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COMMENTS

A NEW LOOK AT *LAURITZEN V. LARSEN*, CHOICE OF LAW AND FORUM NON CONVENIENS

The foreign seaman's suit in admiralty in the courts of the United States is often more complicated at the outset with procedural problems than with substantive ones. The courts' power to assume jurisdiction over a foreign seaman's suit in admiralty is very broad,¹ so broad in fact that some self-imposed limitations must be exercised to prevent litigants having minimal contacts with the United States from swelling court dockets with their disputes.² The procedural concept for this self-imposed reticence to retain a suit for trial notwithstanding the court's power to do so when a more appropriate forum for trial exists elsewhere is termed a dismissal on forum non conveniens grounds.³ While forum non conveniens has been invoked by federal courts sitting in admiralty for at least 175 years,⁴ the history of its application can be described as erratic even granted that its exercise rests within a court's discretion.⁵ In clearly domestic admiralty suits which present only the issue of which United States forum is most convenient, the forum non conveniens doctrine has been clarified by statute and expounded upon specifically by the United States Supreme Court.⁶ The same is not true for cases where foreign seamen seek a United States forum for their maritime suits.⁷

1. *The Belgenland*, 114 U.S. 355 (1855); *Heredia v. Davies*, 12 F.2d 500 (4th Cir. 1926). See also *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463 (5th Cir.), cert. denied, 353 U.S. 938 (1957); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), aff'd, 323 F.2d 873 (2d Cir. 1963); *Retzekas v. Vyglas S.S. Co., S.A.*, 193 F. Supp. 259 (D.R.I. 1960); *Kontos v. Sophie C.*, 1960 A.M.C. 1344 (E.D. Pa. 1960); I.M. NORRIS, *THE LAW OF SEAMEN* 16 (3d ed. 1970); Morrison, *The Foreign Seaman and the Jones Act*, 8 MIAMI L.Q. 16, 17 (1953). In admiralty basic powers of jurisdiction are assumed in any controversy if service of process can be effected. Cohn, *Choice of Forum in Maritime Personal Injury Torts*, 54 ILL. B.J. 966, 969 (1966).

2. See generally Morrison, *supra* note 1.

3. "The doctrine is patterned upon the right of the court in the exercise of its equitable powers to refuse the imposition upon its jurisdiction of the trial of cases even though the venue is properly laid if it appears that for the convenience of litigants and witnesses and in the interest of justice the action should be instituted in another forum where the action might have been brought." BLACK'S LAW DICTIONARY 783 (4th rev. ed. 1968).

4. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 13 (1949), citing *Willendson v. Forsoket*, Fed. Cas. No. 17, 682 (D.C. Pa. 1801).

5. See Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. L. REV. 24, 26 (1973).

6. *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960); see 28 U.S.C. § 1404(a) (1970).

7. Note, 44 FORDHAM L. REV. 413, 414 (1975).

The mere fact that a suitor is a foreign seaman does not bring into play the doctrine of *forum non conveniens*.⁸ Foreign seamen's suits broadly fall into two categories: those which involve a cause of action based on the laws of the United States and those which do not. *Forum non conveniens* as applied to foreign seamen is properly concerned only with the latter class of cases, those in which a foreign seaman has no cause of action based on the laws of the United States.⁹ When a foreign seaman has a cause of action based on the laws of the United States the seaman comes by right into the courts and the retention of his suit based on domestic law should be mandatory.¹⁰ Retention of the suit is not discretionary, because once the scope of United States law has been defined the judiciary is not free to adjudicate selectively the effects of the law. Therefore, the object of judicial inquiry at the outset of a foreign seaman's suit is to determine the applicable law,¹¹ and only if United States law is found not to govern the suit should the appropriateness of the United States forum be examined.

The Supreme Court has on three occasions discussed the applicability of United States law in a foreign seaman's suit.¹² Nevertheless, some courts continue to blur the distinction between the inquiry necessary to determine whether a foreign seaman's suit is to be heard by right in the United States because federal law is applicable, and the different inquiry appropriate for deciding whether a suit falls within the discretionary ambit of a *forum non conveniens* dismissal.¹³ This comment will attempt to delineate such a distinction within the context of the most common cause of action a foreign seaman alleges in United States courts, maritime personal injuries.¹⁴ First, those cases in which a foreign seaman has a cause of action based on United States law will be discussed.

