

**FORUM SELECTION CLAUSES IN  
SEAMEN’S CONTRACTS: ARE WE  
PROTECTING COMMERCIAL PROGRESS  
BY DENYING SEAMEN THEIR RIGHTFUL  
DAY IN COURT?**

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## I. INTRODUCTION

Individuals and corporate entities alike expect certain freedoms and rights to be preserved under the laws of the United States through the powers of legislation and judicial enforcement. Fundamental basics such as the right to contract freely with others in commerce for goods and services must be protected.<sup>1</sup> As technology advances and the boundaries of the

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1. See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972), *enforced*, 464 F.2d 1395 (5th Cir. 1972). The basic concept in *Bremen* is the right of sophisticated businesses to form contracts based upon specific negotiated terms. *Bremen*, 407 U.S. at 12. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1971); 1 ARTHUR

world in which companies conduct their daily business transcend oceans and continents, the basic concepts of law must evolve to meet the changes in demands.<sup>2</sup> Additionally, recognition of the validity of the laws of other forums proves vital to continuing business relations between countries and cultures.<sup>3</sup>

Beyond the need for foreign diplomacy and the protection of foreign relations lies the concern for the protection of individuals' rights.<sup>4</sup> Freedom of contract is vital to evolving business relationships; however, the courts must not go so far as to allow progress to impede basic human rights under the law and the protection these rights deserve.

With the development of international commercial relationships, the question becomes which country's laws will govern the agreements of each relationship and any controversies arising from it.<sup>5</sup> Many companies have sought to settle the question by including forum selection clauses within the language of their contracts.<sup>6</sup> The courts once regarded these clauses that seek to set the forum of future litigation in advance as a type of forum shopping.<sup>7</sup> In early cases involving forum selection clauses, the courts refused to enforce the clauses, claiming they violated public policy by serving as an effort to deny a court its jurisdiction.<sup>8</sup> However, following a 1972 decision by the Supreme Court, *M/S Bremen v. Zapata Off-Shore Co.*,<sup>9</sup> the lower courts sharply turned their practice to upholding

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LINTON CORBIN, CORBIN ON CONTRACTS § 128 (1963); Willis L.M. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187, 189 (1964).

2. See *Bremen*, 407 U.S. at 11–12 (discussing the evolution of the law that the Court feels is necessary for international business relationships to thrive).

3. See *id.* (explaining the laws of various countries and the need to move away from the previously followed belief that all controversies involving U.S. citizens and companies need to be decided in U.S. courts, following U.S. law).

4. See *infra* Part II.A–B.

5. See *Bremen*, 407 U.S. at 8–9.

6. *Id.* at 10–11.

7. See Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068, 1079–80 (1989).

8. See *id.*

9. *Bremen*, 407 U.S. at 8.

forum selection clauses in almost any circumstance.<sup>10</sup> While the new trend provides consistency in determining disputes arising under contract law, it has failed to provide the protections required of the courts when enforcing other areas of the law.<sup>11</sup>

This comment will discuss the evolution of the *Bremen* precedent and the argument that the lower courts have applied the ruling too broadly and have failed to consider the analysis used by the Court in arriving at this significant decision. The discussion will focus on the developments in two vital areas of law—contract law and maritime law—in the wake of this decision. Further, the comment will explore the resulting intersection of advancements in the two arenas and the effect they have on each other.

This comment begins with a brief history of the development of personal protections in contract law and maritime law. Next will be a discussion of the Supreme Court's decision in *Bremen* and a brief recitation of appellate decisions displaying strict adherence to the *Bremen* decision.<sup>12</sup> Through the discussion of cases, the progression of the law will become clear.

Following the discussion of the development of and adherence to the *Bremen* precedent, the comment discusses recent Fifth Circuit decisions extending the *Bremen* doctrine to a cause of action brought under the Jones Act.<sup>13</sup> The comment will then consider the effects of this extension and the potential ramifications for other seamen injured while in the employment of international companies.<sup>14</sup>

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10. See, e.g., *Pelleport Investors v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 (9th Cir. 1984); *Security Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999); *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002) [hereinafter *MacPhail I*], *cert. denied*, *MacPhail v. Oceaneering Int'l, Inc.*, 123 S. Ct. 891 (2003).

11. Federal district courts and state courts alike have held that forum selection clauses in employment contracts control not only the contractual agreement and any controversies arising from the work arrangement, but also tort causes of action for injury or death sustained by an individual while employed under the contract in question. See, e.g., *Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348, 350–51 (4th Cir. 1985) (en banc); *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–22 (5th Cir. 1998).

12. *Infra* Part VI.

13. *Infra* Part VII. See Jones Act, 46 U.S.C. app. § 688 (2000).

14. See *id.*

Next, this comment explores the development of the Jones Act and the extension of all rights of the Federal Employers Liability Act (FELA)<sup>15</sup> to seamen under this law.<sup>16</sup> The discussion includes the effect of the Supreme Court decision in *Boyd v. Grand Trunk Western Railroad Co.*<sup>17</sup> on claims filed under the Jones Act or Death on the High Seas Act (DOHSA).<sup>18</sup> Consideration will be given to the paragraph in the *Bremen* decision where the Court maintained that *Boyd* remained effective following the 1972 ruling.<sup>19</sup> Application of *Boyd* to seamen's contracts could invalidate the trend among the lower federal courts regarding forum selection clauses and personal injury and death claims brought under the Jones Act or DOHSA.

Finally, a brief discussion will explore the future of forum selection clauses in seamen's contracts under the Jones Act, *Bremen*, and *Boyd*.<sup>20</sup> A strict application of the controlling policy in each of these bodies of law will presumably lead to either legislative or judicial intervention and clarification of the effects of enforcement of forum selection clauses in seamen's contracts.<sup>21</sup>

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15. Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (2000) [hereinafter FELA].

16. *Infra* Part VII.B.

17. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263 (1949).

18. *Infra* Part VII.B. *See* Death on the High Seas Act, 46 U.S.C. app. §§ 761-68 (2000) [hereinafter DOHSA].

19. *Infra* Part VII.B. *See* *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Boyd*, 338 U.S. at 265.

20. *Infra* Part VIII.

21. On January 13, 2003, the Supreme Court denied certiorari in *MacPhail v. Oceaneering*, 123 S.Ct. 891 (2003). The Court's refusal to hear the case leaves the controversy open to argument and discord among the circuits. *See id.* However, *MacPhail* may not have provided the particular fact pattern necessary to clearly assess the effect of forum selection clauses in seamen's contracts on injury claims brought under the Jones Act. The question considered by the Fifth Circuit in *MacPhail* involved a forum selection clause in an executed release agreement rather than a clause in an employment agreement. *MacPhail I*, 302 F.3d at 275.

## II. BRIEF HISTORY OF THE DEVELOPMENT OF PERSONAL PROTECTIONS IN CONTRACT AND MARITIME LAW

### A. *Fundamental Concepts in Contract Law*

One long established tenet of contract law protects less educated individuals from the unfair bargaining power of experienced companies in the formation of agreements.<sup>22</sup> Often, companies possess the clear advantage over individuals in the contractual relationship.<sup>23</sup> As a result, the final agreement may reflect the desires of the more influential entity rather than agreed upon terms related to the mutual consent of the parties.<sup>24</sup> At common law, the courts have long recognized the need to protect individuals from the overreaching of companies in the bargaining process.<sup>25</sup> As in most other well-defined areas of law, legislative bodies followed the lead of the judiciary and codified sets of laws to protect disadvantaged consumers and individuals in the contract process.<sup>26</sup>

### B. *The Necessity of Judicial Intervention*

Basic principles of equality in bargaining serve to protect individuals in contractual relationships.<sup>27</sup> In certain contract situations, the individual is at an unmistakable disadvantage.<sup>28</sup> In contracts for the purchase of most items on credit, an individual is not provided an opportunity to negotiate terms of the agreement.<sup>29</sup> Adhesion contracts often contain standard

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22. See RESTATEMENT (SECOND) CONTRACTS § 208 (1981); see also 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 128 (1963); see, e.g., *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988) (stating that disparity in bargaining power could lead to lack of meaningful choice in the contractual negotiations).

23. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

24. See *id.* at 449.

25. See *id.* at 448.

26. See, e.g., Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.46, 17.50 (Vernon 2002); Uniform Commercial Code § 2-302 (2000).

27. See *Gillman*, 534 N.E.2d at 828.

28. See *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501–02 (4th Cir. 2002).

29. See, e.g., *Walker-Thomas Furniture, Co.*, 350 F.2d at 447.

blanket exculpatory phrases or disclaimers that laypersons neither understand nor have the power to change.<sup>30</sup> The courts and legislators uniformly recognize the need for additional protections in similar consumer matters.<sup>31</sup> Therefore, in all cases of serious inequality of bargaining power, extra protections must be provided to the party in the disadvantaged position.

Employment contracts between major corporations and general workers often require additional protections for the individual.<sup>32</sup> Contracts between international maritime corporations and seamen require such a heightened level of protection.<sup>33</sup> Although courts are reluctant to interfere in the parties' right to contract freely, certain protections are necessary to prevent injustice to unwary, inexperienced individuals possessing grossly less bargaining power than the contract drafter.<sup>34</sup>

### C. *The Foundation of Admiralty and Maritime Law and Jurisdiction*

Admiralty law is a long developing body of federal common law based upon the jurisdictional grant to the federal courts in article 3, § 2 of the United States Constitution.<sup>35</sup> As the common law developed in this area, Congress effected change through legislation.<sup>36</sup> In most circumstances the legislation and the

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30. See 3 LAWRENCE A. CUNNINGHAM & ARTHUR J. JACOBSON, CORBIN ON CONTRACTS § 559F (Cum. Supp. 1999).

31. See *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2nd Cir. 1967) (stating that no court has addressed the issue in light of new technology changes), *cert. denied*, 389 U.S. 831 (1967); see also *Carriage of Goods by Sea Act*, 46 U.S.C. app. § 1304(5) (2000) (setting out new legislation allowing for a maximum liability amount).

