国际航运中的法律选择

——海事法中法律选择的最新发展

（结合世界著名案例分析）

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INTRODUCTION

The topic of these chapters is the border area between private international law and maritime law, or perhaps more correctly the area common to these subjects. Private international law and maritime law taken separately are each vast fields of law, particularly if they are studied on an international, comparative basis. It is not possible for a single individual to completely master one of the subjects, let alone both. Most of those who have worked with maritime conflicts of law have thus had their starting point—and strength—in one of the two fields. Many have been specialists in private international law. For them, maritime law has probably presented itself as an area where the need for their expertise was especially great. In addition, the area has provided them with a sizeable number of examples of choice of law problems well suited for purposes of illustration of the various doctrines of private international law.

My starting point is another. I have worked in maritime law for quite a number of years. First and foremost I have been an academic lawyer. But I have also been engaged in legal practice, inter alia, as a drafter of statutes in the field of maritime law and as an arbitrator in maritime disputes. A maritime lawyer in a country like Norway, which has a relatively large merchant fleet sailing almost exclusively among foreign ports, obviously cannot get by with only a study of his national law. A study of foreign maritime law becomes a practical necessity, and in its wake choice of law problems are bound to appear. Seen in this light, rules of choice of law become a part of maritime law; a rule of maritime law is incomplete until the boundaries of its international applicability have been determined.

I will therefore approach the questions of choice of law in this area as practical problems of maritime law. This does not imply that I shall present a catalogue of solutions given to numerous individual questions by the courts of various nations. Such a recital would not be possible within the time-limits given me and furthermore would be impossible to digest. Instead I shall choose certain areas of conflict for a more general discussion. For the most part my discussion will be on a de lege ferenda basis. The first stage is to map out the alternative solutions that can be appropriate to a certain problem. Next, we must attempt to figure how the various alternatives would operate in their total maritime legal context: which solution will best further the considerations and aims upon which the material rules of maritime law build? Such considerations alone, however, will seldom provide unambig uous answers as to the choice to be made among possible alternatives. We must therefore also draw upon general principles of private international law, and the accumulated experience these represent. And so that we might not completely lose contact with legal reality, our discussions di lege ferenda will to some extent be compared to the law in force in a few nations—without any pretension of completeness.

CHAPTER 1

GENERAL REMARKS ON MARITIME CONFLICTS OF LAW

1. The Major Importance of Choice of Law Questions in Maritime Law

Somewhat simplified, we can say that there are two factors which give choice of law questions central importance in maritime law: (1) the large number of international contracts, i.e, contracts entered into by parties from different countries, and (2) the central position of the ship in all maritime legal relations in conjunction with the frequent voyages of the ship from one State to another.

The first factor, the large number of international contracts is not peculiar to maritime law. In finance, insurance, the sale of goods, and a number of other sectors of trade, numerous and important contracts are entered into that cross national borders. But the proportion of international contracts is certainly higher in the shipping industry than in any other trade. Especially striking are conditions in smaller countries, the Scandinavian countries, for example, where the operating merchant fleets are much larger than what the nation's own needs for ships and transportation might otherwise suggest. The Norwegian merchant fleet, for example, as of 1 January 1979 comprised 23.5 million GRT of which 22.6 million was engaged in foreign trade[2]. Furthermore, about 90 per cent of the fleet engaged in foreign trade sailed solely between non-Norwegian ports and presumably almost exclusively on contract to goods owners or charterers abroad. Corresponding figures can be cited for ship-building contracts, for sale of second-hand ships, for financing, and for insurance of ships. Thus, for example, 14.3 million GRT were contracted for Norwegian account as of 1 January 1975, of these 85 per cent. at non-Norwegian shipyards. In larger nations the home market is likely to be of more importance, although by no means wholly dominant. An important consideration here is the increasing number of ships flying flags of convenience. Practically speaking, these ships have no home market; their entire activity takes place on an international level.