8. See Morrison, *supra* note 1, at 17.

9. See Note, 58 CALIF. L. REV. 491, 499 (1970).

10. Robinson, *Admiralty Law: The Plaintiff's Choice of the Forum* (pt. 2), 15 NACCA L.J. 220, 231 (1955) [Hereinafter cited as Robinson II]. Few, if any, cases will be found that openly suggest that a suit should be dismissed if it is properly based on United States law. Rather, the controversy is frequently framed in terms of whether United States law applies at all, yet courts improperly apply *forum non conveniens* discretionary considerations to proper law determination. It is the purpose of this comment to clearly delineate separate considerations of choice of law and *forum non conveniens*.

11. See Robinson II, *supra* note 10, at 231.

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

13. Note, 44 TUL. L. REV. 347, 352 (1970).

14. For a discussion of the various causes of action a foreign seaman could claim in the United States, see generally Bickel, *supra* note 4.

Thereafter, the area of forum non conveniens will be explored in those cases in which a foreign seaman's claim is not based on federal law.

A Federal Cause of Action

The critical issue in discussing whether United States law applies to a foreign seaman's personal injury suit is the extent to which the Jones Act¹⁵ governs his cause of action. A literal reading of the Jones Act, which grants a right for personal injury damages to "any seaman," suggests that "a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording."¹⁶ While an extremely forceful argument can be made that Congress intended to protect any seaman in an action against any employer regardless of the foreign nature of the tort,¹⁷ the courts¹⁸ and many commentators¹⁹ have taken the view that Congress intended for the judiciary to interpret the term "any seaman."

Today, through a half-century of judicial interpretation, it is clear that the Jones Act does not apply to "any seaman." The Jones Act has always been applied to seamen, regardless of their nationality, if they were injured aboard United States flag vessels.²⁰ The rationale for such applications, in absence of express Congressional intent, can be easily supported by the premise that Congress must have intended the Jones Act to apply at the very least to its citizens' ships, but early cases also buttressed their opinions with the international conflict of law notion that the law of the flag should govern the law which was to be applied.²¹

15. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688 (1920).

16. *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).

17. Harolds, *Some Legal Problems Arising out of Foreign Flag Operations*, 28 *FORD-HAM L. REV.* 295, 309 (1959).

18. *E.g.*, *Uravic v. F. Jarka Co.*, 282 U.S. 234 (1931).

19. *E.g.*, Morrison, *supra* note 1; Comment, *Admiralty—Conflict of Laws—Application of the Jones Act*, 53 *MICH. L. REV.* 100 (1954); Note, 49 *N.C.L. REV.* 320 (1971).

20. Comment, *Admiralty—Conflict of Laws—Application of the Jones Act*, 53 *MICH. L. REV.* 100 (1954).

21. See *RESTATEMENT OF CONFLICT OF LAWS* § 405 (1934).

When non-United States flag vessels were involved in a foreign seaman's suit, however, a whole range of domestic and international conflict of law principles was applied by the early courts to determine the possible applicability of the Jones Act. Nevertheless, the clear trend in these cases was steadily toward a very broad application of the Jones Act based on minimum points of contact of foreign interests with the United States.²²

In an attempt to bring some order to the Jones Act's application to foreign seamen injured aboard foreign ships, in 1953 the Supreme Court decided the case of *Lauritzen v. Larsen*.²³ In *Lauritzen*, a Danish seaman was injured in Cuban waters aboard a Danish flag vessel registered in Denmark, and the sole American contact the seaman alleged was that he signed his Danish language employment contract in the United States. The foreign seaman argued that his employer's "doing business" in the United States was sufficient to render the employer liable for damages under the Jones Act.²⁴ The Supreme Court held that the foreign seaman was not protected by the Jones Act, and in so doing the Court took occasion to discuss and evaluate many of the various conflict of law principles that various lower courts had used to justify applying the Jones Act to foreign seamen. Before adopting or rejecting any specific principle, the Court appropriately held that the Congressional intent in enacting the Jones Act was for the act to operate within the context of international conflict of law principles.²⁵

The Court's discussion of the various conflict of law principles was organized in a deceptive "list" of *seven principles* which some lower courts regarded as an organic quantitative test.²⁶ Rather than establishing a quantitative test in which several factors are weighed to determine the applicability of United States law, the *Lauritzen* Court endeavored to discuss primarily the two major conflict of law principles then in use in the United States in this context: the law of the place where the tort was committed, or *lex loci delicti commissi*,²⁷ and the law of the flag.

