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CHOICE OF LAW IN A MARITIME PERSONAL INJURY SETTING: THE DOMESTIC JURISPRUDENCE

*Jack L. Allbritton**

The question of which law to apply—American or foreign—in a maritime injury or death case has been a confusing one to judges and lawyers alike. The issue arises when a foreign seaman or maritime worker, either a "bluewater" merchant seaman or an offshore oil worker, is injured or killed and he or his representative, lured by generous and liberal damage awards and inspired by contingent fee attorney contracts, brings suit in the United States seeking application of United States maritime laws. Although the Supreme Court in a trilogy of cases[1] decided between 1953 and 1970 established the basic "substantial contacts" test for deciding the choice of law question, application of the test on a case-by-case basis has differed widely, with fundamental differences in philosophy developing among the circuits. The choice of law methodology developed in the traditional "bluewater" merchant vessel setting, at a time when foreign offshore oil operations and foreign amphibious oil workers were scarce.

In the "bluewater" seamen cases, an early but strong trend developed in the Second Circuit favoring application of American maritime laws whenever necessary to "effectuate the liberal purposes"[2] of our laws and requiring only meager United States contacts with the parties and occurrence, which were held to fall within the category of "substantial contact." Other courts, particularly in the Third Circuit,[3] have shifted the focus to a more reasoned analysis of the competing national interests involved. With the development of American-based multinational oil companies and the explosive growth of worldwide offshore drilling, the foreign offshore oil worker began seeking remedies under American maritime laws. The developing jurisprudence has resulted in a definitive and marked distinction in the courts between the "bluewater" seaman and the offshore oil worker "seaman" with regard to both the choice of law test to be applied and the application of the "substantial contacts" test. In the offshore oil worker cases, for American law to be applied, a much greater nexus between the United States and both the foreign injury plaintiff and the controversy is required than customarily has been required in the

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1. Lauritzen v. Larsen, 345 U.S. 571 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970).

2. Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 441 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959).

3. Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3d Cir. 1980); DeMateos v. Texaco, Inc., 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

"bluewater" seaman context. Indeed, factors deemed significant in the choice of law question in the "bluewater" setting are deemed of minor importance in the offshore setting and vice versa.

Primarily as a result of the worldwide offshore drilling explosion and the widely publicized disparity between American injury verdicts and foreign damage awards, the volume of foreign maritime injury and death cases filed in the United States courts, particularly in the Fifth Circuit, has been staggering. District courts, especially in Texas and Louisiana, have been flooded with such cases, and as a result, new decisions are appearing constantly, many of them finding their way to the Fifth Circuit, which even now is addressing some of the remaining unanswered questions.

RAISING THE ISSUE—PROCEDURAL

Uncertainty over the manner in which to raise the choice of law issue exists, and courts and lawyers alike have confused the issue with objections to subject matter jurisdiction, failure to state a cause of action, and forum non conveniens. Typically, the complaint alleges a cause of action under the Jones Act or other United States maritime law. When the defense is that foreign law, rather than American law, would be applicable, the proper way to raise the defense is by asserting in the answer, or a subsequent rule 12(b) motion to dismiss, that the complaint fails to state a claim upon which relief can be granted.[4] Subject matter jurisdiction is not at issue.

Typically, the choice of law question is presented to the court in a pretrial motion to dismiss under rule 12(b)(6), which is treated as a motion for summary judgment if, as usual, matters outside the pleadings also are presented to the court.[5] In other words, if the court determines that the pleaded American laws are not applicable and the plaintiff has not pleaded any other source of law for relief, summary judgment is proper.

However, more often than not the plaintiff will assert, at some point in the litigation, an alternative cause of action based on foreign law in an effort to remain in the United States forum in the event

4. *See* Chiazor v. Transworld Drilling Co., 648 F.2d 1015, 1020 n.7 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240, 1243-44 (3d Cir. 1980).

5. *Id. See also* Zekic v. Reading & Bates Drilling Co., 680 F.2d 1107 (5th Cir. 1982); Watson, *Applicable Law in Suits by Foreign Offshore Oil Workers*, 41 LA. L. REV. 827, 828-30 (1981). For a different view, see Carlson, *The Jones Act and Choice of Law*, 15 INT'L LAW. 49, 50 (1981), in which it is argued that failure to state a cause of action "is not the proper defense, but it should in all cases be raised as a motion for summary judgment."

that he should lose his attempt to have American laws applied. For this reason, the typical defense motion also includes a forum non conveniens plea, which becomes addressable only after the court determines that United States maritime laws are not applicable. In most cases where the choice of law analysis results in a decision not to apply American laws, there also will be abundant reasons why trial of the case in a United States forum is inconvenient, thus providing an adequate basis for the court to exercise its discretion to dismiss the case. A foreign maritime injury or death case rarely is tried in an American court under foreign law.[6]

DEVELOPMENT OF CHOICE OF LAW RULES IN THE SUPREME COURT

Any discussion of the choice of law rules in a maritime injury case should begin with the fountainhead decision in *Lauritzen v. Larsen*,[7] the first Supreme Court case to address the question in depth. Larsen was a Danish seaman who entered into Danish shipping articles aboard a Danish flag ship in New York. The vessel was owned by a Danish corporation. While the vessel was in port in Havana, Cuba, Larsen sustained an injury. He commenced litigation in a United States district court alleging a cause of action under the Jones Act against his Danish employer. Although his shipping articles were signed in New York, they provided for the application of Danish law, and the plaintiff was a member of the Danish seaman's union. The defendant argued that the Jones Act was inapplicable and that Danish law clearly controlled.

The trial court ruled that the Jones Act did apply, and the case proceeded to trial on the merits before a jury, which granted a verdict for the plaintiff. The Second Circuit affirmed the decision, but the Supreme Court, in a 7-1 decision authored by Justice Jackson, reversed the two lower courts and held that Larsen had no remedy pursuant to the Jones Act.

The Supreme Court recognized that the Jones Act, if read literally, *could* apply to any seaman on any vessel injured anywhere in the world, but the Court concluded that Congress surely did not intend such a result[8] and imposed some limits on the applicability of the Jones

6. This article will not discuss the subject of forum non conveniens further, as it is a problem distinct from the choice of law issue. Other articles have treated the forum non conveniens issues in one context or another. *See, e.g.*, Paulsen & Burrick, *Forum Non Conveniens in Admiralty: The Availability of the U.S. Courts for Trial of Maritime Cases Arising Outside U.S. Territorial Waters*, 17 FORUM 1350 (1982).

7. 345 U.S. 571 (1953).

8. An oft quoted passage of *Lauritzen* is pertinent:

If read literally, Congress has conferred an American right of action which requires nothing more than that the plaintiff be "any seaman who shall suffer per-

Act by utilizing a "factor analysis" test to determine whether the Jones Act should be applied in a given case. This test, which has become known as "the seven factors test," or the "seven immortal pillars,"[9] is still the basis for every choice of law decision in maritime injury cases, although its application has created much confusion and disparity.

The Supreme Court, in *Lauritzen*, indicated that historically seven factors, either alone or in combination, generally had been conceded to influence choice of law in a maritime tort claim. Those seven factors were (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the plaintiff seaman, (4) allegiance of the defendant shipowner, (5) place of the contract, (6) inaccessibility of foreign forum, and (7) law of the forum. The *Lauritzen* Court analyzed each factor and clearly noted that different weight and significance would be accorded to each factor. The law of the "place of the wrongful act," Cuba, was given minor weight, because a ship plies the waters of the world over and the law to be applied could not be made to depend on the fortuitous factor of where the ship happened to be at the time. *Lex loci delicti*, no matter how useful ashore, was of limited applicability to shipboard torts. On the other hand, the "law of the flag" was considered by the Court of "cardinal importance" and as the "most venerable and universal rule of maritime law," which generally should prevail unless some heavy counterweight appeared.[10] The ship in *Lauritzen* flew the Danish flag.

The "allegiance or domicile of the plaintiff" also was considered significant in *Lauritzen*, since "each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support."[11] The plaintiff's "allegiance or domicile" was in Denmark. Likewise, the "allegiance of the defendant shipowner" was considered significant, because of a state's interest in governing the conduct of its own citizens upon the high seas or in foreign countries when the rights of other nations or their nationals are not infringed thereby. While noting that this factor might be applied differently

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sonal injury in the course of his employment." It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

345 U.S. at 576-77.

9. *See* Hellenic Lines Ltd. v. Rhoditis, 412 F.2d 919, 922 (5th Cir. 1969), *aff'd*, 398 U.S. 306 (1970).

10. 345 U.S. at 584-85.

11. *Id.* at 586.

when the flag of a vessel and the allegiance of its owners were different, as in the case of a flag of convenient registration, the Court was not faced with such a problem in *Lauritzen*, where both the owner and the flag were Danish.

The "place of contract" factor referred to the place where Larsen entered into his contract of employment or signed his shipping articles with his Danish employer. That place happened to be New York, but the Court did not attach significant weight to this factor, for as in the case of the "place of the wrongful act," such factor was purely fortuitous, since seamen customarily join ships fortuitously at different ports around the world.

The sixth factor was "inaccessibility of a foreign forum," to which the Court assigned insignificant weight, noting that such factor would not be persuasive as to the choice of law issue, although it would be persuasive on the question of whether or not a court should exercise its discretionary jurisdiction to hear a controversy. Finally, the seventh factor, the "law of the forum," was dismissed summarily as warranting no consideration.