The other factor, the ship's central position in all maritime legal relations, viewed together with its international mobility, is peculiar to maritime law, even if it has its parallels in other branches of transport law. Legally speaking, the ship is a chattel, but one of quite a special nature. It has a considerable permanence, is often of sizeable value, possesses a high degree of mobility, and often has a great potential to do damage. A number of persons have legal interests bound up in the ship. In addition to the owner or owners we have the bankers and others who have advaned loans against security in the ship, the underwriters who have insured it, and the charterers who have taken the ship on charter, possibly for a number of years. The list is far from complete, also included could be

salvors, shipyards, suppliers and persons who have suffered damage as a result of the ship's activity. Legal relations in the case of typical chattels in situations like these would usually possess a natural bond to the State in which the particular object is located—one employs, as a matter of course, the lex rei sitae. For ships, as well, lex rei sitae seems to be appropriate in a number of instances: by entering the territorial waters and ports of a foreign State a ship can be said to submit to this State's authorities in a number of ways. There will also arise a strong tie to the law of a port of call in questions of responsibility for supplies or assistance afforded the ship, or for damage caused by the ship during its call. In the case of ships with a wide sailing range, for example ships on liner service between European and Far-Eastern ports, or bulk ships employed in tramp trade covering a greater part of the globe, a persistent adherence to the lex loci principle means a nearly continuing change of applicable law. This is bound to lead to difficulties. And in some legal relations it will be virtually impossible to change background law every time a ship calls at a port in another country. When the ship sails the high seas, the lex situs is no solution at all, there is no such law.

2. The Choice of Law Problem as Seen by the Judge, the Practising Lawyer and the Legislator

Legal doctrine is often strongly judge-orientated. I have in mind not only the doctrine's predilection for difficult and unclear questions already decided by the courts or likely to be decided in the future. I am also thinking of the mental set of the legal scholar as he considers how a question of law ought to be solved: he places himself on the bench. That is to say, the problem is dealt with ex post. The material facts are clear what was to happen has happened. The judge is presented with all the arguments pro and con, he can take his time thinking through them all thoroughly, and then write a detailed and logical opinion, mustering up great quantities of wisdom and acumen. The decision can, for example, concern difficult questions of choice of law. In two essential areas, however, a choice of law is already made for the judge: he is always to employ his own law, lex fori, on questions of procedure and equally important on questions of choice of law. Private international law is, despite its name, a part of the municipal law and therefore may vary considerably from State to State.

For the practising lawyer the choice-of-law problem will often arise in a completely different and much more complicated form. One is tempted to speak of a multidimensional choice-of-law problem - as opposed to the judge's unidimensional one. An example from the day-to-day world of maritime law should suffice to make my point. One ship, from Country A, collides upon the high seas with a ship from Country B. Both ships have cargo on board, belonging to owners in Country C and Country D. The ships incur considerable damage, but not so severe as to prevent them from reaching a port of refuge under

their own power. However, the site of collision is so situated as to make possible the seeking of refuge in a number of alternative ports in several different countries, such as the case would be, for example, after a collision in the southern part of the North Sea. The shipowner from Country A, who has received a report by radiotelephone from the ship's master immediately following the collision, awakens his attorney with questions as to how he should secure for himself the best possible position in the coming settlement with the other ship's owner and with the cargo owners.

The attorney must here reason his way through three different steps:

(1) The first step involves choice of forum. A shipowner can normally be sued in his home State, but this may be of little value particularly where the shipowrer is a corporation in Panama or another flag-of-convenience State. In practice, the venue of arrest will be by far the most important. The owner of ship B and the cargo owners will normally be able to establish jurisdiction in ship A's port of call by arresting the ship there. Jurisdiction is gained partly by the arrest of the ship itself, but also by forcing the giving of other security. By directing his ship to a port of refuge in Country X, the shipowner leaves himself open for arrest in that country, and gives the other ship and cargo owners the opportunity of establishing jurisdiction there. The position of the other colliding ship is the same. Shipowner A must watch ship B's voyage onwards and be ready to demand its arrest if it calls at a port where he desires jurisdiction. Also to be considered, by both parties, is the possibility of arrest of a sister ship, i.e., another ship belonging to the same owner[3]. As a rule, such an arrest will provide jurisdiction, but there remains a chance here that the courts of the country where the arrest takes place will refuse to hear the collision case, referring to the doctrine of forum non conveniens[4]. Nevertheless, normally there will be this possibility of establishing jurisdiction in a number of alternative countries.

(2) A choice of forum implies by necessity a choice of that State's conflict of laws rules as well[5]. Somewhere the game must start; if the judge was not required to employ the private international law of the court, rules would be neccessary regarding the choice of choice of law rules, that is to say, choice of law rules raised to the second power. The latter would then have to be sought in the national law of the court. In fact, we find such rules raised to the second power in the renvoi principle. This principle, however, is of only limited application—most national choice of law rules entail a choice of material rules, not of rules of choice of law.

