Lotus*” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) no. 10, at 18–20 (Sept. 7).

84. *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941).

85. See cases cited *supra* notes 75–84; *Rhoditis*, 398 U.S. at 310.

86. *Lauritzen v. Larsen*, 345 U.S. 571, 587–88 (1953).

87. *Rhoditis*, 398 U.S. at 310. In this respect, *Rhoditis* can thus be said to have added another factor to *Lauritzen*’s test: the base of operations, though that may also be seen as incorporated into the allegiance of the defendant shipowner in *Lauritzen*’s test. See *id.*

And in *Romero*, the Supreme Court denied application of U.S. law based on “the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations.”<sup>88</sup> Lower courts have adopted this reasoning: for example, justifying the application of Dutch over U.S. law because “foreign corporations with principal places of business in the Netherlands . . . strongly favor[] the application of Dutch law.”<sup>89</sup>

### C. *More to be Done*

The *Lauritzen* factors provide a good start to evaluating choice of law. Yet they still leave something to be desired—namely, they direct decision-makers to identify and weigh interests, but they do not really instruct courts on *how* to weigh those interests. That is to say, rarely do courts dive deeper into the underlying policies motivating the state interests in order to measure one interest against another. As a result, the law has been typified by the “vagueness inherent in the general and undefined direction in *Lauritzen* for the ‘valuing’ and ‘weighing’ of the various facts or groups of facts” that create state interests and the “lack of any common principle of decision or method of approach to the problem.”<sup>90</sup> Indeed, one critique accuses courts of decision-making “based on mere dialectic manipulation or guesswork.”<sup>91</sup> It is hoped that the present work will enrich maritime conflict rules to better reflect considerations like peace and trade held dear to the international system, thereby supplying a common principle of decision.

### D. *Contract*

A word on contract: as with any customary law, parties largely can contract around that law.<sup>92</sup> Parties can therefore contract for the applicable law should a dispute arise. Choice-of-law clauses have long been a part of the private international law of conflict of laws in the United States and are prevalent abroad,<sup>93</sup> constituting, for example, “a gravamen of continental conflicts doctrine and practice” since the Middle Ages.<sup>94</sup> As early as 1825, the Supreme Court called them a “principle of universal law.”<sup>95</sup> The *Restatement (Second) of Conflict of Laws* builds them into Sections 187 and 188.<sup>96</sup>

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88. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 384 (1959).

89. *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1176 (11th Cir. 2009).

90. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 439 (2d Cir. 1959).

91. *Id.*

92. There are limits, as we will see below. It is the same in public international law. Parties generally can contract around custom via treaty—within limits. For example, State A and State B cannot treaty around the norm against genocide.

93. Council Regulation 593/2008, art. 4, 2008 O.J. (L 177) 1, 11 (EC); SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS* 442 (3d ed. 2012).

94. SYMEONIDES & PERDUE, *supra* note 93, at 442.

95. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825).

96. The *Restatement (Second) of Conflict of Laws* provides in § 187: “(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in

The basic thrust of choice-of-law clauses, or what has come to be known as party autonomy,<sup>97</sup> is that they are enforceable unless they violate some public policy of the state most interested in the dispute.<sup>98</sup> Thus, courts have held choice-of-law clauses unduly limiting a seaman's U.S. statutory remedies "void as a matter of public policy."<sup>99</sup> In line with this jurisprudence, international maritime choice of law does not heed choice-of-law agreements as determinative but considers them only in relation to state and international interests.<sup>100</sup> For example, many of the cases present a conflict of laws between the U.S. Jones Act, which again provides broad remedies for seamen on the one hand, and compensation schemes of other states, which operate as quasi-contractual agreements between the state and seamen on the other hand.<sup>101</sup> Even more demonstrative, courts have found that signing a ship's articles, in which a seaman "agreed to be subject to th[e] laws" of the foreign nation, was not on its own determinative but weighed in favor for foreign law as a matter of respect for "[i]nternational comity."<sup>102</sup>

Passengers' contracts with cruise lines also regularly contain choice-of-law clauses.<sup>103</sup> As with contracts governing seamen's travel, these clauses also may be abrogated if they are contrary to the public policy of the most interested state.<sup>104</sup> In *Long v. Holland America Line Westours, Inc.*, for example, the plaintiff sued Holland America in an Alaska court for negligence after she fell and injured herself.<sup>105</sup> The contract contained a choice-of-law clause providing for the application of Washington state law.<sup>106</sup> She challenged the choice-of-law clause as unenforceable as contrary to public policy, and the court agreed.<sup>107</sup>

