

The Ebb and Flow of *East River*:
Consideration of the Supreme Court’s Decision
on Products Liability in Shipbuilding Contracts*

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* This Article is dedicated to my brothers and sisters “in law,” who offered my firm and me support in the wake of Hurricane Katrina, including Luis Consuegra, Esq., of Miami, Florida; Riney Green, Esq., of Nashville, Tennessee; Ken Handmaker, Esq., of Louisville, Kentucky; Katherine Mize, Esq., and Dwayne Newton, Esq., of Houston, Texas; Mark Stinnett, Esq., of Dallas, Texas; Phil Walker, Esq., of San Francisco, California; and Jerry White, Esq., and Mike Wilson, Esq., of New York, New York. It is also dedicated to the firm of McCormick, Hancock & Newton, which actually provided me with safe harbor after the storm.

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I. INTRODUCTION

On the twentieth anniversary of the announcement of the United States Supreme Court's decision on products liability,¹ *East River S.S. Corp. v. Transamerica Delaval, Inc.* appears to be at flood tide and rolling unencumbered to the sea.² However, a closer examination reveals that *East River* is contained by various dikes and earthworks. This Article will explore *East River* and the constraints on it as well as the "confluence" of *East River* and *M/S Bremen v. Zapata Offshore Oil Co.*³

In cases where the parties to the shipbuilding contract select state law as the governing law, that law should be applied, even if it allows a greater recovery than *East River*, particularly where diversity jurisdiction exists. Even if the federal court has only admiralty jurisdiction, the court should not blindly apply *East River*, but should consider *East River* in light of the contractual principles recognized in *The Bremen*.

If a court determines that *East River* should apply notwithstanding the parties' selection of state law, it may still confront numerous issues, among them: (1) express warranties under the contract and the effect of breach of the same; (2) implied warranties under the contract and the effect of breach of the same; (3) whether express or implied warranties are satisfactorily disclaimed or waived; (4) limitations on remedies; (5) the effect of gross or willful neglect or fraud on the part of the builder and/or its contractors; (6) whether and to what extent *East River* should protect contractors not in privity with the owner; and (7) whether and to what extent *East River* should protect parties who are not involved in the manufacture of the product, such as classification societies.

II. THE *EAST RIVER* DECISION

Seatrain Shipbuilding Corporation (Shipbuilding) contracted with several parties to construct four oil transporting supertankers.⁴ Shipbuilding also contracted with Transamerica Delaval, Inc. (Delaval) to design, manufacture, and supervise the installation of the turbines which were the main propulsion units for the super tankers.⁵ After delivery of

1. *E. River S.S. Corp. v. Transamerica Delaval, Inc. (E. River)*, 476 U.S. 858, 1986 AMC 2027 (1986).

2. After the falls of Vicksburg and Port Hudson in 1863, President Lincoln wrote, "The Father of Waters again goes unvexed to the sea." Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), available at <http://showcase.netins.net/web/creative/lincoln/speeches/conkling.htm> (last visited Feb. 9, 2006).

3. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972).

4. *E. River*, 476 U.S. at 859, 1986 AMC at 2028.

5. *Id.*

the super tankers, numerous problems were experienced in the turbines of three of the super tankers.⁶ Although newly designed parts were installed in the fourth super tanker to avoid the problems affecting the other three, it experienced turbine problems.⁷ Thereafter, the charterers of the vessel filed suit in federal court, invoking the court's admiralty jurisdiction, seeking damages in tort for the cost of repairing the ships and for income lost while they were out of service.⁸ The charterers alleged that Delaval was both strictly liable and negligent.⁹

The United States District Court for the District of New Jersey granted summary judgment to Delaval, and the United States Court of Appeals for the Third Circuit affirmed, holding that disappointments over a product's quality are protected by warranty law and, therefore, neither the negligence claim nor the strict liability claim was cognizable.¹⁰ The Supreme Court granted *certiorari* to resolve a conflict among the courts of appeals sitting in admiralty and affirmed the Third Circuit.¹¹

Initially, the Court pointed out that the torts alleged fell within the admiralty jurisdiction of the federal courts in that the injuries alleged occurred while the tankers were at sea on navigable waters.¹² The Court then held, "With admiralty jurisdiction comes the application of substantive admiralty law."¹³ Addressing the merits, the Court first affirmed the holding of numerous courts of appeal that product liability, including strict liability, is part of the general maritime law.¹⁴ The Court then turned to the issue of whether admiralty recognized a cause of action in tort when a defective product purchased in a commercial transaction malfunctioned, injuring only the product itself and causing purely economic loss.¹⁵ The Court noted that there were a range of approaches to the question.¹⁶ At one end of the spectrum, courts have held that "preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm."¹⁷ At the other end of the spectrum was the minority view that "a

6. *Id.* at 860-61, 1986 AMC at 2028-29.

7. *Id.*

8. *Id.* at 861, 1986 AMC at 2029-30.

9. *Id.*

10. *E. River S.S. Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903, 909-10, 1985 AMC 913, 921-22 (3d Cir. 1985).

11. *E. River*, 476 U.S. at 863, 1986 AMC at 2031.

12. *Id.*

13. *Id.* at 864, 1986 AMC at 2032.

14. *Id.* at 865, 1986 AMC at 2033.

15. *Id.* at 859, 1986 AMC at 2028.

16. *Id.* at 868, 1986 AMC at 2035.

17. *Id.* (citing *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965)).

manufacturer's duty to make nondefective products encompassed injury to the product itself, whether or not the defect created an unreasonable risk of harm."¹⁸

Finding that "the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong" when a product injures only itself, the Court adopted "an approach similar to *Seely* and [held] that a manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself."¹⁹ The Supreme Court therefore relegated the commercial customer to whatever express and implied warranties it may have,²⁰ or if the customer preferred, to the rejection of the product and a suit for breach of contract.²¹

III. SHIPBUILDING CONTRACTS/STATE LAW

Historically, contracts for the building of ships were outside admiralty jurisdiction.²² Accordingly, early federal cases involving shipbuilding contracts typically resulted in the dismissal of such cases for lack of maritime jurisdiction.²³ While *East River* itself indicates that this has changed (i.e., admiralty jurisdiction exists when damages stemming from defective construction manifest themselves while ships are involved in maritime commerce), shipbuilding contracts often contain choice of law provisions selecting the state law of the place of manufacture. When a contract selects a governing body of law, that law normally governs all aspects of the case, including recoverable elements of damages.²⁴ The potential for conflicts becomes even more apparent when states enact product liability laws allowing recovery in tort for damages not only to the product itself but for economic consequences arising from loss of product use.²⁵ Other states have enacted product liability laws as broad as

18. *Id.* at 868-69, 1986 AMC at 2036 (citing *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 312-13 (N.J. 1965)).

19. *Id.* at 871, 1986 AMC at 2038.

20. *Id.* at 872, 1986 AMC at 2039 (citing U.C.C. §§ 2-313-3 to 2-315 (2003)).

21. *Id.* (citing U.C.C. §§ 2-601, 2-608, 2-612).

22. *See generally* *Peoples Ferry Co. v. Beers (The Jefferson)*, 61 U.S. 393 (1857); *Thames Towboat Co. v. The Schooner Francis McDonald (The Francis McDonald)*, 254 U.S. 242 (1920); *Point Adams Packing Co. v. Astoria Marine*, 594 F.2d 763, 1979 AMC 2191 (9th Cir. 1979); *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848 (11th Cir. 1988); *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 1993 AMC 2993 (5th Cir. 1992).