32. See *Fittante v. Palm Springs Motors, Inc.*, 129 Cal. Rptr. 2d 659, 662–63 (Cal. Ct. App. 2003).

33. See *Buckley v. Nabors Drilling USA, Inc.*, 190 F. Supp. 2d 958, 964–65 (S.D. Tex. 2002).

34. See, e.g., *Walker-Thomas Furniture, Co.*, 350 F.2d at 449; see also *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 85–86, 88 (N.J. 1960) (refusing to enforce disclaimers in contract to purchase vehicle as against “public policy” due to the “gross inequality of bargaining position” between parties).

35. U.S. CONST. art III, § 2, cl. 1. “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”

36. See, e.g., *Jones Act*, 46 U.S.C. app. § 688 (2000); *FELA*, 45 U.S.C. §§ 51–60

common law follow the same principles of protecting contractual maritime relationships and international commerce, while providing added protection for seamen who subject themselves to danger by devoting their efforts to life at sea.<sup>37</sup>

### 1. The *Osceola*

The development of the basic protections provided to seamen began with the 1903 Supreme Court decision in *The Osceola*.<sup>38</sup> *Osceola* provided a cause of action for a seaman injured while in the service of his ship.<sup>39</sup> The *Osceola* ruling held that injured seamen are entitled to basic maintenance and cure, and can recover damages when unseaworthiness of the vessel contributed to their injuries.<sup>40</sup> While *Osceola* provided a new level of protection for seamen, it failed to provide a remedy for injuries caused by negligence of a seaman's master or fellow seamen.<sup>41</sup> The legislature later recognized the shortcomings of the Court's decision in *Osceola* and responded with the enactment of the Jones Act in an attempt to provide seamen a more equitable source of recovery.<sup>42</sup>

### 2. *The Jones Act*

Recognizing that seamen encounter the same level of danger in their daily assignments as railroad workers, the legislature drafted the Jones Act.<sup>43</sup> Initially the Jones Act was developed to provide coverage to seamen similar to the protections offered in FELA.<sup>44</sup> The Jones Act created a negligence-based cause of action against a seaman's employer that could be combined with the protections previously offered under the *Osceola* theory,

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(2000); see DOHSA, 46 U.S.C. app. §§ 761–68 (2000).

37. See *Chandris v. Latsis*, 515 U.S. 347, 354 (1995); see also *Offshore Co. v. Robison*, 266 F.2d 769, 779–80 (5th Cir. 1959).

38. *The Osceola*, 189 U.S. 158, 175 (1903).

39. *Id.* at 175.

40. *Id.*

41. *Id.*

42. Jones Act, 46 U.S.C. app. § 688(a) (2000); *Nunez v. Am. Seafoods*, 52 P.3d 720, 722 (Alaska 2002).

43. See *id.*

44. 46 U.S.C. app. § 688(a); see also FELA, 45 U.S.C. § 51 (2000).

including claims of unseaworthiness and claims for maintenance and cure provisions.<sup>45</sup>

The cause of action created by the Jones Act allows seamen an additional source of recovery of damages for injuries sustained in the line of duty.<sup>46</sup> The Act provides for the “[a]pplication of railway employee statutes” and states that any seaman who suffers “personal injury in the course of his employment” has available all such rights and remedies derived from statutes or the extension of common law previously accessible to railway employees.<sup>47</sup>

### 3. *Judicial Interpretation of the Jones Act*

In 1979, the Fifth Circuit had the opportunity to interpret the provision and extension of the Jones Act in *Ivy v. Security Barge Lines*.<sup>48</sup> Sitting *en banc*, the court observed “Congress thereby legislatively overruled *Osceola* insofar as it denied to a seaman the right to recover damages from his employer . . . .”<sup>49</sup> The court further opined that since the passage of the Act, “[t]he Jones Act thus became, and has remained, the sole basis” for all negligence causes of action against an employer by a seaman or his beneficiaries.<sup>50</sup> In a later decision, the Supreme Court agreed with the Fifth Circuit’s observation that the legislative purpose for the enactment of the Jones Act in 1920 was “to remove the bar to suit for negligence articulated in *The Osceola*.”<sup>51</sup> Accordingly, Congress provided additional legal protections for seamen “because of their exposure to ‘the perils of the sea.’”<sup>52</sup>

The courts have had many opportunities to interpret the meaning of the Jones Act. When Congress passed the Act, they failed to properly define the terms of the legislation, therefore

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45. 46 U.S.C. app. § 688(a); *The Osceola*, 189 U.S. at 175; *Chandris Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

46. *See* 46 U.S.C. app. § 688(a).

47. *Id.*

48. *Ivy v. Security Barge Lines*, 606 F. 2d 524, 524–25 (5th Cir. 1979) (*en banc*).

49. *Id.* at 525.

50. *Id.*

51. *Chandris Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

52. *Id.* (construing GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 6-21 (2d ed. 1975)).

leaving great room for interpretation and confusion.<sup>53</sup> In a 1985 Seventh Circuit opinion, Judge Harlington Wood commented on the zone of uncertainty created by the Jones Act.<sup>54</sup> Following case law, he attempted to distinguish Jones Act claims from claims of other types stating, “Diderot may very well have had [Supreme Court maritime case law] in mind when he wrote, ‘We have made a labyrinth and got lost in it.’”<sup>55</sup> Realizing the duty of the judiciary to make sense of the confusion, Justice Wood attempted to draft an opinion that would guide future courts through the fog that was the Jones Act.<sup>56</sup>

### III. THE DIFFICULT JOURNEY TO DEFINE THE INDEFINABLE

#### A. *Who Qualifies as a Jones Act Seaman?*

To qualify as a plaintiff under the Jones Act, an individual must meet the definition of a seaman and have an attachment to a vessel in navigable waters.<sup>57</sup> The question of seaman qualification has long been a matter of controversy.<sup>58</sup> However, the Supreme Court has ruled that benefits under the Jones Act are determined based upon status as a seaman, so the criteria applied will either deny or allow benefits to the injured party.<sup>59</sup> The primary trouble created by the wording of the Jones Act is in Congress’ failure to define the term “seaman.”<sup>60</sup>

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53. See Jones Act, 46 U.S.C. app. § 688(a) (2000); David W. Di Nardi, District Chief Judge, Boston District Office, U.S. Dep’t of Labor, *Seeking Solomon’s Wisdom: State Act, Longshore Act or Jones Act Which to Choose? A Coast to Coast Discussion* 11, available at <http://www.oalj.dol.gov/public/lgshore/refrnc/solomon.htm> (last visited Oct. 25, 2003) [hereinafter *Seeking Solomon’s Wisdom*].

54. *Johnson v. Beasley Constr. Co.*, 742 F.2d 1054, 1056–58 (7th Cir. 1984).

55. *Seeking Solomon’s Wisdom*, *supra* note 53, at 5.

56. *Johnson*, 742 F.2d at 1056–60.

57. See 46 U.S.C. app. § 688; *Seeking Solomon’s Wisdom*, *supra* note 53, at 12.

58. See, e.g., *Chandris, Inc. v. Latsis*, 515 U.S. 345, 355 (1995); *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991).

59. See *Chandris*, 515 U.S. at 367–72.

60. See 46 U.S.C. app. § 688(a); *Seeking Solomon’s Wisdom*, *supra* note 53, at 13. Perhaps Congress felt the need to leave the definitions to judicial interpretation based on the principle that the judiciary was primarily responsible for the development of maritime law prior to this legislation and was better qualified to define the terms of art associated with this body of law. THOMAS J. SCHOENBAUM, ADMIRALTY AND

The current test utilized by most courts to determine seaman status is a two-prong analysis.<sup>61</sup> The consideration for seaman status is based upon the assignment and duties of the worker.<sup>62</sup> In *Offshore Co. v. Robison*, a 1959 decision, the Fifth Circuit drafted an analysis to determine seaman status based upon assignment to a vessel in navigation in a capacity that contributes to the vessel's primary function.<sup>63</sup> On the other hand, the Seventh Circuit held that seaman status required working in a position contributing to the navigation of the vessel.<sup>64</sup> Then in its 1991 decision in *McDermott Int'l, Inc. v. Wilander*, the Supreme Court abandoned the "aid in navigation" language of the Seventh Circuit decision and adopted the Fifth Circuit's test requiring contribution to the accomplishment of the vessel's mission.<sup>65</sup> A few years later the Supreme Court created a test that combined the analyses of *Robison* and *Wilander*.<sup>66</sup> The Court held in *Chandris v. Latsis* that the duties of a seaman must "contribute to the function of the vessel or to the accomplishment of its mission" and that the worker must have a relationship, substantial in terms of time and nature, to a vessel or fleet in navigation.<sup>67</sup>

*B. What Duties Qualify as Aiding in the Accomplishment of the Mission?*

Originally, some courts chose a narrow definition of a seaman's duties requiring that his job aid in the navigation of the vessel.<sup>68</sup> Others held that a worker could qualify as a seaman for the purpose of the Act by simply serving the general purpose

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MARITIME LAW § 3-1 at 94-98 (2nd ed. 1994).

61. See, e.g., *Chandris*, 515 U.S. at 368 (stating the two prongs).

62. *Id.* at 367-68.

63. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), modified by *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).

64. *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984), overruled by *McDermott Int'l, Inc.*, 498 U.S. at 346.

65. *McDermott Int'l, Inc.*, 498 U.S. at 346.

66. See *Chandris*, 515 U.S. at 368-72.

67. *Id.* at 368.

