No. 23-____

IN THE

Supreme Court of the United States

SHELL OFFSHORE INC.,

Petitioner,

v.

PALFINGER MARINE USA, INC.,

Respondent.

On Petition for Writ of a Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 23, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Can oil and gas exploration from a fixed platform on the Outer Continental Shelf qualify as "maritime commerce," triggering the application of maritime law to contracts performed on the platform, when this Court has held in a tort context that such facilities "were not even suggestive of maritime affairs"?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are named in the caption.

STATEMENT OF RELATED CASES

Related cases to this proceeding are:

1. *Earnest v. Palfinger Marine USA, Inc.*, No. 22-30582, United States Court of Appeals for the Fifth Circuit. Judgment entered on January 11, 2024.

2. *Earnest v. Palfinger Marine USA, Inc.*, 6:20-CV-00685, United States District Court for the Western District of Louisiana. Judgment entered on January 10, 2023.

RULE 29.6 STATEMENT

Shell Offshore Inc. is a Delaware corporation with its principal place of business in Houston, Texas. It is a wholly owned indirect subsidiary of Shell plc, a publicly held UK company. No other publicly traded company owns 10% or more of the stock of Shell plc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
STATEMENT OF RELATED CASES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
INTRODUCTION	2
STATEMENT	3
1. Statutory History	3
2. Factual and Procedural History	4
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	7
APPENDIX	

TABLE OF AUTHORITIES

CASES Page(s)

Earnest v. Palfinger Marine USA, Inc., 90 F.4th 804 (5th Cir. 2024) 1, 6

Earnest v. Palfinger Marine USA Inc., 621 F. Supp. 3d 683 (W.D. La 2022) 1, 5

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC, 601 U.S. 65 (2024)..... 7

Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985)..... 2, 6

Norfolk Southern Railway Co. v. Kirby, 543 U.S. 14 (2004)..... 5, 6

Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352 (1969)..... 2, 3

Southern Pacific Company v. Jensen, 244 U.S. 205 (1917)..... 6

STATUTES

28 U.S.C. § 1254 1

43 U.S.C. § 1333(a)(1)(A)..... 3

43 U.S.C. § 1333(a)(1)(A)(ii)..... 3

43 U.S.C. § 1333(a)(2)(A)..... 3

La. R.S. § 9:2780(B)..... 5

La. R.S. § 9:2780(C)..... 5

PETITION FOR WRIT OF CERTIORARI

Shell Offshore Inc. petitions for writ of certiorari to review the ruling of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision under review in this petition (App. A) reversing the ruling of the United States District Court for the Western District of Louisiana (App. C) is reported at *Earnest v. Palfinger Marine USA, Inc.*, 90 F.4th 804; 22-30582 (5th Cir. January 11, 2024).

The opinion of the United States District Court for the Western District of Louisiana (App. C) dismissing claims for contractual indemnity under Louisiana law (App. B) is reported in *Earnest v. Palfinger Marine USA, Inc.*, 622 F. Supp.3d 683; 6:20-CV-00685 (W.D. La. August 12, 2022).

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit from which this petition is taken was entered on January 11, 2024. *Earnest v. Palfinger Marine USA, Inc.*, 22-30582 (5th Cir. January 11, 2024). The order denying a timely petition for rehearing en banc was entered by United States Court of Appeals for the Fifth Circuit on February 26, 2024. *Earnest v. Palfinger Marine USA, Inc.*, 22-30582 (5th Cir. February 26, 2024) (App. D).

This Court has jurisdiction under 28 U.S.C. § 1254.

INTRODUCTION

This Court has long held that a fixed oil and gas platform on the Outer Continental Shelf is "an island, albeit an artificial one, and the accidents [in question] had no more connection to the ordinary stuff of admiralty than do accidents on piers." *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 360 (1969). The Court reaffirmed this principle 16 years later, declining to find a maritime tort in the context of an accident on an offshore production platform, explaining that "drilling platforms were not even suggestive of traditional maritime affairs." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 422 (1985).

Neither this Court nor any court of appeals has addressed this issue in the context of a contractual claim. This case raises that question—whether contracts performed solely on fixed oil and gas platforms, that serve no purpose other than the exploration of minerals on the Outer Continental Shelf, are within or beyond the reach of maritime law and maritime jurisdiction. This Court in *Rodrigue* and *Herb's Welding* strongly declared that platform activities are decidedly not maritime. However, the Fifth Circuit has now refused to apply that same principle to a contractual claim. In evaluating "whether the contract's purpose is to effectuate maritime commerce" under its maritime contract test, the Fifth Circuit held that "offshore oil and gas drilling is what satisfies" the connection to maritime commerce.

The court of appeals' conclusion that maritime commerce arises solely from oil and gas activities on a fixed platform represents an unprecedented extension of maritime law in contract that is inconsistent with the principles this Court enunciated in *Rodrigue* and *Herb's Welding*. If, as this Court has held, accidents

occurring on fixed platforms are "not even suggestive of maritime affairs," then "maritime commerce" is equally absent from contracts performed on those platforms. This Court should therefore grant a writ of certiorari to maintain proper harmony and uniformity of maritime law for both tort and contract claims involving operations on fixed platforms on the Outer Continental Shelf.

STATEMENT

1. Statutory History

In 1953, Congress passed the Outer Continental Shelf Lands Act ("OCSLA") to extend "[t]he Constitution and laws and civil and political jurisdiction of the United States . . . to all artificial islands on the of the outer Continental Shelf." 43 U.S.C. § 1333(a)(1)(A)(ii). Section 1333(a)(1) provides that such laws shall apply "to the same extent as if the outer Continental Shelf were an area of exclusive jurisdiction located within a State." 43 U.S.C. § 1333(a)(1)(A). The Act further provides that the "civil and criminal laws of each adjacent State" extend to artificial islands on the Outer Continental Shelf "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other federal laws." 43 U.S.C. § 1333(a)(2)(A)

The Court concluded that the "legislative history of the Lands Act makes it clear that these structures [*i.e.* fixed platforms on the Outer Continental Shelf] were to be treated as islands or as federal enclaves within a landlocked State, not as vessels." *Rodrigue*, 395 U.S. at 361. Congress, the Court concluded, "decided that these artificial islands, through surrounded by the High Seas, were not themselves to be considered within maritime jurisdiction." *Id*.

2. Factual and Procedural History

The artificial island at issue in this petition is the Auger Tension Leg Platform owned and operated by Shell Offshore Inc ("Shell"). Auger is a floating but fixed platform located on the Outer Continental Shelf in the Gulf of Mexico approximately 130 miles off the coast of Louisiana. Auger's sole function is to produce oil and gas on the Outer Continental Shelf. The courts below and the parties agreed that Auger is not a vessel and no drilling or production activities on Auger were performed from a vessel.

The ten lifeboats on Auger were safety equipment required by the United States Coast Guard for exploration and production operations being conducted on the platform. The sole purpose of the lifeboats is to evacuate workers from the platform in the event of an emergency.

The dispute below concerns the enforcement of indemnity provisions in a contract between Shell and a lifeboat manufacturer, Palfinger Marine USA, Inc. ("Palfinger"). That contract called for Palfinger to perform annual inspections of six lifeboats on the platform and perform 5-year cable changeouts for the davit systems for two of the lifeboats.

Palfinger performed that contract work in June 2019. At that time, its personnel discovered and took a picture of a corroded aft hook release cable in Lifeboat No. 6 and wrote in the June 11, 2019 service report: "recommend hook release cables." The same service report, however, certified that the lifeboat was in "correct working order" and instructed Shell to "return boats back to service and made ready for use." Unfortunately, two weeks after the inspection, the hook release cable malfunctioned on the next manned

lifeboat launch, resulting in the deaths of two platform workers and injuries to a third platform worker. Palfinger sought indemnity from Shell for the amounts Palfinger paid in settlement of the wrongful death and personal injury claims arising from that incident.