23. *See The Jefferson*, 61 U.S. at 401-02; *The Francis McDonald*, 254 U.S. at 243.

24. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 12, 1972 AMC 1407, 1416 (1972).

25. *See, e.g.*, Louisiana Products Liability Act, La. R.S. 9:2800, § 53(5).

Louisiana's.²⁶ In addition, economic losses for product defects are recoverable under section 2-715(2) of the U.C.C. which provides for the recovery of consequential damages when (1) "the seller at the time of contracting had reason to know" of the buyer's general or particular requirements and (2) losses could not reasonably be prevented by cover or otherwise. States which use the U.C.C. in lieu of a separate product liability statute, including Delaware and Maryland, may, therefore, allow recovery of economic losses in these instances. Indeed, these losses may be recoverable under section 2-715(2) of the U.C.C. in states which have more restrictive product liability laws.

Obviously, there is a substantial difference between the damages which the Supreme Court held as recoverable in *East River* and those which may be recoverable under the law of several states.²⁷

IV. *THE BREMEN* DECISION

In its 1972 decision, the Supreme Court held, in admiralty, that a choice of forum clause "made in an arm's length negotiation by experienced and sophisticated businessmen"²⁸ was to be enforced, absent some compelling countervailing reason such as fraud or overreaching. The Court commented that the towage, which was the subject of the contract, involved an extremely costly piece of equipment that was to be towed through the Gulf of Mexico, the Atlantic Ocean, the Mediterranean Sea, and to its final destination in the Adriatic Sea.²⁹ Obviously,

much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the [tug] or [defendant] might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.³⁰

The Court enforced the choice of forum provision, even though it understood the general rule was that the courts in the chosen forum

26. See, e.g., ME. REV. STAT. ANN. tit. 24, § 6093(9) (West 1999); MASS. GEN. LAWS ANN. ch. 1762, § 1 (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(a)(2)(D) (Vernon 2003); VA. CODE ANN. § 8.2-317(2) (West 2005).

27. See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872-75, 1986 AMC 2027, 2039-41 (1986).

28. *The Bremen*, 407 U.S. at 12, 1972 AMC at 1415.

29. *Id.*

30. *Id.* at 13, 1972 AMC at 1416.

(England) would typically apply English law³¹ and that English law was much less advantageous to the American party than U.S. law.³² In fact, it was apparent that English law would require indemnification of the towing interest, even though U.S. law invalidated such provisions.³³ The Court, however, distinguished *Bisso* stating that it “rested on considerations with respect to the towage business strictly in American waters, and those considerations are not controlling in an international commercial agreement.”³⁴ Moreover, there was no showing by the American party in *The Bremen* that the chosen forum was seriously inconvenient for the trial of the action.³⁵ Thus, *The Bremen* stands for the proposition that, in admiralty, absent fraud or overreaching, parties generally may choose the law that will govern conflicts between them.³⁶

The Bremen has been followed consistently by other courts sitting in admiralty. In *Carnival Cruise Lines, Inc. v. Shute*,³⁷ the Supreme Court enforced a forum selection clause in a cruise passenger contract. The Court has also enforced choice of law provisions when those provisions conflicted with U.S. law and would favor the foreign party over the U.S. party.³⁸ Lower admiralty courts have also enforced choice of law provisions selecting foreign law.³⁹

Federal courts sitting in admiralty have also enforced choice of law provisions in maritime contracts calling for the application of state law.⁴⁰ In *Stoot v. Fluor Drilling Services, Inc.*, the court stated: “[U]nder admiralty law, where the parties have included a choice of law clause, that state’s law will govern unless the state has no substantial relationship to the parties or the transactions or the state’s law conflicts with the fundamental purposes of maritime law.”⁴¹

31. *Id.*, 1972 AMC at 1416-17.

32. *Id.*

33. *See Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) (per curiam).

34. *The Bremen*, 407 U.S. at 15-16, 1972 AMC at 1418-19.

35. *Id.* at 18-19, 1972 AMC at 1420-21.

36. *Id.* at 15, 1972 AMC at 1418.

37. 499 U.S. 585, 1991 AMC 1697 (1991).

38. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995).

39. *See Sembawang Shipyard, Ltd. v. Charger, Inc.*, 955 F.2d 983, 986, 1993 AMC 1341, 1343 (5th Cir. 1992) (applying Singapore law); *Trinity Foundry & Fabricating v. M/V K.A.S. Camilla*, 966 F.2d 613, 615, 1992 AMC 2636, 2638 (11th Cir. 1992) (applying English law); *Ryan Walsh, Inc. v. M/V Ocean Trader*, 930 F. Supp. 210, 219, 1996 AMC 1225, 1237 (D. Md. 1996) (applying U.S. law).

40. 851 F.2d 1514, 1989 AMC 20 (5th Cir. 1988).

41. *Id.* at 1517, 1989 AMC at 24 (citing *Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1215, 1986 AMC 1620, 1624 (W.D. La. 1984)).

In *Stoot*, the court applied Louisiana law to invalidate an indemnity provision holding that application of Louisiana's anti-indemnity statute did not conflict with any fundamental purpose of maritime law, while admitting:

Indemnity clauses in maritime contracts are typically construed under maritime law because of the federal interest in maintaining a uniform body of maritime law and because states "do not have an extensive regulatory interest in contracts of indemnity." However, where a choice of law clause mandates the application of a state's law and that state has a strong public policy favoring the application of its law and a substantial relationship to either of the parties or the transaction, then that state's law will govern absent a countervailing federal interest. Because Louisiana's Anti-Indemnity Statute does not conflict with any fundamental purpose of maritime law, Louisiana law controls the rights of the parties here as they agreed it should.⁴²

Campbell v. Sonat Offshore Drilling, Inc. held that maritime law will enforce a contractual provision for application of state law where the state merely has a substantial relationship to the contract.⁴³ Helpfully, Texas state law on this issue was the same as maritime law.⁴⁴

V. JURISDICTIONAL ISSUES/RESOLUTION OF *EAST RIVER*/STATE LAW CONFLICT

A. *Jurisdictional Analysis*

A facile, but flawed, means of resolving the conflict between *East River* and state law allowing the recovery of economic losses in product liability cases is to focus on jurisdiction. As set forth above, cases involving the construction of new vessels historically were outside the admiralty jurisdiction of the federal courts.⁴⁵ That has changed over time so that those claims may be brought under the admiralty jurisdiction of the federal courts if the resulting damages manifest themselves while the

42. *Id.* at 1518, 1989 AMC at 25 (citation omitted); *see also* Advanced Logistical Support, Inc. v. Fritz Cos., 2003 WL 21459688 (E.D. La. June 18, 2003) (applying Louisiana law pursuant to choice of law clause in maritime contract).

43. 1992 AMC 1419 (W.D. La. 1991), *aff'd*, 979 F.2d 1115, 1993 AMC 1008 (5th Cir. 1992), *reh'g denied*, 986 F.2d 1420 (5th Cir. 1993).

44. But in *Verdine v. Ensco Offshore Co.*, 255 F.3d 246, 2002 AMC 1216 (5th Cir. 2001), both the district and appellate courts invalidated the parties' choice of marine law and invalidated an indemnity agreement under Louisiana state law. It is submitted that the parties' contractual choice of law should have governed, absent proof of fraud, overreaching, or another basis to overturn a contract. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 12, 1972 AMC 1407, 1416 (1972).

