The Pennsylvania Rule: No Longer the Rule?

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I. THE MANY CHOICES OF CHOICE OF LAW 132
II. *THE PENNSYLVANIA* RULE AND THE 1910 COLLISION CONVENTION 140

The United States has not ratified the Brussels Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, 1910,[1] commonly referred to as the Brussels Collision Convention or the 1910 Collision Convention.[2] However, eighty-five jurisdictions have ratified the 1910 Collision Convention.[3] These include countries with significant, frequently traveled territorial waters and, as shown in the case law discussed below, 1910 Collision Convention countries flag a large portion of the world's operating vessels.[4] Despite the fact that the 1910 Collision Convention is not the law of the United States, U.S. district courts sitting in admiralty have been applying the 1910 Collision Convention increasingly in collision cases under a choice of law analysis. This application has lead to an increasing body of case

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1. The Mandu, 102 F.2d 459, 463, 1939 AMC 287, 293 (2d Cir. 1939), *cert. denied*, 311 U.S. 715 (1940); William Tetley, The Pennsylvania *Rule—An Anachronism?* The Pennsylvania *Judgment—An Error?*, 13 J. MAR. L. & COM. 127, 128 (1982).

2. This Article uses the latter term. International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, 212 Consol. T.S. 178, *reprinted in* 6 BENEDICT ON ADMIRALTY Doc. 3-2, 3-11 to 3-14 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 2007).

3. *Id.* at 3-15 to 3-17.

4. The United States Department of Transportation Maritime Administration (MARAD) reported in 2005 that of the top ten countries of ownership for vessels of 10,000 DWT or greater, six countries were parties to the 1910 Collision Convention. MARAD, World Merchant Fleet 2005, tbl. S-4, http://www.marad.dot.gov/marad_statistics (follow "World Merchant Fleet: 2005" hyperlink); 6 BENEDICT ON ADMIRALTY, *supra* note 2, at 3-15 to 3-17. In addition, the list of top ten countries of the World Merchant Fleet by flag included five countries that have ratified the 1910 Collision Convention. MARAD, *supra*, tbl. S-6; 6 BENEDICT ON ADMIRALTY, *supra* note 2, at 3-15 to 3-17.

law regarding the 1910 Collision Convention's use in the United States. Most recently the United States Court of Appeals for the Second Circuit ruled that when the 1910 Collision Convention applies, *The Pennsylvania* Rule does not apply because *The Pennsylvania* Rule is unique to U.S. substantive law and has no application under the 1910 Collision Convention.[5] The use of the 1910 Collision Convention in the United States under the choice of law analysis described below now means that in the majority of international casualty cases that are litigated in the United States, *The Pennsylvania* Rule will not apply.[6]

This Article discusses the courts' increasing reliance on the 1910 Collision Convention and the ramifications of the recent Second Circuit opinion.

I. THE MANY CHOICES OF CHOICE OF LAW

In the United States, courts examine a number of factors to determine which law should apply to a given case.[7] As discussed below, the factors evaluated are not always the same, and the importance of each factor varies significantly depending on the particular facts of each case. The guiding principal, however, is that the law common to the most significant factors should be applied. The factors the courts consider to be significant have changed over time, depending on the circumstances of individual cases and cannot always be predicted.

In the context of casualty litigation where claims and defenses are raised under the Carriage of Goods by Sea Act (COGSA),[8] and vessel interests petition for exoneration from, or limitation of, liability under the United States Limitation of Shipowner's Liability Act (U.S. Limitation Act),[9] choice of law is more than academic. Even before the most recent decision abrogating *The Pennsylvania* Rule, a court's application of the 1910 Collision Convention had the effect of changing the dynamics of a

5. *Otal Invs. Ltd.*, 494 F.3d at 51-52, 2007 AMC at 1827. The Second Circuit affirmed the lower court's decision regarding *The Pennsylvania* Rule, but reversed the sole-fault decision and remanded for apportionment of liability and a determination regarding damages. This Article discusses only the portion of the decision regarding *The Pennsylvania* Rule.

6. The law of the flag is a significant consideration in choice of law analysis. In 2005, MARAD reported that 739 vessels of 10,000 DWT or greater were U.S.-flag vessels. MARAD, *supra* note 4, tbl. S-4.

7. The United States Supreme Court identified the factors most often applied to determine applicable law in *Lauritzen v. Larsen*, 345 U.S. 571, 583-90, 1953 AMC 1210, 1219-25 (1953). *See infra* notes 18-27 and accompanying text.

8. 46 U.S.C.A. § 30701 note (West 2007).

9. *Id.* §§ 30505-30512.

casualty case in the United States.[10] The United States District Court for the Southern District of New York explained the important ramifications of choice of law decisions on the direction of a case:

> Both the law of the United States (since the decision in *United States v. Reliable Transfer Co.*) and of the Brussels Convention divide damages proportionately based on comparative fault. Under the Brussels Convention, liability is not joint and several. Under both Cuban and American law, however, liability for total damages is joint and several. Therefore, if Cuban law applied by virtue of the application of the *lex loci* rule or American law applied because the issue of division of damages was held to be procedural, the vessels would be jointly and severally liable.[11]

Where one or both vessels are seeking to limit their liability in a collision under the U.S. Limitation Act,[12] the application of the 1910 Collision Convention can reduce the claimants' potential recovery. Under U.S. maritime law, where liability is joint and several, the claimants can receive 100% of their proven awarded damages from the non-cargo-carrying vessel if that vessel is unable to limit its liability under the U.S. Limitation Act.[13] However, under article 4 of the 1910 Collision Convention, vessels are severally liable for damage to property[14] in proportion to their fault and cannot be held liable to any greater degree.[15]