Shell and Palfinger filed cross-motions for summary judgment addressing the legal viability of Palfinger's contractual indemnity claims. If adjacent state law applied to the contract, Palfinger's indemnity claims would be precluded by the Louisiana Oilfield Indemnity Act. La. R.S. § 9:2780(B) & (C). If maritime law applied to the contract, Palfinger's indemnity claims could proceed in the trial court, including an analysis of the parties' choice-of-law provision.

The district court concluded that state law, rather than maritime law, applied to the contract. The court recognized that, "[a]s the Supreme Court in *Kirby*[1] instructed, the primary focus in determining whether a contract is maritime depends on "the nature and character of the contract" with the fundamental interest being "the protection of maritime commerce." *Earnest v. Palfinger Marine USA Inc.*, 621 F. Supp. 3d 683, 693 (W.D. La 2022). The district court found that the "lifeboats did not engage in maritime commerce, nor did they support maritime commerce." *Id.* Rather, the lifeboats "functioned as safety equipment supporting oil and gas exploration and production operations on the Auger platform on the outer continental shelf." *Id.* Given the absence of maritime commerce to support the application of maritime law, the district court held that Louisiana law applied to the contract and granted Shell's motion for summary judgment.

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[1] *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004).

The Fifth Circuit reversed, concluding that maritime law governed the contract "[r]egardless of whether employing a lifeboat as a lifeboat means its passengers are engaged in maritime activity." *Earnest v. Palfinger Marine USA Inc.*, 90 F.4th 804, 813 (5th Cir. 2024). The court of appeals held instead that "offshore oil and gas drilling" was the hook to apply maritime law, with platform activities satisfying "the contract's purpose [] to effectuate maritime commerce." *Id.* at 814. The court of appeals reversed and remanded for further proceedings in the trial court.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to maintain the uniform application of maritime law on the Outer Continental Shelf whether a claim arises in tort or contract. Namely, maritime law should apply only to contracts that "effectuate maritime commerce." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 27 (2004). In concluding that offshore oil and gas from a fixed platform satisfied that maritime commerce requirement, the Fifth Circuit created a legal distinction for maritime contracts that cannot be reconciled with this Court's maritime tort decisions in *Rodrigue* and *Herb's Welding*.

Oil and gas activities on fixed platforms cannot on the one hand "effectuate maritime commerce" for the purposes of maritime contacts, while on the other "not even [be] suggestive of traditional maritime affairs" for maritime tort law to apply. *Herb's Welding, Inc.*, 470 U.S. at 422. That friction between maritime law of tort and contract belies "the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Southern Pacific Company v. Jensen,* 244 U.S. 205, 217 (1917).

Unlike the issue recently presented in *Great Lakes*, the Fifth Circuit here did not adopt state law "as a gap-filler in the absence of a uniform federal maritime rule." *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 66 (2024). Rather, the court of appeals filled a gap in maritime contract law on the Outer Continental Shelf that is in tension with the principle enunciated by this Court for maritime torts at the same location. That tension, and the disunity it creates between maritime contract law and maritime tort law, can only be reconciled through the granting of this petition.

CONCLUSION

To maintain proper harmony and uniformity of maritime law on the Outer Continental Shelf, the Court should grant a writ of certiorari.

Respectfully submitted,

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May 23, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: OPINION, U.S. Court of Appeals for the Fifth Circuit (January 11, 2024)	1a
APPENDIX B: ORDER, U.S. District Court for the Western District of Louisiana (August 12, 2022)	19a
APPENDIX C: MEMORANDUM RULING, U.S. District Court for the Western District of Louisiana (August 12, 2022)	21a
APPENDIX D: ORDER, U.S. Court of Appeals for the Fifth Circuit (February 26, 2024)	38a
APPENDIX E: 43 U.S.C. § 1333(a)	42a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: January 11, 2024]

No. 22-30582

JEREMY EARNEST,

Plaintiff

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee,

PATTY DUPRE, *Individually and on behalf of minor child*, D D; GAGE DUPRE,

Plaintiffs,

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant / Cross-Claimant / Third Party Plaintiff-Appellant,

versus

SHELL OIL COMPANY

Defendant / Cross-Defendant-Appellee,

SHELL OFFSHORE, INCORPORATED; SHELL EXPLORATION & PRODUCTION COMPANY,

Third Party Defendants-Appellees,

DEVIN MARCEL, *Individually & on behalf of* GARY MARCEL ESTATE,

Plaintiff,

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant / Cross-Claimant / Third Party Plaintiff-Appellant,

versus

SHELL OFFSHORE, INCORPORATED,

Defendant / Cross-Defendant-Appellee,

SHELL EXPLORATION & PRODUCTION COMPANY; SHELL OIL COMPANY,

Third Party Defendants-Appellees,

DANIEL J. LEBEOUF, JR.

Plaintiff,

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC Nos. 6:20-CV-685, 6:20-CV-756,
6:20-CV-773, 6:20-CV-813

Before SOUTHWICK, ENGELHARDT, and WILSON, *Circuit Judges*.

LESLIE H. SOUTHWICK, *Circuit Judge*:

Is a contract to inspect and repair lifeboats on an oil platform located on the Outer Continental Shelf a maritime contract? The answer matters because it affects whether indemnity might be owed by one corporate defendant to the other for payments to third parties. The district court held the contract was not a maritime one. We conclude it is. Further proceedings are necessary to determine whether indemnity must be paid. REVERSED and REMANDED.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a tragic June 2019 accident when a lifeboat detached from an oil platform, killing two workers and injuring another. The accident occurred on the Auger Tension Leg Platform, which is owned and operated by Shell Offshore, Inc., Shell Exploration & Production Company, and Shell Oil Company (collectively, "Shell"). It is located about 130 miles off the Louisiana coast. The parties agree that the Auger is not itself a vessel. Palfinger Marine, USA, Inc. states that the Auger is "a floating [Outer Continental Shelf] facility" under the United States Coast Guard's classifications, and it is not a vessel "because its legs are attached, even if only temporarily, to the seafloor." This description may place the Auger in the category of "spars," which are not vessels because they are

anchored to the seabed and are not intended to be moved. *See Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 355, 358 (5th Cir. 1999).

The platform contains ten lifeboats, as required by the Coast Guard, sufficient to evacuate all oil rig workers in case of an emergency. 46 C.F.R. § 108.525. Shell is required to maintain those lifeboats "in good working order and ready for immediate use at all times" and to conduct quarterly drills where "[e]ach lifeboat must be launched with its assigned operating crew aboard." 46 C.F.R. §§ 109.213(d)(3), 109.301(a).

In 2018, Shell and Palfinger entered a Purchase Contract for goods and services pertaining to Shell's lifeboats on the Auger Platform.[1] The Purchase Contract is akin to a master service contract. Under the contract, Palfinger agreed to provide annual inspections, maintenance, repairs of the lifeboats, and "5 year reoccurring cable change outs" of the davit systems used to launch the lifeboats from the platform. The contract also contains indemnity provisions, whereby Shell agreed to indemnify Palfinger for liabilities resulting from "death, injury, or disease" of any Shell employee. The provisions exclude any "liabilities that did not arise in connection with the contract" and "liabilities caused by [Palfinger's] gross negligence . . . or wil[l]ful misconduct."