45. *See* cases cited *supra* note 22.

vessels are in maritime commerce.⁴⁶ Arguably, this gives the plaintiff shipowner the ability to craft its complaint to take advantage of admiralty law, state law, or both.

If suit is filed in state court or under the diversity jurisdiction of a federal court, an argument may be made that the plaintiff should be entitled to recover all economic damages it sustained, assuming that is allowable under governing state law and notwithstanding the prohibition of *East River*. Alternatively, if suit is filed under the admiralty jurisdiction of a federal court, requesting the application of general maritime law, an argument can be made that *East River* should apply, precluding the plaintiff shipowner from recovering economic losses even if the state law, which governs under the shipbuilding contract, would allow the plaintiff shipowner to recover economic losses. This apparent solution is not very helpful, however, because (1) it does not resolve the issue when the federal court's jurisdiction is based on both admiralty and diversity jurisdiction and (2) it presumes that the general maritime law inexorably requires the application of *East River* when general maritime law clearly recognizes, in most circumstances, the rights of the parties to select the law that will govern disputes among them. Thus, resolution of the *East River*/state law conflict requires more than a simple jurisdictional analysis.

B. *Expectations Analysis*

A review of both *The Bremen* and *East River* decisions indicate that the Supreme Court was primarily concerned with protecting the expectations of the parties to the contracts, in *The Bremen*, by allowing the parties to determine in most instances the law which would govern the contract and, in *East River*, to attempt to limit the parties' rights to the remedies contained or implied in the contract.⁴⁷ Indeed, the Court recognized the ability of commercial officers, dealing at arms length, to create a contractual relationship that would be predictable, notwithstanding unforeseen future developments.⁴⁸ This enables the parties to obtain, insofar as their negotiations allow, certainty as to the applicable substantive law,⁴⁹ regardless of the unforeseen and unknowable future. Concomitantly, this approach highlights *East River's* recognition that

46. See generally *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986).

47. See generally *The Bremen*, 407 U.S. 1, 1972 AMC 1407; *E. River*, 476 U.S. 858, 1986 AMC 2027.

48. See, e.g., *The Bremen*, 407 U.S. at 13 n.15, 1972 AMC at 1416-17 n.15.

49. *Id.*

“[w]hen a product injures only itself the reasons . . . for leaving the party to its contractual remedies are strong.”⁵⁰ This approach would allow the courts to apply the law chosen by the parties even if it is state law that would allow the recovery of damages over and above *East River*, regardless of whether the courts sit in admiralty, in diversity or in both.

Significantly, this approach is in keeping with the recent dictates of the Supreme Court, as well as Professor Force’s analysis in *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*.⁵¹

In *American Dredging Co. v. Miller*, the Court discussed whether federal maritime law preempted Louisiana state law on the doctrine of forum non conveniens.⁵² The Court applied a two-step analysis: first, it considered whether the doctrine originated in admiralty or had its exclusive application there and, second, whether uniform application of the doctrine was necessary to maintain proper harmony within maritime law.⁵³ After answering both questions in the negative, the Court held that federal maritime law did not preempt the Louisiana state doctrine of forum non conveniens in admiralty cases filed in state court.⁵⁴ That analysis is readily applicable to the *East River/The Bremen* conundrum. The *East River* decision clearly indicates that the economic loss doctrine did not originate in admiralty, but instead in product liability law enunciated by the various states and that it was later engrafted onto the general maritime law.⁵⁵ Thus, the answer to the first question posed by *Miller* is no.

The second question posed by *Miller* presumes some disuniformity and then inquires whether that “disuniformity . . . ‘interferes with the proper harmony and uniformity’” of maritime law.⁵⁶ However, this question presents something of an anomaly in this instance because what is proposed is not a uniform rule precluding the recovery of economic damages in cases where a product injures itself, as in *East River*, but instead a uniform rule recognizing the rights of parties to select the substantive law which will govern their relationship, even though that law may allow the recovery of economic losses which an admiralty court

50. *E. River*, 476 U.S. at 871, 1986 AMC at 2038.

51. Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. L. & COM. 517 (2001).

52. *See generally* 510 U.S. 443, 1994 AMC 913 (1994).

53. *Id.* at 447, 1994 AMC at 916.

54. *Id.* at 450, 1994 AMC at 918.

55. *E. River*, 476 U.S. at 864-66, 1986 AMC at 2032-34.

56. *See Miller*, 510 U.S. at 451, 1994 AMC at 919 (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216, 1996 AMC 2076, 2084 (1917)).

might not otherwise allow.⁵⁷ Accordingly, recognizing the parties' right to choose the particular law that would allow the recovery of economic damages actually produces uniformity, albeit in a different manner than *East River*. The lynchpin in the Court's decision as to whether allowing state law should govern or whether it impermissibly interfered with the "proper harmony and uniformity" of maritime law seems to be whether the doctrine was "a rule upon which maritime actors rely in making decisions about primary conduct—how to manage their business and what precautions to take."⁵⁸ In point of fact, the terms of the contract, including the choice of law provision, are a means by which business persons control or, at least predict, the risks they face.⁵⁹ In that regard, it would appear that giving the fullest possible scope to the expression of their intent as set forth in the contract would enhance "the proper harmony and uniformity" of maritime law.⁶⁰

This analysis is also in keeping with the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*,⁶¹ wherein the Court held, in a case within both the diversity of citizenship and admiralty jurisdiction of the Court, that state damages law could supplement general maritime law. While the *Yamaha* Court quoted from the statement in *East River* that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law,"⁶² it also stated, "The exercise of admiralty jurisdiction, however, 'does not result in automatic displacement of state law.'"⁶³ The Court then discussed the parameters of its decision in *Moragne v. States Marine Lines, Inc.*, wherein it recognized a maritime wrongful death action.⁶⁴ The Court stated that the uniformity concerns that prompted it to overrule *The Harrisburg*⁶⁵ in *Moragne* were not based on concerns that state monetary awards in maritime wrongful death cases were excessive or that variations in the remedies afforded by the states threatened to interfere with the harmonious operation of maritime law. "Variations of this sort have long been deemed compatible with the federal maritime

57. Indeed, an admiralty court presumably would allow the same result if the parties had agreed in the contract that the purchase could recover economic losses in the event that product did injure itself.

58. 510 U.S. at 454, 1994 AMC at 921.

59. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15, 1972 AMC 1407, 1418 (1972).

60. *S. Pac.*, 244 U.S. at 216, 1996 AMC at 2084.

61. 516 U.S. 199, 1996 AMC 305 (1996).

62. *Id.* at 206 (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986)).

63. *Yamaha*, 516 U.S. at 206, 1996 AMC at 310 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 528, 1995 AMC 913, 927 (1995)).

64. 398 U.S. 375, 1970 AMC 967 (1970).

