In the

Supreme Court of the United States

M/S BREMEN AND UNTERWESER REEDEREI, GMBH,

Petitioners,

vs.

ZAPATA OFF-SHORE COMPANY,

Respondent.

No. 71-322

Washington, D. C.
March 21, 1972

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v.	No. 71-322
ZAPATA OFF-SHORE COMPANY, Respondent	

Washington, D.C.
Tuesday, March 21, 1972

The above-entitled matter came on for argument at 11:15 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID C.G. KERR, ESQ., Post Office Box 1531, Tampa, Florida 33601, for the Petitioners

JAMES K. NANCE, ESQ.3000 One Shell Plaza, Houston, Texas 77002, for the Respondent

C O N T E N T S

* * *

Afternoon Session begins on page 33.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Bremen Unterweser against Zapata Offshore Company.

Mr. Kerr, you may proceed.

ORAL ARGUMENT OF DAVID C.G. KERR, ESQ.

ON BEHALF OF THE PETITIONERS

MR. KERR: Mr. Chief Justice, may it please the Court:

The Petitioner here is Unterweser Reederei, a German Corporation, Bremen, Germany, owner of the sea-going tug BREMEN. The Respondent is Zapata Offshore Company, a multinational drilling company, owner of the drill rig, self-elevating drill rig CHAPARRAL.

Very briefly, the facts and circumstances which bring this case to this Court have their genesis in a drilling contract executed by and between Zapata or through its wholly owned foreign subsidiary, an Italian company by the name of AGIP , calling for the presence of the drill rig CHAPARRAL off of Ravenna, Italy, in the Adriatic. This necessitated of course towing the CHAPARRAL from its situs off of Louisiana to the Adriatic, off of Ravenna.

Zapata solicited bids for the towage voyage, and several companies responded, including the Petitioner here, Unterweser. Unterweser was the low bidder, and subsequently was requested to submit a contract, and did so submit a

contract to Zapata in Houston and several changes were made in that contract, it was executed by Zapata in Houston, and the contract was then forwarded to Bremen, where the changes were accepted and the contract was executed.

The tow voyage commenced on or about January 5, 1968, from the mouth of the Mississippi and some five days later, in the middle of the Gulf of Mexico, a casualty occurred which precipitated a number of losses. Very briefly, the nature of the casualty was the collapse of the three drilling legs and a parting of the tow line. the tow was reestablished by the tug BREMEN and on orders from Zapata, proceeded to the Port of Tampa, Florida, which was the nearest port of refuge.

On arrival at Tampa, the tug BREMEN was met by a United States Marshal and arrested in conjunction or in connection with a complaint which had been filed by Zapata the previous day, alleging negligent towage and basically a complaint in admiralty based on towage. That is the first litigation in this particular matter, and very briefly, the complaint was filed, and that litigation as I indicated, the day prior to arrival of the flotilla in Tampa, and subsequently Unterweser filed a motion in the District Court at Tampa, seeking among other things, that the action in Tampa be stayed pursuant to a form clause in the towage contract which provided that all of the suits should be heard by the London Court of Justice in England.

QUESTION: Do I understand that that clause was the subject of negotiation before finally agreed upon, was it?

MR. KERR: Yes, sir.

QUESTION: Between the parties--there was some discussion as to what laws should apply, was there not?

MR. KERR: The record is devoid of indication that there was discussion between the parties. The only thing that we have in the record, Mr. Justice Brennan, is the fact that the Director of Unterweser said that without that clause, they would not have entered into this contract. The contract was submitted, as I have indicated, by Unterweser to Zapata in Houston, was reviewed presumably by Zapata in Houston; they made several changes and sent that to Bremen. That clause was not changed in any way.

QUESTION: That clause was in the original submission?

MR. KERR: Yes, sir, it was in the original submission.

QUESTION: I thought I read somewhere that there had been some consideration of other law, besides--

MR. KERR: What you are referring to, Mr. Justice Brennan, is the fact that the Director from Unterweser, that's the affidavit of Eric von Aswegen, in which he said that normally Unterweser applied German law and German forms to their contract; here, recognizing that this tow voyage

would traverse many jurisdictions, as a compromise they selected the London form and then submitted that to Zapata, and Zapata executed it.

QUESTION: That decision though was made by Unterweser?

MR. KERR: Yes,sir.

QUESTION: Is it your view that the parties each have one national court for which it would have a preference, and agreed upon a neutral court?

MR. KERR: I believe that is what happened here. I believe this was a neutral forum and it was decided upon as a selection of a forum in recognition that this tow voyage was after all going to traverse many jurisdictions and be subject to many nationalities.

QUESTION: Well, the courts of many nationalities.

MR. KERR: Zapata filed its motion, as I have indicated, seeking among other things, a stay.

QUESTION: Well, did it state English law would apply?

MR. KERR: No, Mr. Justice White, it merely said all disputes would be submitted to the London Court of Justice.

QUESTION: So there was no attempt to specify a law?

MR. KERR: We would contend that the intent was to specify English law as well, and that is how the clause has

been interpreted by English courts, which also had this case before them.

QUESTION: You mean normally in an English court, regardless of the location of an accident or in any other contacts, they apply English law?

MR. KERR: Apparently the English law on that subject, Mr. Justice White, is where they have selected a forum, it is presumed they have selected the forum with the intent of having it apply its own law.

QUESTION: Would that include the English conflict laws?

MR. KERR: I can't answer that question on English law. As far as I know, in this case the English court has indicated and this I believe was in the Judge Karminski decision in the London Court of Justice that presumably English law would apply, but whether the entire body of English law, including conflicts and whether you get into a _____? situation, I cannot answer that question.

QUESTION: That would be the alternative, if this collision, this accident occurred, if damage occurred in waters of no particular nation, isn't that true?

MR. KERR: That's correct, Mr. Chief Justice. The alternative would be, you would get into contract here as determined by what law should this contract be construed and what law should govern, and I think ultimately you would

get to the conclusion that the contract was executed in Bremen, Germany, and this I think would have considerable weight, as I understand cases thathave dealt with contracts. It's true you have an American national, but that's outweighed by a German national and German flag vessel.

QUESTION: Outweighed or balanced?

MR. KERR: Balanced. So ultimately you come to the proposition that the contract was executed in Germany.

Following the filing of Zapata's motion seeking to have this matter referred to the London Court of Justice, the matter rested in the District Court for some months. In the meantime, the tug was released by agreement of the parties, and Unterweser gave security in the amount of $3.5 million. An action was instituted in London by Unterweser based on breach of the towage contract, and Zapata appeared in that action and objected to the action being brought in London. Ultimately the London High Court of Justice ruled that the towage contract and its form provision, particularly the form provision was a reasonable one, and that was sustained on appeal in the Court of Appeals in London.