Thus, of the "seven factors" referred to by the Supreme Court in *Lauritzen*, only the first five merited serious consideration, and under the facts of that case, the "law of the flag," "plaintiff's allegiance," and "allegiance of the defendant shipowner" were the deciding factors resulting in the Court's choice of Danish law. All of those factors pointed to Danish law, and the only American contact with the parties or the controversy was that the plaintiff signed his contract of employment and joined the ship fortuitously in New York. This slight American contact was insufficient for the application of United States law. The Supreme Court rejected the plaintiff's argument that the Jones Act and United States law should be applied as a means of benefitting seamen and enhancing the costs of foreign shipping operations for the competitive advantage of American shipping operations. Six years later, the Supreme Court again addressed the choice of law question in the case of *Romero v. International Terminal Operating Co.*[12] In a 5-4 decision authored by Justice Frankfurter, the Supreme Court refused to apply the Jones Act and general maritime law against a Spanish corporate shipowner and in favor of a Spanish seaman injured aboard a Spanish flag vessel while the vessel was in Hoboken, New Jersey. The Spanish seaman had been hired in Spain. The Court held that the mere fact that the injury occurred in United States waters was insufficient to justify application of the Jones Act. The Court again rejected the place of the wrongful act as controlling, and it relegated the plaintiff to his remedies in Spain,

12. 358 U.S. 354 (1959).

since the district court had exercised its discretion and refused to entertain this litigation between foreign nationals involving the maritime laws of a foreign country. *Romero* further established the principle that the same choice of law criteria to be used in determining whether the Jones Act is to be applied to a foreign seaman are also applicable in claims brought under the general maritime law. The *Romero* Court reiterated that the amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend upon the wholly fortuitous circumstances of the place of injury. *Romero,* like *Lauritzen,* involved a situation where the nationality of the seaman, the flag of the vessel, and the allegiance of the vessel owner all coincided. Even so, four justices dissented, with Justice Black, who also dissented in *Lauritzen,* arguing that the Jones Act should be applied literally to "any seaman" and, therefore, the choice of law question should never arise.[13]

Lauritzen and *Romero* were "easy" cases, but the cases that followed were not. In the same year that the *Romero* decision was rendered, the Second Circuit decided the case of *Bartholomew v. Universe Tankships, Inc.,*[14] which was later relied upon by many courts and authorities as one of the leading cases in maritime choice of law questions and which also became the basis for an early trend toward liberal application of the Jones Act and United States maritime laws to otherwise foreign controversies. In *Bartholomew,* the Second Circuit applied the Jones Act to a suit brought by a British West Indies seaman injured in American waters on a Liberian flag vessel owned by a Liberian corporation. *Bartholomew* presented the first "hard" case, in which the plaintiff's allegiance, the flag of the vessel, and the allegiance of the defendant shipowner did not coincide. All of the stock of the Liberian corporate shipowner-employer was held by a Panamanian corporation, whose stock was totally owned by United States citizens. All of the defendant corporation's officers were United States citizens, and the principal place of business of the defendant was in New York, as the defendant had only a sham office in Liberia. The American contacts additionally included the fact not only that the injury occurred in United States waters but also that the shipping articles were signed in a United States port and the voyage of the vessel began and ended in the United States.

The Second Circuit in *Bartholomew* undertook to restate the methodology and the principles to be applied in choice of law cases. The court eschewed a "center of gravity" or "place of the most vital connection" approach as being inappropriate and concluded that the

13. *Id.* at 388-89.

14. 263 F.2d 437 (2d Cir.), *cert. denied,* 359 U.S. 1000 (1959).

test for whether or not the Jones Act is to be applied to a foreign seaman injury case is whether there were "substantial contacts" between the transaction and the United States. The court noted that there would be no need to consider and weigh the contacts that did not exist nor to engage in the process of balancing one set of facts that were present against another set of facts that were absent. According to the Second Circuit, a court simply should ascertain those factors or groups of factors which constitute contacts with the United States and then decide whether these contacts are "substantial," vaguely defined as something "between minimal and preponderant contacts."[15] The contacts are to be "weighed" or "evaluated" only in connection with the determination of "substantiality." However, most important to the analysis of the Second Circuit in *Bartholomew* was the court's view that all such contacts and factors "must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act."[16] This "underlying objective" later resulted in some clearly erroneous choice of law decisions and in disagreement among the circuits.

Although the *Bartholomew* court considered the place of the wrong being in American waters significant, it did not decide whether that factor alone would be sufficient for application of the Jones Act. (Indeed, the Supreme Court in *Romero* concluded that factor alone was not sufficient.) Instead, the Second Circuit in *Bartholomew* placed extreme emphasis on the "facade" of the foreign registration and the American ownership behind it, and the court took the approach that the foreign incorporation of the shipowner and the foreign registration of the vessel for convenience purposes clearly were intended to evade the obligations of the ultimate American owners under American law. The court found such an evasion attempt to be contrary to the liberal purposes of the Jones Act, which the Second Circuit viewed as a regulatory act designed to regulate the obligations of American shipowners, rather than to provide a remedy to the seaman-employee. Other factors in *Bartholomew*, however, further supported the court's decision, including the fact that the plaintiff, although a citizen of the British West Indies, had resided in New York, intended to become an American citizen, and, in effect, was considered an American domiciliary.

Bartholomew proved to be an influential decision and a boon to foreign seamen, for it was followed by a plethora of decisions jumping on the bandwagon and furthering a trend toward liberal application of the Jones Act and United States maritime laws to foreign in-

15. 263 F.2d at 440.
16. *Id.* at 441.

jury cases, with the focus primarily on the employer and its contacts with the United States.[17] Eleven years later, the Supreme Court handed down its third and last decision on the choice of law question, *Hellenic Lines Ltd. v. Rhoditis*,[18] which not only continued the trend started by *Bartholomew* but also added fuel to the fire. In a 5-3 decision authored by Justice Douglas, the Supreme Court held that the Jones Act applied to the claim of a Greek seaman injured in New Orleans on a Greek flag vessel owned by a Greek corporation, more than 95 percent of the stock of which was owned by a Greek citizen who resided in the United States and managed the corporation from a New York office. The Greek seaman had entered into his contract of employment in Greece, providing for the application of Greek law in a Greek forum. A Greek forum was accessible and available to the plaintiff.

Of the seven *Lauritzen* factors, four favored the vessel owner's contention that the Jones Act should not be applied. The vessel flew the Greek flag, the plaintiff was a Greek citizen and resident, the contract of employment was entered into in Greece, and a Greek forum was accessible. The Supreme Court, however, rejected a mechanical application of the seven factors test, noting that the seven factors were not exclusive, and introduced an "eighth factor," known as the "base of operations," which ultimately has become the most important (and perhaps the most confusing) factor in any current choice of law analysis. Much emphasis was placed on the fact that the defendant shipowner, although a Greek corporation, had its largest office in New York and was 95 percent-owned by a Greek resident of the United States who managed that Greek corporation and the vessel's business from the New York office. Additionally significant were the fact that the ship made regular runs from United States ports to foreign ports and the Court's finding that the vessel's entire income was from cargo operations either bound for or from United States ports. The *Rhoditis* case shifted the emphasis in the analysis from the question of "who is a seaman" to whom the Jones Act is applicable to the question of "who is an employer" to whom the Jones Act applies. The whole tenor of Justice Douglas's opinion focused on a determination of whether a particular shipowner-employer should be held to be an employer for Jones Act purposes, a significant departure from the approach of the Court in *Lauritzen*.[19] The Court, in

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17. *See* Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977); Moncada v. Lemuria Shipping Corp., 491 F.2d 470 (2d Cir.), *cert. denied*, 417 U.S. 947 (1974); Grammenos v. Lemos, 457 F.2d 1067 (2d Cir. 1972); Mattes v. National Hellenic Am. Line, S.A., 427 F. Supp. 619 (S.D.N.Y. 1977); Pandazopoulos v. Universal Cruise Line, Inc., 365 F. Supp. 208 (S.D.N.Y. 1973).

18. 398 U.S. 306 (1970).

19. Justice Douglas stated: "The Jones Act speaks only of 'the defendant employer'

Rhoditis, noted that the significance of any one or more of the seven factors enunciated in *Lauritzen* must be considered in light of the national interest served by any assertion of Jones Act jurisdiction. The Court focused on the fact that the vessel and her Greek owner in *Rhoditis* were not "casual visitors" to the United States, and despite the foreign flag and foreign incorporation, a "cold objective look"[20] at the actual operational contact of the vessel and the owner with the United States resulted in the Court viewing the owner as an "employer" owing Jones Act obligations. Citing with approval the Second Circuit decision in *Bartholomew*, the Court focused on the liberal purposes of the Jones Act and looked through the facade of the operation to determine whether the foreign employer, having extensive business operations in the United States, was attempting simply to escape the obligations of United States laws through the facade of foreign ownership.

Justice Harlan authored a strong dissent[21] in *Rhoditis*, criticizing the majority for viewing the Jones Act as one creating a standard of conduct on the part of shipowners, instead of viewing it as purely a remedial statute, which it clearly was. Harlan would have focused the inquiry on the question of "who was a seaman" to whom the Jones Act applied, as it was thought the Court had done in *Lauritzen*. Justice Harlan suggested that courts had "become mesmerized by contacts"[22] and had lost sight of the primary purpose of *Lauritzen*, and, in his view, the choice of law question should have been answered by reference to the plaintiff's relationship to the United States. Following *Rhoditis*, a host of lower court cases seized upon the reasoning of Justice Douglas and focused on the "base of operations" and "beneficial United States ownership" as being the primary factors to consider in determining whether the Jones Act and American maritime laws were to be applied in foreign injury cases.