Litigants recognize the 1910 Collision Convention's detrimental effect on cargo claimants' ability to recover damages in U.S. actions. In *Man Ferrostaal v. M/V Vertigo*, cargo claimants argued that application

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10. In *In re Otal Investments Ltd.*, the parties stipulated to the applicability of article 4 of the 1910 Collision Convention. No. 03 Civ. 4304, 2005 WL 2387485, at *1-2, 2005 AMC 2461, 2462-64 (S.D.N.Y. Sept. 29, 2005). The district court determined that because all three vessels involved in the accident flew flags of signatory states, the 1910 Collision Convention should apply in its entirety. *Id.*

11. *In re* Seiriki Kisen Kaisha, 629 F. Supp. 1374, 1393 n.1, 1986 AMC 913, 941 n.1 (S.D.N.Y. 1986) (citing United States v. Reliable Transfer Co., 421 U.S. 397, 1975 AMC 541 (1975)). The district court determined that the division of damages is substantive, not procedural and applied the law of the place of the collision. *Id.* at 1395, 1986 AMC at 944-45 (citing The Belgenland, 114 U.S. 355, 370 (1880); The Mandu, 102 F.2d 459, 1939 AMC 287 (2d Cir. 1939), *cert. denied*, 311 U.S. 715 (1940)).

12. The U.S. Limitation Act is generally considered procedural and is routinely applied in the United States. Karin v. Finch Shipping Co., 265 F.3d 268, 270, 2001 AMC 2618, 2632-33 (5th Cir. 2001); The Mandu, 102 F.2d at 463, 1939 AMC at 293-94.

13. 46 U.S.C.A. §§ 30505-30512.

14. In contrast, under the 1910 Collision Convention, vessels at fault are jointly and severally liable for death or personal injury to those on board. Henry V. Brandon, *Apportionment of Liability in British Courts Under the Maritime Convention Act of 1911*, 51 TUL. L. REV. 1025, 1028 (1977).

15. *See* The Mandu, 102 F.2d at 463, 1939 AMC at 293-94; Man Ferrostaal v. M/V Vertigo, 447 F. Supp. 2d 316, 320-21, 2006 AMC 2187, 2191 (S.D.N.Y. 2006).

of the 1910 Collision Convention conflicted with U.S. law allowing "innocent cargo" to recover its full damages.[16] As more fully explained below, the court considered U.S. policy a substantial argument, but ultimately determined that sophisticated cargo interests could protect themselves by contract and insurance if they had concerns about the application of the 1910 Collision Convention.[17]

In 1939, the Second Circuit considered the place of the collision the most important factor in its choice of law analysis, and relied on lex loci when it applied the law of Brazil to a collision between a Brazilian steamer, MANDU, and a German steamer, DENDERAH, in Brazilian territorial waters.[18] Germany and Brazil were both signatories to the 1910 Collision Convention.[19] As a result of the collision, the DENDERAH sank and most of her cargo was lost.[20] The Second Circuit described the lex loci rule as follows: "Liability for tort caused by collision in the territorial waters of a foreign country is governed by the laws of that country. That law not only determines the existence of liability but also generally determines the measure of it."[21] The Second Circuit additionally noted that both vessels were from 1910 Collision Convention states and that had the collision taken place on the high seas, the law common to the vessels would have governed.[22] However, the court did not undertake an analysis that included the vessels' flag states, finding instead that the occurrence of a collision in territorial waters was sufficient for lex loci to apply.

The court's reliance on lex loci was so dominant in *The Mandu* that commentators regarded lex loci as the only important contact in the case.[23] In 1953, the United States Supreme Court, in *Lauritzen v. Larsen*, explained that conflicts in maritime law should be resolved by valuing points of contact between the transaction and states whose laws are involved:

> Maritime law . . . has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are

16. 447 F. Supp. 2d at 321, 2006 AMC at 2192.
17. *Id.* at 324, 2006 AMC at 2196-97.
18. The Mandu, 102 F.2d at 463, 1939 AMC at 293.
19. *Id.*
20. *Id.* at 460, 1939 AMC at 288.
21. *Id.* at 463, 1939 AMC at 293 (citations omitted).
22. *Id.*, 1939 AMC at 294.
23. NICHOLAS J. HEALY & JOSEPH C. SWEENEY, THE LAW OF MARINE COLLISION 32 (1st ed. 1998).

> involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.[24]

The flag states of the vessels was only one of the different factors to be evaluated.[25] *Lauritzen* has become the seminal case for maritime choice of law.[26] However, its application in casualty cases has been tempered and refined by increased understanding of the nuances provided in the many varied cases that come before the courts. The factors in *Lauritzen* are not always applicable and, as the discussion below demonstrates, not always applied.

In *Lauritzen*, the Supreme Court identified the following criteria to be considered in choice of law analysis:

1. Place of the Wrongful Act . . . .
2. Law of the Flag . . . .
3. Allegiance or Domicile of the Injured . . . .
4. Allegiance of the Defendant Shipowner . . . .
5. Place of Contract . . . .
6. Inaccessibility of Foreign Forum . . . .
7. The Law of the Forum.[27]

In *Lauritzen*, a tort case, the Supreme Court explained the role of the aforementioned factors in a choice of law analysis, stating: "We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them."[28]

Lauritzen did not involve a collision; it involved a personal injury claim by Larsen, a Danish seaman, against a Danish owner of a Danish vessel.[29] Larsen, who wanted his claim governed by the Jones Act, suffered injury aboard the ship while the ship was in the port of Havana, Cuba.[30] He had joined the crew of the vessel in New York.[31] When he