QUESTION: Was the appearance by Zapata there a general appearance or does it make any difference?

MR. KERR: Well, I believe it was a special appearance. They raised the question of the reasonableness of the towage--of the form provision in the court, that it should

not be enforced, that there was prior action pending in the U.S.

QUESTION: Prior action pending where?

MR. KERR: In the U.S. They were referring to court action in Tampa. It was filed in January and the action by Unterweser in London was filed in February. That action was pending in Tampa and pending on Unterweser's motion to have the case referred to London in accordance with--

QUESTION: What other limitations actions followed?

MR. KERR: I was coming to that, Mr. Justice White; that comes later.

QUESTION: Not much later though.

MR. KERR: No, sir, not much later; about six months later. The next procedure here was the filing by Unterweser of its complaint seeking exoneration and limitation of liability.

QUESTION: It didn't have to do that, did it, to ultimately prevail on the issue that's here?

MR. KERR: We submit that it had to do that in order to protect its limitation right which was about to expire.

QUESTION: Only if the forum action didn't cancel out the American action?

MR. KERR: If the forum provision had been enforced

by the District Court, and that had been sustained on appeal because I presume an appeal would have been taken, then they would not have had to file a limitation action in the U.S.

QUESTION: Why didn't they pursue that then from the time the District Court first issued the stay of action?

MR. KERR: Because the time it would be filed, the limitation, the complaint limitation, the District Court still hadnot ruled on our original motion filed on the original action.

QUESTION: Why was the limitations action filed?

MR. KERR: Because the six-month statute was about to run; if you do not file limitation within six months of the first written notice; you may lose that right. You may lose it. There is some doubt, Mr. Justice White. The respondents have argued here that we could have filed defensive limitation. This has two problems connected with it. Problem No. 1 is when you file defensive limitation, you don't protect your security, because you may have mobile claims and you would have to go to different jurisdictions and you'd have to put up the same security in each instance where a lawsuit was filed, and so one of the purposes would be defeated, the purpose of having the course of litigation. The second danger or problem in filing limitation by answer, which is what they suggested, is essentially that

there is some question in the law which was never decided, whether since the 1937 amendment to the limitation act, whether or not defensive limitation can be filed after the expiration of six months. Text writers say the prudent thing to do is file a petition affirmatively within the six months.

QUESTION: Can you file an affirmative petition in any way something like a special appearance without prejudice to your forum claim under the contract?

MR. KERR: Mr. Justice Brennan, that is precisely what we did.

In our complaint seeking limitations, we reaffirmed the supremacy of the forum clause, pointing out that the court had not ruled on it; that we were compelled to file limitations, but we still maintain and assert that that forum clause was supreme and governed the cause and that the matter should be referred to London.

QUESTION: If the parties at the outset had both acknowledged the forum clause of the contract, would you have been in the Florida courts at all, in the United States courts?

MR. KERR: If Zapata had complied with its contractual obligations, there would be no lawsuit in Tampa, that is correct, Mr. Chief Justice.

QUESTION: Mr. Kerr, does English law recognize the type of admiralty limitation proceeding that United States laws do?

MR. KERR: They do, Mr. Justice Rehnquist, but it is somewhat different. It is different in amount of the limitations fund; as Respondent points out, it is considerably less than in the U.S. and also they have no statute of limitations under which to file; they don't have the six months. In England you can only file your limitation acts once a claim has been asserted against you in a court. There is no limitation period, which brings up another point that we did not file limitation in England because it would have been premature under their law because we had no claim against us. The London action is not an issue. Zapata never responded on the merits because the London action was stayed by the United States District Court.

QUESTION: Well, what if as you suggest, Zapata had performed its obligation under the contract, to resort to the British forum, what proceeding would Zapata have sought? Rather than the one it did bring in, in Florida?

MR. KERR: They would have filed a complaint in the British courts alleging negligent towage, alleging I presume the same breaches, same action,

QUESTION: And in that circumstance under British law, what about the limitation action? How would that--

MR. KERR: Under British law as we understand it, the moment you have a court asset a claim against you, you may then turn around and petition for limitation. In the United

States, you could petition for limitation without any other action being filed, just within six months of notice that such a claim might be asserted against you.

In other words, there is no statute of limitation in England. What triggers the limitation under British law is the filing of a complaint against you in court, or a cross-claim or what have you.

QUESTION: Wasn't there a provision in this contract saying that _____would not be liable in any event?

MR. KERR: Mr. Justice White, there are clauses in the contract under general towing conditions which are incorporated into the contract by reference which have been characterized by the British solicitor in his affidavit in this case as exculpatory, and I don't think it would serve a purpose to be coy about it; I think they are exculpatory. Under the laws of Great Britain or the English law, prima facie these are in force; that is, a tug boat is permitted to enter into such a contract with its tow.

In the United States of course this is a critical issue in this case.

QUESTION: That's Bisso, isn't it?

MR. KERR: That's Bisso and Dixidyn and other decisions.

QUESTION: So if Zapata had ever filed an action in an English court, it might have been useless?

MR. KERR: We say this, it's premature actually to determine that but the possibilities or likelihood is that this exculpatory provision or these clauses read all together which provide exculpatory provision, would be enforced by the British court. Of course we say, Mr. Justice White, that this was part of the contract; this was part of the expectation and this was part of referring the case to London which was Zapata's contract and this is a natural--this flows naturally from the entry into the towage contract.

This is what they bargained for.

QUESTION: Do you know whether those clauses are enforced in the German courts?

MR. KERR: I happen to know that; it is not in the record, but they are.

There is no German law in this appendix, although we did plead notice of foreign law including German law, because when we filed our complaint in limitations, we were in doubt as to what conflict of law principle ultimately might be applicable, so in order to be completely safe, we pled British law, American law and German law in the alternative.

I would like to come back to that question on Bisso, because I think in the final analysis whatyou have here is a clash of policies that I think is going to be inherent in any decision this Court might make. On the one hand, we have the so-called Bisso-Dixilyn policy, wherein this Court

stated that as a public policy matter, tugs should not be permitted to exempt themselves or insulate themselves from liability. We believe that in this particular case, there are overriding policy considerations which basically are making parties adhere or stick to their contracts, particularly in an international context, where the parties have selected a forum, they have done so for a variety of reasons in an international contract, particularly for certainty for the law that will govern their contract, and this is particularly true, we submit, in a case where performance of the contract will traverse, as was the case in this instance, many, many jurisdictions and touch upon many different-- waters of many different nations.