65. 119 U.S. 199 (1886).

interests. *See Western Fuel*, 257 U.S. at 242.”⁶⁶ In the same way, the recognition of remedies afforded by state law selected by the parties does not interfere with the harmonious operation of maritime law. Moreover, the *Yamaha* Court found it significant that Congress had not prescribed a comprehensive tort recovery regime to be uniformly applied.⁶⁷ As Congress has not prescribed a comprehensive recovery regime in maritime product liability cases, the courts should recognize the parties’ freedom to select the law to be applied in breach cases.⁶⁸

In his analysis, Professor Force suggests that disputes implicating both admiralty and state law be analyzed with respect to the national interests:

1. . . . would a uniform rule substantially promote some national interest underlying the Admiralty Clause, or would non-uniformity substantially undermine some national interest inherent in the Admiralty Clause?
- and 2. [i]f uniformity would only minimally or marginally promote a national interest or non-uniformity minimally or marginally undermine a national interest, what is the competing state interest and how important is the application of state law to the promotion or protection of that interest?⁶⁹

Professor Force discusses national interests in several dimensions, including sovereignty, transnational, international, and maritime commerce.⁷⁰ Significantly, the application of the law chosen by the parties in a contract, notwithstanding *East River*, appears to be the most satisfactory resolution in several dimensions. In his discussion on the Sovereignty Dimension, Professor Force states, “A uniform rule, to be applied in situations that are beyond the jurisdiction of any state, whether formulated by Congress or the courts, is within the ‘national interests’ inherent in the Admiralty Clause.”⁷¹

Clearly a uniform rule allowing the parties to select the law which would govern their relationship, including claims for economic losses, satisfies this criteria.⁷² Moreover, it is much to be preferred over the current system, within which recoverable damages may depend, at best, on a jurisdictional analysis. Also, this rule is more in keeping with (1) the recent recognition of the rights of parties to select the law to govern their relationship and (2) the blending of federal and state remedies in cases which heretofore would be considered within the

66. *Yamaha*, 516 U.S. at 211, 1996 AMC at 314.

67. *Id.* at 215, 1996 AMC at 317.

68. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15, 1972 AMC 1407, 1416 (1972).

69. Force, *supra* note 51, at 546-47.

70. *Id.*

71. *Id.* at 550.

72. *See The Bremen*, 407 U.S. at 15, 1972 AMC at 1416.

exclusive jurisdiction of admiralty, requiring the application of maritime law to the exclusion of all other laws.

This rule also best satisfies the transnational and international dimensions in that it confirms a principle of self-determination generally recognized in international law.⁷³ Moreover, it would appear that if a contract called for the application of state law, which allows the recovery of economic damages, the state would be particularly interested in having its law applied to allow a full recovery of damages under its law. Alternatively, if the parties to the contract agree that general maritime law or foreign law would apply, very few state interests appear to outweigh the predictability of result and enforcement of contracts, as written by the parties thereto, in order to require the application of another law.⁷⁴

VI. *EAST RIVER* ISSUES

If a court determines that *East River* should apply to the plaintiff shipowner's claim, numerous issues may still confront the court. The resolution of these issues may enable the defendant shipbuilder and/or its contractors to escape or minimize their liability or, alternatively, allow the plaintiff shipowner a full or substantial recovery notwithstanding *East River*. Indeed, under certain circumstances, *East River* may not affect a shipowner's recovery at all.

A. *Express Warranties*

Shipbuilding contracts normally contain express warranties as to the ship's fitness and seaworthiness including (1) that it be tight, fit, staunch, and seaworthy in all respects; (2) that it be built in a good and workmanlike manner; (3) that it comply with all applicable United States Coast Guard regulations; (4) that it be built to certain class-requirements; and often (5) that it meet certain specific, minimum operating

73. See discussion of the decision of the High Court of Justice in London in *The Bremen*, 407 U.S. at 4 n.4, 8 n.8, 14, 1972 AMC at 1410 n.4, 1412 n.8, 1415. See also discussion of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924) (Hague Rules), in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 536, 1995 AMC 1817, 1823 (1995).

74. As indicated, several courts have refused to enforce parties' choice of law agreements where they would have affected substantive rights granted under a particular body of law. See, e.g., *Verdine v. Ensco Offshore Co.*, 255 F.3d 246, 2002 AMC 1216 (5th Cir. 2001). This approach smacks of paternalism and appears contrary to the holdings in *The Bremen* and *Sky Reefer*. At least in a commercial context, the parties' choice of law should be enforced unless the contract is upset on fraud or other grounds. *The Bremen*, 407 U.S. at 12, 1972 AMC at 1416.

requirements. The law also often considers shipbuilding contracts to contain various implied warranties.

In addition, shipbuilding contracts frequently include clauses which (1) purport to exclude the recovery of any consequential or incidental damages, (2) purport to limit any damage claim to the price of the specific product or service which gives rise to the claim and, (3) purport to make the effective warranty period shorter than the applicable prescriptive period.⁷⁵

Arguably, a shipowner whose main concerns are satisfied by the builder's express warranties would agree to substantial limitations of its contractual rights, for other work (not expressly warranted), that go to the heart of the contracted-for work. This appears to be the basis for the decision in *Nathaniel Shipping, Inc. v. General Electric Co.*,⁷⁶ wherein the court stated, "Where, as here, an express warranty and a disclaimer of liability potentially conflict, we must harmonize the two, construing ambiguities *contra proferentem* and in favor of warranty coverage."⁷⁷ Indeed, *Nathaniel Shipping I* allowed the purchaser to recover damages in excess of the cost of repairing the defective equipment, the maximum sum allowed for breach of warranty under the contract.⁷⁸

Thus, although *East River* precludes a claim for economic damages under a negligence or strict liability theory, such damages may be recoverable where the shipbuilder breaches an express warranty.⁷⁹

B. Implied Warranties

Because "[t]he maintenance of product value and quality is precisely the purpose of express and implied warranties," a court should consider any implied warranty in determining the responsibilities of the parties.⁸⁰ The warranty provisions of the Uniform Commercial Code (U.C.C.) are fully applicable in admiralty,⁸¹ and because article 2 of the

75. See *Nathaniel Shipping, Inc. v. Gen. Elec. Co.* (*Nathaniel Shipping I*), 920 F.2d 1256, 1994 AMC 1520 (5th Cir. 1991).

76. *Id.* at 1266, 1994 AMC at 1533, *modified on reh'g*, *Nathaniel Shipping, Inc. v. Gen. Elec. Co.* (*Nathaniel Shipping II*), 932 F.2d 366, 1994 AMC 1812 (5th Cir. 1991).

77. *Nathaniel Shipping I*, 920 F.2d at 1266, 1994 AMC at 1533 (citing *Employers Ins. of Wausau v. Trotter Towing Corp.*, 834 F.2d 1206, 1210 (5th Cir. 1988) (insurance contract)).

78. See also *Leanin' Tree, Inc. v. Thiele Techs.*, 43 F. App'x 318 (10th Cir. 2002) (applying Colorado law).

79. See generally *Nathaniel Shipping I*, 920 F.2d 1256, 1994 AMC 1520.

80. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872, 1986 AMC 2027, 2038-39 (1986).

81. See *id.*; *Employers Ins. of Wausau v. Suwanee River SPA Lines, Inc.*, 866 F.2d 752, 764, 1990 AMC 447, 464-65 (5th Cir. 1989) ("On the rationale of *East River*, the implied warranties provided by Article II of the U.C.C. are an adequate replacement for the imposition of

U.C.C. has been adopted in forty-nine of the fifty states, the court probably should consider section 2-314 (implied warranty of merchantability) and section 2-315 (warranty of fitness for a particular purpose) of the U.C.C. Additionally, in admiralty, the buyer may still be able to take advantage of the implied warranty of workmanlike performance (WWLP).⁸² For that reason, the WWLP should also be considered.