68. See, e.g., *Seeking Solomon's Wisdom*, supra note 53, at 14 (citing *The Canton*, 5 F. Cas. 29, 30 (No. 2,388) (D. Mass. 1858)); *Johnson*, 742 F.2d at 1062-63.

of the vessel's voyage.<sup>69</sup> The Fifth Circuit decision in *Robison* opined that the purpose of the Act was to protect those who battle the "peril of the sea."<sup>70</sup> This theory adopted by the Fifth Circuit has been generally followed in other jurisdictions.<sup>71</sup> Furthermore, the decision has been referred to as "the guiding landmark decision on seaman status and a 'lighthouse' for maritime counsel."<sup>72</sup>

The initial split in circuits regarding seaman status was resolved with the Supreme Court decision in *Wilander*.<sup>73</sup> While the plaintiff in *Wilander* was a foreman on a "paint boat" whose primary duties involved traveling on the paint boat to drill platforms needing painting, the court found that for the purpose of the Act, his employment qualified him as a seaman.<sup>74</sup> Thus, the Court eliminated any necessity for a worker to aid in the navigation of a vessel to meet the seaman requirements.<sup>75</sup>

In *Wilander*, the Court explained that "[w]e think the time has come to jettison the aid in navigation language."<sup>76</sup> The Court found that "aid[ing] in navigation or contribut[ing] to the transportation of the vessel" was not an essential characteristic of a seaman.<sup>77</sup> Instead, the Court held that the necessity is met if the seaman is "doing the ship's work."<sup>78</sup>

The more liberal definition of seaman, as refined in *Wilander*, allows for a more uniform application of seaman status to most employees on a vessel.<sup>79</sup> To classify as a Jones Act plaintiff, even a bartender or cook could meet the necessary test of providing services "in furtherance of the main object[ive] of

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69. See, e.g., *Robison*, 266 F.2d at 779–81.

70. *Id.* at 771.

71. See, e.g., *Bennett v. Perini Corp.*, 510 F.2d 114, 115 (1st Cir. 1975).

72. Jack L. Albritton & David W. Robinson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F. MAR. L.J. 29, 39 (1995).

73. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 341–48 (1991) (discussing the historical development of case law in this area).

74. *Id.* at 339–40.

75. *Id.* at 355.

76. *Id.* at 353.

77. *Id.* at 355.

78. *Id.*

79. *Id.* at 345–46.

the enterprise in which [the ship was] engaged.”<sup>80</sup>

C. *When Is a Seaman Attached to a Vessel?*

The attachment prong of the Jones Act test also raises controversy and has caused a split in the circuits.<sup>81</sup> The initial inquiry was whether the seaman's employment would actually take him to sea.<sup>82</sup> However, such a distinction fails to consider those individuals working on vessels that traverse other navigable waterways, such as rivers and canals.<sup>83</sup> The Court in *Harbor Tug & Barge Co. v. Papai* discussed a need for the seaman to establish his connection to the vessel both in terms of duration and nature so that a determination may be made “distinguishing land-based from sea-based employees.”<sup>84</sup> The Court added that “[t]he substantial connection test” serves a vital function in “distinguishing between sea-based and land-based employment, for land-based employment is inconsistent with Jones Act coverage.”<sup>85</sup>

In its earlier ruling in *Chandris Inc. v. Latsis*, the Court explained that the policy behind the substantial connection test was “to give full effect to the remedial scheme created by Congress” through the Jones Act legislation.<sup>86</sup> Further, the test provides for the necessary distinction between “sea-based maritime employees who are entitled to Jones Act protection” and those employees who essentially work on land and have “only a transitory or sporadic connection [with] a vessel in

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80. *Id.* (quoting *The Minna*, 11 F. 759, 760 (E.D. Mich. 1882)).

81. Compare *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554–57 (1997) (focusing the attachment analysis on whether the employee's duties take him to sea), with *Fisher v. Nichols*, 81 F.3d 319, 321–23 (2nd Cir. 1996) (examining whether the employee's regular employment was sea-based and regularly exposed the employee to the perils of the sea, and rejecting the requirement of a substantial connection to a particular vessel or fleet of vessels), and *Coats v. Penrod Drilling Corp.*, 61 F. 3d 1113, 1119 (5th Cir. 1995) (en banc) (requiring a substantial connection to vessels under common ownership or control).

82. *Papai*, 520 U.S. at 555.

83. *See id.*

84. *Id.*

85. *Id.* at 560. *See also Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995).

86. *Chandris*, 515 U.S. at 368.

navigation.”<sup>87</sup> Such land-based employees do not require additional protections because they are not regularly exposed “to the perils of the sea.”<sup>88</sup>

#### IV. WHY IS THE JONES ACT VITAL TO SEAMEN IN PERSONAL INJURY CLAIMS?

##### A. *Benefits Received Under the Jones Act*

The Jones Act provides benefits to injured employees in addition to the maintenance and cure benefits previously allowed under *Osceola*.<sup>89</sup> The Act provides a cause of action in negligence against an employer to recover either damages for injury sustained or wrongful death benefits, payable to a seaman’s beneficiaries, in the case of death.<sup>90</sup> Damages recovered from a Jones Act employer can include: compensation for past and future wage loss; actual medical expenses and future medical care; past and future pain and suffering, and mental anguish.<sup>91</sup> Furthermore, daily subsistence pay and provision of medical treatment remain available to seamen along with the unseaworthiness claim created in common law.<sup>92</sup> The remaining compensation and damages are recovered under the principles of this special niche carved out in negligence-based tort law.<sup>93</sup>

##### B. *Seamen Are Not Entitled to Recovery Under Any Other Precept*

The Jones Act has proved to be vital legislation in the maritime arena. Seamen do not qualify for the compensation benefits payable to workers in other fields,<sup>94</sup> nor are they

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87. *Id.*

88. *Id.*

89. Jones Act, 46 U.S.C. app. § 688(a) (2000); *The Osceola*, 189 U.S. 158, 175 (1903).

90. 46 U.S.C. app. § 688(a).

91. *See The Osceola*, 189 U.S. at 175.

92. *The Osceola*, 189 U.S. at 175; SCHOENBAUM, *supra* note 60, at 300–03.

93. *See SCHOENBAUM*, *supra* note 60, at 182.

94. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 212–18 (1917) (holding that states have no constitutional authority to extend workers’ compensation benefits to employees

allowed to bring a standard complaint under general tort law.<sup>95</sup> The basic principle of admiralty law was an effort to protect the interests of seamen and the maritime industry.<sup>96</sup> The Jones Act codified that interest of protection.<sup>97</sup>

## V. APPROACHING A CROSSROADS IN MARITIME LAW

### A. *Forum Selection Clauses*

Forum selection clauses in contracts designate the specific forum in which disputes are to be heard.<sup>98</sup> The Supreme Court has held these clauses are presumptively enforceable unless there is “fraud or overreaching,” “enforcement would [violate] a strong public policy,” or if the designated forum would be an unreasonably inconvenient jurisdiction.<sup>99</sup> However, in its earliest cases the Court listed parties’ choice of forum as only one in a list of factors to be considered before a court will move the forum.<sup>100</sup> Then, in its critical decision in the 1972 case *M/S Bremen v. Zapata Off-Shore Co.*, the Court began a new common law movement away from statutory objectives and protection of United States courts’ jurisdictions by upholding a forum selection clause naming the High Courts of London as the proper venue for any disputes arising from an international contract.<sup>101</sup>

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working on navigable waters and therefore working under admiralty jurisdiction).

95. See *The Osceola*, 189 U.S. at 175 (stating seamen may not recover for negligence).

96. See SCHOENBAUM, *supra* note 60, at 98–99, 182.

97. See *infra* Part II.

98. BLACK’S LAW DICTIONARY 665 (7th ed. 1999).

99. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–16 (1972).

100. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (dictating the factors that the district courts should balance in deciding whether to dismiss a case because litigation would be conducted more appropriately in another forum: (1) plaintiff’s choice of forum; (2) “relative ease of access to sources of proof;” (3) “availability of compulsory process for attendance of unwilling” witnesses; (4) “cost of obtaining attendance of willing[] witnesses;” (5) “possibility of view[ing] premises”, if applicable; and (6) “all other practical problems that make trial of a case easy, expeditious, and inexpensive”).

101. See *Bremen*, 407 U.S. at 3, 4, 15.

### B. *Opening a Pandora's Box*

The *Bremen* case laid precedent in two major arenas: contract law and maritime law.<sup>102</sup> Since the decision in *Bremen*, the federal district courts have taken the language of the Supreme Court regarding an international commercial contract and applied it blanketly to all cases involving forum selection clauses or claims of *forum non conveniens*.<sup>103</sup>

The next section of this comment will explore the development of the recent trend in federal interpretation of forum selection clauses in various areas of the law. Further evaluation will reveal the effects of such a change on personal injury and death claims of seamen or their representatives under the Jones Act or DOHSA.<sup>104</sup> Finally, this comment will consider the reluctance of the Supreme Court to grant certiorari to seamen challenging the rulings of lower federal courts that choose to uphold contract selection of foreign jurisdictions for litigating their tort claims.<sup>105</sup>

## VI. THE HISTORICAL DEVELOPMENTS OF FORUM SELECTION CLAUSES

### A. *M/S Bremen v. Zapata Off-Shore Co.—Beginning the Trend*

The current trend in maritime cases dealing with forum selection clauses begins with the 1972 Supreme Court decision in *M/S Bremen v. Zapata Off-Shore Co.*<sup>106</sup> The *Bremen* case

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102. *Id.* at 17–18.

103. *See, e.g.*, *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999); *MacPhail I*, 302 F.3d 274, 278 (5th Cir. 2002), *cert. denied*, 537 U.S. 110 (2003).

104. Jones Act, 46 U.S.C. app. § 688 (2000); DOHSA, 46 U.S.C. app. §§ 761–68 (2000).

105. *See, e.g.*, *MacPhail I*, 302 F.3d at 274; *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 216 (5th Cir. 1998), *cert. denied*, 555 U.S. 1055 (1998). Note that none of these cases where the Court denied certiorari have involved American seamen injured under foreign employment. *MacPhail v. Oceaneering Int'l, Inc.*, 170 F. Supp. 2d 718, 720 (S.D.Tex. 2001) (stating that Oceaneering International is a “large multi-national corporation headquartered in Houston, Texas”), *cert. denied* 537 U.S. 110 (2003) [hereinafter *MacPhail II*]; *Marinechance*, 143 F.3d at 217 (stating that the injured seamen were both citizens of the Philippines), *cert denied* 555 U.S. 1055 (1998).