In June 2019, Palfinger performed inspections on several lifeboats, including Lifeboat 6, as well as five-year cable change-outs on Lifeboats 1 and 3. As provided in the Purchase Contract, a purchase

[1] The lifeboats are substantial crafts called TEMPSCs — "totally enclosed motor propelled survival craft." They are approximately 24 feet long, have a full-load capacity of 13,306 pounds, and can carry 33 persons.

order was executed for these services. The work was performed from the oil platform and inside the lifeboats, which were attached to the platform by cables. It was during this inspection that Palfinger noticed a corroded release cable on Lifeboat 6 and recommended the cable be replaced.[2] Palfinger nonetheless reported that "[a]ll systems [were] found to be [in] correct working order" and instructed Shell to place the "[life]boats back to service and made ready for use."

A few weeks later, Shell conducted a quarterly drill of several lifeboats, including Lifeboat 6. The lifeboats were successfully launched from the platform. During the recovery of Lifeboat 6, the corroded cable failed, causing the lifeboat to fall 80 feet into the water. The two oil rig workers still on the lifeboat were killed. A third worker was injured.

The injured worker and families of the deceased workers filed suit against Palfinger and Shell. Palfinger asserted third-party indemnity claims against Shell under the Purchase Contract. The individuals' claims were settled and are not at issue in this appeal. In the settlement agreement, Palfinger and Shell preserved Palfinger's indemnity defense for appeal.

In district court, Shell and Palfinger filed cross-motions for partial summary judgment addressing the indemnity provisions in the Purchase Contract. The central disagreement was whether the Purchase Contract is a maritime contract. If the Purchase Contract is a maritime contract, then the indemnity provisions would be valid under maritime law. On the other hand,

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[2] The parties dispute whether Palfinger informed Shell that the cable needed to be replaced. That dispute is not material to this appeal.

if the Purchase Contract is not maritime, Louisiana law would apply, making the indemnity provisions unenforceable. The settlement agreement does not appear to concede that indemnity would be owed if the Purchase Contract is maritime. Our sole issue is the category in which to place the contract.

Applying this circuit's test from *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (*en banc*), the district court held the Purchase Contract was not a maritime contract. The court granted Shell's motion for partial summary judgment and denied Palfinger's. This appeal timely followed.

DISCUSSION

The Plaintiffs' claims arose under the Outer Continental Shelf Lands Act ("OCSLA"), giving the district court federal-question jurisdiction under 28 U.S.C. § 1331. *See Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 221 (5th Cir. 2013). We have appellate jurisdiction under 28 U.S.C. § 1291.

"We review a district court's grant of summary judgment *de novo*, applying the same standards as the district court." *Huskey v. Jones*, 45 F.4th 827, 830 (5th Cir. 2022) (citation omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law FED. R. CIV. P. 56(a). The genuine dispute here is legal, not factual.

I. Choice of law

The sole issue on appeal is whether Shell's and Palfinger's Purchase Contract was a maritime contract, which in this case dictates whether federal or state law applies under the OCSLA's choice of law provision.

43 U.S.C. § 1333(a). In analyzing the issue, the district court relied on the *Rodrigue/PLT* test. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355– 56 (1969); *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990). Those authorities set out three requirements for state law to apply. "(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artific[i]al structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law." *PLT Eng'g*, 895 F.2d at 1047; *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009) (*en banc*).

The district court determined that all three requirements of the *Rodrigue/PLT* test were satisfied. In deciding the second requirement, whether federal maritime law applies of its own force, the district court relied on *Doiron*'s two-factor test for determining whether a contract relating to offshore oil and gas exploration and production is maritime. It reasoned that although "the Shell-Palfinger purchase and maintenance contract involved 'services to facilitate the drilling or production of oil and gas on navigable waters,' the record [did] not reflect that a vessel [would] play a substantial role in the completion of the contract." The contract therefore was not maritime and federal maritime law did not apply of its own force.

The district court then held that Louisiana law applies. That rendered the Purchase Contract's indemnity provision unenforceable under the Louisiana Anti-Indemnification Act, which precludes indemnity agreements pertaining to oil, gas, and certain mineral wells. La. R.S. 9:2780(B), (C).

On appeal, Palfinger does not challenge the district court's decision regarding the first and third requirements of the *Rodrigue / PLT* test nor the consequences that would follow if Louisiana law applied. Instead, Palfinger challenges only the second requirement, whether federal maritime law would apply of its own force. What would cause it to apply of its own force is if the Purchase Contract is a maritime contract. *Barrios v. Centaur, LLC*, 942 F.3d 670, 675–76 (5th Cir. 2019).

II. Maritime contracts

To begin our review, we consider how *Doiron* fits within the wider context of maritime law. We will then show how *Doiron* applies in this case.

a. Maritime law and the Doiron *test*

Doiron concerned a work order under a master service contract to perform "flow-back" services to remove obstructions hampering a gas well in the navigable waters of Louisiana. *Doiron*, 879 F.3d at 569–70. The contract did not require or contemplate the use of a vessel, but a barge equipped with a crane was later determined to be necessary to lift heavy equipment used to complete the work. *Id.* at 570. A worker injured by the crane sued the crane's owner, and the issue on appeal concerned the master service contract's indemnity provision. *Id.*

The *en banc* court acknowledged that Fifth Circuit caselaw distinguishing between maritime and non-maritime contracts in the offshore oil field context has "been confusing and difficult to apply." *Id.* at 571. Beginning in 1990, we had applied the six-factor test established in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919

F.2d 313, 316 (5th Cir. 1990).[3] This multi-factor, fact-intensive test often "unduly complicate[d] the determination of whether a contract is maritime." *Doiron*, 879 F.3d at 572. In *Doiron*, we sought to "simplify the is-this-contract-maritime inquiry" and "streamline" the six-factor test. *Barrios*, 942 F.3d at 678–79. We also endeavored to align our test with the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), which rejected the mixed-contract theory underlying the rationale of *Davis & Son*'s six-factor test. *Doiron*, 879 F.3d at 574–76. In doing so, we recognized *Kirby*'s emphasis that "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Id.* at 574 (quoting *Kirby*, 543 U.S. at 25).

Based on *Kirby*'s principles, we adopted a two-factor test for determining whether a contract is maritime in the context of offshore drilling:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

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[3] The test was this: "1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters; 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?" *Davis & Sons*, 919 F.2d at 316.

Id. at 576.[4] This test "removes from the calculus those prongs of the *Davis & Sons* test that are irrelevant, such as whether the service work itself is inherently maritime" and instead "places the focus on the contract and the expectations of the parties." *Id.* at 576–77. We cautioned that some of the *Davis & Sons* considerations could still be relevant to the extent the scope of the contract and the parties' expectations are unclear. *Id.* at 577.

Applying this test, the *Doiron en banc* court held that the first factor was satisfied because the work order to remove obstructions from a gas well provided services to facilitate "the drilling or production of oil and gas on navigable waters from a vessel," which precedent treated as "commercial maritime activity." *Id.* at 575–76. Applying the second factor of whether a vessel would have a substantial role, we held the work order was nonmaritime because it did not provide for and the parties did not anticipate that a vessel would be used to complete the work. *Id.* at 577. The crane barge was used only after "the crew encountered an unexpected problem," and "[t]he use of the [barge] to lift the equipment was an insubstantial part of the job." *Id.*

We now examine the admiralty law background to *Doiron* that allows us to understand some of its nuances.

b. The maritime voyage to Doiron

We start with the bedrock principle that whether a contract is maritime depends on "the nature and character of the contract," which focuses on whether it

[4] We have since expanded the test to include non-oil-and-gas-related activities, but such an expansion is irrelevant to this case. *Barrios*, 942 F.3d at 678–80.

references "maritime service[s] or maritime transactions." *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919); *Kirby*, 543 U.S. at 23–24. This requires a "conceptual rather than spatial approach," under which we do not consider where formation or performance of the contract took place but instead evaluate the substance of the contract. *Kirby*, 543 U.S. at 23–24; *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). "Admiralty is not concerned with the form of the action, but with its substance." *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117, 124 (1933). The boundaries of this approach "have always been difficult to draw," and "[p]recedent and usage are helpful insofar as they exclude or include certain common types of contract." *Kossick*, 365 U.S. at 735.