22. See the early judicial trend in Jones Act litigation discussion in Comment, *Admiralty—Conflict of Laws—Application of the Jones Act*, 53 MICH. L. REV. 100 (1954).

23. 345 U.S. 571 (1953).

24. The foreign employer moved for dismissal on subject matter jurisdictional grounds. 345 U.S. at 575. This is the usual method of excepting to a foreign seaman's allegation of Jones Act applicability. Note, 58 CALIF. L. REV. 491, 492 (1970).

25. 345 U.S. at 577.

26. Cf. *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 900 (3d Cir. 1977) ("[o]f the seven factors discussed in *Lauritzen* the first six concededly point toward the inapplicability of American law to the instant death claim").

27. See BLACK'S LAW DICTIONARY 1056 (4th rev. ed. 1968).

Holding the law of the flag to be the governing principle in most cases, the Court then discussed two contacts with the United States, either one of which could override this major principle—the litigant's domicile in the United States and the litigant's allegiance to the United States. Finally the court discussed those litigant contacts with the United States which would never override the law of the flag application.

A primary conflict principle for land based torts is that the *lex loci delicti commissi* governs the law to be applied in a foreign litigant's suit,²⁸ and it was entirely appropriate for the Court to begin its discussion with this principle. Although place of wrongful act was irrelevant in this case and had not been raised by the parties, the Court emphasized the importance of clarifying the issue because of earlier cases which had held that a United States locus of a foreign seaman's injury was sufficient contact to warrant application of the Jones Act.²⁹ The Court held that the place of wrongful act has little or no significance to torts committed on board ship for a host of reasons, consistency in the application of law to foreign litigants being the primary consideration.³⁰ A necessary concomitant to foreign commerce is visitation by nationals of one country to ports of many others, and commerce is hindered if the rights and responsibilities of seaman and shipowner vacillate from port to port pursuant to municipal law.

The Court held that in personal injury suits brought by foreign seamen, the law of the flag was the recognized international conflict of law principle which should determine the applicable law.³¹ The law of the flag offers a consistency to foreign seamen which *lex loci delicti* cannot and is historically associated with the nationality of the litigants.³² This latter consideration may not still be fact today, but the consistency of law rationale remains sound.³³

28. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) ("the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 145 (1971).

29. See note 22, *supra*.

30. 345 U.S. at 584.

31. *Id.* at 585.

32. *Id.*

33. Prior to World War II the United States Government encouraged the use of foreign flags of convenience on American ships to facilitate trade with allies and yet technically abide by neutrality commitments. Comment, *The Better Part of Valour—Applicability of the Jones Act to the Flags of Convenience Fleet*, 7 SAN DIEGO L. REV. 674 (1970). After the war American vessel owners discovered that they could cut operating and labor costs dramatically by maintaining their flags of convenience and utilizing foreign corporations to own their vessels nominally. See Harolds, *Some Legal Problems Arising Out of Foreign Flag Operations*, 28 FORDHAM L. REV. 295 (1959); Robinson, *Admiralty*

However, the Court suggested in very specific language that either of two factors could overcome the presumption that the law of the flag governs a foreign seaman's suit.³⁴ The Court noted that the United States domicile or allegiance of the injured seaman could be an overriding consideration in favor of applying the Jones Act to foreigners. The Court indicated that the parameters of this consideration needed careful scrutiny, for the injured seaman in *Lauritzen* had resided temporarily in New York prior to his injury, yet the Court held that this was not enough to override the law of the flag.³⁵ Furthermore, the Court noted that allegiance or domicile of the shipowner, if such was the United States, could override the flag considerations and make the Jones Act applicable to foreign seamen because "a state 'is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or other nationals are not infringed.'"³⁶