So we feel that, No. 1, insofar as Bisso sought to enunciate a U.S. public policy, it is not all-pervasive because Bisso can be circumvented by routine, day-to-day commercial insurance practices. This was recognized by Mr. Justice Frankfurter in the original dissent, and in fact and indeed is circumvented on a daily basis, by simply having the tow purchase insurance and the underwriters waive subrogation against the tug. The tug is completely insulated except to the extent of a small deductible, perhaps. And in other fields of law, this Court and other courts have recognized the right to limit one's liability by contract or even to exculpate onself, so we don't feel that Bisso

is an all-pervasive matter of public policy. But more importantly, in the context of this case, we don't feel that Bisso is applicable, because if you extend Bisso to cover this situation--and we feel it's distinguishable on its facts and circumstance--but if this Court should extend Bisso to that extent, it would have to do so by first of all adopting what we consider is the modern rule on foreign contract provisions; that is, that they are prma facie valid unless unreasonable.

QUESTION: Mr. Kerr, I gather you are satisfied that in the British forum proceedings, it is improbable they would apply American law on the merits of this--

MR. KERR: I think it's improbable, Mr. Justice Brennan, and I can't give you a positive answer obviously, but I think it is improbable because they have already indicated and their case law reflects thatin a situation where parties select a forum, they also intend to select the law; otherwise, there would be little purpose in selecting the forum. That is the law of England. So they would probably try English law, and insofar as someone would argue that they'd have to look for American law, I think they would come full circle and say if we have to look to any law here, it would probably be German law because that's where the contract was executed.

QUESTION: If it were tried under either British

or German law, then those exculpatory clauses would be enforced probably?

MR. KERR: Yes, sir.

QUESTION: It's only if the Bisso rule were applied they might not?

MR. KERR: Mr. Justice Brennan, it is only if you extend the Bisso rule and say that it encompasses this situation, and in order to do thatyou must say that it is the Bisso rule which makes this forum clause unreasonable, and we submit thatyou get into a situation then when you've got to consider, is it more unreasonable to reform this contract after the fact in favor of Zapata and thereby frustrate even Zapata's contractual intent when it entered the contract, and at the same time put Unterweser in a position of economic exposure that it contracted to insulate itself from. Is that more unreasonable or is it more reasonable to form a contract and enforce Bisso, extend Bisso to cover the situation?

QUESTION: What you are saying, I take it, Mr. Kerr, is that it's hardly reasonable to assume that the parties would contract for British courts if they intended to enforce American law, for example, in which case it would be in the hands of judges unfamiliar with American law?

MR. KERR: Yes, sir, well we think that's true because why would a party designate a forum unless they intend that

forum to apply its law, and furthermore, we have--there is evidence in the record we intended British law to apply. Zapata for its part is accustomed to this. The drilling contract which is in the appendix, that is, a contract that its wholly owned European subsidiary entered into with the Italians, interestingly enough provides for a British forum and the applicability of British common law. So we feel that they have demonstrated familiarity with that procedure and that indicates that they do this as a matter of routine with them.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kerr.

Mr. Nance.

ORAL ARGUMENT OF JAMES K. NANCE, ESQ.

ON BEHALF OF RESPONDENT

MR. NANCE: Mr. Chief Justice, may it please the Court:

Of course I have my program here, written out, but in view of some of the questions asked by several of the Justices, I think I will reply to some of these questions, while they're fresh in your mind.

As to the towage contract itself, the provision that the Court was inquiring about, with reference to negotiations for the forum clause, although Mr. von Answegen, the man who is Director of Unterweser, made the [illegible] conclusory statement that he wouldn't have made the contract

but for the forum clause, in the affidavit which was before the trial court below, regarding the party that signed the contract on behalf of Zapata, it states the fact that after Zapata accepted Unterweser's bid above-mentioned, the contract for towage was drafted by Unterweser and mailed by them in Bremen to Zapata in Houston. The draft included the clause any dispute arising must be treated in the London Court of Justice. Before and after such draft was tendered to Zapata for acceptance, there were no discussions between Zapata and Unterweser whatever concerning paragraph 8.

Further he also denied Mr. von Answegen's statement that the parties "intended that the controlling law to be applied would be the law of the forum, English law." At no time did affiant Unterweser Reederei discuss what law or mention what law was intended to control in event of litigation.

Simply put, after the low bid by telegram was received, and this is in the record, Unterweser drafted this clause. As Mr. von Answegen's affidavit says, "ordinarily we include an exclusive German forum clause, which means an exclusion of any other forum," which I discuss later on as one of the points in our brief, and also "We usually apply German law," so it is on this record here, there's nothing you cannot rightfully say that the parties agreed the English law would apply.

QUESTION: Do the conditions -- is the call for bids in the record?

MR. NANCE: Well, I'm not sure, your Honor. There are telegraphed bids and Zapata--

QUESTION: Were there any insurance provisions?

MR. NANCE: No, Zapata is uninsured. This is an uninsured loss. We paid out $3 million.

QUESTION: Mr. Nance, Zapata did through its attorneys review this submitted contract, and did submit some changes, did it not?

MR. NANCE: No, your Honor, so far as I know, no attorneys reviewed this.

QUESTION: Well, did Zapata itself review the contract and submit changes?

MR. NANCE: This is not in the record, but they must have exchanged telegrams, and in the draft of the contract that is in the record, it shows the initials H.S.T., that's Mr. Taylor that signed the affidavit. That must have been the one they changed. They do not pertain to the forum clause.

QUESTION: But they did make changes in other portions of the contract?

MR. NANCE: Yes, they did.

QUESTION: And submitted them to Unterweser?

MR. NANCE: Yes, they did.

And they're the ones initialled in the record.

QUESTION: Mr. Nance, is it customary for there to be no insurance in this type of towage operation?

MR. NANCE: Well, I can answer the fact the Zapata Offshore Company, all of its rigs were uninsured. They simply were self-insured.

QUESTION: But in hiring a tug, a tow, is it characteristic you don't specify that the tower carry insurance?

MR. NANCE: Sometimes they do; sometimes it isn't done. It is not mentioned in this contract.

QUESTION: It's not mentioned in this contract?

MR. NANCE: No.

QUESTION: I'm sure it's of no importance, but what was the purpose of this tow?

MR. KERR (inaudible): Just one more question and reply, and then I hope I can get to the main body of my address. About the applicable law, it's simple, clear. This event happened between two nationalities, an American and a German. It happened on the high seas. Starting with the Scotland, they don't challenge it, affirmed by this Court in the Belgenland, affirmed by Second Circuit in The Gylfe v. The Trujillo, and I can name you dozens of cases, they don't challenge it, when that occurs and there are courts involved, the law of the forum is applied. This suit, both ours, and their limitation, is in the United States and it

will apply United States law, not only to determine the rights but also under the Titanic, the limitation actions, the amount of the fund is determined by the American fund, in this case $1. almost 4 million. In England, we'd have recourse to only $80,000. This is important and I'll discuss that later on.