A well-recognized treatise provides a useful summary of classical maritime contracts. *See* 1 BENEDICT ON ADMIRALTY § 182 (Joshua S. Force & Steven F. Friedell eds., 2023). "In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water." *Id.* Nonetheless, mere reference to ships or vessels is not enough. *Id.* Instead, "there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry." *Id.* Thus, "a contract to repair or to insure a ship is maritime, but a contract to build a ship is not." *Kossick*, 365 U.S. at 735 (citations omitted); *see also North Pac. S.S. Co.*, 249 U.S. at 127 (distinguishing repair and construction). "It is well settled that a

contract to repair a vessel is maritime." *Alcoa S.S. Co. v. Charles Ferran & Co.*, 383 F.2d 46, 50 (5th Cir. 1967).

Next, we must account for the OCSLA, which was enacted in 1953. Pub. L. No. 83-212, 67 Stat. 462 (1953). The Act extends federal law to "all artificial islands" and "installations and other devices . . . attached to the seabed," as well as other artificial structures in the Outer Continental Shelf. 43 U.S.C. § 1333(a)(1)(A). Congress chose not to treat oil and gas offshore platforms as vessels, but instead "as island[s] or as federal enclaves within a landlocked State." *Rodrigue*, 395 U.S. at 361. The Act incorporates adjacent state law as federal law on these fictional enclaves, but only to the extent they are "not inconsistent with . . . other Federal laws." § 1333(a)(2)(A). We have held that the OCSLA "does not oust admiralty law having a basis of applicability independent from the location of the platforms at sea." *Kimble v. Noble Drilling Corp.*, 416 F.2d 847, 850 (5th Cir. 1969). Since *Rodrigue* and *Kimble*, we determine when admiralty or maritime law would apply of its own force, independent of the location of a controversy on an offshore platform.[5]

To make this determination in contract cases, "the principle underlying *Rodrigue* and *Kimble* precludes the application of maritime law except in those cases where the subject matter of the controversy bears the type of significant relationship to traditional maritime

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[5] Before *Rodrigue*, we held that federal maritime law applied to incidents occurring from the production of resources on the Outer Continental Shelf because such "hazards . . . were essentially maritime in nature." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1230 (5th Cir. 1985) (citing *Pure Oil Co. v. Snipes*, 293 F.2d 60, 67–69 (5th Cir. 1961)). But *Rodrigue* rejected this construction of the OCSLA. *Id.*

activities necessary to invoke admiralty jurisdiction." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231 (5th Cir. 1985). The panel in *Laredo* then cited to *Kossick* and *Benedict on Admiralty* for their discussion of traditional maritime activities that would invoke admiralty jurisdiction. *Id.* Those activities are the same as the ones discussed above, *i.e.*, contracts "relating to a ship in its use as such" and "to repair or to insure a ship," among others. 1 BENEDICT ON ADMIRALTY § 182; *Kossick*, 365 U.S. at 735 (citations omitted).

Our approach to determining whether contracts involved traditional maritime activities was inconsistent and led to divergent results. *See Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 957 (5th Cir. 1988) (Garwood, J., concurring). Inconsistencies multiplied because a "[d]etermination of the nature of a contract depends in part on historical treatment in the jurisprudence." *Davis & Sons*, 919 F.2d at 316; *see Kossick*, 365 U.S. at 735. In attempting to reconcile these divergent results, whether a vessel had a substantial role in the work became a key factor. Seemingly comparable cases reached different results based on whether the role of a vessel was "inextricably intertwined with [the] maritime activities" of an offshore rig rather than "merely incidental" to them. *Compare Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1123 (5th Cir. 1992), *with Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 397 & n.7 (5th Cir. 1991); *see also Hoda v. Rowan Cos.*, 419 F.3d 379, 381–83 (5th Cir. 2005).

Nearly 30 years of applying the *Davis & Sons* factors and reconciling our precedents led us astray from

where our focus should have been.[6] The central goal of whatever test is used has always been to determine whether the contract "bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction." *Laredo*, 754 F.2d at 1231. Our *en banc Doiron* decision, with the assistance of *Kirby*'s rejection of mixed-contract theory, provided a much-needed correction by focusing us on where *North Pacific* instructed over 100 years ago: "the nature and character of the contract" and its "reference to maritime service or maritime transactions." *Doiron*, 879 F.3d at 574 (quoting *Kirby*, 543 U.S. at 24 (quoting *North Pac. S.S. Co.*, 249 U.S. at 125)). In none of our cases were the traditional maritime activities described in *Kossick* and *Benedict on Admiralty* discarded as irrelevant. *Laredo*, 754 F.2d at 1231.

In summary, the *Doiron* test determines whether maritime law applies of its own force through a contract bearing the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction. The focus of this analysis is on the contract and the parties' expectations, and the role of the vessel should be viewed in light of what is considered classically maritime.

III. Application to the present case

Palfinger's Purchase Contract with Shell provided "services to facilitate the drilling or production of oil

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[6] For example, the *Doiron* three-judge panel found that the use of the crane barge was "inextricably intertwined" with the operations of the gas well because it was "necessary" to execute the service contract. *In re Doiron*, 869 F.3d 338, 344–45 (5th Cir. 2017), *rev'd en banc*, 879 F.3d 568 (5th Cir. 2018). But as the *en banc* court explained, the contract did not call for and the parties did not expect that a vessel would be used. *Doiron*, 879 F.3d at 577.

and gas on navigable waters." *Doiron*, 879 F.3d at 576. The contract required annual inspections and repairs on the Auger Platform's lifeboats and five-year cable changeouts of the davit systems tying the lifeboats to the rig, as well as other related tasks. These lifeboats, their inspection and testing, and the use of davits and winches are all required by Coast Guard regulations for Shell to conduct its exploration and production operations. 46 C.F.R. §§ 108.500–108.597, 109.213, 109.301. That such operations could not occur without Palfinger's services sufficiently establishes that the services facilitate the drilling or production of oil and gas. Similarly, we have held that services to decommission a well as required to obtain a drilling permit facilitated the drilling and production of oil and gas. *Crescent Energy Servs., LLC v. Carrizo Oil & Gas, Inc.*, 896 F.3d 350, 356–57 (5th Cir. 2018).

When the district court found that the Purchase Contract did not provide for and the parties did not expect that vessels would play a substantial role in performance, the court was considering only the *use* of a vessel. The *Doiron* test itself, though, does not refer to whether a vessel will be *used*. It focuses on whether the contract provides or the parties expect "a vessel will play a *substantial role* in the completion of the contract." *Doiron*, 879 F.3d at 576 (emphasis added). The *Doiron* test allows a finding that a contract is maritime when a vessel is not the object of the contract. It does not require the opposite finding when the maintenance and repair of vessels are the purposes of the contract, as such are traditional maritime activities. *See Kossick*, 365 U.S. at 735; 1 BENEDICT ON ADMIRALTY § 182.

The remaining issue is whether lifeboats are vessels. The Palfinger-Shell Purchase Contract pertains solely

to the lifeboats and the systems connecting them physically and operationally to the Auger Platform. The subject matter of the contract is the lifeboats and their operational readiness. Lifeboats are vessels in that they are "watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. "[A] reasonable observer, looking to the [floating structure's] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." *Lozman v. City of Riviera Beach*, 568 U.S. 115, 121 (2013). It is therefore irrelevant that lifeboats can also be described as safety equipment, as all that would mean is that they are vessels that serve a safety purpose.