106. *Bremen*, 407 U.S. at 1. The Supreme Court in *Bremen* upheld the choice of

involved an international towing contract between two corporations, one American and the other German.<sup>107</sup> The contract governed the towage of a drilling barge from Louisiana to a new location in the Adriatic Sea.<sup>108</sup> The contract included, among other things, a clause directing that any litigation or disputes arising from the agreement would be heard before the London Court of Justice.<sup>109</sup> The court record established that the contract had been carefully drafted and negotiated by both parties as to other terms in the agreement.<sup>110</sup> However, no evidence was presented to controvert that the forum selection clause was also negotiated as a compromise between the two companies.<sup>111</sup> During the transport voyage, a severe storm arose in the Gulf of Mexico resulting in serious damage to the drilling rig.<sup>112</sup> This cause of action followed.<sup>113</sup>

The district court's holding followed the 1958 Fifth Circuit decision in *Carbon Black Export, Inc. v. The Monrosa* that rendered forum selection clauses unenforceable as "agreements in advance of controversy whose objective is to oust the jurisdiction of the courts."<sup>114</sup> The court found that such clauses violate public policy.<sup>115</sup> The court of appeals affirmed the district court's holding, and the Supreme Court granted certiorari.<sup>116</sup> Following a review of the facts and the terms of the agreement, the Supreme Court sustained the choice of forum as one of the terms in a freely negotiated contractual agreement between two experienced businesses.<sup>117</sup> The Court ruled that absent a "strong showing that it should be set aside," the clause should be given

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forum in the agreement as a fairly negotiated term in a contract between two experienced entities. *Id.* at 14–20.

107. *Id.* at 2.

108. *Id.*

109. *Id.*

110. *Id.* at 14.

111. *Id.* at 17.

112. *Id.* at 3–4.

113. *Id.* at 3–9.

114. *Id.* at 6 (quoting *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958)).

115. *Id.*

116. *Id.* at 7.

117. *Id.* at 12–15.

its full effect.<sup>118</sup>

The rationale of the Court in *Bremen* centered on the principle that in “an era of expanding world trade and commerce,” the doctrine asserted in *Carbon Black* served little purpose and “would be a heavy hand indeed on the future development of international commercial dealings by Americans.”<sup>119</sup> It is worth noting that in reaching its decision, the Court recognized that the *Bremen* case involved an American company with special expertise contracting with a foreign company for specific services.<sup>120</sup> However, this ruling would later be broadly applied to maritime contracts as a general rule and would not be restricted by the facts in *Bremen*.

### B. Maritime Law Changes Direction

Prior to *Bremen*, courts generally disfavored forum selection clauses.<sup>121</sup> However, such provisions are readily enforced in modern courts.<sup>122</sup> The *Bremen* decision purportedly settled the question of enforceability of forum selection clauses with respect to federal courts sitting in admiralty jurisdiction.<sup>123</sup> Yet, some discourse continues among the appellate courts regarding the enforcement of forum selection clauses in the wake of the

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118. *Id.* at 15.

119. *Id.* at 8–9.

120. *Id.*

121. *Id.* at 9 (citing earlier leading cases wherein both federal and state courts declined to enforce such clauses on the grounds that they were “contrary to public policy” or seeking to “oust the jurisdiction”). *See, e.g.*, *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 941–42 (2nd Cir. 1930) (exemplifying this statement for admiralty cases); *The Ciano*, 58 F. Supp. 65, 66–67 (E.D. Pa. 1944); *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387, 388 (S.D.N.Y. 1918); *Nashua River Paper Co. v. Hammermill Paper Co.*, 111 N.E. 678, 681 (Mass. 1916); *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, cmt. c (1971).

122. *See, e.g.* *Security Watch, Inc. v. Sentinel Systems, Inc.*, 176 F.3d 369, 374–75 (6th Cir. 1999). In *Security Watch*, the court discussed the propriety of the *Bremen* rationale for upholding forum selection clauses; however, it did not feel the need to determine dispositively that *Bremen* controlled because the decision agreed with state law. *Id.* at 375. *See also* *MacPhail I*, 302 F.3d 274, 278 (5th Cir. 2002) (holding that “federal courts must presumptively uphold forum selection clauses in international transactions”).

123. *Bremen*, 407 U.S. at 10; *Security Watch*, 176 F.3d at 375.

decision.<sup>124</sup>

In *Bremen*, the Court held that forum selection clauses “are *prima facie* valid and should be enforced” unless the party seeking relief from the effect of the clause provides evidence that the enforcement is “unreasonable’ under the circumstances.”<sup>125</sup> Further, the Court ruled that the clauses should be given full effect as a part of the freedom to contract unless the evidence demonstrates that the provision was a result of fraud, duress, undue influence, or unfair bargaining power on the part of the party seeking enforcement of the clause.<sup>126</sup>

A survey of the circuits reveals the reluctance to stray from the precedent established in *Bremen*, even under circumstances that would allow circumvention of the clause.<sup>127</sup> Although the general application of *Bremen* to most cases involving forum selection clauses serves the purpose of contract law, such application may result in a serious frustration of purpose in admiralty law.<sup>128</sup>

### C. *A Survey of the Circuits Regarding General Application of Forum Selection Clauses*

#### 1. *First Circuit Court of Appeals*

In 1993, with its decision in *Lambert v. Kysar*, the First Circuit upheld a forum selection clause in a dispute between a

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124. See, e.g., *Nunez v. Am. Seafoods*, 52 P.3d 720, 721–22 (Alaska 2002).

125. See *Bremen*, 407 U.S. at 10.

126. *Id.* at 12–13.

127. See *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 222–23 (5th Cir. 1999) (upholding a forum selection clause in foreign seamen’s contracts as determinative of the proper forum for tort action litigation arising from the employment relationship); see also *MacPhail I*, 302 F.3d at 277–78.

128. Compare *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d at 222–23 (upholding a forum selection clause in a foreign seaman’s contracts as determinative of the proper forum for tort action litigation arising from the employment relationship), and *MacPhail I*, 302 F.3d at 277–78 (determining that a forum selection clause in a release was valid, even though the district court concluded that the clause was “unreasonable and therefore unenforceable because its enforcement would violate a strong public policy and because Plaintiff would thereby be deprived of his day in court”), with *Chandris*, 515 U.S. at 354 (stating that seamen deserve additional protections because of their exposure to perils of the sea).

retailer in Massachusetts and a supplier in Washington.<sup>129</sup> When the retailer failed to pay the supplier, suit was brought to recover payment due.<sup>130</sup> The retailer counter sued in a court in Massachusetts.<sup>131</sup> The Massachusetts federal district court dismissed the suit in its jurisdiction based on a choice-of-law provision in the sales contract selecting Washington as the forum for any disputes arising out of the relationship.<sup>132</sup> The First Circuit sustained the district court decision on two basic premises. First, the court held that “there was no significant public policy militating against the application of Washington law.”<sup>133</sup> Second, the court noted that both Washington state law and federal law considered forum selection clauses as *prima facie* valid and that the contract between the parties constituted an “arms-length transaction between parties of roughly equivalent bargaining power.”<sup>134</sup> The court rejected the retailer’s assertion that the forum selection clause should be overturned for being “seriously inconvenient” for the retailer, since the contract had strong links to Washington.<sup>135</sup>

## 2. Third Circuit Court of Appeals

While the decision in *Lambert* seems appropriate for a pure contract dispute, a prior decision that displayed strict adherence to *Bremen* in a maritime case violates one’s sense of fairness.<sup>136</sup> The Third Circuit, in *Hodes v. S.N.C. Achille Lauro*, rejected an unequal bargaining power argument when passengers on a cruise ship sought to escape a forum selection clause designating Naples, Italy as the forum for any controversies arising from the contractual relationship between the cruise line and passengers.<sup>137</sup> The passengers prevailed at the trial level when the court held that the forum selection clause was

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129. *Lambert v. Kysar*, 983 F.2d 1110, 1111, 1121–22 (1st Cir. 1993).

130. *Id.* at 1112.

131. *Id.*

132. *Id.*

133. *Id.* at 1119.

134. *Id.* at 1116, 1121.

135. *Id.* at 1120–21.

136. *Hodes v. S.N.C. Achille Lauro*, 858 F.2d 905, 906 (3rd Cir. 1988).

137. *Hodes*, 858 F.2d at 906–07, 913.

unenforceable, because the cruise line did not provide adequate notice to passengers regarding the clause.<sup>138</sup> The Third Circuit reversed, holding that the printed clause on the ticket reasonably communicated the choice of forum to the passengers.<sup>139</sup> Furthermore, the court rejected the passengers' argument that the clause was the "result of unfair use of overwhelming bargaining power."<sup>140</sup> Such a strict following of the rule in *Bremen* is almost contradictory to the intentions of the Supreme Court.<sup>141</sup>

In *Bremen*, the Supreme Court clearly established that both contracting parties were sophisticated companies negotiating equally for the terms of the agreement.<sup>142</sup> The circumstance of the passengers in *Hodes* seems to indicate a clear disadvantage in the bargaining process; however, the Third Circuit rejected the argument to strike the clause.<sup>143</sup> A further investigation reveals a similar reluctance throughout the circuits.

### 3. Fourth Circuit Court of Appeals

In 1982, with *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, the Fourth Circuit upheld a forum selection clause in a contract between businesses, even though the clause was among the general terms and provisions on a pre-printed contract form.<sup>144</sup> The buyer in the dispute was an international corporation based in New York who contracted to purchase over 300,000 tons of coal from a West Virginia corporation.<sup>145</sup> The New York corporation furnished pre-printed contract forms for

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138. *Id.* at 906, 909–10.

139. *Id.* at 910.

140. *Id.* at 912–13.

141. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), *enforced*, 464 F.2d 1395 (5th Cir. 1972) (concluding that "the forum clause should control absent a strong showing that it should be set aside" and that a forum clause should be specifically enforced unless one can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching").

142. *Id.* at 8–9, 12.

143. *Hodes*, 858 F.2d at 912–13.

144. *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 316, 318 (4th Cir. 1982).

145. *Id.* at 316.

the arrangement.<sup>146</sup> As individual terms were negotiated, they were added to the front of the contract form.<sup>147</sup> The reverse of each form contained pre-printed terms of conditions of purchase.<sup>148</sup>

A clause stating that all disputes arising from the agreement would be adjudicated in New York was among the pre-printed terms.<sup>149</sup> When the buyer failed to fulfill his contractual obligation, the seller commenced a breach of contract suit under diversity jurisdiction of the federal district court in West Virginia.<sup>150</sup> The district court in West Virginia denied the buyer's motion to dismiss and granted preliminary injunctions to the seller.<sup>151</sup> On appeal, the Fourth Circuit considered precedent and the Choice of Law provision in the *Restatement (Second) of Conflict of Laws* to determine that the forum selection clause must be held *prima facie* valid.<sup>152</sup> The appellate court further held that no evidence was produced to demonstrate that proceeding in the New York forum would prevent the seller from adequately litigating the case.<sup>153</sup>

The appellate court found that the district court erred in rejecting the forum selection clause on the basis of inconvenience, holding that inconvenience will only invalidate a forum selection clause in cases where the inconvenience is so great as to deny the plaintiff his day in court in the chosen forum.<sup>154</sup> Furthermore, the appellate court correctly held that the contract negotiations were between two experienced coal dealers and did not indicate any inequality in the bargaining power of the parties.<sup>155</sup> Finally, the appellate court stated that failure to read pre-printed terms and conditions in a contractual

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 317.

152. *Id.* at 317; *see also* *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 80, cmt. c (1988 Revision).

153. *Mercury Coal & Coke*, 696 F.2d at 318.

154. *Id.*; *see Bremen*, 407 U.S. at 16–18; *Security Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999).

155. *Mercury Coal & Coke*, 696 F.2d at 318.

agreement will not relieve a litigant from being controlled by the terms.<sup>156</sup>

#### 4. *Sixth Circuit Court of Appeals*

In a 1999 decision, the Sixth Circuit took time to analyze the standards for the enforcement of forum selection clauses in contractual agreements.<sup>157</sup> The court in *Security Watch, Inc. v. Sentinel Systems, Inc.* provided a full discussion of the Supreme Court's reasonableness prong of assessing and enforcing forum selection clauses.<sup>158</sup> The court also considered the *Restatement (Second) of Conflict of Laws* to determine the complete standards by which the forum selection provision may be analyzed.<sup>159</sup> In its discussion, the court outlined three situations in which forum selection clauses may be unenforceable.<sup>160</sup>

First, forum selection clauses in contracts "obtained by fraud, duress, the abuse of economic power or other unconscionable means" are deemed unenforceable.<sup>161</sup> Second, if the chosen forum "would be closed to the suit or would not handle it effectively or fairly," the court may disregard the clause.<sup>162</sup> Finally, the court may invalidate forum selection clauses in which the chosen forum causes so "seriously an inconvenien[ce]" for the moving party "that to require the plaintiff to bring suit there would be unjust."<sup>163</sup>

Through the analysis of circumstances under which a forum selection clause would be unenforceable, the Sixth Circuit made a great attempt to carve out exceptions that the other federal district and appellate courts could follow while preserving the

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156. *Id.*

157. *Security Watch*, 176 F.3d at 374–75.

158. *Id.* at 375.

159. *Id.*

160. *Id.*

161. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, cmt. c (1988 Revision)).

162. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, cmt. c (1988 Revision)).

163. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, cmt. c (1988 Revision)).

Supreme Court's decision in *Bremen*.<sup>164</sup> Through this attempt, the Sixth Circuit clearly recognized the need to protect less educated entities in contractual relations with powerful companies from overbearing and unfair bargaining practices.<sup>165</sup> One instance in which the court would strike a forum selection clause involves contracts negotiated under fraud, duress, or the abuse of economic advantage.<sup>166</sup> Justice Moore was not attempting to create new policy; he was simply emphasizing the need to follow the basic principles of contract law.<sup>167</sup>

## VII. A QUESTION OF FORUM SELECTION IN SEAMEN'S CONTRACTS

### A. *A Changing of the Tide in the Fifth Circuit*

#### 1. *Marinechance Shipping, Ltd. v. Sebastian*

In 1998, the Fifth Circuit upheld a forum selection clause in foreign seamen's contracts as determinative of the proper forum for litigating tort actions arising from the employment relationship.<sup>168</sup> The case involved two Filipino seamen injured aboard a vessel owned by Marinechance Shipping.<sup>169</sup> The seamen's employment contracts contained a provision that any disputes arising out of the employment contract as between a ship owner and a seaman would be referred solely to the jurisdiction of the courts in the country of the seaman's nationality.<sup>170</sup> As a result of this provision, the court held that the proper forum for the seaman's personal injury claims would be the courts in the Philippines.<sup>171</sup>

The court in *Marinechance* determined that it need only

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164. *See id.* at 375.

165. *See id.* at 374-75.

166. *Id.* at 375.

167. *See id.* at 374-75; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, cmt. c (1988 Revision).

168. *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221-22 (5th Cir. 1998).

169. *Id.* at 217.

170. *Id.* at 220.

171. *See id.* at 221.

answer two questions to resolve the matter.<sup>172</sup> First, the court must determine whether the forum selection clauses in the seamen's contracts were valid and second, whether these clauses covered tort actions as well as contractual disputes.<sup>173</sup> After deciding that federal maritime law would apply to the case at hand, the Fifth Circuit looked to the Supreme Court decisions in *Bremen* and *Carnival Cruise Lines* to answer these questions.<sup>174</sup>

The court followed the Supreme Court's logic in *Bremen*, which held that "forum selection clauses in admiralty cases are presumptively valid and enforceable,"<sup>175</sup> despite the fact that forum selection clauses violate the spirit of the Jones Act provision of a cause of action for foreign seamen, wherein the laws of the nation having jurisdiction fails to provide an adequate remedy for the injured individual.<sup>176</sup> Further, the court reasoned that forum selection clauses serve a vital function in international cases by resolving any "uncertainty regarding the resolution of disputes."<sup>177</sup>

The Fifth Circuit also relied on the 1991 Supreme Court decision in *Carnival Cruise Lines* to support its opinion in *Marinechance*.<sup>178</sup> The appellate court claimed that the Supreme Court had refined its analysis of forum selection clauses in maritime cases through this decision.<sup>179</sup> In *Carnival Cruise Lines*, the Court upheld a maritime forum selection clause that was printed on the reverse of a passenger ticket as providing the proper forum for tort actions arising out of the contract between the ship and the passenger.<sup>180</sup> The Court reasoned that the passenger's cruise line ticket constituted a routine contract of passage and that although the passenger had no opportunity to

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172. *Id.* at 220.

173. *Id.*

174. *Id.* at 220–21.

175. *Id.* at 220 (citing *M/S Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 10 (1972)).

176. *See* *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1376–80 (5th Cir. 1988); *see also* *Olin v. Tidewater, Inc.*, 897 F. Supp. 968, 971 (S.D. Tex. 1995).

177. *Marinechance*, 143 F.3d at 220.

178. *Id.* at 221.

179. *Id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991)).

180. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 586 (1991).

bargain for this provision, the courts will enforce these clauses as long as they are reasonable.<sup>181</sup>

The court in *Marinechance* reasoned that the decision regarding the forum selection clause before it was clear based upon these precedential cases.<sup>182</sup> The appellate court concluded that the question of enforcement of forum selection clauses in standard maritime contracts was resolved.<sup>183</sup> In their opinion, forum selection clauses were essentially *prima facie* valid and must be enforced absent any substantial evidence that they would prevent the plaintiff from pursuing a remedy.<sup>184</sup> Further, the clauses need not be part of the basic contract negotiation when included as part of a standard maritime contract, such as the employment contracts before the court.<sup>185</sup> Additionally, the court held that forum selection clauses in an employment contract may also control actions brought in tort.<sup>186</sup>

Essentially, the Fifth Circuit decision in *Marinechance* set the stage for the trend toward the validation of forum selection clauses in seamen's international employment contracts.<sup>187</sup> However, the court failed to address the effects of upholding a forum selection clause in seamen's contracts on their ability to seek remedies under federal provisions in the Jones Act.<sup>188</sup>

## 2. MacPhail v. Oceaneering International, Inc.

Several years later in a 2002 decision, the Fifth Circuit determined the effect of a forum selection clause in a release governing the claims of a plaintiff asserting seaman status under the Jones Act in *MacPhail v. Oceaneering International, Inc.*<sup>189</sup> The plaintiff-appellee challenged the enforcement of the

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181. *Id.*

182. *Marinechance*, 143 F.3d at 221 (referencing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 10 (1972) and *Carnival Cruise Lines*, 499 U.S. at 587–88).

183. *Id.*

184. *See id.* at 220–21 (citing *Bremen*, 407 U.S. at 10).

185. *Id.* (citing *Carnival Cruise Lines*, 499 U.S. at 593).

186. *Id.* at 221–22.

187. *Id.* at 222–23.

188. *See id.*; *see also* Jones Act, 46 U.S.C. app. § 688(b) (2000) (providing for extension of the Act to aliens injured in the course of employment at sea).