1. Implied Warranty of Merchantability

Section 2-314 of the U.C.C., entitled “Implied Warranty: Merchantability; Usage of Trade,” provides:

1. Unless excluded or modified (Section 2-316), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
2. Goods to be merchantable must be at least such as
 - a. pass without objection in the trade under the contract description; and
 - b. in the case of fungible goods, are of fair average quality within the description; and
 - c. are fit for the ordinary purposes for which such goods are used; and
 - d. run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - e. are adequately contained, packaged, and labeled as the agreement may require; and
 - f. conform to the promises or affirmations of fact made on the container or label if any.
3. Unless excluded or modified (Section 2-316) other implied warranties may arise from the course of dealing or usage of trade.

a duty in tort when the defective product has injured only itself.”); *Jig the Third v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171, 174-75, 1976 AMC 118, 120-21 (5th Cir. 1975); *Delta Marine, Inc. v. Whaley*, 813 F. Supp. 414, 419, 1993 AMC 2825, 2831 (E.D.N.C. 1993); *Lykes Bros. S.S. Co. v. Waukesha Bearings Corp.*, 502 F. Supp. 1163 (E.D. La. 1980); 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 200 (4th ed. 2004). Earlier case law suggests that the U.C.C. warranty provisions did not apply in admiralty. *See, e.g., In re Alamo Chem. Transp. Co.*, 320 F. Supp. 631, 633, 1971 AMC 1019, 1022 (S.D. Tex. 1970); *Ingram River Equipment, Inc. v. Potts Industries, Inc.*, 816 F.2d 1231, 1235, 1987 AMC 2343, 2348 (8th Cir. 1987). *East River* and subsequent cases have sanctioned the application of the U.C.C. in admiralty. *See, e.g., E. River*, 476 U.S. 858, 1986 AMC 2027.

82. *See* *Ryan Stevedoring Co. v. Atl. S.S. Corp.*, 350 U.S. 124, 1956 AMC 9 (1956). The warranty of workmanlike performance was affirmed in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 1981 AMC 601 (1981).

This warranty, like other implied warranties, imposes strict liability.⁸³ Accordingly, the seller's action is irrelevant.⁸⁴ To establish liability under the implied warranty of merchantability, the plaintiff must prove (1) a merchant sold the goods,⁸⁵ (2) the goods were not "merchantable" at the time of sale, (3) injury and damages to the plaintiff or its property, (4) the injury and damages were caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury.⁸⁶

A "merchant" is defined in section 2-104(1) of the U.C.C. as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁸⁷

Generally, it should not be difficult to establish that a shipyard is a "merchant" within the terms of the U.C.C. As White and Summers note, "Most of the 2-314 cases in which courts found breaches of the warranty of merchantability involve goods that because of defects either did not work properly or were unexpectedly harmful."⁸⁸ If the elements of

83. *Suwanee*, 866 F.2d at 764 n.23, 1990 AMC at 465 n.23.

84. *Delta Marine*, 813 F. Supp. at 418, 1993 AMC at 2032 (citation omitted).

85. The version of the U.C.C. enacted in a given state will determine whether the plaintiff must have privity with the merchant. Recent jurisprudence suggests that privity is not required to establish a claim for implied warranty of merchantability in the following states: Maine (*Sullivan v. Young Bros. & Co.*, 91 F.3d 242 (1st Cir. 1996)), Maryland (*Conkley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456 (4th Cir. 1983), *appeal after remand*, 778 F.2d 196 (4th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1988)), Massachusetts (*Hoffman v. Howmedica, Inc.*, 364 N.E.2d 1215, 1218 (Mass. 1977)), Michigan (*Michels v. Monaco Coach Corp.*, 298 F. Supp. 2d 642 (E.D. Mich. 2003)), New Jersey (*Paramount Aviation Corp. v. Gruppo Agusta*, 288 F.3d 67 (3d Cir. 2002)), Oklahoma (*Patty Precision Products Co. v. Brown & Sharpe Manufacturing Co.*, 846 F.2d 1247 (10th Cir. 1988)), and Pennsylvania (*Flow International Corp. v. Hydrojet Services*, 2003 U.S. Dist. LEXIS 9820 (E.D. Pa. May 19, 2003)). This list is not exhaustive, merely illustrative.

In addition, admiralty courts that have addressed this issue generally apply the U.C.C. in determining whether a warranty of merchantability exists. *Delta Marine*, 813 F. Supp. at 419, 1993 AMC at 283. Although very few admiralty courts have squarely addressed the issue, those that have held that privity is not required to recover on a claim of merchantability. *Sears, Roebuck & Co. v. Am. President Lines, Ltd.*, 345 F. Supp. 395, 402-03, 1971 AMC 2255, 2267 (N.D. Cal. 1971); *In re Rationis Enters. Inc. of Pan.*, 325 F. Supp. 2d 318, 328, 2004 AMC 2211, 2224 (S.D.N.Y. 2004) (citing *Todd Shipyards Corp. v. Turbine Servs., Inc.*, 467 F. Supp. 1257 (E.D. La. 1978); *In re Am. Exp. Lines, Inc.*, 620 F. Supp. 490 (S.D.N.Y. 1985)).

86. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 510-11 (4th ed. 1995).

87. U.C.C. § 2-104(1) (2003).

88. WHITE & SUMMERS, *supra* note 86, at 516.

implied warranty of merchantability are met, the purchaser should be able to recover any resulting damages notwithstanding *East River*.⁸⁹

2. Warranty of Fitness for a Particular Purpose

Section 2-315 of the U.C.C., entitled “Implied Warranty: Fitness for a Particular Purpose,” states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.⁹⁰

This is different from the implied warranty of merchantability discussed in section 2-314 because the warranty of fitness for a particular purpose requires that the seller (1) has reason to know the buyer’s particular purpose and (2) that the buyer is relying upon the seller’s skill or judgment to furnish appropriate goods.⁹¹

One can readily consider a scale of vessels from a simple canoe at one end to a multimillion dollar lift boat or jack-up rig on the other. Obviously, as the type of vessels sold becomes more complex and detailed, it is much more likely that the seller will have reason to know of the buyer’s particular purpose and that the buyer is relying upon the seller to furnish the appropriate goods. Besides explicit waivers,⁹² sellers may more likely avoid this warranty by including a contract term that the buyer shall be represented by an individual who will promptly (1) inspect and accept all workmanship, components and material and (2) reject all workmanship, components and materials which did not comply with the contract specifications.⁹³ This defense, however, would be difficult to establish unless the representative was skilled in all areas involved, including naval architecture and engineering.

The warranty of fitness for a particular purpose was discussed in *Ingram River Equipment, Inc. v. Potts Industries, Inc.*⁹⁴ The plaintiff in that case filed suit for damages claiming that four tank barges built by the defendant were defectively designed and constructed.⁹⁵ The plaintiff

89. Ignazio Messina & C.S.P.A. v. Ocean Repair Serv. Co., 1993 WL 427443, at *5, 1994 AMC 402, 409 (S.D.N.Y. 1993).

90. U.C.C. § 2-315.

91. *Id.* § 2-314.

92. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 873, 1986 AMC 2027, 2039 (1986) (citing U.C.C. § 2-316).

93. *See generally* U.C.C. art. 2.

94. 816 F.2d 1231, 1987 AMC 2343 (8th Cir. 1987).