Finally, the Court discussed those conflict of law principles which should have no bearing on choice of law problems in admiralty tort suits between foreigners. Prior to *Lauritzen*, signing a contract in the United States had been held to warrant application of the Jones Act when a

Law: The Plaintiff's Choice of the Forum, 14 NACCA L.J. 184 (1954); Shils, *Flags of Necessity, Flags of Convenience or Runaway Ships*, 13 LAB. L.J. 1009 (1962); Note, 16 S.C.L. REV. 409 (1964). Today, a majority of the Liberian fleet is probably owned by Americans, and the trend continues. See Robinson, *supra*; Shils, *The "Flag of Necessity" Fleet and the American Economy*, 13 LAB. L.J. 151 (1962). While some favor a judicial weighing of political factors in determining Jones Act applicability to a foreign flag ship (*see, e.g.*, Note, 16 VILL. L. REV. 148 (1970)) to prevent the application of a popularly assumed "flag nationality's" law to American ships (*see* Note, 36 TUL. L. REV. 319 (1962)), the entire problem ought not be a subject of judicial consideration. *Lauritzen* noted that it was the policy of the United States to assume that a vessel's registry with a foreign state is bona fide unless questioned by that state. 345 U.S. at 584. The *Lauritzen* decision is certainly broad enough to make allowances for American owners of foreign flag vessels without creating new tests to determine the validity of a vessel's registration. See discussion in text at note 35, *infra*. The case of *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), is further support for this proposition.

34. The Court stated that the law of the flag is to prevail "unless some heavy counter weight appears." 345 U.S. at 586. Immediately following this statement the Court stated "each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support," and noted that American courts currently applied the Jones Act to United States domiciliaries. *Id.* Finally, the Court declared an equivalent interest in applying United States law to citizens of this country regardless of a vessel's "foreign nominal registration," and noted the current practice of applying the Jones Act to these persons by the courts. *Id.* at 587.

35. 345 U.S. at 587.

36. *Id.*

foreign seaman was also injured in United States waters.³⁷ The next logical step was to assert, as the seaman in *Lauritzen* did, that an American situs for the contract by itself was enough to invoke the Jones Act. The Court held that the place of contract is a consideration when contractual rights are involved, not delictual ones, and dismissed the argument.³⁸ Dismissing a second conflicts principle, the Court held that inaccessibility of a foreign forum is a *forum non conveniens* consideration which has no bearing on the proper application of law.³⁹ The Court also completely dismissed the argument that the law of the forum has anything to do with the law to be applied in a suit between foreigners.⁴⁰ Yet despite the Court's clear holding that place of contract, forum accessibility, and law of the forum have no relevance in determining Jones Act application to foreign suits, lower courts inexplicably continue to discuss and "weigh" these factors in making this decision.⁴¹

It is clear that the basic holding of *Lauritzen* has not been intentionally changed by the Supreme Court in subsequent years⁴² and that it remains the leading decision in choice of law considerations for foreign seamen. In *Romero v. International Terminal Operating Co.*,⁴³ the Court reiterated its *Lauritzen* holding that the law of the flag governs choice of law questions in preference to the *locus delicti* when a foreign seaman is injured aboard a foreign-flag vessel in the United States and neither of the overriding factors is present.⁴⁴ The subsequent holding in *Hellenic Lines Ltd. v. Rhoditis*,⁴⁵ that a foreign shipowner permanently domiciled in the United States was a Jones Act employer for purposes of a foreign seaman's personal injury suit, was also entirely consistent with *Lauritzen's* suggestion that the United States domicile or allegiance of a foreign shipowner could justify applying the Jones Act. However, in a four page opinion, Justice Douglas used language in rendering the decision which can be read to support a discretionary balancing test of the

37. Note, 44 TUL. L. REV. 347, 350 n.19 (1970).

38. 345 U.S. at 589.

39. *Id.* at 589-90.

40. *Id.* at 592.

41. See, e.g., *Rode v. Sedco, Inc.*, 394 F. Supp. 206 (E.D. Tex. 1975); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 323 F.2d 873 (2d Cir. 1963).

42. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 472 (2d ed. 1975).