POST-RHODITIS DEVELOPMENT IN THE "BLUEWATER" SETTING

The early post-*Rhoditis* decisions, mostly from the Second Circuit, furthered the trend, sparked by *Bartholomew* and fueled by *Rhoditis*, toward applying the Jones Act and United States maritime laws to cases with little American connection. These courts suggested, and came close to holding, that American stock ownership alone would be sufficient to justify the application of American maritime laws to

without any qualifications. In Lauritzen v. Larsen, . . . however, we listed seven factors to be considered in determining whether a particular shipowner should be held to be an 'employer' for Jones Act purposes . . . ." *Id.* at 308.

20. *Id.* at 310.

21. *Id.* at 311.

22. *Id.* at 318.

an otherwise foreign injury case. In *Moncada v. Lemuria Shipping Corp.*,[23] the Jones Act was applied to the claim of a Honduran seaman who met his death in Brazil while serving aboard a foreign flag vessel owned by a foreign corporation. All of the defendant corporation's stock, however, was owned by Americans, which the Second Circuit indicated was "the most important" contact. The Second Circuit submitted that "American ownership alone [sufficed] to establish Jones Act jurisdiction,"[24] relying on dicta to that effect in the earlier Second Circuit decision of *Bartholomew*. But the court in *Moncada* did not rely solely upon American stock ownership, for it also found that the "base of operations" of the defendant shipowner was in the United States, where the managing agent and the chartering agent of the vessel were located. Straining to find sufficient contacts, the court noted that all of the officers of the defendant corporation were American citizens and that forty percent of the vessel's voyages began or ended in United States ports. Thus, although the majority of the contacts enumerated in *Lauritzen* seemed to favor the defendant in *Moncada*, the Second Circuit noted that its task was not to weigh or balance the presence or absence of contacts, but merely to determine whether those that did exist were "substantial."

The *Moncada* decision is a good example of the confusion over the meaning of the term "base of operations," which was introduced by *Rhoditis*. Uncertainty arose as to whether the "base of operations" referred to the domicile or residence of the ultimate beneficial owner of the vessel or to the place from which the day-to-day business decisions of the vessel were made and directed or simply to that place from which the vessel derived substantial revenue. The courts grappled with this problem, but the early trend, as evidenced in *Moncada*, focused not on the base of the "vessel" but on the place where the ultimate beneficial owner might be found to reside.

In *Antypas v. Cia. Maritima San Basilio, S.A.*,[25] the Second Circuit applied the Jones Act and maritime law to the claim of a Greek seaman injured on a Greek flag vessel on the high seas. The vessel was owned by a Panamanian corporation. The trial court had dismissed the suit, holding that the only American contact involved was the presence of one of the defendants, which acted as the ship's agent in United States ports. The trial court had concluded that the evidence was insufficient to show that either the ship or the defendant was controlled by American citizens. The Second Circuit reversed, noting that all of the stock of the Panamanian corporation was owned by

23. 491 F.2d 470 (2d Cir.), *cert. denied*, 417 U.S. 947 (1974).
24. 491 F.2d at 473.
25. 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977).

an American citizen and that there was a United States agent who had power and responsibility for booking and soliciting cargo, collecting freight, fixing rates, and allocating tonnage. While noting that American stock ownership alone may have been sufficient for application of the Jones Act, the court further concluded that the ship, in fact, was controlled from New York, as its "base of operations" was in New York. Faced with the trend thus developing in the Second Circuit, some lower courts predictably went to extreme lengths in applying American maritime law to foreign injury cases in order to "effectuate the liberal purposes of the Jones Act." For example, in *Mattes v. National Hellenic American Line, S.A.*,[26] the Jones Act was applied to the claim of a Greek citizen hired in Greece under Greek articles to work on a Greek flag vessel, but who was injured in international waters while the vessel was on its way to New York. The vessel owner-employer was a Liberian corporation. While noting that application of the *Lauritzen* seven factors test alone would result in holding that the Jones Act was inapplicable, the court in *Mattes* seized upon the "base of operations" theory of the *Rhoditis* case and found that the vessel had a "base of operations" in the United States merely because the passenger vessel had made 17 trips to the United States in the previous two years and, although most of her crew were foreign, at least two were United States citizens. Further stretching the point, the court seemed to emphasize that 85 percent of the vessel's passengers were Americans and that the better part of her revenue was derived from United States customers. Thus, these meager connections were found to be "continuing and substantial business contacts" with the United States and seemingly justified a finding of an American "base of operations." The "liberal purposes" of the Jones Act had been effectuated again.

As with most trends, too much of a good thing usually causes the pendulum to swing and the trend to reverse itself. In *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*,[27] the Jones Act was held inapplicable to an action by a Greek citizen and resident against a Liberian shipowner, whose stockholders were Greek citizens residing in Greece. The vessel flew the Liberian flag. The court found no "major base of operations" in the United States and that the vessel's base of operations, in fact, was in Greece. The mere fact that the plaintiff had joined the vessel and signed shipping articles in Virginia was held insignificant. The only "connections" the plaintiff could prove with the United States were that one of three original cosigners of the original ship mortgage was a United States citizen, one of the Greek stockholders

26. 427 F. Supp. 619 (S.D.N.Y. 1977).
27. 582 F.2d 312 (4th Cir. 1978).

owned land in and occasionally visited New York, and the Greek stockholders had access to certain funds in New York. Such connections were held "not even close" and the case ultimately was dismissed.

Even the Second Circuit eventually drew in its reins. In *Koupetoris v. Konkar Intrepid Corp.*,[28] the Jones Act was held inapplicable to the claim of a Greek citizen and resident injured off the coast of Maryland while serving on a Liberian flag vessel owned by a Liberian corporation, the stock of which was owned by Greek citizens and residents and whose principal office was located in Greece. The plaintiff hired on the vessel in Greece. The plaintiff tried unsuccessfully to establish an American base of operations by stressing certain American ties and bank accounts that the defendant corporation maintained in New York and by alleging activities of an American general agent which handled the vessel's business in the United States. But the court found that there was no evidence that the vessel owner was in fact controlled or beneficially owned by Americans or that the base of operations was in the United States. Where the only American contact is the place of the injury, "substantial" contact is lacking.[29]

The Second Circuit also refused to apply United States maritime law in *Fitzgerald v. Texaco, Inc.*,[30] which involved suits brought in the United States by several families of German seamen who were killed in the collision of their German flag vessel with the wreck of a Panamanian vessel in the English Channel. The Panamanian vessel was owned by Texaco Panama, a Panamanian corporation whose stock was wholly-owned by Texaco, Inc. The suit was brought under the general maritime law of the United States and the Death on the High Seas Act. Plaintiffs argued that the alleged failure of the owners of the Panamanian vessel to properly mark the wreck of that vessel constituted negligence. The plaintiffs claimed that Texaco, Inc., the parent company, had supervised the search for the wreck from its New York office. In affirming the trial court's dismissal of the case, the Second Circuit found that Texaco's alleged supervision of the search from New York was not sufficient American contact to justify application of United States maritime law to the case. Surprisingly, the court completely avoided discussion of the aspect of American beneficial

28. 535 F.2d 1392 (2d Cir. 1976).

29. *See Romero*, 358 U.S. at 383-84. See also *Cruz v. Maritime Company of Philippines*, 549 F. Supp. 285 (S.D.N.Y. 1982), holding Philippine law applicable to the injury claim of a Philippine seaman injured on a Philippine flag vessel owned by a Philippine company, where the injury occurred in a U.S. port. Although 29 percent of the vessel owner's revenues arose from U.S. operations, and the owner had an office and an active agent in the U.S., the court held that its principal base of operations was in the Philippines, from where all major business functions were directed.

30. 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

ownership based upon Texaco's stock ownership of its Panamanian subsidiary, even though the plaintiff argued this point.

However, the case that did the most toward injecting reason back into choice of law analysis was the opinion of the Third Circuit in *DeMateos v. Texaco, Inc.*[31] *DeMateos* involved a death action brought by the representative of a deceased Panamanian seaman who was killed aboard the Texaco Kenya, a Liberian flag vessel owned and operated by Texaco Panama, Inc., a Panamanian subsidiary of Texaco, Inc. Relying upon the trend started in the Second Circuit, the plaintiff claimed that Texaco Panama was a mere facade, that the Liberian flag of the vessel was only a flag of convenience, and that beneficial ownership of the vessel was in the United States corporate parent company, which factors should be sufficient for the application of United States law. The court rejected that contention and clarified that United States maritime law would not be applied simply because of American ownership of the foreign defendant corporation's stock. Nor did the fact that American citizens owned the stock of the foreign vessel owner establish a "base of operations" in the United States within the meaning of *Rhoditis*, when in fact the vessel's operations were conducted and directed elsewhere. The Third Circuit analyzed *Rhoditis* and *Bartholomew* and boldly noted that, contrary to the approach of *Bartholomew*, the underlying purpose in a choice of law analysis "is not to effectuate the liberal purposes of the Jones Act,"[32] but is to determine whether within the limits of due process, the Jones Act could be applied to a given case. Addressing the vague concept of "base of operations" in *Rhoditis*, the court focused on that place from which the day-to-day business of the vessel was directed, which was found to be either in Panama or in London, but not in the United States.

In holding that ultimate American ownership alone was insufficient, the Third Circuit specifically departed from the expansive view of the Second Circuit. Reason was reinjected into the analysis, as evidenced by the following language of the Third Circuit:

> It would be an extreme suggestion, we think, that American law could govern relations between Texpan and the employees

31. 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

32. The Third Circuit stated:

> With deference both to Justice Douglas and to Judge Medina, it would seem that the underlying purpose for identifying and weighing factors is not to effectuate the liberal purposes of the Jones Act, but to determine whether within the limits of due process that Act could, and within the limits of assumed congressional deference to the conventions of international law that Act should, be applied to the transaction in question.