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24. 345 U.S. 571, 582, 1953 AMC 1210, 1218 (1953).
25. *Id.* at 584-86, 1953 AMC at 1220-22.
26. *See* Man Ferrostaal v. M/V Vertigo, 447 F. Supp. 2d 316, 322, 2006 AMC 2187, 2193 (S.D.N.Y. 2006); La Seguridad de Centroamerica S.A. v. M/V Global Mariner, No. 01 Civ. 0456 (JSM), 2002 WL 530979, at *5, 2002 AMC 1999, 2005-06 (S.D.N.Y. Apr. 9, 2002).
27. *Lauritzen*, 345 U.S. at 583-90, 1953 AMC at 1219-25.
28. *Id.* at 583, 1953 AMC at 1219.
29. *Id.* at 573, 1953 AMC at 1211.
30. *Id.*, 1953 AMC at 1212.
31. *Id.*, 1953 AMC at 1211.

joined the crew, he signed the ship's articles, which were written in Danish and provided that his rights would be governed by both Danish law and by an employer's contract with the Danish seaman's union.[32]

The Supreme Court found that "Denmark has enacted a comprehensive code to govern the relations of her shipowners to her seagoing labor which by its terms and intentions controls this claim" and that Danish law should apply.[33] Thus, the Supreme Court reached the common sense conclusion that a Danish seaman, serving on a Danish ship under an employment contract that called for Danish law, should have his dispute against his Danish employer governed by Danish law rather than U.S. law. In *Lauritzen*, the law of Denmark was the law common to the more significant contacts: the law of the flag of the ship on which Larsen was injured, the law chosen in his employment contract, and the law of Larsen's own allegiance.

Despite the *Lauritzen* decision, U.S. courts sitting in admiralty rely heavily on the location of the collision to determine the applicable law.[34] Only eight years after the Supreme Court decided *Lauritzen*, the Second Circuit relied on *The Mandu* in *Lady Nelson v. Creole Petroleum Corp.* and again applied lex loci to determine that the 1910 Collision Convention should apply.[35] There, the court stated that "[h]ow damages in a both-to-blame collision in foreign territorial waters should be apportioned is governed by *lex loci*, here Trinidad."[36] *Lady Nelson* concerned a collision between the Canadian passenger ship, LADY NELSON, and the Venezuelan BARGE 75-8 in the territorial waters of Trinidad.[37] The Second Circuit did not mention *Lauritzen* in the *Lady Nelson* decision, nor did it undertake an analysis based on the *Lauritzen* factors.

In *In re Seiriki Kisen Kaisha*, the district court relied not on lex loci, but on the law common to the flags of both vessels.[38] The STENA

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32. *Id.*, 1953 AMC at 1211-12.

33. *Id.* at 575, 592, 1953 AMC at 1213, 1227.

34. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 14-9, at 132 (4th ed. 2004); HEALY & SWEENEY, *supra* note 23, at 31; JOHN WHEELER GRIFFIN, GRIFFIN ON COLLISION § 248, at 566 (1st ed. 1949).

35. 286 F.2d 684, 686, 1961 AMC 289, 292 (2d Cir. 1961). Although the proportionate fault rule of the 1910 Collision Convention should have been applied in *Lady Nelson*, the plaintiff failed to raise the issue until two years after the trial. *Id.* at 685, 1961 AMC at 291. Therefore, the Second Circuit declined to apply proportionate fault and affirmed the judgment for divided damages. *Id.* at 688, 1961 AMC at 296.

36. *Id.* at 686, 1961 AMC at 292.

37. *Id.* at 685, 1961 AMC at 290.

38. 629 F. Supp. 1374, 1395, 1986 AMC 913, 944-45 (S.D.N.Y. 1986).

FREIGHTER and the SEIRYU collided about eight and a half miles from the western end of Cuba.[39] "The Stena Freighter sustained damage and the Seiryu sank, becoming with her cargo a total loss."[40] The STENA FREIGHTER was registered in the Cayman Islands and the SEIRYU was registered in Japan, both of which had enacted the 1910 Collision Convention.[41]

The court determined that the collision occurred on the high seas rather than in the territorial waters of Cuba because the United States did not recognize Cuba's claim to territorial waters beyond three miles from Cuba's coast.[42] Citing old Supreme Court precedent, the court concluded that, because the collision took place on the high seas, the law common to both vessels, the 1910 Collision Convention, applied.[43] The court found it unnecessary to undertake an analysis based on the "modern choice of law principles" set forth in *Lauritzen* because the vessels were subject to the same foreign law by virtue of their flags.[44]

Although the weight given the locality principle in *The Mandu* was reinforced by Judge Friendly in *Lady Nelson*, subsequent case law demonstrates that the lex loci rule is not a wooden rule.[45] It has yielded when a law other than lex loci is common to the most significant contacts. When the lex loci rule has yielded, it has often yielded to apply the 1910 Collision Convention. Because the 1910 Collision Convention is a convention, it is, of course, more likely to be the law common to many contacts than the law of a single nation.

La Seguridad de Centroamerica S.A. v. M/V Global Mariner is instructive of both choice of law analysis and the unpredictability of courts' decisions in this area.[46] The case involved a collision between the M/V ATLANTIC CRUSADER and the M/V GLOBAL MARINER on the Orinoco River in Venezuela.[47] Although the collision occurred in Venezuela, which is not a 1910 Collision Convention state, the Southern District of New York court reasoned that because the 1910 Collision

39. *Id.* at 1392, 1986 AMC at 940.
40. *Id.*, 1986 AMC at 940.
41. *Id.* at 1392-93, 1986 AMC at 940.
42. *Id.* at 1393, 1986 AMC at 941-42.
43. *Id.* at 1395, 1986 AMC at 944 (citing RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 410(2) (1934); The Belgenland, 114 U.S. 355, 370 (1880)).
44. *Id.*, 1986 AMC at 944-45.
45. The Mandu, 102 F.2d 459, 463, 1939 AMC 287, 293 (2d Cir. 1939), *cert. denied*, 311 U.S. 715 (1940); Lady Nelson v. Creole Petroleum Corp., 286 F.2d 684, 686, 1961 AMC 289, 292 (2d Cir. 1961).
46. No. 01 Civ. 0456 (JSM), 2002 WL 530979, 2002 AMC 1999 (S.D.N.Y. Apr. 9, 2002).
47. *Id.* at *1, 2002 AMC at 1999.