43. 358 U.S. 354 (1959). See discussion of the case in Comment, *United States: Suits by Foreign Seamen; Jurisdiction and Choice of Law*, 9 AM. J. COMP. L. 508 (1960).

44. 358 U.S. at 384.

45. 398 U.S. 306 (1970).

Lauritzen factors which a court may use in deciding whether to apply the Jones Act.

The respondent in *Rhoditis* was a Greek national domiciled in the United States who owned 95% of the stock in the Greek corporation which managed a vessel on which a Greek seaman was injured. The ship itself was fictionally owned by a Panamanian corporation whose stock was also ultimately owned by the respondent. The respondent could have been held to be a Jones Act employer because he was a United States domiciliary, but instead Justice Douglas referred to the *Lauritzen* discussion of conflict of law principles as a test "in determining whether the Jones Act is applicable," and added the shipowner's "base of operations" as "another factor of importance." Indeed, the majority noted that "there well may be others"⁴⁶ among the "factors" for determining Jones Act coverage. Thus, while *Lauritzen* had discussed conflict principles, the language in *Rhoditis* may have lent support to an argument suggesting that *Rhoditis* changed the criteria to "contacts" needed to apply the Jones Act to foreigners.

Lauritzen was misinterpreted by many courts⁴⁷ and was confusing in some respects,⁴⁸ but at the very least the case held that the Jones Act should not apply to foreign seamen injured on foreign flag vessels unless either the shipowner or the injured seaman is domiciled in or bears allegiance to the United States. However, in post-*Rhoditis* litigation lower courts are proceeding in diverse directions to find the applicable law for foreign seamen's suits, a diversity due in large part to the almost parenthetical remarks in *Rhoditis* that a court decides choice of law questions by considering unenumerated "factors" in a "test" of United States contacts rather than by deferring to the international conflict of law principles discussed in *Lauritzen*. Two completely adverse federal circuit trends can be observed in this context with both trends drawing support from *Rhoditis* language.

The *Rhoditis* language was criticized soon after the case's rendering. It was argued that virtually no contact of a foreign shipper with the

46. *Id.* at 309. Another manifestation of loose language in the decision is the Justice's statement, "The injury occurred here," in context appearing to support the holding. *Id.* at 310. It can now be argued that there is Supreme Court authority for a *lex loci commissi* choice of law determination notwithstanding *Lauritzen* and *Romero*. There already exists a post-*Romero* appellate suggestion that *locus delicti* is a valid consideration. *Gkiasis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967).

47. Note the multiple uses to which the courts have put the *Lauritzen* criteria, as discussed in Note, 44 TUL. L. REV. 347, 352 (1970).

48. Morley, *supra* note 5; Note, 44 FORDHAM L. REV. 413 (1975).

United States would be found insignificant on this case's authority,⁴⁹ and Second Circuit cases, at least, are proving this argument to be prophetic. In *Antypas v. Cia. Maritima San Basilio, S.A.*,⁵⁰ a foreign shipper with a New York based managing agent was held sufficiently connected with the United States under *Rhoditis* to warrant application of the Jones Act to a suit brought by one of his injured foreign seamen.⁵¹ The Second Circuit noted that the amount of business a foreign shipper derives from the United States is significant for applying the Jones Act⁵² even though the *Lauritzen* court specifically held that business contacts alone are not sufficient for a choice of law determination because the essence of the shipping trade is foreign business contacts.⁵³ However, the broadest extension of this reasoning thus far was made in *Mattes v. National Hellenic American Lines, S.A.*,⁵⁴ where a host of United States business "contacts" by a foreign shipper was found sufficiently significant to warrant application of the Jones Act to foreign shippers because "they put themselves in direct competition with American companies."⁵⁵

This trend is surely supported by some of the language in *Rhoditis*,⁵⁶ but has support in neither the theoretical framework of

49. Note, 49 N.C.L. REV. 320, 329 (1971) ("Extension of the reasoning applied in *Rhoditis* would leave virtually no contact insufficient for the application of American law. Maintenance of a United States office could be the critical factor rendering a legitimate foreign shipper liable under the Jones Act.").

50. 541 F.2d 307 (2d Cir. 1976).