But I do want to get that crystal clear. On contacts, Mr. Justice Rehnquist, we have detailed in our brief, if the Court wants to talk about, Rodiadis or Rensen, we have detailed that up to the point of collision, it was all done in America; this rig was prepared here, the Germans inspected it, seaworthiness inspections, seaworthiness certificates, and so forth. It was prepared in the American zone.

Now I would like to get back to my own speech here.

QUESTION: Well, then, at some point I hope you will suggest your hypothesis as to why the forum clause was included, and what the parties intended by it.

MR. NANCE: I will do that.

Now, just in order to get to the crux of the thing, the end result of this, if this Court overruled the suppressionary order entered by the limitation court, in which he determined he would assert and retain his jurisdiction, it will necessarily relegate Zapata to London where under London law, the exculpatory clauses would defeat our

claim, and American law being applied as outlined here before, under Bisso and Dixilyn, and in Dixilyn that was a freely negotiated contract, where reduced rates were given in exchange for the _____, this Court per curiam and on Bisso reversed the law court and held the exculpatory clauses void and invalid.

Now what we had here was a vessel as tall as the Humble Building in Houston, 44 stories tall. There is a picture of it in the brief, in operating position. This thing had been carefully moved on 32 coastwise voyages on 32 previous occasions. Then it was decided to send the ship overseas on a drilling contract in the Italian sea.

Special devices called locking devices which are on the deck were to be installed on this huge 44-story leg rig prior to a transocean crossing. This rig with those tall legs simply cannot take the roll without the legs locked. Zapata instructed the BREMEN to tow the vessel coastwise in 250 foot water depths, so in the event of bad weather, it could jack down its legs, jack up the rig and ride out the weather, as I am sure you have heard about, during the hurricane season. This was not a hurricane, but a norther came through in January and instead of going coastwise in jack-up water depths, the rig was towed directly across where in 2,000 feet of water, 150 miles from the nearest jack-up water depths of 250 feet, this bad weather hit; the legs

rolled, and finally all three broke off. There is a picture of the damaged rig in the brief.

Now as I stated, under American law, the court below is entitled to consider the contention of the party when he gets around to determine where is the evidence, which I am going to discuss in a moment.

Now let's focus in on what is the condition here. Here is a case where after we filed suit, we took, we noticed and took 25 German depositions, including Mr. von Answegen, the Managing Director, attended by Mr. Kerr and his firm. Thereafter, they noticed, we noticed, and they cross-noticed involking jurisdiction of the Tampa court and took depositions of eight Americans on the CHAPARRAL. After that, invoking jurisdiction of the court below, they took two more depositions of marine surveyors in New Orleans. They also filed motion for discovery, we produced documents and the file in this case, I could not put it all on this table. This case has been deposed and it substantially was ready for trial in the first suit which we filed when Mr. Kerr's client decided to file the limitation of liability proceeding.

Let me tell you what that is, your Honors. He mentioned that he made a special appearance when he filed it. Well, just read the complaint. Under our rules of practice, you cannot make a special appearance in filing a lawsuit. Let me tell you what a limitation of liability

proceeding is. Under 181 of 46 U.S. Code, Congress provides that a ship owner may limit his liability to the value of the vessel if he can show he is not at fault; 183 provides it may file [illegible] --a limitation of liability proceeding if it does so within six months of written notice of claim, and assert that it is entitled to limit its liability to the value of the vessel. Rule F of the Rules, the Rules of Civil Procedure elaborate on that procedure and goes into quite detail, as we mention in our brief, the procedure he is to go through. Not only does Rule F allow the petitioning shipowner to assert limited liability, but he is entitled to claim he is exonerated from any and everyhody's claim.

Now what happened here is this. If he could have filed this defensively, as the courts have held, as cited in the brief, this case doesn't turn on that. What he did was to file this suit and in the suit he claimed these things, it was all the fault of the CHAPARRAL, that there were other potential claimants, and the crew members on there were somewhat hurt getting off, and he wanted a concourse where all these claims could come into the suit. He got an injunction out, and enjo[illegible] he suit being litigated by Tampa District Court, enjoined it and cited up Zapata to come in and file their claim. We were served with a monition. He's the Plaintiff and we are the Defendant.

Now what is this proceeding? It is most important,

your Honors, that you look at this forum clause in the context of the litigation that is before you. There's not before you what the trial court did, that is, the ruling in the Zapata first filed suit, denying their motion to dismiss the jurisdiction state. What they did in their own suit was file a motion to stay the prosecution of our claim.

Now, if you look through this Court's decision in British Transport, which is cited in the brief, there you have the question of the United States owning one vessel, filing a limitation proceeding. British Transport Commission had a vessel in collision; it came in and filed a claim. Other parties came in and filed claims, being a concourse here.

QUESTION: Well, were there some claims against Unterweser other than Zapata?

MR. NANCE: No, your Honor, there have been no claims in the suit filedup to this point.

QUESTION: Well, why would Unterweser have filed its own limitations actions if it could have done the same thing in Zapata's suit?

MR. NANCE: Because, your Honor, in event some other claimant were to file a separate suit against them then, the six months having run, then of course they --

QUESTION: You think this was a way of eliminating through this limitations action then with, as you call it, a

concourse, of eliminating all other claims?

MR. NANCE: No, your Honor, it was to provide that if anybody else wanted to come in and do it, they could do so.

QUESTION: But they'd have a limited time to do so?

MR. NANCE: Under the procedure, your Honor, the court sets a time.

QUESTION: Yes, that's what I mean. But Unterweser this way could say anybody else who has a claim, come in and file it?

MR. NANCE: That's right.

QUESTION: And if they didn't, that was the end of it?

MR. NANCE: Well, your Honor, actually there are no other claims filed, but other people could come in today and file one now because no order of default has been entered. But let me address myself to this point. In the British Transport case, this Court characterized the limitation proceedings as one that constitutes as a cross-liable between it and the plaintiff. That was a case where the claimant British Transport was cross-claimed against by other claimants; it was cross-claimed against by the original petitioner. And this Court was confronted with the contention that the petitioner could not do that, said that everybody that's in it can cross-claim and sue each other. But the point of it is that in this case, the petitioner here has submitted himself to the jurisdiction of the court. There is

no rule for providing for any special appearance. The basis of his motion today is based solely on the basis of the forum clause. He has said, I am entitled to exoneration from the world; he says I am entitled to limit my liability; he has sued us, he has cited us to come in there, and we've cross-claimed. We followed our claims.