Convention was the law common to most of the contacts, the 1910 Collision Convention applied.[48] The M/V GLOBAL MARINER was registered under the flag of England, the United Kingdom being a 1910 Collision Convention state, and was owned and operated by English and Scottish corporations.[49] The ATLANTIC CRUSADER was registered under the flag of Cyprus, whose owners and charterers were German and Cypriot, and Germany and Cyprus are also 1910 Collision Convention countries.[50]

The court held that "[s]ince both the Global Mariner and the Atlantic Crusader fly the flag of countries that have adopted the 1910 Brussels Collision Convention, . . . that is the law that should apply to the tort claims in this case."[51] That law was also common to the vessels' insurers, English Protection and Indemnity (P&I) Clubs.[52] In addition, both vessels had agreed to litigate the claims between the two vessels in England, where the 1910 Collision Convention applies, while the cargo claims against both vessels were before the Southern District of New York.[53]

In the *Global Mariner*, cargo interests argued that the law of Cuba should apply. The district court rejected this argument:

> In this case, the allegiance or domicile of both ships would point to Cypriot and German law (owners of the Atlantic Crusader) and English law (owners of the Global Mariner). All of these countries are signatories to the 1910 Brussels Collision Convention, which law the Atlantic Crusader defendants argue should apply. The cargo interests agreed to English law as governing their bills of lading . . . .[54]

The decision in *Global Mariner* was not unusual in finding that cargo interests should abide by the law of the cargo-carrying vessel. It is well established that a U.S. court may "relegate the cargo owners to the law which governed the ship on which they were content to ship their goods."[55] Similarly, in *Man Ferrostaal v. M/V Vertigo*, the district court

48. *Id.* at *6, 2002 AMC at 2007.
49. *Id.* at *1, 2002 AMC at 2000.
50. *Id.*
51. *Id.* at *6, 2002 AMC at 2007.
52. *Id.* at *1, 2002 AMC at 2000.
53. *Id.* at *1, *4 n.6, 2002 AMC at 2000, 2004 n.6.
54. *Id.* at *17, 2002 AMC at 2006-07.
55. *In re* Seiriki Kisen Kaisha, 629 F. Supp. 1374, 1395, 1986 AMC 913, 945 (S.D.N.Y. 1986).

judge reasoned that cargo owners could protect themselves through contract prior to a casualty if choice of law is a concern to them.[56]

In *M/V Vertigo*, the district court judge moved further away from lex loci and, again referring to *Lauritzen*, undertook a balance of interests analysis including U.S. law and public policy to determine the body of law with the most significant contacts to the dispute.[57] Competing interests included the place of the collision in Denmark, the U.S. cargo interests, and the interests of the vessels: Jamaica, Greece, Liberia, Switzerland, and Germany on one side; and Poland, Greece, and Cyprus on the other.[58] All countries, except the United States, Liberia, and Morocco, had enacted the 1910 Collision Convention.[59]

The district court judge relied on New York law to reject the predominance of lex loci and employ a "center of gravity" theory, which emphasized the domicile of the parties and the location of the tort.[60] After examining the *Lauritzen* factors and finding them inconclusive, the court relied on *Babcock v. Johnson* to choose between the law of the parties suffering damage, the United States, and the law of the location of the collision, Denmark.[61] Ultimately, Denmark's interest in regulating the conduct of vessels in the Great Belt predominated.[62] The court contrasted this with COGSA as being "not conduct-regulating in nature."[63]

An emerging trend appears to discount, if not disregard, cargo interests' reliance on the more cargo-friendly U.S. maritime law after a collision where those interests chose not to include a choice of law provision in the governing contract of carriage.[64]

Under evolving choice of law analysis, the court in *M/V Vertigo* came the closest to applying U.S. law to a collision in foreign territorial waters after analyzing the contacts, but ultimately did not. The analysis of that court showed how many countries trading in international

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56. Man Ferrostaal v. M/V Vertigo, 447 F. Supp. 2d 316, 325, 2006 AMC 2187, 2197 (S.D.N.Y. 2006).

57. *Id.* at 322, 2006 AMC at 2193.

58. *Id.* at 318, 2006 AMC at 2188-89.

59. *Id.* at 319, 2006 AMC at 2189. The court noted that one vessel was on a voyage from Russia to the United States while the other was going from Morocco to Poland at the time of the collision. *Id.*

60. *Id.* at 323, 2006 AMC at 2194.

61. *Id.* at 323-24, 2006 AMC at 2195 (citing Babcock v. Johnson, 191 N.E.2d 279 (N.Y. 1963)).

62. *Id.* at 324, 2006 AMC at 2195.

63. *Id.*, 2006 AMC at 2196.