We conclude that the Purchase Contract is a classically maritime contract. *See Alcoa S.S. Co.*, 383 F.2d at 50. The district court decided otherwise. First, the court relied on where the work was conducted, *i.e.*, on the Auger Platform or on the lifeboats themselves. That is the type of spatial analysis that is inapplicable to maritime contracts, which requires a conceptual analysis. *Kirby*, 543 U.S. at 23–24. Instead, the "nature and character" of the contract is for the repair and maintenance of vessels necessary to support offshore drilling and production of oil and gas, *i.e.*, maritime commerce. *Doiron*, 879 F.3d at 575.

Second, the district court dismissed the involvement of lifeboats as vessels because it concluded that, like *Doiron*, the vessels were only incidental to the performance of the contract. Third, the district court reasoned that because Palfinger did not "use" the lifeboats to complete a substantial portion of the work, the Purchase Contract was not maritime. We discuss

these two reasons together, because our response is the same to both.

The court's focus on "use," and not on whether a vessel will play a substantial role in the completion of the contract, made the lifeboats incidental when instead they are central to performance of this contract. The inspection, repair, and maintenance of the lifeboats are the reason for the purchase order under the Purchase Contract. It is certainly true that, in applying the actual factor of whether a vessel had a substantial role, *Doiron* discussed whether a vessel was "use[d]" to perform the work or whether the work was performed "from" a vessel. *Id.* at 573, 577. That discussion was appropriate based on the facts in *Doiron*. The overarching consideration, though, is whether it was contemplated "that a vessel would be necessary to perform the job." *Id.* at 570. A contract for maintenance and repair of a vessel inevitably gives the vessel a substantial role. *Id.* at 576.

Doiron's requirement that "a vessel will play a substantial role" in completing the contract, *id.*, incorporates the traditional view that "a contract relating to a ship in its use as such" is a maritime contract if "there [is] a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat," 1 BENEDICT ON ADMIRALTY § 182. In other words, *Doiron*'s test contemplates traditional maritime activities because it ensures that the relation of the contract to the vessel, *i.e.*, the vessel's role, is substantial rather than incidental.

Finally, the district court held, and Shell argues, that the lifeboats themselves were not engaged in maritime commerce. *Kirby* instructs that the conceptual, as opposed to spatial, approach protects maritime

commerce by "focusing our inquiry on whether the principal objective of a contract is maritime commerce." *Kirby*, 543 U.S. at 25. Regardless of whether employing a lifeboat as a lifeboat means its passengers are engaged in maritime activity, the lifeboats are a required component of "drilling and production of oil and gas on navigable waters from a vessel[, which] is commercial maritime activity." *Doiron*, 879 F.3d at 575. This factor asks "is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?" *Id.* at 576. In the oil and gas context, the first factor considers whether the contract's purpose is to effectuate maritime commerce and the second ensures that the use of a vessel to do so is substantial instead of merely incidental. *Id.*; *Barrios*, 942 F.3d at 680.

In none of our cases have we required that the vessel itself be engaged in maritime commerce. *See, e.g.*, *Crescent*, 896 F.3d at 361; *Hoda*, 419 F.3d at 383. Indeed, *Doiron* itself assumed the crane barge satisfied the first factor because its application was not even discussed. *Doiron*, 879 F.3d at 576–77. The offshore oil and gas drilling is what satisfied the first factor. *Id.* at 575, 577. Therefore, the *en banc* court reasonably found no need even to discuss the first factor — even though the second factor is relevant only after the answer to the first is "yes." *Id.* at 576.

We REVERSE the district court's decision and REMAND for additional proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

CASE NO. 6:20-CV-00685

JEREMY EARNEST

versus

PALFINGER MARINE USA INC ET AL

LEAD JUDGE ROBERT R SUMMERHAYS
MAGISTRATE JUDGE CAROL B. WHITEHURST

ORDER

The present matters before the Court are the Motion for Partial Summary Judgment on Contractual Defense and Indemnity Obligations Versus Shell Offshore, Inc. [ECF No. 88] filed by Palfinger Marine, USA, Inc. ("Palfinger") and the Motion for Summary Judgment [ECF No. 90] filed by Shell Offshore, Inc., Shell Exploration & Production Company, and Shell Oil Companies (collectively, the "Shell Entities"). For the reasons stated in the Court's Memorandum Ruling,

IT IS ORDERED THAT the Motion for Partial Summary Judgment on Contractual Defense and Indemnity Obligations Versus Shell Offshore, Inc. [ECF No. 88] filed by Palfinger is DENIED. The Motion for Summary Judgment [ECF No. 90] filed by the Shell Entities is GRANTED. Palfinger's claims for

contractual and/or tort indemnity against the Shell Entities are DISMISSED.

THUS DONE in Chambers on this 12th day of August, 2022.

/s/ Robert R. Summerhays
ROBERT R. SUMMERHAYS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

CASE NO. 6:20-CV-00685

JEREMY EARNEST

versus

PALFINGER MARINE USA INC ET AL

LEAD JUDGE ROBERT R. SUMMERHAYS
MAGISTRATE JUDGE CAROL B. WHITEHURST

MEMORANDUM RULING

The present matters before the Court are the Motion for Partial Summary Judgment on Contractual Defense and Indemnity Obligations Versus Shell Offshore, Inc. [ECF No. 88] filed by Palfinger Marine, USA, Inc. ("Palfinger") and the Motion for Summary Judgment [ECF No. 90] filed by Shell Offshore, Inc., Shell Exploration & Production Company, and Shell Oil Companies (collectively, the "Shell Entities"). Both motions address Palfinger's claims for contractual and tort indemnity against the Shell Entities.

I. BACKGROUND

Plaintiffs' claims in this matter arise from a June 30, 2019, accident involving a lifeboat that fell from its moorings on a floating, tension leg oil and gas exploration and development platform—the Auger platform.

The Auger platform is "located on and permanently attached to the Outer Continental Shelf ("OCS") at Garden Banks Block 426" in the Gulf of Mexico approximately 130 miles due south of Vermillion Parish.[1] At the time of the incident, Auger had approximately 18 producing wells and associated production facilities with the sole purpose of the exploration and production of minerals on the Outer Continental Shelf.[2] The lifeboats on Auger are safety equipment required by the United States Coast Guard for exploration and production operations being conducted on the platform.[3] The lifeboats on Auger are necessary to support and sustain the workers on the platform by providing a means to evacuate the platform in the event of an emergency.[4]

In 2018, Shell Offshore and Palfinger entered into a purchase and maintenance contract for lifeboats to be used on Shell's Offshore platforms.[5] The scope of the contract specifically includes annual inspections, repairs, and 5-year cable change outs.[6] The contract requires execution of individual purchase orders for work to be performed and, in turn, each purchase order "is a stand-alone contract between the parties" and "incorporates the terms of the purchase and maintenance contract.[7] The contract further provides that Shell must indemnify Palfinger for "death injury, or disease

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[1] *See Patty Dupre et. al. v. Palfinger Marine USA Inc. et. al.,* No. 6:20-00756, 2022 WL 885867 (W.D. La. Mar. 24, 2022).

[2] ECF No. 90, Exhibit 1, Declaration of Jose A. Rincon at ¶ 2.

[3] *Id.* at ¶ 3.

[4] *Id.* at ¶ 4.

[5] ECF No. 90, Exhibit 2, Shell-Palfinger Purchase Contract.

[6] *Id.* at p. 41.