562 F.2d at 901.

> in its Panamanian gasoline stations because its stock was owned by a multinational business enterprise incorporated in Delaware. It is no less extreme to suggest that American law should govern the relations between Texpan and its employees on vessels it uses in the transportation of petroleum between Central American countries. Either suggestion is a variety of social jingoism, which presumes that the "liberal purposes" of American law must be exported to wherever our multinational corporations are permitted to do business. Some of our laws, to other nations, may not appear as liberal as the Jones Act appears to us, and extreme applications of such an effort might well result in those nations closing their door to such corporations, to their and our competitive disadvantage.[33]

Reinforcing the reverse trend begun by *DeMateos*, the Third Circuit then decided *Chirinos de Alvarez v. Creole Petroleum Corp.*,[34] which denied application of United States law to the widows of four Venezuelan men who died in an explosion while working on a crew launch in Lake Maracaibo, Venezuela, where the only American nexus was the fact that a Delaware corporation, Creole, a wholly-owned subsidiary of Exxon, both employed the men and owned the vessel. Creole's principal place of business was in Venezuela, where it had an extensive crude oil operation. Creole clearly was not a sham corporation. Although it maintained an export sales office in New York and had an ongoing relationship with Exxon, its parent, Creole's major business decisions were made in Venezuela.

Thus, in *Chirinos de Alvarez*, despite the fact that the defendant shipowner-employer apparently owed its allegiance to the United States by virtue of its Delaware incorporation, American law was not applied. While Creole undoubtedly did engage in some business in the United States, that business and Creole's relationship with its parent company were held not to be substantial enough to consider Creole's "base of operations" to be in the United States. The most significant aspect of *Chirinos de Alvarez* was its analysis of the "base of operations" factor. The decision clearly comprehended that the *Rhoditis* "base of operations" referred to an actual *operational* base of operations, that is, the place from which the day-to-day activities of the business enterprise giving rise to the cause of action are conducted, not merely that place where the ultimate beneficial owner might reside or even the place where the defendant is incorporated. The Third Circuit, in *Chirinos de Alvarez*, focused on the significant interest of Venezuela in the matter, and some commentators have sug-

33. *Id.* at 902.
34. 613 F.2d 1240 (3d Cir. 1980).

gested that the Third Circuit has departed from the "substantial contacts" test of *Bartholomew*, sanctioned in *Rhoditis*, in favor of a "balancing of interest" analysis.[35] In any event, the Third Circuit refused to become "mesmerized by contacts" and avoided a mechanical application of the choice of law factors to reach a clearly correct decision.

If the logical trend of the Third Circuit had gathered much steam, it apparently went unnoticed in, or was ignored by, the Fifth Circuit, which rendered perhaps the most liberal and expansive opinion to date, *Fisher v. Agios Nicolaos V*.[36] In *Fisher*, the surviving widow and dependents of a Greek seaman killed on a Greek flag vessel in Beaumont, Texas, brought a wrongful death action under the Jones Act and the general maritime law against the Liberian corporation which owned the vessel and the Panamanian corporation which operated the vessel. Both corporations were owned and controlled by Greek citizens and residents. The vessel owners had just purchased the vessel, and the vessel was on her maiden voyage under her new owner—a voyage to Beaumont to pick up a load of grain for carriage to the Soviet Union. The accident occurred on this first voyage. Apparently, the only American contacts with this case were the facts that the accident occurred in an American port and that the plaintiff had flown to that port to join the vessel, after having been hired in Greece. Similar contacts clearly had been rejected as insufficient for application of the Jones Act and American maritime law in a host of previous cases, dating back to *Lauritzen* and *Romero*. However, the trial court in *Fisher* concluded that the Jones Act and maritime law of the United States would apply, primarily relying upon the fact that prior to the accident, the vessel's entire service under its present ownership and therefore its entire revenues arose from a base of operations in the United States. The trial court evidently concluded that even though this was the vessel's maiden voyage, the vessel had been purchased primarily to service the American grain trade, which was equated to a United States "base of operations" for the shipping and revenues of the vessel. Curiously, the Fifth Circuit approved the choice of law decision of the district court on this point, despite acknowledging that the defendants had made an "extremely strong case for application of Greek law;"[37] the Fifth Circuit pointed out that the district court's factual finding that the vessel had a substantial United States base of operations was not "clearly erroneous." The opinion contained no reference at all to the place from which the day-to-day operational

35. See text at notes 80-84, *infra*.

36. 628 F.2d 308 (5th Cir. 1980), *reh'g denied & reh'g en banc denied*, 636 F.2d 1107 (5th Cir.), *cert. denied*, 454 U.S. 816 (1981).

37. 628 F.2d at 316.

decisions of the vessel were made. The opinion seemingly indicates that that place was in fact in Greece. The Fifth Circuit's decision in *Fisher* is extremely hard to reconcile in light of what had been a trend away from the liberal, expansive exportation of the Jones Act and American maritime law under the early Second Circuit decisions. In fact, the *Fisher* decision probably involved the weakest possible factual case for the application of American law. The case further resulted in a scathing dissent by Judge John R. Brown on the court's decision to deny a petition for rehearing en banc.[38] According to Judge Brown, the majority opinion in *Fisher* would have the following result:

> Left to stand, the opinion-decision opens the 19 District Courts of the six maritime states of this Circuit and, by precedent, all of the federal and state courts of the nation to injury/death claims by foreign crew members against their foreign flag employers for recovery under American statutory (Jones Act) or general maritime law. All that is required to trigger this new burden on beleaguered federal courts is the presence of the foreign flag vessel to pick up cargo on the ship's sole voyage to an American port. There need be no American direction, control or operation, nor the presence of foreign nationals as domiciliaries running things from an American base.[39]

As noted by Judge Brown in his dissent, it is difficult to reconcile the *Fisher* opinion with previous decisions of the Fifth Circuit in *Avila v. M/V Toluca*,[40] an unpublished opinion in which the Fifth Circuit adopted the opinion of the trial court holding that doing business in or trading at a United States port was not equivalent to establishing a base of operations, and *Merren v. A/S Borgestad*,[41] holding that the existence of shipping agents in the United States did not constitute a base of operations.

Fortunately, the sting of the *Fisher* opinion in the Fifth Circuit seems to have vanished as quickly as it appeared, for it has not been the focal point of a new, expansive liberalism on choice of law, as some may have thought. In fact, the decision now seems to have been limited to its facts and generally is regarded as an aberration, being a product of the "clearly erroneous" rule, rather than any expression

38. 636 F.2d 1107, 1108.

39. *Id.* at 1108.

40. No. 79-2921 (5th Cir. May 30, 1980) (unpublished opinion attached as appendix to Judge Brown's dissent and found at 636 F.2d 1112). The Fifth Circuit affirmed per curiam the trial court on the basis of the district court's order adopting the Memorandum and Recommendation of the United States Magistrate. The Memorandum and Recommendation also was previously unpublished.

41. 519 F.2d 82 (5th Cir. 1975).

of the Fifth Circuit's view on the test to be applied in maritime choice of law cases.[42]

Recent decisions of the Fifth Circuit bear out this analysis. In *Volyrakis v. M/V Isabel*,[43] the Fifth Circuit affirmed a lower court's decision that American law was inapplicable where the place of the wrong was in a United States port and the vessel made only periodic visits to United States ports. The court distinguished the *Fisher* opinion as being "inapplicable," because in *Fisher* "the vessel's 'entire business activity prior to the accident' was in the United States."[44]

Although the development of the rules concerning choice of law in maritime injury cases has been confusing enough in the "bluewater" seaman context, treatment of the same issue in the context of the foreign offshore oil worker "seaman," ostensibly under the same *Lauritzen-Rhoditis* test, has added to the disarray, particularly in the Fifth Circuit.

CHOICE OF LAW IN THE OFFSHORE OIL SETTING

In the last few years, the majority of maritime injury choice of law cases have involved foreign offshore workers in the oil industry working for American multinational oil companies and service companies or their foreign subsidiaries. These workers are employed either as part of the drilling crews of mobile offshore drilling rigs, such as jack-ups and semi-submersibles, or as workers on special purpose offshore construction vessels, such as derrick barges and pipe-laying barges or offshore tug and supply vessels servicing oil rigs in foreign waters. The dockets of federal courts, particularly in Texas and Louisiana, literally are clogged with such cases.

Initially, the courts struggled with applying the *Lauritzen-Rhoditis* choice of law rules to the offshore oil setting and attempted to apply

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42. Judge Tate's opinion in *Fisher* seems to suggest the Fifth Circuit merely was approving the trial court's finding of a United States base of operations as not being "clearly erroneous," rather than undertaking to expand the applicable test. Clearly, Judge Brown, in his dissent on the denial of rehearing en banc, thought so, when he noted:

> Although nowhere expressed, the panel, oblivious to the existence of these three Fifth Circuit opinions, seems to operate on the dubious theory that this Court merely approved as not clearly erroneous the finding by the trial court that a substantial base of operations was established. Where legal standards are involved—as they must certainly be under *Lauritizen* and *Rhoditis*—they may not be ignored, overlooked or watered down by any such distortion of the function of F.R.Civ.P. 52(a).

636 F.2d at 1111.

43. 668 F.2d 863 (5th Cir. 1982).