Important for our purposes is that the party autonomy analysis in *Long* did not automatically apply forum law as the applicable law in the absence of the choice-of-law clause.<sup>108</sup> Rather, the court engaged in an independent choice-of-law determination of the state whose law would apply absent the choice-of-law clause; the state with the greatest material interest in the dispute; and whether enforcing the

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their agreement directed to that issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971). In § 188, it provides for default rules to apply "in the absence of an effective choice of law by the parties." *Id.* § 188.

97. SYMEONIDES & PERDUE, *supra* note 93, at 442.

98. *Lauritzen v. Larsen*, 345 U.S. 571, 587–88 (1953).

99. *Williams v. Royal Caribbean Cruises, Ltd.*, No. 10-24156-Civ-COOKE/BANDSTRA, 2011 U.S. Dist. LEXIS 44101, at \*5–6 (S.D. Fla. Apr. 18, 2011) (invalidating choice-of-law clause providing for application of Norwegian law); *see also* *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123–24 (11th Cir. 2009); *Matthews v. Princess Cruise Lines, Ltd.*, 728 F. Supp. 2d 1326, 1331–32 (S.D. Fla. 2010).

100. *See infra* Part III.

101. *See Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 307–11 (1970); *Lauritzen*, 345 U.S. at 575–77.

102. *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426, 429 (2d Cir. 1966).

103. *See Lauritzen*, 345 U.S. at 588–89; *see generally* cases cited *supra* note 99.

104. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (AM. L. INST. 1971).

105. 26 P.3d 430, 431 (Alaska 2001).

106. *Id.*

107. *Id.* at 432.

108. *Id.* at 432–34.

chosen law would be contrary to a fundamental public policy of that state.<sup>109</sup> The party autonomy analysis thus invites its own independent choice-of-law analysis that takes into consideration the interests of other states, which ties directly into the Section above and shows why international choice-of-law analysis is so critical.

## II. FOREIGN NATIONS' LAWS

Other countries have maritime choice-of-law rules similar to those of the United States, in particular exhibiting a strong preference for the law of the flag. As with U.S. law, Canadian law uses the law of the flag to determine seamen's rights and liabilities to shipowners, provides that this rule is established in international law, and even cites to U.S. Supreme Court decisions for this proposition.<sup>110</sup> Indeed, the reason for this is to promote international relations and trade. As one court noted,

[B]ecause of the importance of encouraging commercial exchanges between nations and of the resulting importance of protecting and preserving the international character of shipping, where the rights of the crew are involved and where there exists any real doubt as to whether the law of the flag or that of the forum is to be applied, admiralty courts should, whenever possible, apply the law of the flag to determine the rights of the crew with regard to their employers for nothing can constitute a more essential or integral part of a ship than the crew which sails it.<sup>111</sup>

Moreover, according to Canadian courts, this rule stems from international law, strongly indicating that Canada views its maritime conflicts rules as resulting from custom, citing and quoting U.S. law for this proposition:

There is no doubt that to determine the rights of seamen against the owners of the ship on which they are serving, which is the subject matter of the action, the law of the ship's port of registry is to be looked at. This is required by "the well-established rule of international law that the law of the flag state ordinarily governs the intern[al] . . . affairs of a ship" (*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), at page 21), a rule

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109. *Id.* at 432–35 (following the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. L. INST. 1971)).

110. *Fernandez v. Ship Mercury Bell*, [1986] 3 F.C. 454, para. 5 (Can.). There, the court found Canadian law preferences the law of the flag, *see also* *Gronlund v. Hansen*, [1969] 4 D.L.R. 435 (Can.), and further indicates this is custom by citing not only the rule but also the fact it is "required by 'the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship.'" *Fernandez*, 3 F.C. at para. 5 (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963)).