51. There were also suggestions by the majority that ownership of the vessel might be partially vested in United States citizens. 541 F.2d at 310. However, the dissent noted a complete lack of evidence in this respect, and the majority's decision apparently did not rest on this basis. *Id.* at 310-11.

52. There are cases which have suggested that one-ship foreign companies taking on cargo in the United States are doing *all* their business here at that time for Jones Act purposes. *Gkiafis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967); *Gomez v. Karavias U.S.A., Inc.*, 401 F. Supp. 104 (S.D.N.Y. 1975). *See also Elefteriou v. Tanker Archontissa*, 443 F.2d 185 (4th Cir. 1971).

53. 345 U.S. at 590 ("The 'doing business' which is enough to warrant service of process may fall quite short of the considerations necessary to bring extraterritorial torts to judgment under our law We have held it a denial of due process of law when a state of the union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state.").

54. 427 F. Supp. 619 (S.D.N.Y. 1977) (United States bank accounts, marketing agents, advertising, letter head mailings to parties in the United States, and past American crew membership).

55. *Id.* at 626.

56. 398 U.S. at 310 ("We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer.'") (emphasis added).

Lauritzen nor in legislative history. For example, the Senate Report⁵⁷ on a section of the Death on the High Seas Act,⁵⁸ passed in close proximity to the Jones Act, states: "From a review of the authorities it is not believed that the Congress has the power to create a substantive right of action to recover damages against foreigners and their vessels for wrongful death on the high seas."⁵⁹ This legislative sentiment makes it entirely unlikely that the Jones Act was ever meant to apply to foreign seamen injured on foreign flag vessels unless the foreign litigants have some personal connection with the United States.

Completely at odds with the Second Circuit trend is the Third Circuit case of *DeMateos v. Texaco, Inc.*⁶⁰ In this case the estate of a Panamanian seaman killed on the high seas brought suit under the Jones Act against Texaco Panama, Inc., a Panamanian corporation that owned the ship upon which the seaman met his death.⁶¹ The admitted ultimate owner of all of the defendant's vessels was Texaco, Inc., a Delaware corporation.⁶² Although admitting that its vessels regularly called at ports in New Jersey, Pennsylvania, and Delaware, the defendant moved for a dismissal of the plaintiff's suit on forum non conveniens grounds and the nonapplicability of United States law.

Relator argued that the disguised base of operations of the entire Texaco, Inc., enterprise was New York City and that ultimate United States ownership interests made the Jones Act applicable under *Rhoditis*. The trial court had rejected this argument even though the defendant's main corporate officer in Panama was American, on grounds of "comity" for a previous Panamanian court decision in the defendant's favor.

57. S. REP. NO. 216, 66th Cong., 1st Sess. (1919).

58. 46 U.S.C. §§ 761-68 is popularly referred to as the Death on the High Seas Act. It was passed into law on March 20, 1920. The Jones Act in its present form was passed into law on June 5, 1920.

59. S. REP. NO. 216, 66th Cong., 1st Sess. § 4 (1919). See also 59 CONG. REC. 4482 (1920).

60. 562 F.2d 895 (3d Cir. 1977).

61. A typical fact pattern [for flags of convenience] is as follows:

A vessel is owned and registered in Liberia by a Liberian corporation. The Liberian corporation, with only a nominal office in Liberia, is wholly owned by a Panamanian corporation, having only a nominal office in Panama. The Panamanian corporation is wholly owned by a Delaware corporation with its principal place of business in New York. The vessel is involved in shipping in and out of United States ports, and has never been to Liberia.

Comment, *The Better Part of Valour—Applicability of the Jones Act to the Flags of Convenience Fleet*, 7 SAN DIEGO L. REV. 674, 675 (1970).