189. *MacPhail I*, 302 F.3d 274, 277–78 (5th Cir. 2002).

forum selection clause in a release signed by him following an injury sustained while in the employment of the defendant, Oceaneering.<sup>190</sup> MacPhail asserted the argument that enforcement of the clause would create an unjust inconvenience.<sup>191</sup>

*a. Southern District of Texas—Decision & Analysis*

The district court sitting in the Southern District of Texas denied Defendant's Motion to Dismiss based on the forum selection clause in the release for multiple reasons.<sup>192</sup> The district court found that enforcing the forum selection clause would run contrary to the deeply entrenched public policy of that court with respect to the protections provided to seamen.<sup>193</sup> Next, the court found that enforcement of the clause would deprive MacPhail of his day in court.<sup>194</sup> Additionally, the court reasoned that the forum mandated in the release provided no adequate remedy for MacPhail.<sup>195</sup> He was asserting a seaman's claim for injuries under § 688(b) of the Jones Act and would not be allowed to pursue this cause of action under the laws of Australia, the designated forum.<sup>196</sup> Finally, the district court realized the unreasonableness of forcing MacPhail to litigate his suit in the selected forum.<sup>197</sup>

The district court in *MacPhail* followed the *Bremen* doctrine to determine the appropriateness of MacPhail's argument that the clause should be invalidated.<sup>198</sup> The Court in *Bremen* provided certain instances when a provision may be unreasonable and should be deemed unenforceable.<sup>199</sup> The first circumstance involves the incorporation of a forum selection clause into an agreement as the product of fraud or

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190. MacPhail II, 170 F. Supp. 2d 718, 722 (S.D. Tex 2001).

191. *Id.* at 726–27.

192. *MacPhail I*, 302 F.3d at 277.

193. *MacPhail II*, 170 F. Supp. 2d at 727.

194. *Id.*

195. *Id.* at 726–27.

196. *Id.* at 720.

197. *Id.* at 727.

198. *Id.* at 721.

199. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–18 (1972)

overreaching.<sup>200</sup> The district court in *MacPhail* declared that the forum selection clause in the release was unenforceable as it would “violate a strong public policy.”<sup>201</sup> The court noted that although Oceaneering provided MacPhail with medical care, they failed to provide the appropriate treatment for his injuries.<sup>202</sup> Therefore, when Oceaneering informed MacPhail that “nothing more medically . . . could be done for him,” and negotiated a settlement agreement, the court could find that Oceaneering’s unfair bargaining power over MacPhail in the situation could meet the requisite *Bremen* burden to declare the clause unenforceable.<sup>203</sup>

Second, *Bremen* allows invalidation of a forum selection clause if enforcement would have the effect of depriving MacPhail of his day in court due to the grave inconvenience or unfairness of the selected forum.<sup>204</sup> The district court found that the following facts in *MacPhail* supported this exception as well:<sup>205</sup> MacPhail was ill at all times during the litigation in question; he was present in the United States seeking treatment for the injuries that served as the basis for the suit; and the defendant, Oceaneering, was an American company.<sup>206</sup> MacPhail’s inability to travel to Australia at the time of the action precluded him from bringing suit in the selected forum.<sup>207</sup> Furthermore, forcing him to postpone his treatment in the United States in order to stay in Australia to litigate his claims would constitute a grave inconvenience for MacPhail.<sup>208</sup> Therefore, forcing MacPhail to litigate in Australia would essentially deprive him of his day in court.<sup>209</sup>

The third prospect for non-enforcement of a forum selection

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200. *Id.* at 12–13, 18.

201. *MacPhail II*, 170 F. Supp. 2d at 727.

202. *See* *MacPhail I*, 302 F.3d 274, 276 (5th Cir. 2002). Oceaneering failed to provide experts in hyperbaric medicine to treat MacPhail’s injuries. *Id.*

203. *See MacPhail II*, 170 F. Supp. 2d at 723–27.

204. *Bremen*, 407 U.S. at 18.

205. *See MacPhail II*, 170 F. Supp. 2d at 727.

206. *Id.* at 720–24.

207. *Id.*

208. *MacPhail I*, 302 F.3d 274, 277 (5th Cir. 2002).

209. *MacPhail II*, 170 F. Supp. 2d 718, 727 (S.D. Tex. 2001).

clause under *Bremen* includes clauses that were fundamentally unfair because the law of the chosen forum would deprive the plaintiff of a remedy.<sup>210</sup> Because MacPhail was seeking recovery under the provisions of the federal Jones Act, forcing him to litigate in Australia would prevent the assertion of a Jones Act claim, thus eliminating his cause of action.<sup>211</sup>

Finally, in situations where enforcement of the forum selection clause would contravene a strong public policy in the forum state, the clause may be invalidated.<sup>212</sup> In *MacPhail*, enforcement of the forum selection clause in the release would violate the spirit of both the *Osceola* decision and the Jones Act.<sup>213</sup> Both the common law, through *Osceola*, and the Jones Act legislation served to provide additional protection to seamen so that they could recover more than simple workers' compensation benefits in the case of injury at sea.<sup>214</sup> The purpose of these bodies of law was to provide seamen with additional protection in exchange for their service in a line of work requiring them to face the dangers of the high seas.<sup>215</sup> The district court in *MacPhail* properly determined that the multiple affidavits presented by MacPhail suggested "fraud, coercion, and manifest overreaching by Oceanering" in the creation of the forum selection clause.<sup>216</sup> Furthermore, the court found that the clause violated strong public policy, and its enforcement would deprive MacPhail of both a remedy and a meaningful day in court.<sup>217</sup>

*b. Fifth Circuit Court of Appeals—Decision & Analysis*

The Fifth Circuit reversed the district court's ruling in *MacPhail* with strict adherence to the *Bremen* and *Carnival Cruise Lines* rulings by applying the narrowest reading of the

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210. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17–18 (1972).

211. See *MacPhail I*, 302 F.3d at 276–77.

212. *Bremen*, 407 U.S. at 15.

213. See Jones Act, 46 U.S.C. app. § 688(b) (2000); see also *The Osceola*, 189 U.S. 158, 175 (1903).

214. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995); 46 U.S.C. app. § 688(a). See *The Osceola*, 189 U.S. at 175.

215. *Chandris*, 515 U.S. at 354.

216. *MacPhail II*, 170 F. Supp. 2d 718, 725 (S.D. Tex. 2001).

217. *Id.* at 727.

decisions.<sup>218</sup> The appellate court held that the Supreme Court had settled the situation by holding a forum selection clause in a maritime contract *prima facie* valid in prior rulings.<sup>219</sup> The court however, failed to consider the differences between the parties to the suit in the presumably controlling decisions as compared to the parties in the case before it.<sup>220</sup> Although the *Bremen* ruling together with the *Carnival Cruise Lines* opinion are held by many to have settled the enforcement question regarding forum selection clauses in an admiralty context,<sup>221</sup> the reliance on these cases in Jones Act claims is flawed for multiple reasons.

First *MacPhail* may be rightfully distinguished from the *Bremen* case. The *Bremen* Court clearly found that the provision in question was part of a fully negotiated contract between sophisticated international businessmen, and that the forum chosen was a neutral forum with expertise in the subject matter.<sup>222</sup> Furthermore, the Court in *Bremen* determined “with reasonable assurance that at the time they entered the contract” and at all times preceding the agreement, the parties were engaged in free negotiation and had fully “contemplated the claimed inconvenience” of the forum selection clause brought before the Court.<sup>223</sup> Therefore, the Court found it “difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.”<sup>224</sup>

The *Bremen* Court relied heavily upon the dissenting opinion from the court of appeals wherein Justice Wisdom noted that Zapata failed to allege or present any evidence of fraud or even undue bargaining power in the negotiation of the agreement.<sup>225</sup> Furthermore, the record showed that Zapata made

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218. *MacPhail I*, 302 F.3d 274, 278 (5th Cir. 2002).

219. *Id.*

220. *See id.*

221. *See, e.g.*, *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–22 (5th Cir. 1998); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991); *but see Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 264–65 (1949).

222. *Bremen*, 407 U.S. at 11–12.

223. *Id.* at 16.

224. *Id.*

225. *Id.* at 14 n.14.

various alterations to other provisions in the contract, but never moved to alter the forum provision clause.<sup>226</sup> Justice Wisdom further noted in his dissent, "Zapata is clearly not unsophisticated in such matters."<sup>227</sup>

The contract in question in *Bremen* was between two sophisticated entities that included, in addition to the forum selection clause, both an arbitration clause that all disputes be settled by arbitration in London under English law and broad exculpatory clauses.<sup>228</sup> Neither party in *Bremen* could claim that the other party maintained superior bargaining power, or subjected the adversary to undue influence or duress.<sup>229</sup> Therefore, the *Bremen* Court found "compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power such as that involved here, should be given full effect."<sup>230</sup> MacPhail was not a sophisticated businessman, well versed in contract negotiations.<sup>231</sup> He was an injured employee who feared he was risking the opportunity to receive medical treatment when he signed the release that contained the forum selection clause in question.<sup>232</sup>

Perhaps the court of appeals was correct in its verdict under the exact circumstances of the *MacPhail* case. The court viewed the case as a breach of contract case, rather than a Jones Act injury claim.<sup>233</sup> However, the reasoning in the decision leaves open the question of how courts would decide a forum selection case involving an American seaman injured while in the employment of a foreign maritime company if he signed an employment contract dictating a forum outside the United States for litigating all claims arising out of his employment.<sup>234</sup>

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226. *Id.* at 14 n.15.

227. *Id.* For the original decision containing Justice Wisdom's dissent, see *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 896-912 (5th Cir. 1970).

228. *Bremen*, 407 U.S. at 14 n.14.

229. *Id.* at 12-13, 14 n.14.

230. *Id.* at 12-13.

231. *MacPhail I*, 302 F.3d 274, 275 (5th Cir. 2002).

232. *See id.* at 275-76.

233. *See id.* at 275, 278.

234. Several federal district courts have held that forum selection clauses in

The decision in *MacPhail* did not address those issues. MacPhail was not an American citizen seeking to pursue his rights under federal law,<sup>235</sup> and the clause in question was part of an executed release—not an employment contract.<sup>236</sup> Furthermore, the Fifth Circuit failed to address the status of MacPhail as a Jones Act seaman and what effect, if any, such status may have on the enforcement of the forum selection clause under *Boyd*.<sup>237</sup> Unless *Boyd* is given proper consideration, the rules the court followed to arrive at the decision could lead to the same outcome under different circumstances.