64. *See id.*; La Seguridad de Centroamerica S.A. v. M/V Global Mariner, No. 01 Civ. 0456 (JSM), 2002 WL 530979, at *6, 2002 AMC 1999, 2007 (S.D.N.Y. Aug. 23, 2006); *In re* Seiriki Kisen Kaisha, 629 F. Supp. 1374, 1395, 1986 AMC 913, 945 (S.D.N.Y. 1986).

shipping have enacted the 1910 Collision Convention and how many nations might have an interest in a voyage or a casualty. The court advised that sophisticated businesses are aware of the many competing legal systems when drafting their contracts and planning their voyages, and they should mitigate their risks by contract and insurance if they wish to avoid the proportionate fault rule under the 1910 Collision Convention and rely on joint and several liability under the American "innocent cargo" rule.[65]

The choice of law analysis applied by the courts is not uniform and there is no single decisive factor in determining the law a court will apply to collision litigation. As the foregoing discussion illustrates, courts do not always refer to the *Lauritzen* factors. However, in all of the cases, the courts examined the contacts that they considered to be significant and applied the law of the place that had the greatest interest in the litigation.

II. *THE PENNSYLVANIA* RULE AND THE 1910 COLLISION CONVENTION

The Second Circuit's recent decision in *Otal Investments Ltd. v. M/V Clary* created an increased risk to cargo interests in maritime casualty cases by removing the presumption of a vessel's liability when the vessel violates certain statutes.[66] The parties had stipulated that article 4 of the 1910 Collision Convention would govern the apportionment of liability.[67] The district court ruled that the 1910 Collision Convention applied in its entirety, to the collision between vessels flagged by 1910 Collision Convention states, and that article 6 of that Convention prevented application of *The Pennsylvania* Rule.[68]

The Pennsylvania Rule takes its name from the Supreme Court case of that name, *The Pennsylvania*, in which the Court stated:

> [W]hen, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.[69]

65. *Man Ferrostaal*, 447 F. Supp. 2d at 324-25, 2006 AMC at 2196-97.
66. 494 F.3d 40, 2007 AMC 1817 (2d Cir. 2007).
67. *In re* Otal Invs. Ltd., No. 03 Civ. 4304, 2005 WL 2387485, at *1, 2005 AMC 2461, 2461 (S.D.N.Y. Sept. 29, 2005).
68. *Id.* at *3, 2005 AMC at 2465.
69. 86 U.S. 125, 136, 1998 AMC 1506, 1512 (1874).

The Second Circuit has explained that "*The Pennsylvania* Rule, an oddity of admiralty law, shifts the burden of proving causation from plaintiffs to defendants . . . ."[70] The burden created by the rule has been described as "frequently extremely difficult, if not impossible, . . . to discharge."[71] Though strict, *The Pennsylvania* Rule has never been applied without limit. The Second Circuit has held that the rule is "limited to the violation of a statute intended to prevent the catastrophe which actually transpired."[72] The same court explained, "our cases hold that *The Pennsylvania* Rule will not create a presumption that the law's violation caused a calamity unless common sense or the realities of admiralty prompt that conclusion."[73]

The Second Circuit has not been alone in limiting *The Pennsylvania* Rule, and it stated its agreement with the United States Court of Appeals for the Third Circuit,[74] which previously stated: "We do not believe it was intended to increase the likelihood of liability no matter how remote and unrelated an injury to a statutory violation."[75] The United States Court of Appeals for the Fifth Circuit also refused to extend application of the rule, holding that it applies "only to violations of statutes that delineate a clear legal duty, not regulations that require judgment and assessment of a particular circumstance."[76] The United States Court of Appeals for the First Circuit commented on its disbelief "that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote."[77]

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70. Wills v. Amerada Hess Corp., 379 F.3d 32, 42, 2004 AMC 2082, 2091 (2d Cir. 2004).

71. Ishizaki Kisen Co. v. United States, 510 F.2d 875, 879, 1975 AMC 287, 291 (9th Cir. 1975) (quoting The Princess Sophia, 61 F.2d 339, 347, 1932 AMC 1562, 1577 (9th Cir. 1932)); *see also* Robert P. McCleskey, Jr. & Jeremy A. Herschaft, *Unique Features of Maritime Collision Law*, 79 TUL. L. REV. 1403, 1416 (2005) ("This burden—as one would expect—is difficult to carry."); CRAIG H. ALLEN, FARWELL'S RULES OF THE NAUTICAL ROAD 35 (8th ed. 2005) ("Proving that a violation 'could not have been a cause' of the collision can be exceedingly difficult.").

72. *Wills*, 379 F.3d at 43, 2004 AMC at 2091 (quoting Dir. Gen. of India Supply Mission v. S.S. Maru, 459 F.2d 1370, 1375, 1972 AMC 1694, 1700 (2d Cir. 1972)).

73. *Id.*, 2004 AMC at 2093 (citing The Mabel, 35 F.2d 731, 732 (2d Cir. 1929) (per curiam)).

74. *Id.* at 44, 2004 AMC at 2094.

75. *In re* Nautilus Motor Tanker Co., 85 F.3d 105, 115, 1996 AMC 2308, 2319-20 (3d Cir. 1996).

76. Tokio Marine & Fire Ins. Co. v. Flora M/V, 235 F.3d 963, 966, 2001 AMC 1697, 1699 (5th Cir. 2001).

77. Seaboard Tug & Barge Inc. v. Rederei AB/DISA, 213 F.2d 772, 775, 1954 AMC 1498, 1502 (1st Cir. 1954).

At the time the Supreme Court adopted *The Pennsylvania* Rule, U.S. courts relied on the divided damages doctrine (sometimes referred to as mutual fault-equal contribution) in determining damages in maritime tort cases.[78] Under the divided damages doctrine, damages were apportioned equally between vessels when both vessels were held to be at fault for a maritime collision.[79]

Healy and Sweeney provided a thorough explanation and criticism of *The Pennsylvania* Rule.[80] They explained why *The Pennsylvania* Rule is not needed after *United States v. Reliable Transfer Co.*,[81] which replaced the divided damages rule with proportional damages, and why *The Pennsylvania* Rule is contrary to the 1910 Collision Convention.[82] Healy and Sweeney's call for abolition of the rule has been echoed by other commentators.[83] The Supreme Court's adoption of comparative fault in *Reliable Transfer* brought American admiralty law into conformity with the maritime law of other nations and with general American tort law regarding the apportionment of liability,[84] but it left *The Pennsylvania* Rule in place.[85]