62. See the district court case, *DeMateos v. Texaco Panama, Inc.*, 417 F. Supp. 411 (E.D. Pa. 1976).

Moreover, the lower court held that under *Rhoditis* ultimate United States ownership of a foreign flag vessel renders shippers Jones Act employers only if a foreign shipowning corporation wholly owned by United States citizens was specifically created to defeat application of federal maritime law,⁶³ and that the burden of showing this intent is on the injured foreign seaman.⁶⁴ In reaching its decision, the trial court clearly viewed the various *Rhoditis* considerations as elements for it to weigh in a discretionary decision whether to apply United States law and retain the case for trial.⁶⁵ The Third Circuit Court of Appeals affirmed the lower court's holding on all grounds.⁶⁶

This case is clearly erroneous under the holding of *Rhoditis* alone, but it is more significant for departing radically from the theory behind *Lauritzen*. *Rhoditis* had actually presented a more arguable point to the court than did *DeMateos*. The *Rhoditis* court held that a shipowner domiciled in the United States was to be treated as a United States citizen owning majority stock in a foreign corporation, who would in turn be held to Jones Act standards of care for his seamen employees. The only major difference in the facts of *Rhoditis* and *DeMateos* was that the ultimate ownership of the foreign ship in *Rhoditis* was by a mere United States domiciliary, while in *DeMateos* it was by United States citizens. Prior to this decision there was little doubt that ultimate United States ownership of a ship mandated the application of the Jones Act.⁶⁷ As one case held, retention of a Jones Act claim is not a matter of discretion and either "the facts warrant the application of the Jones Act or they do not."⁶⁸

The Second⁶⁹ and Third Circuit decisions, hopelessly irreconcilable

63. There is some commentary support for this argument. See, e.g., Comment, *Choice of Law and the Foreign Seaman Under the Jones Act*, 1967 U. ILL. L. F. 639, 649 (1967).

64. This holding is much more developed in the district court case. 417 F. Supp. at 418.

65. *Id.* at 418.

66. 562 F.2d at 895. As extra weight for its holding the court noted that the plaintiff had not proved that the specific ship upon which the deceased died derived substantial revenue from United States trade and noted that there was no proof that United States citizens actually owned a majority of stock in Texaco, Inc. of Delaware. *Id.* at 902.

67. *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959).

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

69. Cases with fact patterns similar to *DeMateos* have reached an exactly opposite result in the Second Circuit. *Groves v. Universe Tankships, Inc.*, 308 F. Supp. 826

in result,⁷⁰ are very similar in basic methodology. If a foreigner has a cause of action based on United States law he comes by right into the nation's courts and not by the discretion of a federal judge sitting in admiralty.⁷¹ This is also the apparent belief in other maritime countries,⁷² and may be grounded in the belief that courts of a jurisdiction do not have the option to apply municipal law on a selective basis when the legislative intent of the law would otherwise direct its application. The *Lauritzen* holding lends support to this proposition because the Court specifically held that Congress intended for the Jones Act to be applied in the context of international conflict of law principles. Notwithstanding this, the thrust of the trends of both circuits is that a foreign ship-owner's United States contacts, evaluated on the unique criteria of each circuit, should be considered in deciding whether to dismiss the seaman's suit instead of appealing to the principles of international conflict of laws. Gone is the consistency that the law to be applied to a seaman throughout his voyage is the law of the ship's flag. Gone is the consistency of the *Lauritzen* test in determining when the Jones Act will apply. What is left is a case-by-case and highly inconsistent analysis of the "contacts" a foreign shipper may have with the United States and whether they are sufficient to invoke the Jones Act. The courts may have come full circle to the uncertainty of those pre-*Lauritzen* days.

A Foreign Cause of Action

If the seaman's complaint alleges only United States law to be applicable and subsequently federal law is found not to apply, the case must be dismissed for lack of subject matter jurisdiction⁷³ because no recognized cause of action has been pleaded before the federal court. This was the result in both *Lauritzen*⁷⁴ and *Romero*,⁷⁵ because no court may

(S.D.N.Y. 1970); *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S.D.N.Y. 1953). See also 67 HARV. L. REV. 340 (1953).

70. The *DeMateos* court acknowledged this fact. "We note that federal courts in the Second Circuit have taken an expansive view on the question of the export of American maritime law, viewing American stock ownership in a ship owning corporation as sufficient to justify the extraterritorial application of the Jones Act." 562 F.2d at 902 n.3.

71. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), cert. denied, 359 U.S. 1000 (1959). Morrison, *supra* note 1, at 17. See also Harolds, *supra* note 17; Note, 44 FORDHAM L. REV. 413 (1975).