### B. Considering Boyd

In 1949, the Supreme Court heard the case of *Boyd v. Grand Trunk Western Railroad Co.*<sup>238</sup> *Boyd* involved assertion of a claim under FELA contrary to a signed agreement stating that injured employees would only bring suit in either the forum where they resided or the forum where they were injured.<sup>239</sup> The forum selection clause in the *Boyd* agreement was not unlike the clauses in the cases discussed previously.<sup>240</sup>

The Supreme Court held in *Boyd* that the forum selection clause directly violated the rights of railroad workers to “bring

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employment contracts control tort causes of action arising out of the employment. *See, e.g.,* *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–22 (5th Cir. 1998). Such a decision in a Jones Act claim would violate the Supreme Court decision in *Boyd*, wherein the court ruled forum selections in FELA cases a violation of the statute and therefore invalid. *See Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949). The Jones Act extends all of the protections of the railway employees under FELA to maritime seamen. Jones Act, 46 U.S.C. app. § 688(a) (2000). Therefore a forum selection clause preventing a Jones Act seaman from pursuing a cause of action in any given forum would violate the statute as well as the common law. *See Boyd*, 338 U.S. at 265; *see also* *Nunez v. American Seafoods*, 52 P.3d 720, 720–21 (Alaska 2002).

235. *MacPhail I*, 302 F.3d at 276 n.2.

236. *Id.* at 276. Note, however, that MacPhail may be entitled to assert a claim under section (b) of the Jones Act, wherein the Act is extended to alien seamen as well. 46 U.S.C. app. § 688(b). Additionally, the defendant in *MacPhail* was a U.S. company. *MacPhail I*, 302 F.3d at 275.

237. *MacPhail I*, 302 F.3d at 278.

238. *See Boyd*, 338 U.S. at 263.

239. *Id.* at 263–64.

240. *See id.*; *see also MacPhail I*, 302 F.3d at 276; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

the suit in any eligible forum” as mandated by § 55 of FELA.<sup>241</sup> The Court explained that the Congressional mandates in FELA provided that any regulations or contractual attempts to limit or exempt a carrier from liability “shall to that extent be void.”<sup>242</sup> The Court ruled that the freedom to select a forum is a “right of sufficient substantiality” to be included under § 55 protection.<sup>243</sup>

The extension of FELA to injured seamen under the Jones Act provides that all of the protections of railroad workers, both in legislation and at common law, be provided to seamen as well.<sup>244</sup> Therefore, in the natural progression of the law, the Supreme Court decision in *Boyd*—to invalidate forum selection clauses in contracts involving railroad workers<sup>245</sup>—would extend to seamen’s contractual relationships as well. Therefore, seamen’s contracts would not be considered part of a general maritime category wherein forum selection clauses should be rigorously enforced under the strict rulings of *Bremen* and *Carnival Cruise Lines*.

The courts in the discussions above have strictly applied the rulings in the *Bremen* case and its progeny.<sup>246</sup> However, in the analyses of *MacPhail* and *Marinechance*, the Fifth Circuit has failed to incorporate the *Boyd* decision in their analysis.<sup>247</sup> The Supreme Court in *Bremen* used *Boyd* to exemplify the rule for holding a forum selection clause unenforceable if “contraven[ing] a strong public policy . . . whether declared by statute or by judicial decision.”<sup>248</sup> Therefore, the Court in *Bremen* maintained that *Boyd* remained effective in spite of the decision to consider

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241. *Boyd*, 338 U.S. at 265.

242. *Id.* (citing FELA, 45 U.S.C. § 55 (2000)).

243. *Id.*

244. Jones Act, 46 U.S.C. app. § 688(a) (2000). *See Boyd*, 338 U.S. at 265; *see also* FELA, 45 U.S.C. §§ 51–60 (2000).

245. *Boyd*, 338 U.S. at 265.

246. *See, e.g., Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301, 304–05 (5th Cir. 1998); *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 220–22 (5th Cir. 1998); *Sabocuhan v. Geco-Prakla*, 78 F. Supp. 2d 603, 605 (S.D. Tex. 1999); *Lejano v. K.S. Bandak*, 705 S.2d 158, 166–68 (La. 1997).

247. *See MacPhail I*, 302 F.3d 274 (5th Cir. 2002); *see also Marinechance*, 143 F.3d at 220–22; *but see Boyd*, 338 U.S. at 265.

248. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

forum selection clauses *prima facie* valid.<sup>249</sup> Following a complete reading of the *Bremen* decision together with the lower court decisions that have followed, it would seem that the future of forum selection clauses in maritime cases is not as well settled as the Fifth Circuit claimed in *Marinechance*.<sup>250</sup>

#### VIII. THE FUTURE OF FORUM SELECTION CLAUSES: FORUM SELECTION CLAUSES FOLLOWING *NUNEZ V. AMERICAN SEAFOODS*

Although the Court's decisions in *Bremen* and *Carnival Cruise Lines* are argued to be the established rule in admiralty cases, some recent lower court decisions are following *Boyd* and striking down forum selection clauses in personal injury tort claims. The Supreme Court of Alaska properly determined in its 2002 decision in *Nunez v. American Foods* that the forum selection clause in Nunez' contract was invalid because it violated the seaman's right to sue under the Jones Act in any eligible forum.<sup>251</sup>

The goal of the Jones Act is to provide injured seamen with a right of action against their employers by incorporating rights previously conferred upon railroad workers by FELA.<sup>252</sup> In an initial decision, the Superior Court for the third judicial district in Alaska dismissed Nunez' claim based on the forum selection clause in his employment contract.<sup>253</sup> The Alaska Supreme Court then reversed the lower court decision, proclaiming that although they recognize that *Bremen* and *Carnival Cruise Lines* undeniably establish that "a strong presumption of validity attaches to forum selection clauses under general maritime law," Nunez was pursuing recovery under the federal protections of the "saving to suitors" clause and the Jones Act—not general maritime law.<sup>254</sup> The Supreme Court of Alaska founded their decision on the protections provided in the Jones Act and the "saving to suitors" clause, holding that these

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249. *See id.*

250. *Marinechance*, 143 F.3d at 222.

251. *Nunez v. Am. Seafoods*, 52 P.3d 720, 721, 723 (Alaska 2002).

252. *See Jones Act*, 46 U.S.C. app. § 688(a) (2000); *see also FELA*, 45 U.S.C. §§ 51–60 (2000); *Nunez*, 52 P.3d at 722.

253. *Nunez*, 52 P.3d at 721.

254. *Id.* at 721.

remedies “prescribe[] the substantive maritime law by providing a right of action” for seamen injured in the course of employment to sue their employers for negligence.<sup>255</sup>

Justice Bryner stated in his opinion for the court that the Jones Act provides seamen with causes of action granted to railroad workers by FELA, stressing that “consequently the *entire judicially developed doctrine of liability*” follows.<sup>256</sup> As a result, the Supreme Court’s interpretation of FELA in *Boyd* “strictly curtails an employer’s right to contractually limit a worker’s substantive rights.”<sup>257</sup> When applied to Nunez’ employment contract, a valid claim for remedy under the Jones Act invalidates any provisions that run contrary to rights established under the Act.<sup>258</sup>

Therefore, the court in *Nunez* properly held that *Boyd*, not *Bremen* or *Carnival Cruise Lines*, dictates the conclusion in cases brought under the Jones Act concerning forum selection clauses in seamen’s contracts.<sup>259</sup> Section 55 of FELA requires the invalidation of the forum selection provisions in Nunez’s contract.<sup>260</sup> Under the *Boyd* decision, Nunez’s right to choose “any eligible forum”<sup>261</sup> in which to bring suit is a substantive right that may not be waived by contract.<sup>262</sup>

The court in *Nunez* insisted that the case before it was inapposite to *Marinechance* and its progeny.<sup>263</sup> The previous decisions all involved foreign sailors, and most involved foreign employers or injuries on foreign-controlled, foreign-flagged vessels.<sup>264</sup> The court concluded that these cases were correctly decided, even in light of *Boyd*, because they fell into the category

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255. *Id.* at 722.

256. *Id.*

257. *Id.*

258. *See id.*; *see also Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 264–65 (1949).

259. *Nunez*, 52 P.3d at 723–24.

260. *See id.* at 723; *see also FELA*, 45 U.S.C. §§ 55–56 (2000); Jones Act, 46 U.S.C. app. § 688(a) (2000); *Boyd*, 338 U.S. at 264–65.

261. *Boyd*, 338 U.S. at 265.

262. *See Nunez*, 52 P.3d at 722–23.

263. *Nunez*, 52 P.3d at 723–24.

264. *See id.* (referencing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221 (5th Cir. 1998)).

of cases that require the “uniformity and comity that are unique to their international settings.”<sup>265</sup>

Further, the court in *Nunez* pointed out that the decisions in previous maritime cases did not carve out a niche exclusive of other potential outcomes.<sup>266</sup> These decisions did not upset or overrule the principle established in *Boyd*. The court decisions that strictly adhered to the *Bremen* and *Carnival Cruise Lines* rulings did not “apply—or even meaningfully consider”—the statutory mandates of the Jones Act or “the continued vitality of *Boyd*.”<sup>267</sup> Although such an analysis was not necessary under the facts of many previous maritime decisions, the Fifth Circuit could have applied *Boyd* to the facts in both *Marinechance* and *MacPhail* if they had chosen to consider the plaintiffs’ status as Jones Act seamen.<sup>268</sup>

The *Nunez* court stands firmly on the distinction that the case before it lacked an international dimension found in the previous decisions.<sup>269</sup> Therefore, they found it unnecessary to consider the application of *Boyd* to an American seaman employed under contract with an international or foreign corporation, or even on a foreign-flagged vessel.<sup>270</sup> However, under the *Nunez* analysis, an international case would be determined using the same approach.<sup>271</sup>

The test for deciding maritime forum selection cases should follow the two-step process utilized by the court in *Nunez*.<sup>272</sup> First, the court must decide if the plaintiff is asserting a valid claim under the Jones Act as a qualified Jones Act seaman.<sup>273</sup> Then, if seaman status is determined and Jones Act provisions apply, the court would follow the precedent established in *Boyd*;

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265. *Id.* at 723.