Now he also counterclaimed against us for every claim he had filed in the London suit. In addition, he put it in terms not of breach of contract but in terms of tort. Furthermore, he filed a brand new thing called salvage, salvage claim in Count 2. He claims that everything that happened after the legs were lost, was outside the contract; that he in other words, therefore, is a stranger who came up to the wreck, put a line on it, and towed it to the nearest port of refuge. He has asked the admiralty court below to give him an award for salvage. Well, the vessel was worth about $3 million after the wreck, and it is not unusual for an admiralty court to give, say, 10 percent or something like that. That would amount to $300,000.

The point is, may it please the Court, that he submitted himself voluntarily to the jurisdiction of the court below.

QUESTION: Well, would a salvage claim be a claim under the contract?

MR. NANCE: They have alleged, your Honor,

specifically, that it arose outside the contract.

QUESTION: Anyone who had picked up the vessel and towed it to port or engaged in salvage operations could bring a suit, could they not?

MR. NANCE: Yes, your Honor, they could make a claim for salvage if they rescued a wreck on the seas.

QUESTION: I am a little confused. You say it is under the contract?

MR. NANCE: They claim it was outside the contract.

QUESTION: What do you say?

MR. NANCE: Well, we deny it, but that's for the Court to decide. I am saying to you, your Honor, that he has submitted himself to the jurisdiction of a limitation court in filing the counterclaims, particularly the one where he filed a counterclaim for salvage, and he has asked this Court here to give him an affirmative recovery.

QUESTION: Let us assume Zapata had followed the languageof the contract and had filed suit in London--let's just assume that--do you think it would have been inconsistent with that forum clause for Unterweser then to file a limitations action in the United States, to attempt to have other possible claimants file--surface their claim?

MR. NANCE: Well, Mr. Justice White, whatever they wanted to do, they could do. The question before this Court is, having submitted himself to the jurisdiction of the

limitation court, and having invoked it, he is not asking for affirmative relief of exoneration of liability. He is asking for limited liability and counterclaiming. He has thereby fully submitted himself to the court and he's not in position to say just because of a forum clause, don't let Zapata try to claim.

QUESTION: But he did all this, as I understand it, in the limitations court expressly without prejudice to the reliance on the forum clause.

MR. NANCE: Well, your Honor--

QUESTION: And you are saying that reservation is meaningless.

MR. NANCE: It's meaningless, your Honor. He has either submitted himself or he hasn't. I want to call attention to two decisions of this Court where a counterclaim was filed--

QUESTION: Before you come to that, let me see if I can try one other thing, the same question I put to Mr. Kerr.

If your client had consented to the forum clause and gone into the British court, would there be any proceedings in the federal courts in this country at all?

MR. NANCE: Your Honor, if we had submitted ourselves over there, if we had, we have a right still to sue over here.

QUESTION: Well, this is hypothetical. Would there have been any occasion for Unterweser to go into the courts of the United States, if you had complied with the forum clause of the contract, and let this matter be resolved in the British court?

MR. NANCE: Well, I don't believe they would have done it, your Honor, no, sir, if we ruled that litigating. That case is not even at issue. There's been nothing done about that case, no depositions taken. It is just sitting there.

QUESTION: It is conceivable that they might have filed a salvage claim in the court in Florida, because that is wholly unrelated and did not involve any dispute arising under the contract.

MR. NANCE: Well, they could have filed it wherever they could find Zapata which is at Houston; that's where their base is.

QUESTION: Mr. Nance, what do you say Unterweser should have done in order to reserve its right, after your client has the ship arrested in Tampa? You feel apparently they did more than they ought to have in order to reserve their rights to go to London.

What do you think they should have done? What should Unterweser have done after your client had the ship arrested in Tampa, and in order to fully preserve its right

to this action and still not avoid a waiver of its claim to have it submitted to the High Court of London?

QUESTION: You may answer that question right after lunch.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Nance, you may now address yourself to Mr. Justice Rehnquist's question, if you wish.

Q Would it be of any help, Mr. Nance, if I --

MR. NANCE: If you would repeat it, yes, sir.

Q -- tried to restate it or rephrase it?

It is my understanding that the proceedings in the federal court were instituted by your client, by the arrest of the tug when it arrived, and that your position is that as a result of subsequent actions taken by Unterweser in that action they have somehow waived their claim to assert the forum clause; or at least they've submitted themselves to the jurisdiction of that court.

My question is, assuming either that they have a right to take whatever precautionary steps that they feel are necessary to preserve their rights in the Tampa litigation, in case they lose on this point; what would you have them do differently, so that you wouldn't say they had submitted themselves to the jurisdiction of the court?

MR. NANCE: Well, I'll try to answer it this way, Mr. Justice Rehnquist. Of course, as it was stated, they had the -- or previously they wanted to assert it, to assert their limited liability defense as to us in the first filed suit

by Zapata.

Now, before they filed their limitation action on July 2, this case had been pending several months. As I stated, we were all litigating by taking depositions and so forth. Counsel for Unterweser had all the opportunity in the world to file a motion with the District Court and apprize them -- Your Honor, I need to know whether you're going to overrule my motion as to jurisdiction, or are you going to grant them? Because I've got to make a decision whether or not I need to file a limitation of liability proceeding.

The docket entries in the record show that no such motions were made, and I'm certain the District Court, like any other judges, where he's apprized of a situation, would, if such a motion had been presented, he would have ruled on these things in order to accord them the opportunity to do one of two things then: They could plead it defensively, if he overruled their motion of jurisdiction; or, as they have a privilege to do, and there are certainly under no legal compulsion to do, they could have filed, which they did do, the suit which is before this Court today.

Q Did they assert lack of jurisdiction in their answer?

MR. NANCE: Yes, Your Honor.

Q You say they should have done it by motion rather than answer?

MR. NANCE: No, sir. The record shows that after we filed our lawsuit, and depositions had been taken, they filed a motion to address the court's jurisdiction, saying, one, that it lacked jurisdiction because of the forum clause.

Well, that was overruled partly because private parties cannot fashion their own private rules of jurisdiction. Parties by contract cannot say what the federal court or what the State court's jurisdiction will be. Either it's taking jurisdiction or as to the subject matter.

That was presented, and ultimately it was overruled. In that proceeding they filed a motion to stay, and to decline jurisdiction on the ground of forum non conveniens.

The court, on July 29th, after they had already filed a limitation action on July the 2nd, overruled those motions. So those motions were presented to the court, and he overruled them.

So he has entered two orders in this court, Your Honor, Mr. Justice Rehnquist: an order overruling the motions in Zapata's first filed suit addressed to the jurisdiction; and he's overruled the motion to stay, which is what is before this Court today.

Q Well now, you're quite right that he could have made these motions. The question in this case is whether he was required to make them in order to protect the position which he is now trying to protect. Sometimes judges don't

entertain motions very cheerfully if the motion is telling them to get along and decide some matter.'