[7] *Id.* at 13 (Section 1(a)).

of any person in Company Group[,]" which includes Shell employees.[8] The indemnification agreement excludes liabilities that "do not arise in connection with the CONTRACT or are unrelated to the SCOPE of the CONTRACT" as well as those caused by the gross negligence/willful misconduct of Palfinger employees.[9]

Palfinger asserts a contractual indemnity claim under the purchase and maintenance contract.[10] A few weeks prior to the incident, Palfinger performed annual inspections of six lifeboats on Auger, including Lifeboat No. 6, as well as the 5-year davit wire change for Lifeboats Nos. 1 and 3 pursuant to Purchase Order #4513428944 (the "June 2019 Purchase Order").[11] During that inspection, Jason Kemp—Palfinger's lead service engineer—observed and photographed a corroded aft hook release cable in Lifeboat No. 6, and wrote in his service report "recommend hook release cables."[12]

The June 2019 Purchase Order incorporated Palfinger's Quotation FA5412944, which described the scope of work for the June 2019 service as "annual inspections of lifeboats 1,2,3,6,7,8 and 5yr davit cable change on

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[8] *Id.* at 22 (Section 7.2). Two of the plaintiffs for which Palfinger seek indemnity were employees of Shell Exploration & Production Company. The third decedent, Gary Marcel, was an employee of Danos, Inc., a contractor of Shell Offshore Inc.

[9] *Id.* at 23 (Sections 7.5(b)(i) & (ii)).

[10] *See,* for example, Palfinger's Cross Claim and Third-Party Complaint in the Earnest case, Rec. Doc. 52 at 3-5, which identifies the 2018 Purchase Contract as the applicable contract.

[11] ECF No. 90, Exhibit 3, Purchase Order #4513428944.

[12] ECF No. 90, Exhibit 4, Deposition of Jason Kemp at pp. 99-100; and Exhibit 5, June 2019 Palfinger Service Report.

lifeboats 1 & 3 aboard 'SHELL AUGER.'"[13] In his deposition, Mr. Kemp explained that the annual inspections involved work to both the components of the platform, such as checking for rust and corrosion on the platform's davit and ensuring the fall cables were properly adjusted, as well as to the lifeboats, such as checking the air bottles, seat belts, and sprinkler systems.[14] The work performed by Palfinger occurred from the Auger platform.[15]

Palfinger has asserted a contractual indemnity claim against Shell Offshore and tort contribution/ indemnity claims against the Shell Entities associated with all personal injury and wrongful death claims arising from the Lifeboat No. 6 accident.[16] The Shell Entities argue that contractual indemnity provisions are barred by the Louisiana Oilfield Anti-Indemnity Act, and further, that any tort indemnity claims no longer exist under any arguable law.

II. SUMMARY JUDGMENT STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."[17] "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

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[13] ECF No. 90, Exhibit 6.

[14] ECF No. 90, Exhibit 4, Deposition of Jason Kemp at pp. 172-176.

[15] *Id.* at p. 174.

[16] ECF No. 42 (claims of Dupre family); ECF No. 52 (claims by Jeremy Earnest); and ECF No. 53 (claims of Marcel family).

[17] Fed. R. Civ. P. 56(a).

judgment as a matter of law."[18] "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party."[19] As summarized by the Fifth Circuit:

> When seeking summary judgment, the movant bears the initial responsibility of demonstrating the absence of an issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. However, where the nonmovant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial.[20]

When reviewing evidence in connection with a motion for summary judgment, "the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached."[21] "Credibility determinations

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[18] *Id.*

[19] *Quality Infusion Care, Inc. v. Health Care Service Corp.,* 628 F.3d 725, 728 (5th Cir. 2010).

[20] *Lindsey v. Sears Roebuck and Co.,* 16 F.3d 616, 618 (5th Cir.1994) (internal citations oinitted).

[21] *Roberts v. Cardinal Servs.,* 266 F.3d 368, 373 (5th Cir.2001); *see also Feist v. Louisiana, Dept. ofJustice, Office of the Atty. Gen.,* 730 F.3d 450, 452 (5th Cir. 2013) (court must view all facts and evidence in the light inost favorable to the non-moving party).

are not part of the summary judgment analysis."[22] Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof."[23]

III. LAW AND ANALYSIS

Shell contends that the indemnification obligations in the Shell-Palfinger purchase and maintenance contract are unenforceable. Specifically, Shell argues that the purchase and maintenance contract falls under the choice of law provision of the Outer Continental Shelf Lands Act ("OCSLA"), and that OCSLA provides that Louisiana law governs the contract. Accordingly, the contract's indemnification obligations are unenforceable under the Louisiana Oilfield Anti-Indemnification Act (the "Anti-Indemnification Act").[24] The Anti-Indemnification Act "declare[s] null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee."[25] Palfinger counters that OCSLA does not apply to the maintenance contract because the maintenance contract is a maritime contract governed by maritime law, and that the indemnification obligations in the contract are enforceable under maritime law. In sum, the threshold

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[22] *Quorum Health Resources, L.L.C. v. Maverick County Hosp. Dist.,* 308 F.3d 451, 458 (5th Cir. 2002).

[23] *Patrick v. Ridge,* 394 F.3d 311, 315 (5th Cir. 2004) (alterations in original) (quoting *Celotex v. Catlett,* 477 U.S. 317, 322 (1986)).

[24] La. R. S. § 9:2780.

[25] La. R. S. § 9:2780(A).

question for the Court is whether OCSLA's choice-of-law provision applies to the Shell-Palfinger purchase and maintenance contract.

A. Does OCSLA's Choice-of-Law Provision Apply to the Purchase and Maintenance Contract?

OCSLA grants subject matter jurisdiction to the federal courts over cases and controversies "arising out of or in connection with" any operation involving the "development" of minerals on the Outer Continental Shelf.[26] OCSLA's primary concern is "to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for the purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures."[27] OCSLA's choice-of-law provision, 43 U.S.C. § 1333 (a)(2)(A), states that:

> To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were

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[26] 43 U.S.C. § 1349(b)(1)(A).

[27] *Offshore Logistics v. Tallentire,* 477 U.S. 207, 217, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986).

> extended seaward to the outer margin of the outer Continental Shelf ....[28]

Under this provision, OCSLA "extends federal law to the Outer Continental Shelf and borrows adjacent state law as a gap-filler."[29] As explained by the Supreme Court, "[t]he purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures ... on the outer [sic] Continental Shelf."[30] The Fifth Circuit has articulated a three-part test, known as the *Rodrigue / PLT* test, for determining whether OCSLA requires application of state law to a dispute: (1) the controversy must arise on a situs covered by OCSLA; (2) federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with federal law.[31]

The Fifth Circuit specifically addressed the OCSLA situs prong of the *Rodrigue / PLT* test in the context of a contractual indemnification claim in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC.*[32] There, in an *en banc* decision, the Fifth Circuit explained that its prior precedent had incorrectly used a tort analysis to determine the situs of a contractual indemnity claim.[33] In other words, prior precedent had held that the situs of a contractual indemnity claim was governed by the location where the tort that triggered the indemnity claim occurred. The *Grand Isle Shipyard* court rejected

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[28] 43 U.S.C. § 1333(a)(2)(A).

[29] *Texaco Expl. & Prod., Inc., v. AmClyde,* 448 F.3d 760, 772

[30] *Rodrigue v. Aetna Cas. & Sur. Co.,* 395 U.S. 352, 354, 89 S. Ct. 1835, 1836 (1969).

[31] *See Tetra Techs., Inc. v. Continental Ins. Co.,* 814 F.3d 733, 738 (5th Cir. 2016).