44. *Id.* at 868.

the "substantial factor" test in a mechanical fashion, failing to take into account the special considerations presented in the offshore drilling context. Among the earlier cases, *Rode v. Sedco, Inc.*[45] applied the Jones Act and general maritime law primarily by taking the *Rhoditis-Bartholomew* approach of piercing the facade of foreign flag and foreign incorporation and applying American law where there were substantial management activities of the foreign drilling rig owner taking place in the United States.[46] The same traditional approach was taken in *Castanho v. Jackson Marine, Inc.*,[47] which held that the Jones Act would be applied to the claim of a Portuguese seaman aboard an offshore oil service vessel operating in United Kingdom waters, where the vessel, although flying the Panamanian flag, was beneficially owned by American interests through a Netherlands Antilles subsidiary. Taking the *Bartholomew* approach and piercing the "facade" of foreign flag and foreign incorporation of a subsidiary, the *Castanho* court ultimately concluded that through "stock ownership, interlocking directorates, and control of assets" and for the purposes of choice of law, the plaintiff was considered to be "employed by an American corporation on an American ship which, for all practical purposes, was operated from a home office in Texas."[48] On the other hand, some courts quickly determined that there were different considerations in the offshore drilling context which justified applying the choice of law rules in a different fashion. One of the earliest cases to make

45. 394 F. Supp. 206 (E.D. Tex. 1975).

46. See also the unreported decision in Ramirez v. Zapata Offshore, No. 73-H-1239 (S.D. Tex. March 4, 1975), an early "offshore" decision applying American law to a Spanish oil worker injured on a Panamanian flag drilling barge operating off the coast of West Africa, where the employer and barge owner were foreign subsidiaries of an American parent company. Clearly inspired by *Bartholomew* and *Rhoditis*, the court found that American beneficial ownership alone was sufficient for application of the Jones Act.

47. 484 F. Supp. 201 (E.D. Tex. 1980).

48. *Id.* at 206. Interestingly, the plaintiff in *Castanho* simultaneously had brought suit in a court of the United Kingdom, which court had attempted to stay the United States litigation, albeit inappropriately. When the defendant moved the American court to certify the denial of its choice of law and forum non conveniens motions for interlocutory appeal under 28 U.S.C. § 1292 (1976) and sought an order to stay the American proceeding pending outcome of the English litigation, the district court denied both motions. The defendant, in a last ditch effort to appeal the choice of law question prior to trial, filed a petition for mandamus in the Fifth Circuit seeking an order directing the district court to dismiss the case on grounds of forum non conveniens. This effort also failed. See the opinion of the Fifth Circuit regarding the mandamus petition, Castanho v. Jackson Marine, Inc., 650 F.2d 546 (5th Cir. 1981). The trial court's choice of law decison thus never reached the Fifth Circuit, for the case was settled thereafter during the trial on the merits.

Compare *Castanho* with the Fifth Circuit's recent decision in De Oliveira v. Delta Marine Drilling, 684 F.2d 337 (5th Cir. 1982).

such a distinction was *House v. Santa Fe International Corp.*,[49] which refused to apply American maritime law in a death action involving a British diver and a mobile jack-up drilling vessel operating in the North Sea, even though the drilling vessel flew the American flag and was owned and operated by an American corporation. Despite the fact that the American office of the American corporate owner had complete control of all finances, personnel hiring, paying of wages, and purchasing, where the day-to-day operations of the drilling venture were conducted out of the foreign office of the owner of the drilling rig, which made the base of operations foreign, American law was held inapplicable, since the British interests involved far outweighed those of the United States.[50]

The traditional "bluewater" analysis given to the choice of law problem and the weight to be assigned to the various *Lauritzen-Rhoditis* factors apparently were not wholly applicable in the offshore drilling context. An offshore drilling operation, for example, lacks the fortuitous aspect found in a traditional merchant vessel situation, which had resulted in a minor weight, if any, being given to such factors as the place of the wrong and the place of the contract of employment in *Lauritzen*. An offshore drilling operation has an air of permanence as the drilling rig is usually on station for months or even years at a time. Thus the place of the wrong is not fortuitous. Similarly, foreign workers employed to work on the offshore drilling rig and in the offshore drilling venture generally are hired in the same locale, unlike the fortuitous place of employment associated with "blue water" seamen. Similarly, factors such as the law of the flag, which was considered of "cardinal importance" by the Supreme Court in *Lauritzen*, should have less significance in the offshore drilling vessel context, because once again, the need for a law on board ship that does not change fortuitously from port to port is not present in the offshore drilling context, because of the absence of fortuity. The leading case which recognized the need for such different application and set forth the rationale therefor was *Phillips v. Amoco Trinidad Oil Co.*,[51] which held that the Jones Act and United States maritime law were not to be applied to death and injury actions brought by Trinidad employees injured aboard an American flag semi-submersible drilling barge operating off the coast of Trinidad, even though the drilling rig was owned by an American corporation and the plaintiffs

49. 1978 A.M.C. 1899 (S.D. Tex.), *modified*, 1978 A.M.C. 2348 (S.D. Tex. 1978).

50. *See also* Villalobos v. Loffland Bros. Co., 507 F. Supp. 904 (S.D.N.Y. 1981); Dos Santos v. Reading & Bates Drilling Co., 495 F. Supp. 843 (E.D. La. 1980); Caie v. Occidental Petroleum Co., 1980 A.M.C. 880 (S.D. Tex. 1979); Iriah v. J. Ray McDermott & Co., 1979 A.M.C. 1219 (S.D. Tex. 1979).

51. 632 F.2d 82 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

were employed directly by an American corporation headquartered in California. The court specifically compared the interests of the United States with that of Trinidad and concluded that the interests of Trinidad far outweighed those of the United States in the controversy. Although recognizing that if the case were a typical "bluewater" merchant vessel case under previous authority American law probably would apply, the Ninth Circuit refused to mechanically apply the *Lauritzen-Rhoditis* factors. The court noted the different considerations that are applicable in an offshore oil drilling context and assigned much more weight to those factors (such as allegiance of the plaintiff, the place of the wrong, and the place of the contract of employment) than traditionally had been accorded them in the "bluewater" seamen cases. Perhaps most importantly, however, the Ninth Circuit made it clear that the "base of operations" factor did not refer simply to the corporate headquarters of the vessel owner, but instead referred to the place from which the day-to-day operations of the business enterprise giving rise to the liability were conducted. The Ninth Circuit thus placed itself in accord with the Third Circuit and its decisions in *DeMateos*[52] and *Chirinos de Alvarez*.[53] The Ninth Circuit's opinion noted:

> It is true that Santa Fe is based in Orange, California, and that its Orange offices were involved in monitoring and controlling the overall operations of Mariner I. We conclude, however, that the more relevant and important base of operations for determining choice-of-law in this case is in Trinidad. We thus follow cases that have focused on the base of operations of the relevant business venture rather than of the corporate owner of the vessel. This is consistent with the injunction that we weigh the "connecting factors between the *shipping transaction regulated* and the national interests served by the assertion of authority."[54]

The Ninth Circuit soon was joined by the Fifth Circuit in the case of *Chiazor v. Transworld Drilling Co.*[55] In *Chiazor*, a Nigerian employee was killed on a semi-submersible drilling rig operating off the Nigerian coast. The decedent had been employed by a Nigerian corporate subsidiary of an American company, while working on a semi-submersible rig being operated by a Nigerian corporate subsidiary of another American company. The representatives of the decedent sued the rig owner, an American parent company, arguing that the decedent was a borrowed employee of the rig operator, a subsidiary of the American

52. See text at notes 31-32, *supra*.
53. See text at notes 34-35, *supra*.
54. 632 F.2d at 88 (quoting *Lauritzen*, 345 U.S. at 582).
55. 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982).

rig owner. As is customary in nearly all such cases, the plaintiffs argued that the parent-subsidiary corporate relationship should have been pierced, under an "alter ego" theory, so as to increase the potential American nexus with the controversy and to afford a basis for arguing that the base of operations was in the United States. The Fifth Circuit held that the trial court was correct in refusing to apply American law to the controversy, notwithstanding the allegations that the Nigerian corporate subsidiary was merely a sham corporation with actual control emanating from the American base of the parent corporation. The appellate court noted that where the day-to-day operating activities were in fact conducted in Nigeria, it mattered not that there was ultimate United States beneficial ownership or even that primary management decisions were made by American corporate officers in America.[56] In fact, the Fifth Circuit further concluded that even under an assumption that the ultimate owner of the drilling vessel was a United States corporate owner whose "base of operations [was] in the United States," the result would be the same.[57] A corporate base of operations is not necessarily that of the vessel, and the vessel's base of operations, which is the place where the day-to-day decisions are actually made and implemented, is of much more significance in the offshore drilling context.

Chiazor became the justification for dismissal of many cases in the Fifth Circuit. Typically, the handling of a foreign offshore oil worker case involved very tedious discovery and briefing concerning allegations by the plaintiff of control over some foreign subsidiary by an American parent company. The Fifth Circuit, in *Chiazor*, made it unnecessary to engage in such painful exercises, for it assumed an alter ego status and still concluded that American interests were not furthered by applying American laws to an otherwise foreign controversy. The Fifth Circuit's decision in *Chiazor* came as quite a surprise in light of its earlier opinion in *Fisher v. Agios Nicolaos V.*[58] Even more surprising was that the *Chiazor* opinion was written by Judge Tate, who also had authored the *Fisher* opinion. The two opinions, written less than a year apart, are difficult to reconcile and

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56. The Fifth Circuit stated:

> We pretermit discussion of whether or not Transworld Nigeria was a legitimate corporation with its base in Nigeria, or was a sham corporation with its actual control emanating from Oklahoma City, for, even assuming a U.S. base of operations, the substantiality of the contacts herein with Nigeria warrants the non-application of American law. We are unable to state, and *Rhoditis* in fact does not command us to hold, that the shipowner's base of operations is the sole controlling factor in a choice-of-law decision.

648 F.2d at 1018 (footnote omitted).

57. *Id.* at 1018 n.4.

58. See text at note 36, *supra*.

represent both ends of a spectrum. Fortunately, however, the attitude expressed by the court in *Chiazor* appears to have prevailed over the extremely liberal and expansive view expressed in *Fisher*.