A choice of law rule of seemingly universal application, and probably necessarily so, is that which requires all procedural questions to be adjudged under the national law of the court, lex fori[6]. To this extent one can say choice of forum also amounts to choice of law with regard to questions of procedure. In this regard it is important to remember that notions of what constitutes procedural law may vary greatly from country to country, and that lex fori also will govern how this question (which is a special choice of law question)

is to be decided. For the shipowner's legal adviser the rule that choice of law be decided by lex fori requires, in principle, that he asks himself for each of the possible fora, what result the choice of law rules might lead to concerning the collision that has occurred. The answers could vary considerably. For the extra-contractual liability, the law of the flags of the ships, or a combination of these, will be possibilities; where the collision has occurred in territorial waters, lex loci delicti will also be available and here, as elsewhere lex fori remains a possible solution. Concerning the important question of global limitation of shipowner liability one finds special choice of law rules in many countries. If we add to this cases involving responsibility to cargo, passengers and crew members on shipowner A's own ship, the list of possible alternatives again increases; thus for cargo liability a question of the validity of an explicit choice of law clause in a bill of lading may arise. Moreover, the law of the country of issuance of the bill of lading and possibly that of the cargo's destination, may enter the picture as well.

(3) As a third step comes the ascertainment of which material rules govern in the different States which the various choice of law rules point to. It is to be hoped that the alternatives are not all too numerous and that the attorney is reasonably well versed as to the most important dissimilarities among these legal systems with regard to collision liability limitation of liability, cargo liability and liability for personal injury. An evaluation of which set of rules in the case at hand benefits the client most can lead to a preference for a certain choice of law rule, and attempts to avoid certain jurisdictions, or even an attempt to place a dispute before a certain jurisdiction for resolution there. An evaluation of the facts of the case, so far as they are known to the attorney at this point can come in, should it seem A's own ship was chiefly to blame, and that the damages to the other ship are far and away the greatest, an attorney will naturally prefer a choice of law which leads to a narrow limitation of liability. The other ship will clearly have an opposing interest, if the ship from Country A is a valuable one, which practically speaking escaped the collision unscathed, it would be to the advantage of the shipowner from Country B if the choice of law led to a limitation according to some form of fund based on the value of the ship (as one has, for example, in American law).

That choice of forum by arrest or other action can imply a choice of law rule and thereby, indirectly, a choice of law, must not cause us to overlook other, possibly more important aspects of arrest and forum. These aspect can also motivate a shipowner's actions, possibly even contrarily to that that consideration of choice of law alone might lead to.

Normally, arrest has its primary purpose in obtaining for he who seeks it an object of attachment, either the arrested ship itself or, as is most often the case, the security given by the arrested ship's owner to effect the ship's release. Where the colliding ship belongs to a singleship company domiciled in a distant "State of convenience", arrest of the ship in the first and best port can be a practical necessity—the alternative being the

disappearance of the ship to faraway shores, where it is then sold to a new and equally anonymous shipping company and as a result possibly made unavailable for attachment.

Choice of forum, too, can have considerable importance beyond its connection to the choice of law problem. Even where choice of law rules in two States point to the same material rules as decisive for collision liability, the choice of forum can have considerable influence on the outcome of a collision case. Procedural rule, particularly rules of evidence, can come down hard; a judge's ability and desire to familiarize himself with the appropriate foreign law can vary greatly, and—one may surely be permitted to add—the competence and integrity of judges does not everywhere lie at the same high level. As a result one can imagine a shipowner and his attorney faced with a choice may opt for a "good court" rather than a "good choice of law rule". To secure a suitable forum for the shipowner is an important and sometimes difficult task. It is usually referred to as "forum shopping", often in a somewhat derogatory sense, especially when used by legal scholars[8]. In their opinion lawyers who practise forum shopping are taking unfair advantage of the existing vacuum in international law. Attorneys, whose prime concern is to protect the interests of their clients, take a different view; they are more inclined to speak about "the noble art of forum shopping".