[32] 589 F.3d 778 (5th Cir. 2009).

[33] *Id.* at 785-87.

this analysis in favor of a "focus-of-the-contract" test for determining the situs of a contract claim.[34] Using this analysis, a contractual indemnity claim "arises on an OCSLA situs if a majority of the performance called for under the contract is to be performed on stationary platforms or other OCSLA situses enumerated in 43 U.S.C. § 1333(a)(2)(A)."[35] According to the court, "[i]t is immaterial whether the underlying incident that triggers the indemnity obligation occurs on navigable waters or on a platform or other OSCLA situs."[36] In *Grand Isle Shipyard,* the indemnity provision at issue was contained in a maintenance contract between Grand Isle and BP American Production Company involving work performed almost exclusively on oil and gas exploration and production platforms governed by OCSLA.[37] The indemnification claim, however, was triggered when a worker was injured while being transported by a Seacor vessel from one platform to another.[38] According to the court, even though the underlying tort occurred aboard a vessel on navigable water, contract contemplated that a majority of the performance due under the contract would occur on an OCLSA situs—i.e. a BP platform.[39]

Here, a majority of the performance due under the Shell-Palfinger maintenance agreement was to occur on Auger platform, which is an OCSLA situs. Specifically, the June 2019 Purchase Order incorporated Palfinger's Quotation FA5412944, which described the scope of

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[34] *Id.* at 787.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 781-82.

[38] *Id.*

[39] *Id.* at 789.

work for the June 2019 service as "annual inspections of lifeboats 1,2,3,6,7,8 and 5yr davit cable change on lifeboats 1 & 3 aboard 'SHELL AUGER.'"[40] In his deposition, Mr. Kemp explained that the annual inspections involved work to both the components of the platform, such as checking for rust and corrosion on the platform's davit and ensuring the fall cables were properly adjusted, as well as to the lifeboats, such as checking the air bottles, seat belts, and sprinkler systems.[41] The work performed by Palfinger occurred from the Auger platform.[42] Any work involving test runs of the lifeboats on navigable water were only incidental to the work performed on the platform. Accordingly, Shell has satisfied the first requirement for applying OCSLA' s choice-of-law provision.

Next, the Court must decide whether Shell has satisfied the second prong of the *Rodrigue/PLT* test—whether maritime law applies of its own force to the Shell-Palfinger purchase and maintenance contract. In *In re Larry Do iron, Inc.,* the Fifth Circuit, in an *en banc* ruling, redefined the analysis for determining whether a contract is a maritime contract.[43] *Doiron* involved a work order to perform flow-back services on a gas well in navigable waters.[44] The work originally did not require vessels and the parties did not expect to use vessels.[45] However, the work eventually required

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[40] ECF No. 90, Exhibit 6.

[41] ECF No. 90, Exhibit 4, Deposition of Jason Keinp at pp. 172-176.

[42] *Id.* at p. 174.

[43] *In re Larry Doiron, Inc.,* 879 F.3d 568, 570 (5th Cir. 2018) (*en banc*),

[44] *Id.*

[45] *Id.*

the use of a crane barge to complete the job.[46] The injury at issue occurred when the crane on the crane barge struck and killed a worker.[47] Sitting *en banc,* The Fifth Circuit rejected its prior precedents for determining whether a contract is a maritime contract. The court instead adopted a simplified analysis grounded on the answers to questions:

1. First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?
2. Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?[48]

If the answers to both questions are "yes," the contract is a maritime contract and maritime law applies.[49] The court concluded that this revised test would "harmonize [Fifth Circuit] law with" the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby.*[50] In *Kirby,* the Supreme Court ruled that whether a contract is maritime depends on "the nature and character of the contract" with the fundamental interest being "the protection of maritime commerce."[51] Applying this analysis to the facts in the record, the court held that

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 576.

[49] *Id.*

[50] 543 U.S. 14, 125 S. Ct. 385, 160 L.Ed.2d 283 (2004); *see also Barrios v. Centaur, LLC,* 942 F.3d 670, 675 (5th Cir. 2019).

[51] 543 U.S. at 15 (citing *Exxon Corp. v. Central Gulf Lines, Inc.,* 500 U.S. 603, 608, 111 S. Ct. 2071, 114 L.Ed.2d 649 (emphasis added)).

the contract in *Doiron* was not a maritime contract because "[t]he use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed."[52] In *Barrios v. Centaur, LLC,* the Fifth Circuit held that the *Doiron* test applies not only to oil and gas contracts but also to mixed-services contracts.[53]

Here, while the Shell-Palfinger purchase and maintenance contract involved "services to facilitate the drilling or production of oil and gas on navigable waters," the record does not reflect that a vessel will play a substantial role in the completion of the contract. The contract did not provide, nor did the parties expect, that a vessel would play a substantial role in the completion of the contract. Specifically, the contract provided for annual inspections involving work to the components of the Auger platform, such as checking for rust and corrosion on the platform's davit and ensuring the fall cables were properly adjusted, as well as to the lifeboats, such as checking the air bottles, seat belts, and sprinkler systems.[54] Based upon the deposition testimony of Mr. Kemp, all work done on the lifeboats under the contract was performed on the Auger platform and not on any vessel.[55]

Palfinger, however, ignores *Doiron* and instead argues that the parties' purchase and maintenance contract is purely maritime in nature as it involves only vessels—lifeboats. Palfinger appears to suggest that *Doiron* is inapplicable in the present case because

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[52] *Id.* at 577.

[53] *Barrios v. Centaur, LLC,* 942 F.3d 670, 673 (5th Cir. 2019).

[54] ECF No. 90, Exhibit 4, Deposition of Jason Keinp at pp. 172-176.

[55] *Id.* at p. 174.

the purchase and maintenance contract is "inherently and historically maritime in nature, making the *Doiron / Kirby* analysis unnecessary."[56] Alternatively, Palfinger argues that the purchase and maintenance contract is maritime in nature under the *Doiron* test for the same reason—that the contract involves only vessels. Simply put, Palfinger argues that the purchase and maintenance contract is automatically a maritime contract because it involves maintenance on components related to the platform's lifeboats. The Court disagrees. First, Fifth Circuit jurisprudence dictates that the *Doiron* test be used to determine whether a contract is a maritime contract.[57] Second, the mere fact that the lifeboats may satisfy the definition of a vessel does not transform the contract into a maritime contract. *Doiron* involved a vessel as well. However, as in the present case, the *Doiron* court concluded that the vessel was only incidental to the performance of the contract. Moreover, the lifeboats in the present case were not functioning as maritime vessels but rather functioned as safety equipment supporting the oil and gas exploration and production operations of the Auger platform on the outer-continental shelf. The lifeboats did not engage in maritime commerce, nor did they support maritime commerce. As the Supreme Court in *Kirby* instructed, the primary focus in determining whether a contract is maritime depends on "the nature

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[56] ECF No. 92 at 2.

[57] *See In re Crescent Energy Servs., LLC for Exoneration from or Limitation of Liab.,* 896 F.3d 350 (5th Cir. 2018) (the court noted that prior inaritiine cases "improperly focus[ed] on whether services were inherently maritime as opposed to whether a substantial amount of the work was to be performed froin a vessel" as the *Doiron* court now requires.

and character of the contract" with the fundamental interest being "the protection of maritime commerce."[58]

In sum, the Shell-Palfinger purchase and maintenance contract is not a maritime contract under *Doiron*. Accordingly, the second prong of the *Rodrigue/PLT* test is satisfied because maritime law "does not apply of its own force."