111. *Metaxas v. Ship "Galaxias"*, [1990] 2 F.C. 400, para. 20 (Can.). Interestingly, however, Canadian law also provides that another law other than the law of the flag may apply to issues that have a more substantial connection with a foreign jurisdiction. For example, in *Shibamoto & Co. v. Western Fish Producers, Inc.*, [1991] 3 F.C. 214, para. 37 (Can.), the trial division of the Federal Court of Canada held that "it is well established [in Canada] that where questions of conflict of laws arise, this country recognizes [that] the law of the place where the lien arose . . . [governs] the question of whether the lien accrues or not." *Id.*

formally confirmed in section 274 of the *Canada Shipping Act*, R.S.C. 1970, c. S-9 . . . .<sup>112</sup>

Similarly, the Spanish Civil Code provisions on conflict of laws provides in Article 10 that “[v]essels . . . and all rights created thereon, shall be subject to the law of their flag.”<sup>113</sup> U.K. law as well provides that the law of the flag is of paramount importance in its interplay between the Private International Law (Miscellaneous Provisions) Act of 1995 and maritime law. The Act provides that “[t]he general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.”<sup>114</sup> Under U.K. law, the law of the flag is the law of the place of the delict.<sup>115</sup>

One area in which the United States may be moving beyond foreign law is its willingness to discard the law of the flag where other interests are of heavier weight.<sup>116</sup> The reason for doing this, however, is not forum parochialism, but rather it is taking into consideration the relevant interests of the respective states.<sup>117</sup> Thus, where the law of the flag does not represent the true ownership or base of operations of a ship, it may not capture the true interests of the particular state whose flag the ship flies.<sup>118</sup> The U.K. Private International Law (Miscellaneous Provisions) Act of 1995 also opens up this possibility. As noted, it creates a default rule for the law of the place of the tort, i.e., the law of the flag under U.K. maritime law, as governing.<sup>119</sup> But it then carves out an exception, namely:

1. If it appears, in all the circumstances, from a comparison of—

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112. *Metaxas*, 2 F.C. at para. 16.

113. CÓDIGO CIVIL art. 10(2) (Spain).

114. Private International Law Act 1995, c. 42, § 11(1) (Eng.).

115. *Roerig v. Valiant Trawlers Ltd.* [2002] EWCA (Civ) 21 [961], [964] (Eng.) (“It is not in dispute that under the general rule there laid down the applicable law is English law because the accident to the deceased occurred on an English-registered trawler, and thus that is the law ‘in which the events constituting the tort or delict in question’ occurred, or at the very least, the law of the country ‘where the individual was when he sustained the injury.’”).

116. *See supra* Sections I.B.1.b–c. There are instances of other statements to this effect. William Tetley, *The Law of the Flag, ‘Flag Shopping,’ and Choice of Law*, 17 TUL. MAR. L.J. 139, 180–83 (1993). One prominent example is *Chartered Mercantile Bank of India, London, & China v. Netherlands India Steam Navigation Co.* [1883] X QBD 521 (Eng.). Although the vessel in question flew the Dutch flag, the British law was found applicable because, according to Lord Justice Brett, “the Dutch company had no power to deal with the ships. Every appointment with regard to the ships was made by the English company,” and “the mere fact of obtaining a register in Holland and carrying the Dutch flag” did not determine the applicable law. *Id.* at [535]; *see also id.* at [544] (Lord Justice Lindley).

117. *See sources cited infra* note 121.

118. *See sources cited infra* note 121; *see also* Powell, *supra* note 1, at 266 (“Today, FOC [Flags of Convenience] vessels account for a disproportionate amount of shipping vessels. With State-vessel ties as flimsy as a few sheets of paper, it is conceivable that these States lack the interest in capacity to regulate all vessels carrying their flag.”).

119. *See* Private International Law Act 1995, c. 42, § 11(1) (Eng.).



- a. the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
- b. the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

2. The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute to the tort or delict in question or to any of the circumstances or consequences of those events.<sup>120</sup>

The factors enumerated in Section 2 of the Act capture the interests in *Lauritzen*'s flag piercing analysis, particularly "factors relating to the parties."<sup>121</sup> In *Roerig v. Valiant Trawlers, Inc.*, for example, the Court of Appeal, Civil Division was asked to apply this exception to find for Dutch law where the tort occurred on a British flag ship but the plaintiff was a Dutch national, and the ship's parent company was Dutch.<sup>122</sup> Although the court found that the ordinarily applicable law of the flag had not been displaced by the exception,<sup>123</sup> nothing in the opinion suggested that the exception would not apply to maritime torts in appropriate cases.