95. *Id.* at 1232, 1987 AMC at 2343.

purchaser contracted with the defendant to purchase four barges and specified that they be equipped with steam-coil systems for heating heavy petroleum products and other heavy liquid cargo (which would make unloading them much easier).⁹⁶ Unfortunately, numerous leaks developed in the steam coils in all four barges which required that the steam coil systems be replaced with systems made out of seamless pipe.⁹⁷ Initially, the defendant argued that plaintiff's purpose for the goods was ordinary rather than a particular purpose since other companies used heating-coil equipped tank barges in precisely the same manner.⁹⁸ The plaintiff responded that it was not necessary for its use of the goods to be unique to fall within the fitness for a particular purpose warranty. The court agreed, stating:

The key inquiry is not whether anyone else can be found who puts the goods to the same use, but whether the buyer's use is sufficiently different from the customary use of the goods to make it not an ordinary use of the goods; that a buyer's use is not entirely idiosyncratic does not mean that it is ordinary.⁹⁹

After finding that the plaintiff operated and the defendant built barges for a variety of uses, the appellate court held it could not conclude that the district court's finding, that an implied warranty of fitness for a particular purpose arose, was clearly erroneous.¹⁰⁰

The defendant also argued that plaintiff did not communicate any particular purpose to it; however, it did not deny that it knew the barges were to be used to carry heavy petroleum products and that employing the coils to heat the petroleum would make unloading easier.¹⁰¹ Accordingly, the court rejected that argument.¹⁰²

Finally, the defendant contested the district court's finding that the purchaser relied upon the defendant's expertise to furnish suitable barges because (1) the purchaser operated similar barges, (2) the purchaser approved the plans and specifications, and (3) the purchaser had the seller alter the plans in one minor respect.¹⁰³ The appellate court affirmed the district court's findings, noting the following: (1) the contract between the buyer and seller stated that the buyer was interested only in the results obtained and that the manner and method of performing the

96. *Id.*, 1987 AMC at 2344.

97. *Id.*

98. *Id.* at 1233, 1987 AMC at 2345.

99. *Id.* at 1233-34, 1987 AMC at 2347 (citation omitted).

100. *Id.* at 1235-36, 1987 AMC at 2350.

101. *Id.*

102. *Id.* at 1234-35, 1987 AMC at 2348.

103. *Id.*

work were under the seller's control; (2) the buyer's expertise related primarily to the operation and maintenance of barges, not to their design, whereas the seller was a shipbuilder and supplied the design and specification for barges; and (3) the buyer's request for minor modifications in the design to facilitate maintenance did not negate its reliance on the seller.¹⁰⁴ Accordingly, the appellate court affirmed the award for breach of warranty for a particular purpose (albeit under state law).¹⁰⁵

3. Warranty of Workmanlike Performance

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,¹⁰⁶ the Supreme Court recognized an implied WWLP, thereby giving the shipowner the right to recover indemnity against a stevedoring company which failed to stow cargo in a reasonably safe manner:

The shipowner here holds petitioner's uncontroverted agreement to perform all the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.¹⁰⁷

Significantly, unlike the U.C.C. which applies solely to the sale of goods, the WWLP applies to services.¹⁰⁸ Although the holding in *Todd Shipyards Corp. v. Turbine Service, Inc.*¹⁰⁹ that a subcontractor was liable to indemnify a general contractor against its liability for economic damages under the WWLP has been criticized,¹¹⁰ it contains a detailed description of the types of contractors and subcontractors who might assist in large vessel repair contracts.¹¹¹

104. *Id.* at 1235, 1987 AMC at 2348.

105. *Id.*

106. 350 U.S. 124, 1956 AMC 9 (1956).

107. *Id.* at 133-34, 1956 AMC at 18.

108. *Employers Ins. of Wausau v. Suwanee River Spa Lines, Inc.*, 866 F.2d 752, 763, 1990 AMC 447, 464 (5th Cir. 1989).

109. 674 F.2d 401, 1982 AMC 1976 (5th Cir. 1982).

110. *See Nathaniel Shipping, Inc. v. Gen. Elec. Co. (Nathaniel Shipping II)*, 932 F.2d 366, 369, 1994 AMC 1812, 1816 (5th Cir. 1991).

111. *See* 674 F.2d at 406-07, 1982 AMC at 1980-81.

In a recent case involving an oral contract, the court allowed recovery of full damages suffered by a shipowner against its contractor and also awarded the contractor indemnity against its subcontractor under a WWLP.¹¹² Significantly, the WWLP allows shipowners to recover not only their foreseeable damages, but also reasonable attorneys' fees and litigation expenses.¹¹³

C. Warranty Disclaimers or Waivers

In *East River*, the Supreme Court held that a "manufacturer can restrict its liability, within limits, by disclaiming warranties."¹¹⁴ Significantly, however, that U.C.C. section, entitled "Exclusion or Modification of Warranties," refers principally to implied warranties:

1. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
2. Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
3. Notwithstanding subsection (2)
 - a. unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
 - b. when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with

112. See *B&B Schiffahrts GmbH & Co. v. Am. Diesel & Ship Repairs, Inc.*, 136 F. Supp. 2d 590, 2001 AMC 2203 (E.D. La. 2001).

113. *Todd Shipyards*, 674 F.2d at 415, 1982 AMC at 1984, cited by *Schiffahrts*, 136 F. Supp. 2d at 598, 2001 AMC at 2212; see also *Ignazio Messina & C.S.P.A. v. Ocean Repair Serv. Co.*, 1993 WL 427443, at *5, 1994 AMC 402 (S.D.N.Y. Oct. 19, 1994) (confirming that implied WWLP is undisturbed by the economic loss rule recognized in *East River*).

114. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873, 1986 AMC 2027, 2039 (1986) (citing U.C.C. § 2-316 (2003)).

- regard to defects which an examination ought in the circumstances to have revealed to him; and
- c. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.¹¹⁵
 4. Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy.¹¹⁶

Employers Insurance of Wausau v. Suwanee River Spa Lines, Inc. also focused on implied warranties under the U.C.C.¹¹⁷ In that case, the United States Court of Appeals for the Fifth Circuit specifically noted that the “protective value” of implied warranties could be “disclaimed entirely, leaving the buyer with only an argument that the disclaimer at issue is unconscionable.”¹¹⁸ Again, the means on disclaiming the implied warranties are set forth in section 2-316 of the U.C.C. Of course, the burden is on the party seeking to avoid liability under an implied warranty to establish that the warranty has been waived or disclaimed, failing which the shipowner will recover under the implied warranty. In that regard, the builder must require that the contract contains language denying any warranties except those specified in the contract itself.¹¹⁹ The shipowner will be held to any implied warranties not specifically disclaimed.¹²⁰

Although section 2-316 mentions “express warranty” in subsection (1), it does not detail the specific means by which an express warranty can be negated, unlike the implied warranties which are the express subjects of subsections (2) and (3).¹²¹ Subsection (4) of section 2-316 of the U.C.C. clearly indicates, however, that remedies for breach of warranty, presumably both express and implied, can be limited under certain circumstances.¹²²

115. U.C.C. § 2-316.

116. *Id.* §§ 2-718 to -719.

117. *See* *Employers Ins. of Wausau v. Suwanee River Spa Lines, Inc.*, 866 F.2d 752, 764-65, 1990 AMC 447, 465 (5th Cir. 1989).

118. *Id.* at 764 n.23, 1990 AMC at 465 n.23. Note, however, that the states may limit or bar a seller’s ability to disclaim a warranty. *See, e.g.*, *Back v. Wickes Corp.*, 378 N.E.2d 964, 969 (Mass. 1978).

119. *See* U.C.C. § 2-316(2).

120. *See* *Nathaniel Shipping, Inc. v. Gen. Elec. Co. (Nathaniel Shipping I)*, 920 F.2d 1256, 1265 n.34, 1994 AMC 1520, 1531 n.34 (5th Cir. 1991).