We have now suggested how the choice of law problem might appear seen from the viewpoints of a judge and a legal practitioner. As our discussions of the individual choice of law rules will mostly take place on a de lege ferenda basis, we must also attempt to visualize the problem seen through the eyes of the lawmaker. Our first observation must then be that legislators have quite often simply closed their eyes to the problems concerning choice of law. In the Scandinavian countries, for example, a great deal of labour has been expended through the years in developing an extensive and comprehensive maritime code, without a position being taken as to what extent this legislation might see use internationally. This issue has been left for subsequent case law to solve[9]. This seems a little striking when one remembers that an important proportion of the sizeable Scandinavian merchant fleet sails exclusively among ports outside Scandinavia. A maritime law statute is left in rather thin air where its international validity is undecided.

An explanation of the legislator's reluctance, however, lies close at hand; here, too, choice of law problems are multi-dimensional and therefore quite complex. An example: the national legislator considers what protection should be afforded the various suppliers of a ship at a port of call, for example, shipyards carrying out repair work on board during the call, suppliers of bunkers and provisions, towboat owners who tow the ship in and out of the harbour, etc. It is generally accepted that the shipmaster to a certain extent should be authorized by law to bind the shipowner personally. The important question is, however: should the suppliers claim be secured by a maritime lien on the ship with priority over the mortgagees[10]? The suppliers are of course in favour of such a lien.

To a certain extent the granting of a lien would even be in the interest of the shipowner, as it would make it easier for him to obtain credit in foreign ports. On the other hand, the interests of the mortgagees and thereby that of shipping finance speak against the granting of a lien. The legislator must make a choice. But before he does, he ought to consider what effect the rule he makes will be given internationally; if the courts let the law of the flag be decisive, the rule can achieve great importance for the sizeable part of the nation's fleet engaged in trade between foreign ports. If they prefer the law of the port of supply (the lex loci contractus), the rule's impact will be considerably reduced; trade at home may be insignificant compared to that between the world's great ports. By himself the legislator can only prescribe a partial solution to the choice of law problem; that is to say, for disputes heard in his own courts. But even this partial solution ought to be imposed with an eye to the choice of law rules in use in other States. Suppose that the national legislator refrains from giving a maritime lien to the supplier—and at the same time decrees that the question of choice of law concerning suppliers' lien be decided according to the law of the flag. The goal of such action is clearly to protect mortgages in the country's own ships. Nevertheless this, is of little value if the rest of the world recognizes the supplier's lien and chooses lex loci contractus as the governing law. If the country's ships are constantly calling at foreign ports, the national legislators' attempt to protect the mortgagees will be abortive—what they achieve is only to place suppliers in ports at home in a poorer position than their competitors abroad. A satisfactory solution of the choice of law problem here can only be reached on an international level, i.e., via international conventions[11]. This is a long and difficult process. Still, when we discuss maritime choice of law problems de lege ferenda, it is this international perspective we must keep in mind.

3. Policy Considerations: What Do We Wish to Achieve by Conflict of Law Rules[12]?

If we wish to explore freely, unbound by existing positive law, what would be the most expedient choice of law rules in the maritime field, we must first be sure of what we wish to achieve through the use of such rules. The simplest of solutions, undeniably, would be if all courts were allowed to apply their own laws, laws with which they are intimately familiar. One could then completely dispense with this troublesome discipline called private international law. When we wish, all the same, to require a judge to apply foreign law, we ought to be able to cite positive reasons for such action.

3.1. The argument that is likely to come to mind first is the principle of uniform solutions: It would be highly dissatisfying if a case were to be decided according to different rules depending on whether the case was brought before the courts of country A, B or C. This could run contrary to one's immediate notions of the nature of the law. One thinks of the parties' rights and duties as something that exist and, preferably, as being

firmly and clearly defined. Where lex fori governs as the principle of choice of law and there are several possible jurisdictions, rights and duties may, however, as a result first be fixed ex post, in that a case is brought before a specific jurisdiction. It is also possible that the same occurrence, a collision for instance, leads to several legal proceedings, for example where some cargo owners sue the shipowner in Country A, others in Country B. If each court bases itself on its own laws, identical questions of responsibility arising from the same accident at sea may be decided according to different rules.

The rules of international private law clearly have an important task here: to secure that a dispute be judged according to the same material rules of law, regardless of where the case is brought, and—for that matter—to give a guide as to which law shall govern even if the case has not been or will not be brought to court. To achieve this, however, it is not sufficient that choice of law rules are laid down in each country. The choice of law rules of the different countries must be identical or at least correspond closely with one another. If Country A decides responsibility according to the law of the flag and Country B employs lex loci delicti, choice of forum will still be of importance.