Interestingly, the Rome II Regulation, which is the tort choice-of-law rule for E.U. countries, says nothing at all about maritime torts; yet its general rule for torts leaves open the exception to the law of the flag carved out by U.S. and U.K. law.<sup>124</sup> Article 15 provides that "[t]he principle of *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States,"<sup>125</sup> leading to the law of the flag on the fiction that the flag vessel is a floating piece of the state. Yet it carves out an exception, explaining that "departure from these rules [is appropriate] where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country."<sup>126</sup> Importantly, the Rome II Regulation was adopted to ensure "the proper functioning of the international market"<sup>127</sup> and to encourage "conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the

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120. *Id.* § 12.

121. *Id.*

122. *Roerig v. Valiant Trawlers Ltd.*, [2002] EWCA (Civ) 21 [961], [961] (Eng.).

123. *Id.* at [962].

124. Commission Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations (Rome II), art. 14–15, 2007 O.J. (L 199) 40 (EC).

125. *Id.* at art. 15.

126. *Id.* at art. 14.

127. *Id.* at art. 1.

court in which an action is brought.”<sup>128</sup> These purposes support an international approach to maritime conflict of laws.

A question thus immediately arises between the descriptive and the normative here: namely, whether U.S. (and possibly U.K. and E.U.) law captures current international law, or alternatively, whether it should—a point taken up in a more general sense in the next Part. I submit that even if U.S. practice does not accurately capture current international law by looking through the law of the flag in appropriate cases, it should go forward based on the overall objectives of the system in line with the features already discussed of international law more generally: peace and trade. If actors can circumvent the truly interested state’s laws by flying what are generally referred to as “flags of convenience,”<sup>129</sup> comity and mutual respect among nations suffer. Thus, U.S. practice in this regard ought to be seen as a development in international conflict-of-laws rules.

Finally, with the possible exception of Canada,<sup>130</sup> it is unclear from these foreign directives whether the default application of the law of the flag is merely state practice or constitutes state practice accompanied by *opinio juris* in these conflict-of-laws situations. That is to say, it is unclear whether these directives are merely indicators of a general principle of international law or whether they indicate custom. In this respect, *Lauritzen*’s claim that it is applying international law may only be partly true: it may be applying only a general principle of international law but not customary international law based on the *opinio juris* of other states in these conflict-of-laws situations. Yet at the same time, there are a host of international legal instruments in other areas that prescribe the law of the flag as of paramount importance.<sup>131</sup> The nature of these instruments as international law may be indicative of *opinio juris* because they amount to states undertaking a legal obligation that preferences the law of the flag.

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128. *Id.* at art. 6.

129. Powell, *supra* note 1, at 263; *see also* Tetley, *supra* note 116, at 173. For this reason, flags of convenience have come under serious criticism. Martin Davies, for example, notes that:

[M]any countries operate ‘open registers’ that do not require shipowners to be citizens of the country of registry, the only ‘genuine link’ with that country being a desire to have one’s ship registered there.

...

It follows that in the large majority of cases, it is inaccurate—wildly inaccurate—to assume that the law of a ship’s flag has anything to do with the ship’s ownership.

Martin Davies, *Choice of Law in Determining the Ownership of Ships*, in *THE WORLD OF MARITIME AND COMMERCIAL LAW: ESSAYS IN HONOUR OF FRANCIS ROSE* 107, 110 (C. Mitchell & S. Watterson eds., 2020).

130. *See* cases cited *supra* note 110 and accompanying text.

131. Tetley, *supra* note 116, at 149–52.

### III. INTERNATIONAL LAW

A systems view of international law treats this body of law as analogous to a biological organism.<sup>132</sup> International law differs from top-down systems of law in the world because it grows organically from the practice of states accompanied by *opinio juris*.<sup>133</sup> Under a systems view, the system evolves for the purpose of its own survival; it is self-perpetuating through rules that tilt toward peace and trade over time. An international conflict methodology fits neatly within this view.

That maritime conflict-of-laws rules purport to be international law makes a great deal of sense, of course, because they are in the business of resolving disputes with international elements. But it also makes them an exception to much other maritime law, which is parochial in nature.<sup>134</sup> That is to say, maritime rules regulating tort, contract, etc., can be national law peculiar to individual nation states.<sup>135</sup> Maritime conflict rules, by contrast, claim to be an international law common to all. This is a major conceptual and doctrinal distinction, as one might surmise. While the substantive or “internal” national laws of states may conflict, conflict-of-laws rules can swoop in and resolve those conflicting internal laws through a choice-of-law methodology acceptable to all because it is an international law agreed upon by all.