121. *See also id.* at 1265-66, 1994 AMC at 1531-33.

122. *Id.*

D. Limitations on Remedies

Section 2-316 of the U.C.C. specifically refers to sections 2-718 and 2-719 dealing with liquidation or limitation of damages and contractual modification or limitation of remedies.¹²³ Section 2-718 (1) provides:

Damages for breach by either party may be liquidated in the agreement, but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.¹²⁴

Section 2-719 provides:

1. Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
 - a. the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
 - b. resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
2. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
3. Consequential damages¹²⁵ may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of

123. See U.C.C. § 2-316.

124. *Id.* § 2-718.

125. "Consequential damages" are defined under section 2-715(2) as:

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

"Incidental damages" are distinct from "consequential damages" and are defined in section 2-715(1) as "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, and any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." It is significant that the U.C.C. distinguishes consequential and incidental damages. Where a contract waives consequential, but not incidental, damages, the purchaser should be able to recover incidental damages. If the seller intends to exclude both, the contract must explicitly do so. See, e.g., *Piper Jeffrey & Co. v. SunGard Sys. Int'l, Inc.*, 2004 U.S. Dist. LEXIS 19724 (D. Minn. Sept. 30, 2004) (noting that both consequential and incidental damages are barred when the contract so provides).

consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.¹²⁶

A number of cases have discussed subsection (2) of section 2-719, where circumstances cause an exclusive or limited remedy to fail of its essential purpose.¹²⁷

It seems that when the contract between the parties provides numerous discreet requirements, several of which may have been breached and which require relatively little effort or expense to correct, a contractual provision limiting damages or remedies is more likely to be enforced. On the other hand, where the contract speaks in much broader terms, as in requiring that a vessel be constructed in a safe and workmanlike manner, be seaworthy in all respects, and meet specific minimum operating requirements, these provisions are less likely to be enforced.

E. Builder's Gross or Willful Neglect or Fraud

It is not difficult to imagine a case in which a shipbuilder agrees to warrant a vessel in several material respects when the contract is signed, but discovers during the course of the construction that the vessel cannot meet all or some of the warranties made. Rather than advise the purchaser of these deficiencies, however, the shipbuilder simply completes the vessel and turns it over to the purchaser, perhaps hoping that "red letter clauses"¹²⁸ will preclude a claim by the purchaser.

126. U.C.C. § 2-719.

127. See *Ragen Corp. v. Kearney & Trecker Corp.*, 912 F.2d 619 (3d Cir. 1990) (applying Wisconsin law) (stating that consequential damages are recoverable notwithstanding contract exclusion where a contract failed in its essential purpose); *Comind, Companhia de Seguros v. Sikorsky Air Craft Div. of United Techs. Corp.*, 116 F.R.D. 397, 1988 AMC 1091 (D. Conn. 1987) (applying Connecticut law) (finding a ninety-day limitation ineffective where it would leave buyer without remedy for defects guarantee in contract); *Smith v. Navistar Int'l Transp. Corp.*, 714 F. Supp. 303 (N.D. Ill. 1989), *reconsideration denied*, 744 F. Supp. 832, *aff'd*, 957 F.2d 1439 (applying Illinois law) (finding consequential damages are recoverable despite disclaimer if buyer can demonstrate that warranty fails of its essential purpose); *Siemens Credit Corp. v. Marvik Colour, Inc.*, 859 F. Supp. 686 (S.D.N.Y. 1994) (applying New York law) (finding that when application of limited contractual remedy deprives buyer of substantial benefit of its bargain, buyer may resort to remedy created by the New York Uniform Commercial Code); see also *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd in part, vacated in part*, 422 F.2d 1205 (3d Cir. 1970). Wherein the court held that a remedy failed of its essential purpose when, inter alia, consequential damages far exceeded the contractual remedy of return of the purchase price. While noted commentators have criticized this discussion, they have also suggested the possibility of invalidating the remedy under other Code provisions (presumably U.C.C. § 2-302)). See WHITE & SUMMERS, *supra* note 86, at 664-65.

128. "Red letter clauses" are clauses which attempt to limit or exclude the shipbuilder's responsibilities in various respects, including (1) excluding express and implied warranties; (2) limiting the time for filing suit; (3) placing a ceiling on damage exposure; (4) limiting liability

However, if the purchaser can show that the shipbuilder was grossly or willfully negligent, or that it committed actual or constructive fraud,¹²⁹ those clauses may be voided. The voiding of red letter clauses in cases of gross or willful negligence or intentional misrepresentation appears to be the rule both in admiralty¹³⁰ and under the laws of certain states.¹³¹

In this regard, the legal effect of gross or wanton negligence or fraud appears to be more severe than breach of an express warranty; in the latter instance, some courts have held that damages can be limited or excluded by clear contractual terms.¹³²

to the cost of repair or replacement of the defective material or workmanship; (5) excluding consequential damages; (6) excluding specific risks such as liability for pollution, third party claims, and *force majeure* occurrences; and (7) excluding the cost of defense and attorneys' fees. See 1 SCHOENBAUM, *supra* note 81, at 216-17.

129. Of course, actual fraud or wilful negligence may vitiate any insurance coverage. Accordingly, the purchase may wish to focus on claims of gross negligence or constructive fraud in the event that it is relying on insurance proceeds to settle the case or pay any judgment.

130. See *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 115-16, 1999 AMC 2873, 2876-77 (9th Cir. 1999) (citing *La Esperanza de P.R., Inc. v. Perez y Cia. de P.R., Inc.*, 124 F.3d 10, 19, 1998 AMC 21, 33 (1st Cir. 1997); *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 411, 1982 AMC 1976, 1987 (5th Cir. 1982)); *Houston Exploration Co. v. Halliburton Energy Servs., Inc.*, 269 F.3d 528, 531 n.5 (5th Cir. 2001); see also *Kemper Ins. Co. v. Fed. Express Corp.*, 252 F.3d 509 (1st Cir. 2001) (discussing federal common law).

131. See LA. CIV. CODE ANN. art. 2004 (2005); *Occidental Chem. Corp. v. Elliott Turbomachinery Co., Inc.*, 84 F.3d 172, 178 (5th Cir. 1996) (applying Louisiana law). In addition to Louisiana, Hawaii (*Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 736 (D. Haw. 1993)), Kansas (*Butler Manufacturing Co. v. Americold Corp.*, 841 F. Supp. 1107, 1111 (D. Kan. 1993)), New Jersey (*Tessler & Son, Inc. v. Sonitrol Security System of Northern New Jersey, Inc.*, 497 A.2d 530 (N.J. Super. Ct. App. Div. 1985)), New York (*American Tissue, Inc. v. Donaldson, Lufkin & Jeanerette Security Corp.*, 351 F. Supp. 2d 79, 99 (S.D.N.Y. 2003)), Oklahoma (*Page v. Allison*, 417 P.2d 134, 136-37 (1935)), and, probably, North Carolina (*Northeast Solite Corp. v. Unicon Concrete, LLC*, 102 F. Supp. 2d 637, 642 (M.D.N.C. 2000)), invalidate similar clauses. Other states may as well.