MR. NANCE: Well, it certainly was a motion that he could have made, and he did not, so I couldn't prejudge what he did. I just presumed that the court would move on such a motion.

But, Your Honor, that begs the issue, I think, because there is no legal compulsion for him to file this limitation liability proceeding. He did it for two reasons: one was to get the injunction out to stop the litigation in the first filed suit of Zapata; secondly, as he claims in his petition, he says, I fear the filing of other suits. There were eight seamen on our rig, that this was a terrible accident, they were flooded, the compartments, they were sinking, they got off, they came back and pumped it out, and so there were people who got hurt.

He says in the limitation proceeding: I fear the filing of other claims.

Now, one of the purposes of a limitation proceeding is, as held by the case I've cited in the brief, is to provide a concourse not only for the claim where he has sued us in the limitation -- because he did, he got admonitions to come into this Court; but in order to bring into concourse the claimtants who got hurt on the rig. And by doing that, he has only one, they get just one piece of pie they can slice:

the value of the tug, which is $1,390,000 here.

And this is most important, Your Honor, if you read Hartford Accident & Indemnity Company, which says: The purpose of limitation proceedings, being an equitable one, is one to bring all controversies into one, so that the court can administer and dispose of a many-cornered controversy.

That case has been cited in the British Transport case, saying, where they said a limitation proceeding is a cross-libel against the claimants. And so, Your Honor, I submit that he's not -- he's invoked it, it's here, I'll admit there is nothing to keep him from claiming it.

Q Well, Mr. Nance, do you suggest that his position would have been any different had he done this by way of answer in your suit?

MR. NANCE: He could have pled anything, Your Honor, under --

Q Well, would his position be any different?

MR. NANCE: The difference, Your Honor, would be that if these eight seamen, Americans, sued him for Jones Act, where they're a third-party case, of course if he hadn't filed within six months --

Q You mean not filed his answer within six months, or what?

MR. NANCE: Well, under the cases, Your Honor, he can file his answer -- under the cases I have cited in the brief,

he can file those at any time before they go to trial. Like any other defense, you've always got the question of motive, and --

Q I know, but I don't quite understand. Perhaps I didn't catch it, Mr. Nance, but I gather your position is he may not now claim the benefit of the forum clause, because of what he did in fighting the limitation suit?

MR. NANCE: No, I want to get that straight.

He has the privilege, in addressing this equity court, to say, Your Honor, in whatever state it is send Zapata a way there.

I do not think it's a matter of law. He's waived it. The point is he has invoked and submitted himself to this equitable court, asking for exoneration from liabilities not only to us but to the world, and also saying --

Q Well, from that --

MR. NANCE: And so he's _____ in court.

Q And from that you conclude that he may not now insist on sending Zapata to Tampa, isn't that it?

MR. NANCE: So he is in the interesting position to say that "I here invoke the court's jurisdiction; and not only that but I counterclaim and sue." And, Your Honor, I --

Q So you're saying that you have the right to participate in his limitations actions in Tampa? You have a right to assert your claim there?

MR. NANCE: Yes, and I'm going to discuss that in just a moment.

Q Along with other claimants? Along with other claimants?

MR. NANCE: When I say what I think is the proper interpretation of the -- oh, is my light off?

MR. CHIEF JUSTICE BURGER: Your light is on.

Q Well, Mr. Nance, --

MR. NANCE: May I have five minutes, Your Honor?

Q Mr. Nance, I take it that if you lose on the point you've been arguing, then you arrive at the question of whether or not the forum clause is valid?

MR. NANCE: I want to get to that, and I would hope you would give me five minutes, Your Honor; this is a -- we've been litigating this case for four years. And I'm sorry. I mean, I think I could give my speech in thirty minutes. I appreciate -- and the Court should ask me anything it wishes. But I want to answer your question.

MR. CHIEF JUSTICE BURGER: Under the circumstances, we'll give you five more minutes, and enlarge Mr. Kerr's time accordingly.

MR. NANCE: Thank you.

I want to -- these two Supreme Court cases are not in my brief, and one decided by Mr. Justice Douglas, Freeman vs. B. Machine Company in 1943, that's 319 U.S. 448; where

this Court held that where a defendant filed a counterclaim, he submitted -- invoked the jurisdiction of the Court and submitted himself for the purposes for which he was there.

Q Was there a --

MR. NANCE: There was not a forum clause, no, sir.

Q Well, then, it doesn't help very much, does it?

MR. NANCE: Well, it does in this sense, Your Honor, because it -- we're not taking the position that the forum clause has been -- they're entitled to assert it, but the limitation court sitting in equity had to take into consideration all the factors, which I'm fixing to discuss on the reasonableness of the forum clause in just a moment.

Q You'd better get to that, then.

MR. NANCE: All right, then.

The other case relied upon in that case was Merchants Heat & Light vs. James B. Clow & Sons, 204 U.S. 286, where the Court held that the filing of a counterclaim doesn't -- that he waived all objections to the jurisdiction. If it's good for that, it certainly won't say he's waived his right to assert that we should be sent somewhere, but the rationale of that case is overbearing.

Now, I want to address myself now, quickly, to the forum clause, which reads: "Any dispute arising must be treated before the London Court of Justice."

A forum clause was strictly construed in this Court

in the Carbon Black-Monrosa case cited in the brief; here the elected clause was drafted by the German company, having usually put the exclusive jurisdiction provisions in it. They did not in this case. And we submit -- and we've got it fully briefed here -- that that forum clause, being non-exclusive in nature, should not be to bar or preclude Zapata from prosecuting its counterclaim in this suit.

I think the Court is called upon to pass upon that.

Now, turning to this question: The weight of authority in this country is that forum clauses are unenforcible. All cases hold that they are voided against public policy, in so far as they attempt to deprive or defeat any court of its jurisdiction.

There are a line of cases, referred to as the modern rule, starting in the Second Circuit with William H. Muller and others cited in the brief here, which say that under appropriate set of circumstances a court may decline to assert its jurisdiction in a case where there is a forum clause involved.

And they look at these factors, and Mr. Kerr, in urging this upon the Court, said to the Court, among other factors you can consider is whether or not the plaintiff -- we were plaintiff there at that stage -- would be deprived of his remedy if he were relegated to the foreign court.

In the Third Circuit, after -- in the Second Circuit,

after this reasonable -- the forum clause may be enforced if reasonable; the cases in there held in situations cited in the brief that where the plaintiff would be deprived of his remedy in the jurisdictional forum,stipulated forum, that in that instance that is a proper consideration, and that they could keep the case.

Now, the reasonableness of this thing, and we have covered this clearly, where they include nationality of the parties, place of performance of contract, deprivation of remedy, and then the balance of convenience of the trial. Now, I hope I can clear this in one moment.