Suppose X happens on State A’s vessel but involves State B’s nationals, which law applies? The conflict-of-laws rule might say the applicable law is where the act in question takes place, leading to State A law. Moreover, this is not some ad-hoc rule for choosing the applicable law; it is an *a priori* methodology agreed to by all states, including State B. And because it is the same everywhere, presumably the same choice of law would apply irrespective of where suit is brought. The opposite of using international law would naturally be to use parochial choice-of-law rules to resolve conflict dilemmas. Here the rules may or may not be agreed to by other states and thus may not have that *a priori* consent. Resolution of the conflict-of-laws dispute will also depend largely upon where suit is brought, rendering it arbitrary because only one party has control over that variable, and the forum will choose the law according to its own parochial conflict methodology.

For reasons that this hypothetical suggests, we may want an international law conflict-of-laws methodology. As discussed at length already, international conflict-of-laws rules aim ultimately toward two goals: peace and trade. They take into consideration other states’ interests through the vehicle of a commonly agreed upon methodology (one that, as we have seen, even more purposefully and substantively takes into account other states’ interests than the simplistic hypothetical methodology posed above) and create certainty for commercial actors

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132. Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. INT’L L. & POL. 1, 3 (2016).

133. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 757 (2001).

134. See generally DAVID W. ROBERTSON ET AL., *ADMIRALTY AND MARITIME LAW IN THE UNITED STATES* (2d ed. 2008); DAVID J. SHARPE ET AL., *CASES AND MATERIALS ON ADMIRALTY* (6th ed. 2017).

135. See generally ROBERTSON ET AL., *supra* note 134; SHARPE ET AL., *supra* note 134.

looking to predict how law will treat their behavior. This is in line with international law rules more generally. As noted, international law is fundamentally an autopoietic system; that is, it develops to perpetuate itself or to ensure its own survival.<sup>136</sup> And its rules veer toward peace and trade because they help achieve this objective.<sup>137</sup> For the absence of peace and trade is war and anarchy, viz. the death of the system.

There is also a rule-of-law component here: the more legal actors can predict the law applicable to their activities, the more they will feel free to engage in that activity.<sup>138</sup> The activity at issue here is largely international trade, and we largely consider international trade as beneficent to overall social welfare.<sup>139</sup> And international conflict rules encourage more predictability than parochial rules. We might think of this as primary predictability and secondary predictability. Primary predictability relates to how the law will treat my primary conduct in the real world. In other words, can I predict how law will treat my driving, or more to the point, my international business transaction, before I engage in it? Secondary predictability relates only to how the law treats my conduct in a particular forum after I have engaged in it. In other words, now that I am before the court of State A, what law will State A law apply to me? We are concerned here with primary predictability because that is the type of behavior—trade and commerce—that we want to encourage. Because a parochial approach is so forum-centric—the applicable law depends on the forum in which suit is filed—and only one party by and large controls that variable, a parochial approach provides less primary predictability than an international approach, for the choice of forum can occur long after I have engaged in the activity (not to mention the fact that it prompts the irresistible urge to forum shop, which further interferes with the smooth working of the system).

Although it does not deal at length with maritime choice of law, the *Restatement (Second) of Conflicts of Law* adopts a systems view for resolving domestic conflicts. Section 6 is the “cornerstone”<sup>140</sup> of its choice-of-law methodology<sup>141</sup> and lists a number of factors courts should consider in resolving choice-of-law disputes. They are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and

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136. Colangelo, *supra* note 132, at 22.

137. *Id.* at 5.

138. *See id.* at 20–21.

139. *See id.* at 6.

140. SYMEONIDES & PERDUE, *supra* note 93, at 166.

141. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971).

(g) ease in the determination and application of the law to be applied.<sup>142</sup>

According to the comments section, “[p]robably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them.”<sup>143</sup> And “[r]ules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.”<sup>144</sup> This fits snugly with the present analysis’s focus on maritime conflict rules being international, rather than parochial in nature, and promoting peace and trade.