Healy and Sweeney have described *The Pennsylvania* Rule as a "hindrance" to uniformity across the circuits, because of the varied interpretations, and called on the Supreme Court or Congress to overturn the rule.[86] Furthermore, they explained:

> It is contrary to the 1910 Brussels Convention, so that its abolition would narrow the differences between U.S. collision law and that of the other major maritime countries remaining after adoption of the proportional rule by the United States in 1975. Since *Reliable Transfer*, it has no place in a regime of law which permits the courts to apportion damages in accordance with the degree of causative fault chargeable to each of the colliding vessels.[87]

According to another commentator, the conflict between the 1910 Collision Convention and *The Pennsylvania* Rule has meant that "any

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78. HEALY & SWEENEY, *supra* note 23, at 49.
79. Tetley, *supra* note 1, at 139.
80. HEALY & SWEENEY, *supra* note 23, at 45-53.
81. 421 U.S. 397, 1975 AMC 541 (1975).
82. HEALY & SWEENEY, *supra* note 23, at 53.
83. Tetley, *supra* note 1, at 145-46; George Rutherglen, *Not with a Bang But a Whimper: Collisions, Comparative Fault, and the Rule of* The Pennsylvania, 67 TUL. L. REV. 733, 739-40 (1993).
84. Rutherglen, *supra* note 83, at 734.
85. *Reliable Transfer*, 421 U.S. at 405-06, 1975 AMC at 548; *see* discussion *infra* note 89.
86. HEALY & SWEENEY, *supra* note 23, at 53.
87. *Id.*

extension of the *Pennsylvania* rule puts the United States more at odds with the nations that adhere to the 1910 Brussels Collision Convention, which rejects presumptions of fault."[88]

Despite the opinion of commentators such as Healy and Sweeney, Tetley, and Rutherglen that the rule is anachronistic and unnecessary, *The Pennsylvania* Rule survived the *Reliable Transfer* decision and continues to be applied.[89] However, the *Otal Investments* decision further eroded its efficacy and vitality.

In the district court, one of the vessel interests argued both that the 1910 Collision Convention, as a whole, applied to the case and that article 6 thereof abolished any legal presumptions of fault, precluding the application of *The Pennsylvania* Rule.[90] Without further analysis, the district court held that because all vessels were flying flags of states that were signatories to the 1910 Collision Convention, that Convention applied to the action.[91]

A determination regarding the meaning of article 6 proved less straightforward. Article 6 of the 1910 Collision Convention states: "There shall be no legal presumptions of fault in regard to liability for collision."[92] As already explained, article 6 has been interpreted as being in conflict with *The Pennsylvania* Rule.

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88. ALLEN, *supra* note 71, at 205; *see also* Rutherglen, *supra* note 83, at 735.

89. Tug Ocean Prince v. United States, 584 F.2d 1151, 1160, 1978 AMC 1786, 1800 (2d Cir. 1978); Tetley, *supra* note 1, at 128. According to Tetley, *The Pennsylvania* decision was intended to apply the Merchant Shipping Amendment Act 1862, but the Supreme Court, by creating the presumption of causation, "applied the British Statute in a manner inconsistent with the wording of the provision itself." Tetley, *supra* note 1, at 130-31. As evidence of this theory, Tetley refers to the Privy Council decision which arose from the same collision as *The Pennsylvania* and in which the PENNSYLVANIA was held solely to blame for the collision. *Id.* at 134. In *The Pennsylvania*, the Supreme Court held that both vessels were at fault. 86 U.S. 125, 138, 1998 AMC 1506, 1513 (1873).

90. *In re* Otal Invs. Ltd., No. 03 Civ. 4304, 2005 WL 2387485, at *1, 2005 AMC 2461, 2462 (S.D.N.Y. Sept. 29, 2005).

91. *Id.*

92. 6 BENEDICT ON ADMIRALTY, *supra* note 2, at 3-12; Otal Invs. Ltd. v. M/V Clary, 494 F.3d 40, 52 n.4, 2007 AMC 1817, 1827 n.4 (2d Cir. 2007) (citing Ishizaki Kisen Co. v. United States, 510 F.2d 875, 882, 1975 AMC 287, 295 (9th Cir. 1975); 4 ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY § 620, at 246-65 (Arnold Whitman Knowth ed., 6th ed. 1940); HEALY & SWEENEY, *supra* note 23, at 51-52 n.38)); *see also In re Otal Invs.*, 2005 WL 2387485, at *6, 2005 AMC at 2463. It should be noted that, although it was cited by the Second Circuit in *Otal Investments Ltd.*, the 1940 edition of *Benedict on Admiralty* did not contain this translation of article 6. As the Ninth Circuit in *Ishizaki Kisen* noted, that edition of *Benedict on Admiralty* translated the phrase "présomptions légales" as "statutory presumptions." *See Ishizaki Kisen*, 510 F.2d at 882, 1975 AMC at 295. The seventh edition of *Benedict on Admiralty* includes the translation cited by the Second Circuit and district court. 6 BENEDICT ON ADMIRALTY, *supra* note 2, at 3-12. This later translation is consistent with the translation used by the Comité Maritime

In *Otal Investments*, the cargo owners and the cargo-carrying vessel interests argued to the district court that *The Pennsylvania* Rule was a procedural rule and, therefore, should be applied to determine liability in a U.S. action.[93] The court disagreed, holding that the rule was "outcome determinative" and, therefore, substantive.[94] The Second Circuit, on appeal, agreed that *The Pennsylvania* Rule was substantive and "so significant as to substantially 'affect the decision of the issue' of liability in a collision."[95]