The principle that a given case should be decided by the same rules regardless of where the litigation takes place, is a "negative" guidepost: it precludes choice of law rules which lead to a relationship being subjected to different laws in different jurisdictions. The principle does not, however, provide any guidance for a positive selection among several choice of law alternatives, each guaranteeing equal treatment.

3.2. A certain such positive support, however, is provided by the next leading principle:

Choice of law rules ought to be formulated so as to support the considerations which the appropriate material rules attempt to realize.

This principle can give clear guidance in a number of cases. As an example one can mention the choice of law rules concerning ship mortgages Today's shipping industry is highly capital intensive and it seems clear that an essential part of the necessary capital must be raised through loans on a fairly long-term basis (7-10 years). Therefore it is essential for lenders that they obtain what is legally an unassailable mortgage in the ship. It is not sufficient that the mortgage is protected in the ship's homeland. That the ship might sail from State to State, an internationally protected right for the mortgagee is a necessity. This places certain demands upon choice of law rules. Lex loci and lex fori which change during the ship's voyage, cannot be employed. A single specific law must be decisive. Whereas the right of the mortgagee in most nations is given protection through registration in the official register of ships the law of the State of registration—synonymous with that of the flag—presents itself as the natural solution[13].

In other cases, considerations of the purpose behind a statute may provide an important contribution to the solution of a problem, though without singling out any specific choice of law rule. When e.g., a legislator has laid down mandatory rules concerning a

shipowner's liability for passengers and cargo, choice of law rules ought to be set forth which give these mandatory rules a reasonable international scope, for example by not recognizing private choice of law clauses which refer questions concerning the shipowner's responsibility to a law possessing less severe requirements[14].

In many cases, however, considerations of purpose will fall short because they do not lead to an internationally uniform solution. Rules of law often represent a compromise of competing interests—in one country greatest importance has perhaps been attached to one of these concerns in, another country an opposing interest may have come to the fore. Rules governing "global" or "overall" limitations of liability provide a good example of this. Country A views the protection of the national shipping industry from large and burdensome tort liability as an important task. It therefore lays down rules governing the limitation of liability establishing low limits. In Country B one is more interested in protecting tort victims, and as a result law makers shut off any possibility of limitations of liability, or enact rules calling for very high limits. In Country A continued pursuance of considerations of statutory purpose would require the law of the flag to be the rule of choice of law, while in Country B lex loci delicti would be the end result. We obtain, in a sense, definitive outcomes. We do not, however, achieve equal treatment, and none of the national choice of law rules obtain international scope.

In a good number of cases considerations of purpose provide no indication at all in support of a particular choice of law rule. Suppose that Country A imposes a two-year time bar for a given cause of action, while Country B has provided for a three-year limit upon the same cause of action. What is important here is that a statute of limitations exists and that its time period is definite and of reasonable length. Both A's two-year rule and B's three-year rule meet these requirements. Whether the time bar is two or three years is of subordinate importance, however, and provices no ground for a choice between A's law and B's law.

3.3. A principle of a more paticular nature, which is of importance in a maritime connotation, is the following: choice of law rules ought to prevent ships sailing under certain flags from achieving unreasonable competitive advantages.

Ships and shipping have, as is well known, seen a rapid technological development during the last 150 years, and a corresponding development has followed - a few steps behind the pace-in the legal regulation of the shipping industry. The changes have been particularly sizeable in the decades following the Second World War. The result: problems of a scope and nature earlier unknown. Key words like super-tankers, gas-tankers and solventvessels, dangers of pollution and contamination, environmental protection, occupational safety, and consumer protection demonstrate the point I am making. Legislative reaction to these new problems has involved steadily increasing demands for safety including stronger and better-equipped ships, more careful handling of dangerous cargoes, greater demands upon the competence of the crew, stricter rules and higher limits of

liability. It would seem natural that the national legislators at first make greater demands upon their own flag vessels. But most of the reforms discussed are expensive and increase the shipowner's requirements for capital and his running costs. And a standard argument brought against such reforms is naturally that they will weaken the ability of the shipowners to compete on the international market where the law of supply and demand and competitive pricing still apply. A possible recourse is the accomplishment of such reform on an international level—the numerous and important ILO and IMCO conventions attest to the feasibility of such action [15]. There remains, however, the possibility that certain States - often the socalled States of convenience—will choose to remain outside the international regulations. By choosing the flag of one of these States the shipowner can sail "cheaply". Here, rules of conflict of law can serve as an aid in the campaign against ships which nautically and socially must be said to be substandard in the countries placing strict requirements on their ships, the national rules, to a greater or lesser degree, can be given application to ships sailing under foreign flags, by choosing the lex loci delicti or even the lex fori as the conflict rule.