It is hoped that the *Restatement (Third) of Conflict of Laws* takes this cue and addresses for the first time in a systematic way maritime conflict rules under *Lauritzen*’s international approach. Yet this may not be the case. The Draft Restatement breaks from the *Restatement (Second) of Conflict of Laws* in adopting a “two-step” theory, sparking a “major theoretical realignment in favor of a school of thought once generally known as ‘governmental interest analysis.’”<sup>145</sup> While this approach asks courts to determine a statute’s scope using ordinary methods of statutory construction to discern whether a state has an interest in applying its law (and is thus consistent with the interest approach *Lauritzen* recommends),<sup>146</sup> the father of the governmental interest analysis, Brainerd Currie,<sup>147</sup> advocated for a strong preference for the *lex fori* any time a state had an interest in the dispute.<sup>148</sup>

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142. *Id.*

143. *Id.* § 6 cmt. d.

144. *Id.*

145. Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 *YALE L.J.F.* 266, 267 (2018).

146. *See id.* at 268.

147. *Id.* at 271–72, 278.

148. SYMEONIDES & PERDUE, *supra* note 93, at 138 (“Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.”); Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 *U. CHI. L. REV.* 463, 464 (1960) (summarizing Currie’s approach as holding that “[i]f the court finds that the forum state has no interest in the application of its laws and policy, it should apply the law of the forum even though the foreign state also has such an interest and, *a fortiori*, it should apply the law of the forum if the foreign state has no such interest”); *id.* at 474 (“[According to Currie], the court would simply advance the interests of the forum state if any are in issue; if domestic interests are not in issue, the court would effectuate the foreign interests which are at stake in the litigation.”); *see also* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *DUKE L.J.* 171, 176 (1959) (“[W]here several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to ‘weigh’ the competing interests, or evaluate their relative merits, and choose between them accordingly. . . . [W]hen the court, in a true conflict situation, holds the foreign law applicable, it is assuming a great deal: it is holding the policy, or interest, of its own state

Currie's approach was a clear nod to a parochial approach to conflict-of-laws disputes,<sup>149</sup> viewing courts as the instruments of the forum state's policy—a policy that should trump even where foreign states have greater interests.<sup>150</sup> This approach was purposefully “marginalized in the *Restatement (Second)*,”<sup>151</sup> which as noted had focused additionally on factors “sensitive to the uniquely interstate nature of conflict of laws.”<sup>152</sup>

### CONCLUSION

U.S. maritime conflicts rules appear to capture international law, at least as far as general principles are concerned. Whether they capture international custom is more debatable. They have a distinctly international bend by taking into consideration the interests not only of the forum state but also of other interested states in the system. Indeed, they may even point the way forward in new ways by looking through “flags of convenience” to get at true state interests so that the law of the most interested state is applied to a dispute even if it is not the law of the flag the vessel nominally flies. By looking to the interests of all involved states, an international approach promotes two key objectives of the international legal system: maintaining peaceful relations among states and encouraging commerce through predictable and universally applicable choice-of-law rules. These objectives should anchor maritime choice of law going forward.

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inferior and preferring the policy or interest of the foreign state. . . . [T]he task is not one to be performed by a court.”); Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 263 (1958).

149. SYMEONIDES & PERDUE, *supra* note 93, at 139 (“The new critics seem to concur with the old ones and among themselves that interest analysis is ‘chaotic,’ ‘unpredictable,’ ‘parochial,’ ‘chauvinistic,’ and possibly unconstitutional.”); *id.* at 148 (“[Currie’s] approach to conflicts placed him squarely into the ‘unilateralist’ camp.”).

150. *Id.* at 243 (“In summary, Currie thought that the *lex fori* should apply in every case in which the forum has an interest, even if that interest is not the stronger one.”). For examples of this approach, see *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964) (“Courts are instruments of state policy. . . . In litigation Oregon courts are the appropriate instrument to enforce this policy.”); *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972) (“[I]f there are significant contacts—not necessarily the most significant contacts—with Kentucky [the forum], the Kentucky law should be applied.”). But see *id.* at 831 (Reed, J., dissenting) (describing “Kentucky as a forum which will instantly apply its own law upon any excuse whatever, regardless of policy considerations of sister states to the contrary”), for a criticism of the majority’s holding.

151. Brilmayer & Listwa, *supra* note 145, at 269.

152. *Id.* at 271.