In a recent unpublished opinion in the case of *Johnson v. J. Ray McDermott & Co.*,[59] the Fifth Circuit followed *Chiazor* to the letter in affirming the dismissal of the claim of a Nigerian seaman injured on an American flag derrick barge operating off the coast of Nigeria, even though the barge was owned by an American corporation and bareboat-chartered to one of its foreign subsidiaries. The plaintiff, in fact, was employed by a Nigerian subsidiary of the barge owner. The plaintiff argued, on appeal, that the "base of operations" factor had been misinterpreted by the district court, that the court should have focused on the fact that the American parent company, owner of the barge and parent of the Nigerian employer, had a substantial operation in the United States, and further that the foreign subsidiary was but a mere alter ego of the American parent. The Fifth Circuit again emphasized that even if the base of operations was considered to be that of the American parent rather than that of the foreign subsidiary, American law would not be applied.

The most recent Fifth Circuit decisions have furthered the trend started by *Chiazor*. In *Zekic v. Reading & Bates Drilling Co.*,[60] the court affirmed the trial court's holding that American law would not be applied to the claim of a Yugoslavian employee injured aboard a jack-up drilling barge operating in Italian territorial waters, even though the jack-up drilling rig was owned by an American corporation and the plaintiff was employed by an American corporation. Further, in *De Oliveira v. Delta Marine Drilling Co.*,[61] the court reversed the lower court's decision to apply the Jones Act and American law to the injury claim of a Brazilian worker injured on a drilling tender tied to a fixed drilling platform off the coast of Brazil. The drilling tender, a recently converted cargo ship, flew the Panamanian flag, but it was owned by an American corporation headquartered in Texas. The trial court, treating the action as a "bluewater" case, focused on the American beneficial ownership and control and the American base of operations; the court also relied heavily on the Fifth Circuit's opinion in *Fisher v. Agios Nicolaos V*.[62] The Fifth Circuit, however, concluded that *Chiazor* controlled and that while the vessel's "profits

59. No. 80-2378 (5th Cir. Oct. 16, 1981) (unpublished, 660 F.2d 495), *cert. denied*, 102 S. Ct. 2270 (1982), *aff'g per curiam & reinstating* 1980 A.M.C. 887 (S.D. Tex. 1979).

60. 680 F.2d 1107 (5th Cir. 1982), *aff'g* 536 F. Supp. 23 (E.D. La. 1981).

61. 684 F.2d 337 (5th Cir. 1982), *rev'g* 527 F. Supp. 332 (S.D. Tex. 1981).

62. See text at note 36, *supra*.

[wended] their way back to the United States, all the significant contacts [centered] on Brazil."[63]

De Oliveira is significant as it represents the first time since *Lauritzen* that an appellate court has reversed a lower court's decision to apply American law in a maritime injury case. Heretofore, the battles were fought mainly in the trial court, for once that court decided to apply American law, the defendant either had to attempt to persuade the trial court to grant an interlocutory appeal or had to try the case on the merits before he could appeal the choice of law decision. The latter alternative generally promoted settlement; hence the erroneous choice of law decision never was appealed.[64] Even in those rare cases in which an interlocutory appeal properly might be granted, however, the "clearly erroneous" rule was likely to support the trial court in these essentially factually-oriented cases, giving the circuit court an easy manner in which to avoid making a hard decision.[65] *De Oliveira,* therefore, is a refreshing opinion which should prevent potential miscarriages in the trial courts which otherwise might remain uncorrected.[66]

In a recent opinion on the issue, *Borralho v. Keydril Co.*,[67] the Fifth Circuit again reaffirmed the stand it took in *Chiazor*. In *Borralho,* the court affirmed the district court's decision to apply Brazilian law, rather than U.S. law, to the death claims of Brazilian survivors of a Brazilian worker killed on a semi-submersible drilling rig operatoring off the coast of Brazil. On the strength of *Chiazor* and *Zekic,* the Fifth Circuit again rejected ultimate American ownership and control as being "substantial contact," where the *day-to-day operating deci-*

63. 684 F.2d at 340.

64. See the discussion of *Castanho v. Jackson Marine, Inc., supra* note 48. Had the district court in *Castanho* certified the issue for a 28 U.S.C. § 1292(b) interlocutory appeal, it is likely that the choice of law decision would have been reversed on appeal, in hindsight view of *Chiazor* and *De Oliveira.* Instead, however, faced with the prospect of a trial on the merits in the United States forum before it could complain on appeal, the defendant settled the litigation.

65. That is apparently what occurred in *Fisher v. Agios Nicholas V.* See note 42, *supra.*

66. Reliance on *De Oliveira* may be somewhat premature, however, because on September 7, 1982, one week after the opinion was rendered, the court notified the litigants in that case that its judgment as mandate would be stayed pending further notification from the court, with no reasons given. Although there has been much speculation on the meaning of the stayed mandate, such as the possibility that the court would change its mind, or that a rehearing en banc may be in the offing, the subsequent decision of the court by another panel in *Borralho v. Keydril, infra* note 67, appears to reaffirm the substance of the choice of law holding in *De Oliveira.* It is curious, however, that the panel in *Borralho* failed to mention or cite *De Oliveira* in any way.

67. No. 81-2436 (5th Cir. Jan. 27, 1983), *rev'g on other grounds,* 1982 A.M.C. 1316 (S.D. Tx. 1981).

sions for the venture were made and conducted in Brazil. The court specifically rejected the Second Circuit's position to the contrary, as expressed in *Bartholomew*, "at least insofar as it concerns offshore drilling platforms at long term fixed locations."[68]

Chiazor definitely set the trend in the Fifth Circuit, and it is now apparent that in the offshore drilling context, if there is a local operational base in foreign territory, a foreign plaintiff, and a foreign drilling locale, the chances are great that American maritime laws will not be applied. Following *Chiazor*, a host of lower courts have chosen foreign law in similar circumstances. In *Gomez v. Sedco*,[69] American law was held inapplicable in the case of the death of a Mexican rig worker who was killed aboard an American flag drilling barge operating off the coast of Mexico, where the barge was owned by a United States corporation but under a bareboat-charter to a Mexican corporation, even though the supervisory personnel aboard the rig were American personnel employed by the American owner. Even though payments under the rig contract were made to a United States bank and the purchase of supplies and replacement parts for the drilling barge was controlled by the American corporate owner from the United States, Mexico was held to have the closest connection with the transaction and, therefore, Mexican law was to be applied. Similarly, in *Paez v. Dan-Tex International, Inc.*,[70] the court dismissed a Mexican worker's personal injury action arising out of his injury on a drilling barge off the coast of Mexico, even though the operator of the drilling barge was a Texas corporation. The current focus in these cases is not on the corporate base of operations but on that place from which the relevant business venture actually is conducted.

In *Bailey v. Dolphin International, Inc.*,[71] American law was held inapplicable to the case of a Filipino rig worker killed aboard a Panamanian flag drilling barge off the coast of Indonesia, even though a Panamanian subsidiary of a Texas corporation, which provided some supervision and control from the United States, both employed the worker and owned the rig.[72]

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68. *Id.* at 2205 (slip op.). The rig had operated off the Brazilian coast for 13 years, ever since she had been built.

69. 1982 A.M.C. 252 (S.D. Tex. 1981).

70. 1981 A.M.C. 2821 (S.D. Tex. 1981).

71. 1982 A.M.C. 1174 (S.D. Tex. 1981), *rev'd & remanded on other grounds*, No. 82-2060 (5th Cir. Feb. 17, 1982).

72. See also Sumardiko v. Reading & Bates Exploration Co., No. M-79-68 (E.D. Tex. Apr. 15, 1981) (unreported), in which American law was held inapplicable to the death action on behalf of an Indonesian rig worker killed on a Venezuelan jack-up drilling barge in the Java Sea, even though the rig was owned by a United States corporation, where the day-to-day base of operations was found to be in Indonesia.

Despite the obvious trend, however, some lower courts still appear to be confused, perhaps understandably, by the divergent results and the different applications of the rules governing the "bluewater" seaman and the offshore oil worker. As previously noted, the trial court in *De Oliveira v. Delta Marine Drilling Co.*[73] held that American law applied in an action brought by a Brazilian citizen injured on a drilling tender operating off the coast of Brazil, where the vessel was owned by an American corporation headquartered in Texas. The trial court, taking the "bluewater" approach and citing *Fisher v. Agios Nicolaos V*, held that there were substantial and significant United States contacts mandating application of American law. Presumably, the court viewed the drilling tender vessel in *De Oliveira* as an ocean-going "bluewater" vessel and applied the rules as if it were a merchant vessel, even though it was a converted cargo vessel on its maiden assignment as a drilling tender and was tied to a fixed offshore platform off the Brazilian coast. The Fifth Circuit, in reversing the trial court, acknowledged that such a distinction might be made, but it concluded that the vessel's status as a drilling tender tied to an offshore drilling platform did not involve the element of transient fortuity normally associated with the "bluewater" merchant vessel cases; instead, the vessel's status was more closely akin to the more permanent drilling vessels.

The *De Oliveira* case is a clear illustration of the conceptual difficulty in the application of the same choice of law criteria and rules to ocean-going merchant vessels and special purpose vessels in the offshore drilling industry. While the law may be fairly clear in the case of the typical ocean-going cargo merchant vessel, as well as in the case of the jack-up or semi-submersible drilling barges, a question arises as to when a "vessel" falls into the category of a "bluewater" merchant vessel as opposed to an offshore drilling vessel. Every offshore drilling operation involves not only a drilling platform or a mobile drilling vessel but also service vessels of different types. In *De Oliveira*, the vessel was a converted cargo ship used as a drilling tender. It was tied to a fixed offshore platform, and thus its function had just as much purpose and permanency as a jack-up drilling barge or a semi-submersible drilling barge. The Fifth Circuit found no justification for treating the drilling tender in *De Oliveira* differently from a jack-up drilling barge.