The third and final prong of the *Rodrigue/PLT* test requires that the Court find that the application of state law is not inconsistent with federal law. "[The Fifth Circuit has specifically held that 'nothing in the Anti-Indemnification Act is inconsistent with federal law.'"[59] In sum, all three prongs of the *Rodrigue/PLT* test are satisfied based on the summary judgment record. Accordingly, Louisiana law applies to the Shell-Palfinger purchase and maintenance contract—and the indemnification obligations contained in that contract—as surrogate federal law.

B. The Louisiana Anti-Indemnification Act.

Louisiana's Anti-Indemnification Act precludes indemnity agreements that (1) "pertain[] to a well for oil, gas, or water, or drilling for minerals" and (2) are related to "exploration, development, production, or transportation of oil, gas, or water."[60] Contracts are considered to "pertain to" a well under the Anti-Indemnification Act analysis if the contract services are necessary to

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[58] 543 U.S. at 15 (citing *Exxon Corp. v. Central Gulf Lines, Inc.,* 500 U.S. 603, 608, 111 S. Ct. 2071, 114 L.Ed.2d 649 (emphasis added)).

[59] *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,* 589 F.3d 778, 789 (5th Cir. 2009) (quoting *Hodgen v. Forest Oil Corp.,* 87 F.3d 1512, 1529).

[60] LSA- R.S. § 9:2780(B) & (C); *see also Transcontinental Gas Pipe Line Corp. v. Trans. Ins. Co.,* 953 F.2d 985, 991 (5th Cir. 1992).

sustain the manpower or equipment needed for a platform to produce oil and gas from wells.[61] The Fifth Circuit has specifically held that contracts to provide and maintain lifesaving safety equipment on a platform, "pertain to" a well.[62] As such, the first element of the Anti-Indemnification Act test is satisfied. As to the second element, there is no dispute that Auger's sole purpose is the exploration and production of minerals on the outer-continental shelf. The Court concludes that both elements are satisfied, and thus the Anti-Indemnification Act precludes the indemnity agreement contained in the Shell-Palfinger contract.

C. Palfinger's Other Arguments.

Palfinger alternatively argues that, if state law applies, a choice-of-law provision in the purchase and maintenance contract requires the application of Texas law, which does not prohibit indemnity agreements. The Court disagrees. The Fifth Circuit has specifically held that OCSLA' s choice of law provision is mandatory "[b]ecause OSCLA' s choice of law scheme is prescribed by Congress, parties may not voluntarily contract around Congress's mandate."[63] Accordingly, the choice-of-law clause in the contract cannot alter the choice of law rule set forth in OCSLA.

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[61] *See Broussard v. Conoco, Inc.,* 959 F.2d 42, 43-45 (5th Cir. 1992) (holding a contract for a caterer to feed the production workers and maintain their living quarters pertained to a well and finding a "'functional nexus' arises from the fact that production employees are unquestionably necessary for production from a well").

[62] *Roberts v. Energy Dev. Corp.,* 104 F.3d 782, 783 (5th Cir. 1997).

[63] *Petrobras Am., Inc., v. Vicinay Cadenas, S.A.,* 815 F.3d 211, 216 (5th Cir. 2016).

Finally, Palfinger asserts that the Shell Entities "are liable for tort indemnity, or contribution in proportion to their fault as vessel defendants under LHWCA § 905(b)."[64] The Court previously ruled that § 905(b) is inapplicable in this case as maritime law is not applicable.[65] Further, even if general maritime law did apply, the availability of common law indemnity under maritime law is limited after the Supreme Court replaced tort indemnity with the doctrine of comparative fault.[66] The Fifth Circuit has recognized that "Louisiana law allows claims for tort indemnity only when the third-party plaintiffs negligence is passive or its fault is only technical or theoretical."[67] The allegations of negligence against Palfinger in this case involve active negligence and therefore no claim for tort indemnity would apply. Thus, under either maritime law or Louisiana law, there would be no basis for a claim for tort indemnity.

For the foregoing reasons, the Court finds that there are no valid claims by Palfinger for contractual or tort indemnity and, accordingly, those claims are dismissed. The Motion for Partial Summary Judgment on Contractual Defense and Indemnity Obligations Versus Shell Offshore, Inc. [ECF No. 88] filed by Palfinger is DENIED. The Motion for Summary Judgment [ECF No. 90] filed by the Shell Entities is GRANTED.

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[64] ECF No. 42, 52, and 53.

[65] *See Patty Dupre et. al. v. Palfinger Marine USA Inc. et. al.,* No. 6:20-00756, 2022 WL 885867 (W.D. La. Mar. 24, 2022).

[66] *United States v. Reliable Transfer Co.,* 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975).

[67] *Threlkeld v. Haskins Law Firm,* 922 F.2d 265, 266 (5th Cir. 1991).

Palfinger's claims for contractual and/or tort indemnity against the Shell Entities are DISMISSED.

THUS DONE in Chambers on this 12th day of August, 2022.

/s/ Robert R. Summerhays
ROBERT R. SUMMERHAYS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
600 S. MAESTRI PLACE,
SUITE 115
NEW ORLEANS, LA 70130

LYLE W. CAYCE
CLERK
TEL. 504-310-7700

February 26, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-30582 Palfinger Marine U S A v. Shell Oil
USDC No. 6:20-CV-685
USDC No. 6:20-CV-756
USDC No. 6:20-CV-773
USDC No. 6:20-CV-813

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Allison G. Lopez
Allison G. Lopez, Deputy Clerk
504-310-7702

Mr. Alexander James Baynham
Mr. Thomas Pollard Diaz
Mr. Raymond Chandler Lewis
Mr. Joseph Lee McReynolds
Mr. Christopher L. Zaunbrecher

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-30582

JEREMY EARNEST

Plaintiff

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee,

PATTY DUPRE, *Individually and on behalf of minor child*, D D; GAGE DUPRE,

Plaintiffs,

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant / Cross-Claimant / Third Party Plaintiff-Appellant,

versus

SHELL OIL COMPANY

Defendant / Cross-Defendant-Appellee,

SHELL OFFSHORE, INCORPORATED; SHELL EXPLORATION & PRODUCTION COMPANY,

Third Party Defendants-Appellees,

DEVIN MARCEL, *Individually & on behalf of* GARY MARCEL ESTATE,

Plaintiff,

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant / Cross-Claimant / Third Party Plaintiff-Appellant,

versus

SHELL OFFSHORE, INCORPORATED,

Defendant / Cross-Defendant-Appellee,

SHELL EXPLORATION & PRODUCTION COMPANY; SHELL OIL COMPANY,

Third Party Defendants-Appellees,

DANIEL J. LEBEOUF, JR.

Plaintiff,

versus

PALFINGER MARINE USA, INCORPORATED,

Defendant-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:20-CV-685
USDC No. 6:20-CV-756
USDC No. 6:20-CV-773
USDC No. 6:20-CV-813

ON PETITION FOR REHEARING EN BANC

Before SOUTHWICK, ENGELHARDT, and WILSON, *Circuit Judges*.[*]

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

[*] Judge Dana M. Douglas did not participate in the consideration of the rehearing en banc.

APPENDIX E

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands
(Refs & Annos)

43 U.S.C.A. § 1333

§ 1333. Laws and regulations governing lands

Effective: January 1, 2021
Currentness

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) Jurisdiction of the United States on the outer Continental Shelf

(A) In general

The Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State, to–

(i) the subsoil and seabed of the outer Continental Shelf;

(ii) all artificial islands on the outer Continental Shelf;

(iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources; or

(iv) any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources.

(B) Leases issued exclusively under this subchapter

Mineral or energy leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never

[1] So in original. Probably should be "settling".

be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section–

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended, any unfair labor practice, as defined in

such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of

the United States is extended to the artificial islands, installations, and other devices referred to in subsection (a).

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.