266. *See id.* at 723–24.

267. *Id.* at 723.

268. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9–11 (1972); *MacPhail I*, 302 F.3d 274, 278 (5th Cir. 2002); *Marinechance*, 143 F.3d at 222. *But see Nunez*, 52 P.3d at 723–24.

269. *Nunez*, 52 P.3d at 724.

270. *See id.* at 723–24.

271. *See id.*

272. *See id.*

273. *Id.* at 721–24.

if not, then *Bremen* and *Carnival Cruise Lines* would control.<sup>274</sup>

### IX. CONCLUSION

This comment explores a group of appellate level cases that strictly follow a path carved out in *Bremen* and reinforced in *Carnival Cruise Lines*.<sup>275</sup> Conversely, *Nunez*, the single case in the discussion that deviates from the trend toward blanket enforcement of forum selection clauses, is clearly distinguishable from the others because the court claims that the lack of an international influence was the determining factor controlling its decision.<sup>276</sup> The *Nunez* court attempted to use the international element as the primary difference that allowed it to overlook the purportedly established rule of *Bremen* and *Carnival Cruise Lines* that held forum selection clauses in maritime cases to be *prima facie* valid.<sup>277</sup> However, the *Nunez* analysis hinged, not on the lack of international ties, but on the determination of the seaman status of a plaintiff asserting a valid claim under the federal Jones Act.<sup>278</sup> Although the decision in *Nunez* does not effect controlling precedent, the persuasive value of the court's analysis is high.

The primary analysis in the *Nunez* court's opinion would allow other jurisdictions to circumvent *Bremen* and *Carnival Cruise Lines*,<sup>279</sup> followed in the maritime cases previously discussed,<sup>280</sup> even when deciding maritime cases involving forum selection clauses and international employment contracts. The Fifth Circuit has required strict adherence to the maritime precedent set in *Bremen* and *Carnival Cruise Lines*.<sup>281</sup> This court

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274. See *id.*

275. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9–11 (1972); *MacPhail I*, 302 F.3d 274, 275–76 (5th Cir. 2002); *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–22 (5th Cir. 1998).

276. See *Nunez*, 52 P.3d at 724.

277. Compare *id.*, with *Carnival Cruise Lines*, 499 U.S. at 593–95, and *Bremen*, 407 U.S. at 9–11.

278. See *Nunez*, 52 P.3d at 721–24.

279. See *id.* at 723–24.

280. *Supra* Part VI.C.

281. See *MacPhail I*, 302 F.3d 274, 278 (5th Cir. 2002); see also *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–23 (5th Cir. 1998).

has failed to resolve the issue of enforcement of forum selection clauses in seamen's contracts under the Jones Act by completely avoiding the Jones Act discussion in its opinions.<sup>282</sup>

The Supreme Court has yet to grant certiorari to a case through which it may clarify the matter concerning the validity of forum selection clauses in international employment contracts involving Jones Act seamen.<sup>283</sup> It has been said many times that hard cases make bad law; perhaps this explains why the Court has avoided ruling on this matter.<sup>284</sup>

Still, the future of forum selection clauses in seamen's contracts remains uncertain. Until the right case presents itself before the high Court, the circuits will be free to continue the application of *Bremen* or any of its progeny when judging the enforcement of forum selection clauses in seamen's contracts. The common law is full of decisions that have evolved with the changes in society. The *Bremen* case itself was an attempt to look to the future of business and create precedent that would allow for advancement into a world of international relationships.<sup>285</sup> The common law has been forced to evolve along with the technological advances that have allowed businesses and individuals to transcend geographic boundaries to form global relationships.<sup>286</sup> Furthermore, along with the evolution of our statutory and common law provisions, courts have also realized the necessity of recognizing the validity of the laws of other forums and the role these jurisdictions play in the developing global society.<sup>287</sup> However, courts must not allow the

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282. See *MacPhail I*, 302 F.3d at 277–78; see also *Marinechance*, 143 F.3d at 221–23.

283. The Supreme Court denied certiorari in *MacPhail* in January 2003. *MacPhail v. Oceaneering Int'l, Inc.*, 537 U.S. 1110 (2003). Although the facts in *MacPhail* were not ideal for settling the issue, the Court allowed the Fifth Circuit decision to stand, essentially denying *MacPhail* the right to bring a Section (b) Jones Act claim as an alien seaman—even considering that the defendant, *Oceaneering*, is a U.S. corporation. *MacPhail I*, 302 F.3d at 275–78.

284. *Cintron-Lorenzo v. Departamento de Asuntos del Consumidor*, 312 F.3d 522, 528 (1st Cir. 2002); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 487 (1st Cir. 1989).

285. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–9 (1972).

286. *Id.*

287. *Id.* at 7–12.

trend toward global unification in business to interfere with their acknowledgement of the protections effected through statutory provisions in our own country and the legislative intent behind these protections.

At some future date the right case will present itself to the U.S. Supreme Court for determination of the validity of forum selection clauses in seamen's contracts.<sup>288</sup> Ideally, the case will involve an American seaman employed by a foreign corporation. The seaman's employment contract will contain standard language designating that all disputes or issues arising from the relationship will be litigated in a given foreign forum. Following the Fifth Circuit's analysis in *Marinechance*, tort claims arising from personal injury incurred during employment would qualify as disputes or issues arising from the employment relationship.<sup>289</sup> Therefore, a valid forum selection clause would prohibit the seaman from asserting a claim in a U.S. forum under the protections incorporated into the Jones Act.<sup>290</sup>

In 1920, the legislature clearly mandated in the Jones Act that all of the protections and provisions granted to railroad workers statutorily under FELA or under the common law would thereafter apply also to seamen.<sup>291</sup> In its 1949 decision in

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288. Arbitration clauses serve to select a forum outside the courts of our nation, performing the essential function of a forum selection clause. In comparing the courts' handling of forum selection clauses to the application and enforcement of arbitration clauses, one may predict the future of forum selection clauses in seamen's contracts under *Boyd*. In a 2002 decision, the Texas Supreme Court upheld enforcement of an arbitration clause in an employment contract as "valid under general principles of state contract law" and therefore "valid, irrevocable, and enforceable." *In Re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002) (quoting 9 U.S.C. § 2 (2000)). One year later in *Brown v. Nabors Offshore*, the Fifth Circuit held that although arbitration clauses in interstate employment contracts are valid and enforceable, seamen are among the categories of workers enumerated under the Federal Arbitration Act (FAA) as exempt from its application. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 392 (5th Cir. 2003). The same theory that led the Fifth Circuit to invalidate the arbitration clause in *Brown* under the FAA should carry over into the application of forum selection clauses in Jones Act seamen under *Boyd*, because the Jones Act extends all protections of workers under FELA—in statute or at common law—to seamen.

289. See *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–23 (5th Cir. 1998).

290. See *MacPhail I*, 302 F.3d 274, 277–78 (5th Cir. 2002).

291. See Jones Act, 46 U.S.C. app. § 688(a) (2000); see also FELA, 45 U.S.C. §§ 55–60 (2000).

*Boyd*, the Supreme Court discussed the substantiality of the right to select a forum in causes of action under FELA.<sup>292</sup> This freedom granted to railroad workers was read into the codified protections of § 55 of FELA.<sup>293</sup> The Congressional mandates within the statute prohibit contractual attempts to limit or exempt a carrier from liability.<sup>294</sup> The *Boyd* court held that forum selection clauses in railroad workers' contracts not only sought to effectively limit carrier liability, but also specifically violated the § 55 protections of FELA by restricting the right to "bring . . . suit in any eligible forum."<sup>295</sup>

Although *Boyd* was decided subsequent to the passage of the Jones Act, the Act provides that an injured seaman has available all those rights and remedies derived from statutes or the extension of the common law previously accessible to railroad employees and therefore should be interpreted to include any future protections granted to railroad workers as well.<sup>296</sup> Consequently, the *Boyd* analysis should strictly apply to forum selection clauses in seamen's contracts, deeming them invalid.<sup>297</sup>

Until the right case finds its way to the Supreme Court or until a Jones Act plaintiff argues for the invalidation of his forum selection clause under *Boyd*, the circuit courts may continue the strict adherence to *Bremen* and *Carnival Cruise Lines* and the rule upholding forum selection clauses in general maritime cases. When the *Bremen* Court upheld the forum selection clause as being *prima facie* valid, reference was made to *Boyd* in the decision, essentially maintaining that *Boyd* is still good law.<sup>298</sup> Therefore, eventually the Supreme Court must dictate whether subsequent decisions regarding FELA claims apply equally to Jones Act claimants. If the determination is made that the language of the Jones Act intended to include subsequent remedies derived from the extension of common law,

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292. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949).

293. 45 U.S.C. §§ 55.

294. *Id.*

295. *Boyd*, 338 U.S. at 265.

296. 46 U.S.C. app. § 688(a).

297. *See Boyd*, 338 U.S. at 264–65.

298. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–16 (1972).

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the protections read into the FELA provisions in the *Boyd* decision must be applied to claims asserted under the Jones Act as well. Therefore, Jones Act seamen injured in the course of employment under a contract that contains a forum selection clause will maintain the statutory right to “bring suit in any eligible forum,” and the forum selection clauses in seamen’s employment contracts must be considered void in any issues arising from the employment relationship that involves a qualifying Jones Act injury claim.<sup>299</sup>

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299. See Jones Act, 46 U.S.C. app. § 688(a); see also FELA, 45 U.S.C. §§ 55 (2000); *Boyd*, 338 U.S. at 264–65.

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