Other cases involving special-purpose craft which service the offshore oil industry have not drawn the fine distinction that was attempted to be drawn with the drilling tender in *De Oliveira*. In *Johnson v. J. Ray McDermott & Co.*,[74] a derrick barge used in the

73. 527 F. Supp. 332 (S.D. Tex. 1981), *rev'd*, 684 F.2d 337 (5th Cir. 1982).
74. See text at note 59, *supra*.

marine construction industry was treated under the same rules as an offshore oil drilling barge, and foreign law was held applicable despite the fact that it flew the United States flag and was owned by a United States corporation. The barge was engaged in a rather permanent venture involving major offshore construction in the oil fields off the Nigerian coast. In *Fajardo v. Tidewater, Inc.*,[75] American law was held inapplicable to an action brought by a Spanish seaman injured on an offshore supply vessel off the coast of Norway, despite ultimate American beneficial ownership of the vessel through a parent corporation and the fact that ultimate responsibility, management, and control of the foreign subsidiary's operations were vested in the directors, officers, and personnel of the parent corporation headquartered in Louisiana. The court in *Fajardo* found the important facts to be that the vessel in question had never been in United States waters and she had derived all her income from overseas employment. The court further determined that the "cold objective look" demanded by *Rhoditis* must be directed at both the shipowner and the ship. Therefore, while the vessel owner in fact may have a base of operations in the United States, where the vessel itself has little connection with the United States, the application of American law is not justified.[76]

Chiazor has caused a "domino effect" in the foreign offshore oil worker injury cases, virtually eliminating the availability of United States law to this class of potential maritime injury plaintiffs, despite American ownership and control and an American base of operations, all of which are now considered insignificant. At the other end of the spectrum, however, the foreign "bluewater" seamen cases are still viable and continue to emphasize American beneficial ownership and an American base of operations as the most significant factors justifying application of American laws. Reconciling these divergent results has become increasingly difficult.

"SUBSTANTIAL CONTACTS" VERSUS "INTEREST ANALYSIS"—REAL OR IMAGINED CONFLICT

Two apparent conflicts currently exist in the maritime injury choice of law jurisprudence. First, a conflict has developed within the "bluewater" setting between the Third Circuit on the one hand and the Second and Fifth Circuits on the other. The Third Circuit emphasizes a more reasoned "comparative interest analysis," while the

75. C.A. No. 80-5094 (E.D. La. 1982) (unreported opinion of Schwartz, J.).

76. *Compare Fajardo with* Castanho v. Jackson Marine, Inc., 484 F. Supp. 201 (E.D. Tex. 1980), discussed in text at notes 47-48, *supra*. Such a comparison will vividly illustrate how two courts can approach the same basic factual situation and achieve divergent results.

Second and Fifth Circuits adhere to a more liberal "substantiality" test, focusing only on this country's contacts and ignoring the interests of other nations, even though those interests may be paramount. Second, a basic philosophical conflict exists between the choice of law analysis employed in the "bluewater" cases and that employed in the offshore oil cases, with a more substantial American nexus being required in the latter cases than in the former. Whether these conflicts are real or imagined from a technical sense becomes important only in connection with assessing the prospects of the Supreme Court granting certiorari to resolve the "conflicts." The conflicts in result, nevertheless, are very real from a practical viewpoint.

The first conflict pits the Second Circuit (*Bartholomew*) and Fifth Circuit (*Fisher*) against the Third Circuit (*DeMateos* and *Chirinos de Alvarez*).[77] In "bluewater" cases, the liberal, expansive application of American laws to foreign injury claimants, exemplified by *Bartholomew, Moncada, Antypas, Mattes,* and *Fisher,* results from those courts' efforts to "effectuate the liberal purposes" of American maritime law by determining the "substantiality" of American contacts in isolation, without regard to whether the interests of some other nation outweigh the interests of this country. The source of this approach was not the Supreme Court but rather the Second Circuit opinion in *Bartholomew,* which undertook a description of the "decisional process" to be employed in a choice of law analysis and was given apparent Supreme Court sanction when cited with approval in *Rhoditis*.[78] The Second Circuit in *Bartholomew* stated:

> Accordingly, the decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial. Thus each factor is to be "weighed" and "evaluated" only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of whether all the factors present add up to the necessary substantiality. Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act.[79]

The Third Circuit, first in *DeMateos* and later in *Chirinos de Alvarez,* concluded that the teachings of *Lauritzen, Romero,* and *Rhoditis* did

77. *See* Watson, *Applicable Law in Suits by Foreign Offshore Oil Workers,* 41 LA. L. REV. 827, 846-49 (1981); Comment, *Striking the Colors: Choice of Law Under the Jones Act,* 21 VA. J. INT'L L. 577, 590-95 (1981).

78. 398 U.S. at 309 n.4.

79. 263 F.2d at 441.

not ignore the interests of other nations but, on the contrary, required that a court "should determine the substantiality of the links to the United States and the links to the foreign sovereignty" in order "to discern in whose 'domain' the paramount interest lies."[80] Although the Third Circuit thus articulated a "test of substantiality," the test essentially was a comparative interest analysis, with the result that "substantiality" became the functional equivalent of paramount interest. In other words, if a foreign nation's interest is deemed "substantial," the United States contacts are not. Under this approach, "substantial contacts" with the United States can not exist where the foreign contacts are more "substantial" after appropriate weighing and evaluation, contrary to the *Bartholomew* approach. Except for the unfortunate citation of *Bartholomew* with approval in *Rhoditis*, there is nothing in *Lauritzen*, *Romero*, or *Rhoditis* that suggests that such a comparative interest analysis is inappropriate. In fact, as construed by the Third Circuit, the Supreme Court clearly had called for such comparison. The comparative interest analysis approach to the "substantiality of contacts" question is the most reasonable approach, especially when compared with the shocking result in *Fisher v. Agios Nicolaos V*, which is an example of blind adherence to the *Bartholomew* approach and an exercise in the "social jingoism decried in *DeMateos*."[81]

The second conflict is an outgrowth of the first, in that the choice of law analysis now firmly established in the offshore oil setting clearly has followed the path of the Third Circuit's comparative concept of "substantiality." However, the rules as applied in the offshore cases resulted in many contacts thought to be controlling or "super-substantial" in the "bluewater" setting becoming insignificant in the offshore setting. Factors such as an American flag, an American registration, American ownership, American control, or even an American base of operations, are no longer dispositive of the foreign offshore oil case, even though the same factors in a "bluewater" case probably would dictate application of American law.

The leading offshore oil cases, *Phillips* in the Ninth Circuit and *Chiazor* in the Fifth Circuit, ostensibly are applying the same choice of law test as in the "bluewater" cases, but the widely divergent results suggest that either a different test is in fact being employed or the test is being applied in a substantially different manner. In *Phillips*, the Ninth Circuit, while giving lip service to the "substantial contacts" test, clearly felt unrestrained in opting for a comparative interest analysis approach, when rejecting the absolute approach of *Bartholomew*. The Ninth Circuit in *Phillips*, like the Third Circuit in

80. *Chirinos de Alvarez*, 613 F.2d at 1246.

81. Dos Santos v. Reading & Bates Drilling Co., 495 F. Supp. 843, 847 (E.D. La. 1980).

Chirinos de Alvarez, viewed a given transaction as having "substantial contacts" with one competing nation or another, but not both, and applied the law of the nation which had the "greater interest" in having its laws applied to the controversy.[82]

Despite its absolutist approach in *Fisher v. Agios Nicolaos V*, which is hopefully an aberration that is dying on the vine, the Fifth Circuit, beginning with *Chiazor*, also has effectively used the comparative interest analysis approach in the offshore setting.[83] Although the test still is acknowledged to be one of "substantial contacts," the court is engaging in an interest analysis. Whether in fact a test is being employed in the offshore setting which is different from that employed in the "bluewater" setting, as some suggest,[84] or whether the same test is merely being applied differently, the conflict, if real rather than imaginary, has not garnered the attention of the Supreme Court, which consistently has denied certiorari in every such case to date.

CURRENT CONTROVERSIES

Two issues remain uncertain in maritime injury choice of law cases, particularly in the area of the foreign offshore oil worker. The first is whether a distinction should be made in the choice of law analysis in the foreign offshore oil worker context where the foreign plaintiff is a "third country national," neither a citizen nor a resident of the place where the drilling venture is being conducted, nor a United States expatriate. The second issue is whether American citizenship automatically entitles a seaman, whether merchant seaman or offshore oil worker, to application of American maritime law.

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82. The opinion of the Ninth Circuit expressed its concept of "substantiality" in these terms: "Substantiality is a relative term, and *Lauritzen* requires that we compare the substantiality of our interest in a given transaction with that of other nations. . . . This is a comparative, and not an absolute, evaluation." *Phillips*, 632 F.2d at 86. The ultimate inquiry was expressed in the following language: "The question before us is whether the United States or Trinidad has the greater interest in having its legal standards applied to these facts." *Id.* at 88.

83. The *Chiazor* court stated:

> When viewed in this light, it cannot be said that the district court erred in finding there were substantial contacts with Nigeria, rather than the United States. . . . As in *Lauritzen*, . . . the overwhelming preponderance of the factors favor the application of Nigerian rather than American law as governing the employment and accident in question.