The trial court found that the balance of convenience is strong in his forum. All the evidence of Zapata's liability and damages is in America by form of depositions of 40 witnesses, total, because a tremendous amount of repair and liability went into this. All the evidence as to the German, the Unterweser, as to its towing line that broke, is in Florida, where it was surveyed. The salvage suit testimony has been taken by deposition, as to the services that were done. That's preserved in the depositions in Florida.

The only thing that would be left to calculate would be the hire of the tug, which it didn't get because it didn't finish the voyage.

I think it's most important that this Court, in deciding the case, that I do believe you would find that, from

that standpoint, that the forage clause is not enforcible, ipso facto; no case holds that. They all say the Court must look at all the circumstances, and we detailed very much in our brief all of those things, and there is a fact finding by the Court that the balance of convenience is strongly there.

This is equity court, he exercised his best judgment, for what he should do under the circumstances, and I don't think that Unterweser has shown to this Court any abuse of that discretion.

I thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Kerr.

REBUTTAL ARGUMENT OF DAVID C. G. KERR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KERR: Mr. Chief Justice, if it please the Court:

I have several factual points that I think should be cleared up that were raised by questions from the Court. But, first of all, in order to decide what the lower court, the District Court, determined or held with respect to our motion, our original motion filed in the initial action to stay this proceeding and have it referred to the London Court, you must go to the court's original order, which, as I think has been pointed out, was filed or submitted or entered some

six months after our motion was originally filed.

And in that order the District Judge committed what we think is the fundamental error in this case, with respect to how he approached the case. And he held, and I'm reading from page 82 of the Appendix, which is Judge Krentzman's order of July 29, 1968, and I'm reading from the next to last paragraph on that page, and the last sentence of that paragraph. We think this is crucial to show the misunderstanding that the court had of this entire issue.

"The balance of conveniences here is not strongly in favor of defendant" -- that being Zapata -- "and Plaintiff's choice of Forum should not be disturbed."

This means that as of that date, with the initial action filed, the District Court found that the balance of convenience was in Unterweser's favor, although not strongly, and then it went on to say: "and Plaintiff's choice of forum should not be disturbed." Which is of course applying the forum non conveniens rule.

But the difference between the forum non conveniens rule, the critical difference and the difference between the choice of forum situation is that the initial choice of forum is not the District Court intent, the initial choice of forum here is London.

So he first of all found that the balance of conveniences were in favor of Unterweser, and then he said,

he applied the presumption that Zapata's choice of forum was Tampa, which of course it was not; by contract its choice of forum was London from the very beginning.

I make that point because I think it is critical to the decision of this case.

Now, there were several factual points, I think, that should be cleared up. Mr. Justice White, you asked whether -- you asked Mr. Nance whether or not insurance was mentioned or discussed.

Mr. Nance is incorrect when he said it was not. Insurance was mentioned. In the original telegraphic bid, sent by Unterweser to Zapata, in response to a solicitation for bids which appears on page 295 of the Appendix. Unterweser agreed or offered to arrange for insurance for Zapata.

And then subsequently in the towage contract, Clause 2(b) -- and the towage contract appears at several points in this Appendix, but the one I'm referring to is on page 72. In the towage contract it was stipulated that insurance would be for the account of the owner; that is, the owner of the tow, Zapata.

So insurance was mentioned, and the decision to go uninsured was here a decision made by choice, by Zapata. So I don't feel that that really has, as far as saying it is here uninsured, it was given the opportunity to get insurance, it was told that insurance would be for its account; so

insurance was discussed by the parties and was mentioned in the documents.

The second factual point is with respect to all of these depositions. It is true that a lot of depositions were noticed initially when the tug first arrived in Tampa de bene esse. We moved for protective orders twice. In the second protective order, when we were aware of all the facts and had consulted with our German clients, we specifically pointed out that this cause might well be tried in London. And therefore some of the discovery that, taken here, might well have to be repeated.

But the court ordered us to go ahead and we then also engaged in discovery depositions, once the court had said that it was not impressed with our argument; and, in any event, we feel this is immaterial because we have stipulated that all the discovery undertaken in the United States will be admissible in the London action subject to the ordinary rules of evidence.

Q You say "we have stipulated", have both parties agreed?

MR. KERR: We have offered this.

Q Oh, you have offered it?

MR. KERR: Yes. We have stipulated unilaterally, Mr. Chief Justice.

Q What did you say, Mr. Kerr, was the status of

that London proceeding?

MR. KERR: The London proceeding, of course, Mr. Justice Brennan, is stayed by injunction, the parties have been enjoined by the District Court from proceeding, which raises the next point I wanted to mention.

The reason that all the issues are not pending in London is not because they could not be presented through appropriate pleading in London, but it is because the District Court has enjoined us as parties from moving forward with that action.

Q Well, let's assume you win this case, are you going to abandon your limitations action?

MR. KERR: Abandon the limitation action in the U.S.? I suspect we will, Mr. Justice White, because then, under English law, we will be compelled, as soon as Zapata makes its claims against us in the English action, we are then compelled by English law to assert English limitations. Those are their rules.

Q Well, I know, but do you think you can force other claimants to go to England?

MR. KERR: So far as I know there are no other --

Q Well, let's assume some other claimant came in here, into this limitations action, you couldn't terminate it then, could you?

MR.KERR: No, sir. And of course those claimants

would not be bound by the forum provision, either.

Q No, that's what I say.

MR. KERR: That's right.

Q And I suppose you're interested in foreclosing other claimants?

MR. KERR: Yes, sir.

Q And if they don't come into this limitations action here in the United States, they are foreclosed, aren't they?

MR. KERR: That is correct. That's my understanding of the law.

Q So my question again to you is: are you going to abandon your limitations action if you win this lawsuit?

MR. KERR: If we win this lawsuit, we would ask, as we did, have already asked in the limitations action, that our action be stayed in the United States --

Q Be stayed but not abandoned?

MR. KERR: No, sir. And the reason for that is that we have -- one of the concerns here, concerns in some of the cases is: what about Zapata's security? After all, they brought an in rem suit, and the purpose for bringing an in rem suit is to obtain security. And we did post security. And we posted a bond on the limitation action.

One of the reasons that action in Tampa would remain on file is because we have offered to make that security

available to Zapata, not remove it.

Q Well, your claim in the limitations action is that every claimant except Zapata should be able to litigate in that action against Unterweser?

MR. KERR: That is correct. That's the purpose of a limitation action.

Q But you say that for one claimant the forum clause precludes his filing a claim?

MR. KERR: I say that the claimant that is subject to a forum provision must litigate where the contract calls for. Obviously, we can't bind people that weren't parties to the contract.

Q But you gave Zapata notice, though, I suppose? And got an injunction against their lawsuit?