The Second Circuit not only affirmed the lower court's decision that *The Pennsylvania* Rule did not apply, but did so on different grounds. The appellate court explained that it would not have been sufficient to show that the 1910 Collision Convention did not abolish *The Pennsylvania* Rule.[96] In order for *The Pennsylvania* Rule to apply, appellants would have needed to show that one of the instruments of the 1910 Collision Convention embraced the rule, which appellants had not done.[97] Similarly, in *Ishizaki Kisen Co. v. United States*, the United States Court of Appeals for the Ninth Circuit declined to apply *The Pennsylvania* Rule because no similar rule had been shown to be a part of Japanese law and, the court assumed, if it ever had been a part of Japanese law, article 6 of the 1910 Collision Convention would have abolished it.[98]

In *Otal Investments*, appellants argued that the 1910 Collision Convention did not affect *The Pennsylvania* Rule because it abolished only presumptions of "fault" not presumptions of "causation."[99] The district court explained that any distinction between a presumption of fault and a presumption of causation is meaningless in the context of the 1910 Collision Convention, because the term "'[f]ault' in the Collision

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International, which is an association of maritime law associations that drafted the 1910 Collision Convention. COMITÉ MAR. INT'L, THE TRAVAUX PRÉPARATOIRES OF THE 1910 COLLISION CONVENTION AND 1952 ARREST CONVENTION 124 (Francesco Berlingieri ed., 1997). The later translation that all "legal presumptions," rather than merely "statutory presumptions," are abolished provides a greater conflict with the court-made *Pennsylvania* Rule than the earlier translation suggested.

93. *Otal Invs. Ltd.*, 494 F.3d at 50, 2007 AMC at 1824.

94. *In re Otal Invs.*, 2005 WL 2387485, at *9, 2005 AMC at 2464 (citing *Ishizaki Kisen*, 510 F.2d at 881, 1975 AMC at 293).

95. *Otal Invs. Ltd.*, 494 F.3d at 51, 2007 AMC at 1824-26 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 134 (1971)).

96. *Id.* at 51-52, 2007 AMC at 1826-27.

97. *Id.* at 52, 2007 AMC at 1827.

98. 510 F.2d at 882-83, 1975 AMC at 296-97.

99. *Otal Invs. Ltd.*, 494 F.3d at 51, 2007 AMC at 1825-27.

Convention has been interpreted to mean 'causative fault.'"[100] The Second Circuit appeared to agree with the district court that under article 6 of the 1910 Collision Convention "fault" meant "causative fault."[101]

Not only the commentators whose opinions have already been discussed, but also U.S. case law had strongly supported the district court's conclusion.[102] Prior to the district court's decision in the case, the only published decision in the United States that specifically dealt with the interpretation of "fault" as used in article 6 of the 1910 Collision Convention was *Ishizaki Kisen*.[103] In *Ishizaki Kisen*, the Ninth Circuit explained that article 6 is only concerned with presumptions that affect liability in "a strong and direct way"—presumptions like *The Pennsylvania* Rule.[104] Integral to the Ninth Circuit's analysis is the underlying interpretation that "fault" as used in the 1910 Collision Convention is causative fault.

Thus, the Second Circuit agreed with the many commentators and the one other circuit that had considered the issue, all of whom had stated clearly that the 1910 Collision Convention prevented application of *The Pennsylvania* Rule. Despite the treatises and case law, in *Otal Investments* the parties did not agree as to whether article 6 of the 1910 Collision Convention negated *The Pennsylvania* Rule—a disagreement that continued on appeal. These same parties had stipulated to the application of article 4 of the 1910 Collision Convention to the action[105] suggesting a greater familiarity with the application of that article. The reason behind the controversy might be attributed to the differences between the laws of nations and an imperfect translation.

As indicated by the Second Circuit, the 1910 Collision Convention was drafted and signed in French.[106] The well-regarded treatise *Benedict on Admiralty*, in its sixth edition, erroneously criticized a translation of article 6,[107] which is now generally relied on as being accurate.[108] The translation required the abolition of "legal presumptions of fault,"

100. *In re* Otal Invs. Ltd., No. 03 Civ. 4304, 2005 WL 2387485, at *3, 2005 AMC 2461, 2464 (S.D.N.Y. Sept. 29, 2005) (citing HEALY & SWEENEY, *supra* note 23, at 52).

101. *Otal Invs. Ltd.*, 494 F.3d at 51, 2007 AMC at 1826-27.

102. *Ishizaki Kisen*, 510 F.2d at 880, 1975 AMC at 291-92; *In re* G&G Shipping Co., 767 F. Supp. 398, 404, 1994 AMC 170, 177 (D.P.R. 1991).

103. *Ishizaki Kisen*, 510 F.2d at 879-80, 1975 AMC at 290-93.

104. *Id.* at 883, 1975 AMC at 296.

105. *In re Otal Invs.*, 2005 WL 2387485, at *1, 2005 AMC at 2462.

106. *Otal Invs. Ltd.*, 494 F.3d at 52 n.4, 2007 AMC at 1827 n.4; *see also Ishizaki Kisen*, 510 F.2d at 882, 1975 AMC at 295.

107. 4 BENEDICT ON ADMIRALTY, *supra* note 92, § 620, at 263.