3.4. Usually cited as an important factor to consider in the formulation of choice of law rules is the desirability of the parties being able to predict which national law will govern their legal relationship. The first condition for the fulfilment of this wish is that the choice of law rules in the various countries be unambiguous and simple to employ. Where the choice of law rules in the individual countries refer one to different material rules, it is a further condition that it can be ascertained ahead of time which country's choice of law rules are to be decisive. A charterparty which appoints a certain country's law as governing law fully satisfies these demands of predictability; I here presuppose the universal recognition of an explicit choice of law clause such as this. At the other end of the scale we find systems involving a consistent use of lex fori combined with broad access to forum shopping.

The need for predictability with regard to applicable law is undoubtedly of importance in many situations. But it varies greatly depending upon the type of legal relationship in question.

As example, take the shipowner's rights and responsibilities under a charterparty on the one side and his liability for collision damage, damage to cargo and injury to passengers on the other. As regards the charterparty, a ten-year time charterparty, for example, it is of greatest importance that the shipowner, from the time when the contract is concluded and throughout the charter period, can know exactly which law shall be governing law. Uncertainties can arise, for example, concerning the extent of off-hire, the right to withdraw the ship from the charterparty because of late payment of freight, and in regard to the shipowner's right to cancel the charterparty in cases of shipwreck, war or other forms of alleged frustration. The parties must in a number of cases take positive action to maintain their rights under the contract; declare set-off in freight

settlements, pay or elect not to pay freight, cancel the charterparty, etc. But their course of action must be rightfull under the charter; if it is not, it will constitute a breach of contract. This can give the other party the right to cancel, something which in time can mean the loss of a valuable charterparty, and possibly a very burdensome liabilty for damages. A party must therefore undertake a very careful evaluation of its contractual rights and duties before it acts. The background law is then, in many cases, of prime importance. Choice of law rules that are difficult to employ, for example, because they refer issues to judicial evaluation (of "the proper law of contract"), will be a burden here, particularly as the parties' decisions under a charter must often be made under considerable time pressure.

Even concerning responsibility for cargo and passengers and other types of tort liability, it can be desirable to be able to predict under which law a prospective liability would be decided. Suppose, for example, that the law of the flag sets a definite and rather moderate per passenger limit on the shipowner's liability for injury or loss of life. If the shipowner could be certain that his liability for the passengers would in all cases be decided according to the law of the flag, he would have a good basis upon which to insure against this liability, in that his maximum potential liability would be his maximum liability per passenger times the number of passengers that the ship, by its certificate, may carry. ("Owner's privity" could increase this liability, but liability in cases of privity cannot normally be insured.) Similar considerations will apply concerning the right to global limitation of shipowner's liability.

Predictability with regard to governing law, however, is not especially important at this stage. Uncertainty concerning the frequency of accidents and the extent of the damage is so large anyway, that it completely overshadows the uncertainty surrounding the size of the prospective liability which the choice of law rules entail. Commercially speaking, liability insurance is a necessity in all circumstances. Furthermore, the liability insurers, the so-called P. and I. underwriters, will cover the liability regardless of whether it be imposed under the law of one State or another. One can say that to this extent the risk of choice of law is covered by insurance.

Once damage has occurred, the need to clarify which State's law shall apply increases. The ship has, for example, collided with another ship on the high seas, has severed an underwater power cable while anchoring, or has arrived at its port of destination with a cargo of fruit that proves to be rotting, etc. By far the greatest proportion of damage claims of this sort are settled amicably, often following negotiations between the parties underwriters, between the cargo underwriters and the P. and I. insurer for example. In many instances the parties will only discuss the amounts to be paid—the factual and legal premises for the settlement need not be agreed upon. It is clear, all the same, that these premises play an important role a party's notion of what he can demand or be liable for on a strictly legal basis is the point from which he begins negotiation.