MR. KERR: We got a restraining order of the initial suit. This is the traditional form that a limitation action can take.

Q I know, but didn't they get a notice and an invitation or a direction to file their claim?

MR. KERR: And they did; yes, sir.

And they filed their claim in that, and that action of course has all the issues pending in it that pended in the original action.

Q Mr. Kerr, I suppose there's at least several practical presumptions that if no other claimants have appeared

on the scene since the time of the accident, there probably are no other claimants, is there?

MR. KERR: I think at this point that's a safe assumption, Mr. Justice Rehnquist. It was not necessarily a safe assumption at the time that this action was originally filed.

Q We don't know whether there have been any settled or anything?

MR. KERR: Not to my knowledge, no, sir.

Q Is this situation different with respect to colloquy you have been engaging in from what it would be if, instead of a forum clause for the British courts, you had a different type of forum clause with arbitration, binding arbitration of a fixed kind, the American Arbitration Association or whatnot?

MR. KERR: Mr. Chief Justice, evidently there would be a slight distinction as a matter of law, because it appears that arbitration clauses now are generally recognized and enforced. We submit, and we have argued in our briefs, that there is no logical reason for making a distinction between an arbitration clause, calling for arbitration in London or any other forum, and a contractual forum provision. And that's been fully argued, I believe, by both parties.

But there would be that slight distinction in law, because I think generally arbitration clauses are enforced

without any exceptions nowadays.

Q Well, I'm not so sure that that's true. There have been recent cases which have failed to recognize arbitration clauses, with finality, and elimination of judicial review. But that's not really relevant.

MR. KERR: I wasn't referring to the recognition as far as the results or what the review might be, I was referring to the fact that arbitration clauses, calling for arbitration in a foreign forum, are generally recognized and enforced to that extent.

One important factor that we also want to make very clear is with respect to the limitation action. We were faced, of course, with the -- where, the moment that action is filed in admiralty, a claim in this country, limitation, a petition for limitation or the party defendant seeking limitation, this is almost an inevitable consequence of that action.

So that we had to protect our security in this country. We had $3.5 million security. So what we did was a reactional protective measure, to avail ourselves of a protective device at a time when the court had not yet ruled on our original motion. And therefore we reasserted in that petition, as I've indicated before, and this is in the Appendix, we reasserted the paramountcy of our forum provision and the motion for stay.

Q Could you have done the same thing, Mr. Kerr, by answer in the Tampa suit?

MR. KERR: We suggest, Mr. Justice Brennan, no; for two reasons. No. 1, we would not have had a protection of our security. We might then be called upon to post security, if any other actions were filed. And secondly, and perhaps more importantly, there is doubt in the law at the present time, and we cited the cases and the comment by Gilmore & Black on that point, there is doubt at the present time whether defensive limitation is permissible after the six months have expired.

And that comes about as the Morro Castle amendment in 1937, when the six-month provision was first introduced in the law. And it's not entirely clear at this point, in the decisions since then, whether you can file defensive limitation after the expiration of the six months.

In any event, what Zapata argues is that in the limitation proceeding we are invoking the benefit of the limitation action. The privilege, as they put it. You invoke that by answer or by petition, so you're subject to the same objections.

There has been an urging here with respect to Carbon Black, and our forum provision in this case is governed by Carbon Black. There are several distinctions there, made in the brief, but the principal ones are: in Carbon Black, the

forum clause related only to actions against the master, owner, or agent. That is, it was, per se, stipulated who could not be sued.

And the Fifth Circuit seized upon that to say that this was directed to in personam suits, and not at in rem suits. So that's one distinction.

The second distinction is that Carbon Black is a Carriage of Goods by Sea Act case, and therefore governed by the provisions of that federal statute.

And that does make a difference, and that difference I think is sufficiently discussed in the briefs.

Q Do you think the forum clause would have prevented you from bringing a limitations action in Tampa?

MR. KERR: Yes, sir. I think the forum clause compelled us to go to London for all remedies available in London, including limitation, and not in the U. S.

In so far as Zapata is concerned, Mr. Justice White; now, if there is a suit by a third person, not subject to the provisions of the towage contract, obviously we could file limitations --

Q Well, let's assume somebody, some other claimant had arrested this shipment in Tampa, and sued you, and you brought a limitations action. And you noticed all claimants, including Zapata. Could you do that under the limitations clause?

MR. KERR: Yes, sir. And I think the limitations court would say that since Zapata is compelled by contract to file its claim in London, they may file their claim in London.

Q They may, but --

MR. KERR: They can. Or should.

Just like Unterweser would have to file its limitation claim in so far as Zapata is concerned in London, because the contract is binding only on those two; not on the seamen that traveled on the CHAPARRAL.

Q You don't think you could make Zapata come into the limitations action if it had been filed in the circumstances I have posed?

MR. KERR: No, sir, because it would have been a limitation action pending in London, presumably.

Q Mr. Kerr, what's --

Q Well, not if Zapata hadn't sued you there?

MR. KERR: No. Obviously, if Zapata hadn't sued us there there would be no limitation action in London. But if the contract had been complied with, the full, all of the issues in this cause, including limitation, would have been before the London High Court of Justice.

Q Well, put it this way: What if, on my assumptions, some other claimant had sued you and you had filed the limitations action, and Zapata had filed its claim there.

And you had objected to it?

Could you have done it? Successfully?

MR. KERR: Successfully? I think we could have.

Q Even though some other claimant arrests the ship, you file limitations action in response to that, and then Zapata files its claim along with other claimants, you would say you could make Zapata go to London to litigate his claim?

MR. KERR: Yes, sir. Because we would not have filed the limitations --

Q I guess you have to say that, in your position, don't you?

MR. KERR: Well, I feel I do, because --

Q Yes.

MR. KERR: -- because the action -- there would have been a limitation action pending in London, presumably. This could only have happened if Zapata had gone to London, and they would have been engaged in all the issues in London.

Q Mr. Kerr, I know your time is up, but may I just ask this: What's the difference between this $8,000 fund that Mr. Nance mentioned and what would be available here?

MR. KERR: This is just a difference in the limitation funds in the two countries. The limitation fund in Great Britain is smaller than the limitation fund in the U.S.

Q Well, is it as small as $8,000?

Q It's eighty.

MR. KERR: It's eighty thousand, I believe --

Q Oh, eighty?

MR. KERR: -- yes, sir.

Q And what's the amount here?

MR. KERR: It's --

Q 8300-odd?

MR. KERR: -- one million three ninety; which is presently the established value of the BREMEN at the present -- the juncture of the proceedings we're in.

Q Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kerr.

Thank you, Mr. Nance.

The case is submitted.

[Whereupon, at 1:31 p.m., the case was submitted.]