132. *Royal Insurance Co. of America v. Southwest Marine* indicates that the Ninth Circuit allows exculpatory clauses even when they completely absolve parties from liability for negligence, although other circuits do not. 194 F.3d at 1014, 1999 AMC at 2873; see *Saunders v. Alexander Richardson Invs.*, 334 F.3d 712, 719, 2003 AMC 1817, 1825-26 (8th Cir. 2003) (distinguishing slip rental agreement from ship repair contract). Compare *Merrill Stevens Dry Dock Co. v. M/V Yeocomico II*, 329 F.3d 809, 813, 2003 AMC 1228, 1232 (11th Cir. 2003) (indicating that limiting clauses will be enforced where they (1) clearly and unequivocally indicate the parties' intention, (2) do not absolve the repair of all liability and still provide a deterrent to negligence, and (3) the parties to the contract have equal bargaining power), with *Diesel "Repower," Inc. v. Islander Invs., Ltd.*, 271 F.3d 1318, 1324, 2002 AMC 751, 758 (11th Cir. 2001) (stating that repayment of purchase price is a sufficient deterrent). Ultimately, whether a clause allows a sufficient deterrent to negligence may require a case by case analysis, encompassing the cost to the seller, the loss of the buyer, prior claims against the seller, and other factors.

F. Privity

In *Nathaniel Shipping I*, the Fifth Circuit held by a majority decision that the owner could not sue a subcontractor on a service contract in tort for failing to complete its work in a timely fashion.¹³³ The majority held that

[w]hen the negligence complained of is simply failure to live up to the term of its contract, such as incomplete or late performance, then what is really being alleged is that the contractor had breached its contract in failing to get the work done properly. This is a non-delegable duty placed upon the contractor by way of its contract, and it cannot escape the fact that the contract was breached, even if it relied upon a subcontractor to do the work. Likewise the customer/shipowner should not be able to sue the subcontractor directly, because all that it is alleging is that its contract was breached, and it should not matter whether or not its contractor subcontracted the work.¹³⁴

In a vigorous counter, however, Judge Brown stated that because there was no contract between the subcontractor and the owner,

there was no possibility of bargaining over the allocation of risk or G.E.'s negligent performance, either between Nathaniel and LGS (because LGS was not liable for G.E.'s negligence), or between Nathaniel and G.E. (because they were not in contractual privity). Thus, the key inquiry of both *East River* and *Wausau*, i.e., whether Nathaniel received "insufficient product value" from G.E. is simply inapplicable, because those two parties did not effectively bargain over the "value" to be received.¹³⁵

On rehearing, the majority held to its guns, disparaged the *Todd Shipyard* case and affirmed their earlier ruling. In a pithy dissent, Judge Brown stated: "Essentially, my main argument is that *East River* does not substitute *contract* for maritime *tort* principles where there is *no* contract as between the shipowner (Nathaniel) and the negligent repair subcontractor (general contractor)."¹³⁶

It is difficult to contest Judge Brown's position, but the majority's decision is still the law in the Fifth Circuit. Although there remains some question as to how far the WWLP will extend, it still exists certainly between parties who are in privity with each other.

133. *Nathaniel Shipping, Inc. v. Gen. Elec. Co. (Nathaniel Shipping I)*, 920 F.2d 1256, 1257, 1994 AMC 1520, 1522 (5th Cir. 1991).

134. *Id.* at 1263-64, 1994 AMC at 1520.

135. *Id.* at 1261, 1994 AMC at 1520.

136. *Nathaniel Shipping, Inc. v. Gen. Elec. Co. (Nathaniel Shipping II)*, 932 F.2d 366, 369, 1994 AMC 1812, 1812 (5th Cir. 1991).

G. East River's Impact on Nonmanufacturers

East River focused on a product liability claim against manufacturers.¹³⁷ *East River* does not foreclose all tort claims, but only products liability claims against manufacturers and others tied into the manufacturing process.¹³⁸ Where a defendant did not design, manufacture or sell a vessel, *East River* has no application.

Thus, entities who are outside the design, manufacture and sale chain of the vessel are not protected by *East River*. Accordingly, *East River* did not effect the claim that an owner had against the contractor who made alterations to a vessel, especially where those alterations breached the original manufacturer's warranty.¹³⁹ *East River* certainly does not apply to a charter party.¹⁴⁰ Moreover, *East River* has been held not to apply to a manufacturer's post-sale duty to warn.¹⁴¹

In *Otto Candies v. Nippon Kaiji Kyokai Corp.*,¹⁴² the Fifth Circuit held a party has a cause of action against a classification society based upon the tort of negligent misrepresentation. To prevail on a cause of action for negligent misrepresentation, the aggrieved party must establish that (1) the classification society supplied false information, (2) the classification society failed to exercise reasonable care in gathering the information, (3) the aggrieved party justifiably relied on the false information, and (4) the aggrieved party suffered a pecuniary loss.¹⁴³

Accordingly, to the extent that the claim is not being made against a manufacturer or seller of goods in reference to presale conduct, *East River* should have no application whatsoever.

137. See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 1986 AMC 2027, 2034 (1986). "The manufacturer is liable whether or not it is negligent. . . . For similar reasons of safety, the manufacturer's duty of care was broadened. . . ." *Id.* at 873, 1980 AMC at 2045. "The manufacturer can restrict its liability, within limits. . . . While giving recognition to the manufacturer's bargain, warranty law sufficiently protects the purchaser. . . ." *Id.* at 874, 1986 AMC at 2046 ("Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums . . .").

138. See *Thiele v. Oddy's Auto & Marine, Inc.*, 906 F. Supp. 158, 161 (W.D.N.Y. 1995); *Am. Commercial Barge Line Co. v. Tampa Bay Stevedores, Inc.*, 1995 AMC 2788 (E.D. La. 1995); *Brown v. Eurocopter, SA*, 143 F. Supp. 2d 781, 783 (S.D. Tex. 2001).

139. See *Thiele*, 906 F. Supp. at 161.

140. See *Am. Commercial Barge Line Co.*, 1995 AMC at 2801.

141. See *Brown*, 143 F. Supp. 2d at 783.

142. 346 F.3d 530, 533, 2003 AMC 2409, 2412 (5th Cir. 2003).

143. *Id.* at 535, 2003 AMC at 2414; see also *In re Dann Marine Towing, L.L.C.*, 2004 WL 74881, at *4 (E.D. La. 2004).

VII. CONCLUSION

Lower courts have frequently applied *East River* across the board, excluding remedies which would be recognized under the law actually selected by the parties to govern the contract and/or their relationship. In so doing, the courts seem to have elevated certain portions of the contract (wherein remedies are excluded or limited) over other portions (choice of law provisions). Ironically, this is done while the Supreme Court proclaims that the terms of the contracts (both express and implied) are paramount in determining the parties' obligations and rights.¹⁴⁴ Indeed, it is time for the courts to give the parties the full benefit of their bargain; where they have specifically designated a governing law, that law should normally be applied even if it expands on remedies that would historically be available under the Supreme Court's decision in *East River*.

Even if the parties agree that their contracts should be governed under U.S. admiralty and maritime law, counsel for shipbuilders and shipowners need to consider the numerous issues that may affect the obligations and rights of their respective clients. It is the author's hope that this Article will assist practitioners and their clients in analyzing product liability issues in a maritime context.

144. See *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 12-13, 1972 AMC 1407, 1412-14 (1972) (“[A] freely negotiated private international agreement . . . should be given full effect.”); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873, 1986 AMC 2027, 2038 (1986) (“[S]ince a commercial situation generally does not involve large disparities in bargaining power . . . we see no reason to intrude into the parties’ allocation of the risk.”); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537, 1995 AMC 1817, 1824 (1995) (noting that parochial concepts “must give way to contemporary principles of international comity and commercial practice”).