Uncertainty as to choice of law will obviously contribute to making this starting point unclear. If the question of liability has to be taken to court, it is also an advantage if the choice of law question is clear—this can be of importance in the choice among several possible fora and it can simplify the proceedings considerably. Nevertheless, one can live with a good deal of uncertainty regarding background law also at this stage. The liability insurers are standing behind the scenes and for them it is no great problem whether, say, a cargo damage case is to be judged under the law of Country A, which builds upon the Hague Rules and limits liability to £100 per unit, or that of Country B, which bases itself on the Hague-Visby Rules and therefore sets a somewhat higher limit of liability. Uncertainty as to choice of law counts for much less than uncertainty as regards the frequency of accidents, and can, in all events, be covered by insurance.

4. Policy Considerations: the Connecting Factors

4.1. First of all we face a choice of method: shall we allow one single or several specific connecting factors to be decisive or shall we rely instead upon an overall judicial evaluation based on all the connecting factors present. The first method is the oldest. It leads to choice of law rules based on connecting factors such as the place of registration (the law of the flag), the place where the tort was committed (lex loci delicti commissi), the place where the contract was made (lex loci contractus), etc. The second method is of newer vintage, but already well established. It is labelled "the individualizing method" and "the centre of gravity method"; in the common-law countries one speaks of seeking "the proper law of contract" or "the proper law of tort"[16].

The individualizing method has its obvious advantages. In the hands of an able judge it makes possible decisions that are both flexible and just with regard to the concrete facts of a case. On the minus side, however, one must take note of the legal uncertainty the method will, in many cases, lead to. The extent to which the method leaves the decision to the judge's evaluation means there is little to hinder the result in a particular dispute from differing depending on whether judge X or judge Y makes the decision—even the highest of professional standards on the part of both judges will not prevent their placing different emphasis on the individual connecting factors.

Most scholars of private international law seem all the same to be quite positively disposed to the individualizing method[17]. Many authors view the introduction of the method as a liberation from the rigid and schematic rules of statute of earlier laws and therefore as an important step forward.

I shall not express myself on the method in general terms. As concerns maritime choice of law, however, I must confess to being strongly sceptical of the expedience of operating with decisions based wholly upon judicial evaluation of the concrete facts of the case. I refer again to my assertion that the legal doctrine is too strongly judge-orientated; for the judge, who has seen the case illuminated from all angles, and who

— take the time he needs to evaluate the various connecting factors, the individualizing method can appear to be an effective technique providing good results. However, only a very small, and presumably steadily decreasing, proportion of these kinds of cases are brought before a court. Law suits, with good reason, are viewed as undesirable-they are time-consuming and expensive and often create ill-will between what were once good business contacts. The law lives a substantial part of its life outside the courtroom. As mentioned earlier, the parties to amicable settlements of disputes normally use as a starting point what they believe to be their position strictly before the law. In contractual relationships knowledge of the law can be of the greatest importance, even before any dispute has arisen. I refer again to the case of a long-term charterparty, and to the number of measures the parties must take to protect their rights or to avoid liability during the charter period; here it is clearly essential that they know where they stand legally. But this again presupposes that they can predict which country's law will be decisive. If the individualizing method is to be employed such prediction can be difficult or even impossible.

A final point; it seems to be accepted as an axiom that the law to which the case has its closest connections is the law best suited to govern it. In my opinion this is far from self-evident. The individualizing method may be in its place where it is of prime importance to the implicated parties that one obtain a "tailormade" legal regulation of the relationship in question, as I can imagine how the situation would be for instance in disputes involving family law. Technical efficiency in law can be bought too dearly. Most maritime disputes, however, are of a purely economic, and often rather prosaic nature. One brand of legal regulation of a case may be just as good as another. Whether a supplier of provisions to the ship is or is not given a maritime lien at the cost of a mortgagee's security need not mean the world; whether liability for the delivery of cargo without return of the bill of lading is cut off by a one or a three-year time bar is not one of the most crucial of questions, either, seen in a wider context. Where the parties are directed to a simple and clear choice of law rule, they accept the results as just. In such a case, there is little need to use the expensive and time-consuming individualizing method. In a litigation based on this method the attorneys will bring in and comment upon every possible connecting factor. The judge will list them all and weigh them carefully on the scales of justice. Perhaps there are three rather heavy factors on one side as against six somewhat lighter ones on the other, resulting in a tiny turn of the balance in the one or the other direction. The scales of justice here seemingly is a legal instrument of precision. But this apparent exactness is an illusion. The near-to balance of the scales means that the alternative solutions from a practical point of view are equivalent, and that the choice between them should be made on the basis of far simpler and clearer criteria.

4.2. A Presentation of Certain Connecting Factors of Importance in a Maritime