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

whereas Benedict argued that article 6 referred to "statutory presumptions of fault."[109] The translation proposed by Benedict, even at the time it appeared, was apparently controversial, as evidenced by its being proposed in opposition to the translation discussed in the Senate in connection with consideration of the 1910 Collision Convention.[110] Thus, Benedict's translation does not appear to have been generally accepted, though it did appear in that venerable maritime text. Based on his translation Benedict concluded: "The Collision Convention has no effect whatsoever on the *Pennsylvania Case* doctrine, because that doctrine is not a 'présomption légale,' i.e., a statute directing the courts to presume anything as to fault. It is just a rule of reasoning by the courts as to causation . . . ."[111]

The dispute regarding the translation of article 6 was noted by the Ninth Circuit in *Ishizaki Kisen*.[112] As the Ninth Circuit explained, using Benedict's translation, which had not been updated at that time, a judge-made version of *The Pennsylvania* Rule would survive the 1910 Collision Convention while a statutory presumption would not.[113] The Ninth Circuit attributed Benedict's translation, which it regarded as erroneous, to the distinction in the Code Napoleon between statutory and nonstatutory presumptions.[114] The Ninth Circuit categorically rejected the import of the translation put forward by Benedict, which abolished only "statutory presumptions."[115]

The Ninth Circuit read *The Pennsylvania* Rule through the requisites of article 6 and concluded, "It strains reason to insist that it is not a legal presumption of fault 'in regard to liability for collision.'"[116] Thus, the Ninth Circuit was the first of the circuit courts of appeal to decide that *The Pennsylvania* Rule was inconsistent with the 1910 Collision Convention.[117]

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109. 4 BENEDICT ON ADMIRALTY, *supra* note 92, § 620, at 263.

110. *Id.*

111. *Id.* at 267.

112. Ishizaki Kisen Co. v. United States, 510 F.2d 875, 882, 1975 AMC 287, 295 (9th Cir. 1975).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 883, 1975 AMC at 296.

117. *Id.* In addition, the United States District Court for the District of Puerto Rico, in *G&G Shipping*, recognized the import of article 6 of the 1910 Collision Convention, stating: "Article 6 of the Convention abolishes legal presumptions of fault, leaving courts with discretion to attribute fault as they see fit rather than following the rigid rule of the *Pennsylvania*." *In re* G&G Shipping Co., 767 F. Supp. 398, 404, 1994 AMC 170, 177 (D.P.R. 1991). Although the court in *G&G Shipping* applied *The Pennsylvania* Rule, it did so because it declined to apply the

Thus, as the Ninth Circuit pointed out, the Code Napoleon's reliance on statutory law apparently contributed to an erroneous translation of article 6 of the 1910 Collision Convention that did not appear to apply to the existing U.S. legal environment. This erroneous translation provided a respected commentator's analysis that only statutory presumptions regarding liability had been abolished by article 6 and that the 1910 Collision Convention had no effect on *The Pennsylvania* Rule.

The seventh edition of *Benedict on Admiralty* contains the translation relied upon by the Second Circuit in *Otal Investments*,[118] which abolishes "legal presumptions of fault."[119] This translation is now in line with the Comité Maritime International, which negotiated the 1910 Collision Convention.[120]

There is an additional language aspect to the problems that article 6 has posed. Both the Second Circuit and the district court noted that arguments were put forward regarding whether *The Pennsylvania* Rule was a presumption of "fault" or "causation." The two courts agreed that it is a presumption of "causative fault."[121] Fault, causation, and causative fault are all legal terms developed over centuries of tort law in the United States. All of these terms were forced into the one French word "faute" as if translations of legal terms can be made easily and directly without further explanation. However, international conventions are more complex than a direct translation of a single word allows.[122]

In any event, in the Second and Ninth Circuits, where a court applies the 1910 Collision Convention, *The Pennsylvania* Rule should

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1910 Collision Convention at all. *Id.* at 405, 1994 AMC at 177. Had *G&G Shipping* applied the 1910 Collision Convention, it is clear that it would have interpreted the convention to abolish *The Pennsylvania* Rule. *Id.* at 404, 1994 AMC at 177.

118. *Otal Invs. Ltd.*, 494 F.3d at 52 n.4, 2007 AMC at 1827 n.4 (citing 4 BENEDICT ON ADMIRALTY, *supra* note 92, § 620, at 246-5 [sic], instead of 6 BENEDICT ON ADMIRALTY, *supra* note 2, at 3-12, as containing the correct translation); *see also Ishizaki Kisen*, 510 F.2d at 882, 1975 AMC at 295; HEALY & SWEENEY, *supra* note 23, at 51-52 n.38).

119. 6 BENEDICT ON ADMIRALTY, *supra* note 2, at 3-12.

120. COMITÉ MAR. INT'L, *supra* note 92.

121. *Otal Invs. Ltd.*, 494 F.3d at 51, 2007 AMC at 1826-27; *In re* Otal Invs. Ltd., No. 03 Civ. 4304, 2005 WL 2387485, at *3, 2005 AMC 1261, 1264 (S.D.N.Y. Sept. 29, 2005).

122. The United Kingdom ratified the 1910 Collision Convention. Accordingly, English case law and England's implementation of the Convention via the Maritime Conventions Act of 1911, 1 & 2 Geo. 5, c. 57, 16 December 1911, have provided valuable insight into the scope and definition of the term "fault," as used in article 6 of the 1910 Collision Convention. For example, in discussing the meaning of fault, Mr. Justice Brandon of the Admiralty Court, High Court of Justice, explained "'fault' . . . includes blameworthiness as well as causation . . . no true apportionment can be reached unless both factors are borne in mind." Brandon, *supra* note 14, at 1032 (quoting The Miraflores & The Abadesa, [1967] 1 A.C. 826, 845).

not be applied.[123] Under such circumstances, apparently, *The Pennsylvania* Rule is no longer the rule.

123. *Otal Invs. Ltd.*, 494 F.3d at 52, 2007 AMC at 1826-27; *Ishizaki Kisen*, 510 F.2d at 883, 1975 AMC at 296-97.