648 F.2d at 1019. See also De Oliveira v. Delta Marine Drilling Co., 684 F.2d 337, 340 (5th Cir. 1982), where the court reversed the district court's choice of American law, because "the contacts with Brazil preponderate." Finally, see Borralho v. Keydril Co., No. 81-2436 (5th Cir. Jan. 27, 1983), in which the court embraced the comparative concept of substantiality by noting that "the contracts with the United States are insubstantial when compared with those to Brazil . . . ."

84. *See* Bailey v. Dolphin Int'l, Inc., 1982 A.M.C. 1174, 1176 (S.D. Tex. 1982), *appeal docketed*, No. 82-2060 (5th Cir. Feb. 5, 1982).

In most of the leading decisions in the foreign offshore worker arena, the foreign injured workers were citizens and residents of the country in whose waters the drilling venture was being conducted. The courts in these cases apparently placed some emphasis on the fact that these foreign workers were hired in their home country to work in the waters of their home country in a rather permanent drilling operation, thus making it reasonable that their home law, rather than the law of the United States, be applied to determine their rights and remedies. More uncertain is the case of the third country national employed to work for an American-based oil company in foreign waters other than those of his home country. *Bailey v. Dolphin International, Inc.*[85] made no distinction and held that American law would not be applied in connection with the death of a Filipino electrician killed aboard a Panamanian flag drilling barge operating off the coast of Indonesia. The drilling barge was owned by a Panamanian subsidiary of an American company based in Houston, Texas. The plaintiff was employed by the Panamanian subsidiary, having been employed in Singapore, where a foreign office of the employer and rig owner was maintained and from which place the day-to-day operational decisions were implemented. While the American office of the parent company monitored and maintained some supervision over the activities of the drilling barge off the coast of Indonesia and, in fact, paid the wages of the deceased Filipino worker on behalf of its Panamanian subsidiary from Texas, a *Chiazor*-type analysis convinced the district court that there were not sufficient substantial contacts to justify application of American law to the controversy. Four different countries potentially had an interest in applying their law to this case—the Phillipines (to whom the plaintiff owed allegiance and which was the residence of his widow and children), Indonesia (the place of the wrong and in whose waters the drilling activity was being conducted), Singapore (in whose jurisdiction the plaintiff was employed and from which the day-to-day business of the drilling rig was conducted), and the United States. The district court's choice of law analysis simply concluded that United States law would not be applied. The court did not further choose among the potential foreign laws. The court dismissed the case on grounds of forum non conveniens, despite the plaintiff's argument that there was no available forum which was more convenient than the United States as each of the other potential jurisdictions was somewhat inconvenient.[86] The district court seemingly was

85. 1982 A.M.C. 1174 (S.D. Tex. 1982), *rev'd & remanded on other grounds*, No. 82-2060 (5th Cir. Feb. 17, 1982).

86. The court dismissed the action on the condition that the defendants submit to service of process "in an appropriate foreign court," leaving to the plaintiff the determination of which foreign court that might be. 1982 A.M.C. at 1178.

correct in viewing its function as determining only whether United States law was to be applied in the first instance and, once concluding that United States law was inapplicable, taking up the second and distinctive issue of forum non conveniens. Only if the district court should conclude that matters of convenience dictated retaining the case in the United States court, should it have to determine which of the competing foreign laws would in fact be applied.

Thus, while the case of the third country national presents additional problems, those problems are best dealt with as a forum non conveniens issue and not a choice of law analysis, which focuses only on whether or not United States laws should be applied. *Bailey* has been decided recently by the Fifth Circuit. A recent Fifth Circuit decision, *Zekic v. Reading & Bates Drilling Co.*,[87] affirmed a trial court decision that American law would not apply in a case involving a third country national, although it does not appear in the decision of either the trial court or the Fifth Circuit that any substantial argument was presented that a distinction should be made in such a case. In *Zekic*, a Yugoslav plaintiff was injured off the coast of Italy on a drilling barge. The district court concluded that Italian law applied, and dismissed the action, with the Fifth Circuit affirming the choice of law analysis but vacating in part and remanding the case only on the question of whether the dismissal should have been conditional or unconditional.

The second question, which has never been thoroughly presented for decision, is whether American citizenship of an injured or deceased maritime worker, whether "bluewater" or offshore oil worker, automatically commands that United States law will be applicable, even though all other traditional choice of law factors indicate that application of foreign law is appropriate. In one of the early "bluewater" seaman cases, *Symonette Shipyards, Ltd. v. Clark*,[88] American citizenship was held to be the most significant choice of law factor in applying American law; the injured seamen were employed in the United States to work on a foreign vessel and were injured in foreign waters. On the other hand, United States residence of an alien seaman generally has not been a significant factor in the choice of law analysis.[89]

87. 680 F.2d 1107 (5th Cir. 1982), *aff'g* 536 F. Supp. 23 (E.D. La. 1981).

88. 365 F.2d 464 (5th Cir. 1966).

89. *See* Tjonaman v. A/S Glittre, 340 F.2d 290 (2d Cir. 1965) (United States residence of alien seaman and signing of shipping articles in the U.S. held insufficient). Post-accident establishment of United States residence also has received little attention in the choice of law factor analysis. *See* Nunez-Lozano v. Rederi, 634 F.2d 135 (5th Cir. 1980); Frangiskatos v. Konkar Maritime Enters., S.A., 471 F.2d 714 (2d Cir. 1972); Cruz v. Maritime Co. of Philippines, 549 F. Supp. 285 (S.D.N.Y. 1982); Helu v. Nauru Pacific Line, 1978 A.M.C. 1996 (N.D. Cal. 1978); Rivadeneira v. Skibs A/S Snefon, 353 F. Supp. 1382 (S.D.N.Y. 1973).

Although many courts have assumed that American citizenship alone would be sufficient to justify the application of the Jones Act or United States maritime law to an otherwise foreign controversy, there is no sound reason for that assumption. Indeed, many cases arising under the related forum non conveniens doctrine suggest a trend away from "according a talismanic significance to the citizenship or residence of the parties."[90] A number of recent cases, not necessarily maritime in character, have denied actions to American citizens or residents in the United States, even against American defendants, where forum non conveniens factors otherwise justified dismissal.[91] No sound reason appears why American citizenship, standing alone, automatically should entitle a citizen to application of American maritime law in the absence of a further nexus with the United States and the parties or controversy. Most courts will be reluctant to turn away the American citizen seaman in a "bluewater" merchant vessel case, particularly if he is a resident of this country. However, there are many American citizens who clearly have established a foreign residence while working in foreign offshore oil fields around the world. Many of these Americans, for example, have moved to Singapore and have set up residence there, effectively avoiding United States taxation. Some rarely return to the United States, even on vacations. A number of suits by these American nonresident citizens are now pending. The courts soon will have to decide whether or not their citizenship alone will be sufficient to justify application of American law. There is nothing in *Lauritzen, Romero, Rhoditis*, or any other case which clearly mandates application of American maritime law solely by virtue of the plaintiff's citizenship.

On the other hand, with respect to the American citizen and resident who is recruited in the United States to work overseas for a specific but temporary term and who does not give up his permanent United States residence, courts are unlikely to deny the benefits of the Jones Act and American maritime law. In any event, just as the American flag no longer compels application of American maritime law in a maritime injury case,[92] neither does American citizenship.

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90. Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 154 (2d Cir. 1980) (en banc), *cert. denied*, 449 U.S. 890 (1980).

91. *Id.*; Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980); Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978); Abiaad v. General Motors Corp., 538 F. Supp. 537 (E.D. Pa. 1982).

92. The prior jurisprudence was to the effect that an American flag vessel automatically carried with it the umbrella of American law. The Second Circuit indicated as much in *Bartholomew* when it stated, "Yet could anyone doubt that if the ship flew the American flag, without more, the Jones Act would apply?" 263 F.2d at 440. See also Carlson, *The Jones Act and Choice of Law*, 15 INT'L LAW. 49, 61 (1981), where it was stated, "Application of the Jones Act to any seaman aboard a vessel

CONCLUSION

The development of choice of law rules in maritime injury cases has seen trends from one extreme to the other, with some courts seeking to expand application of American maritime law to otherwise foreign controversies with minimal connections to this country, while others have taken a clearly restrictive approach, applying American law only where the interests of this country are paramount to that of a competing foreign nation. While technically there may be no conflict and the same basic rules ostensibly are being applied, the basic philosophy of the Second and Fifth Circuits in the "bluewater" merchant vessel cases appears to directly oppose that taken by the Third Circuit, while the philosophy of the Fifth and Ninth Circuits in the offshore drilling cases clearly opposes that view generally prevailing in the "bluewater" cases.

While the time seems ripe for some clarification or assistance from the Supreme Court to help guide the courts through these tricky waters, the Court consistently has refused certiorari over the last twelve years. Perhaps the Court's recent refusal to grant certiorari in the offshore drilling cases of *Phillips, Chiazor*, and *Johnson* is a stamp of approval on the distinctive approaches taken by those courts in applying the traditional *Lauritzen-Rhoditis* choice of law analysis to an offshore drilling venture clearly not envisioned when the rules were first devised. Speculation will continue until the Supreme Court agrees to hear one of these cases.

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flying an American flag is beyond doubt."

While it still may be true that the American flag "bluewater" merchant vessel cannot escape application of American law, it certainly has not been true, *ipso facto*, in the case of special purpose vessels used in the offshore drilling and construction industry, such as jack-up and semi-submersible drilling barges. *See* Johnson v. J. Ray McDermott & Co., No. 80-2378 (5th Cir. Oct. 16, 1981) (unpublished, 660 F.2d 495), *cert. denied*, 102 S. Ct. 2270 (1982); Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980); Gomez v. Sedco, 1982 A.M.C. 252 (S.D. Tex. 1981); House v. Santa Fe Int'l, Inc., 1978 A.M.C. 1899 (S.D. Tex. 1978).