72. Comment, *Conflict of Laws—Forum Shopping—Forum Conveniens*, 52 CAN. B. REV. 315, 327 (1974) (English maritime law).

73. See note 24, *supra*.

74. See note 24, *supra*.

75. 358 U.S. at 357 n.4. Note that *Romero* was a multi-party suit and the instant discussion only concerns the seaman's Spanish employer.

discuss the merits of retaining a suit for trial absent demonstrated jurisdiction over the subject matter.⁷⁶ This is to be contrasted with the notion that United States courts have almost unlimited power to assume jurisdiction over a maritime controversy occurring anywhere in the world.⁷⁷ In a situation where federal law is found not to apply the foreign seaman's task is to demonstrate to the court by specific pleadings⁷⁸ that it possesses subject matter jurisdiction over his case on another basis, *i.e.*, that of foreign law.⁷⁹ Although there is no need categorically to set forth specific foreign laws in the complaint,⁸⁰ the mere allegation that foreign law is applicable⁸¹ or that one is afforded a cause of action under the laws of a certain country⁸² is not sufficient. Rather, the allegation must be substantive, and not conclusory,⁸³ in setting out a cause of action.

When the court clearly has subject matter jurisdiction over a foreign seaman's personal injury suit not governed by United States law the truly discretionary retention of the case for trial may be considered by the court.⁸⁴ Consideration of whether the forum is a convenient one for the litigants is made necessary because the abuse of forum is a frequently used trial tactic by plaintiffs to gain an unfair advantage over defendants,⁸⁵ but the consideration is not entirely one-sided due to defendants'

76. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

77. See note 1, *supra*, in the context of U.S. CONST. art. I, § 3. See also, *e.g.*, *Camarias v. M/V Lady Era*, 318 F. Supp. 379 (E.D. Va. 1969) (The court held it had jurisdiction over a case involving the death of a foreign seaman on a foreign owned flag vessel on the high seas even though neither the deceased nor the ship had ever visited the United States. The case was, however, appropriately dismissed on the basis of *forum non conveniens*.)

78. Supplemental Rule E(2)(a) states, "The complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a definite statement, to commence an investigation of the facts and to frame a responsive pleading." This should be read in conjunction with FED. R. CIV. P. 44.1, which requires foreign law to be pleaded specifically.

79. "[T]he rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of such a court." C. WRIGHT, *LAW OF FEDERAL COURTS* 17 (3d ed. 1976).

80. *The Presidente Wilson*, 30 F.2d 466 (D. Mass. 1929).

81. *The Silverpalm*, 79 F.2d 598 (9th Cir. 1935).

82. *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957).

83. *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952).

84. See note 9, *supra*.

85. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) ("A plaintiff sometimes, is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.").

use of forum non conveniens pleas to frustrate the plaintiff's most ideally chosen forum.⁸⁶

Forum non conveniens has no bearing on what law is to be used to decide a case⁸⁷ because conflict of laws doctrine properly invoked in a seaman's suit assures that the case will be decided under the appropriate law regardless of the forum.⁸⁸ Rather, forum non conveniens in the United States is usually a plea by the defense that the logistical problem of defending the suit in the United States is itself an injustice.⁸⁹ Although the courts use a balancing of "inconvenience" as the basic methodology in deciding the defense plea⁹⁰ and seek to avoid general injustice to either party,⁹¹ United States courts will not permit a plaintiff to be inconvenienced more by granting the defense plea than the defense would have been if the case had been retained for trial by the deciding court.⁹² This is in marked contrast to the practice in some other countries where the "balance of convenience" test used envisions one ultimately "proper" forum for the litigation, analogous to a proper venue, and is apparently chosen by the court regardless of the inconvenience to the plaintiff.⁹³

In *Gulf Oil Corporation v. Gilbert*⁹⁴ the Supreme Court defined the then non-statutory⁹⁵ limits for the application of forum non conveniens among alternative United States forums in cases where United States law applied. Noting that the doctrine is entirely appropriate in maritime matters,⁹⁶ the Court discussed several factors which should be used to gauge the appropriateness of the forum to the litigants, chief among

86. Cohn, *supra* note 1, at 973 ("One of the principal tactics available to the defendant in a maritime case to frustrate the claimant's choice of forum" is a transfer of a case under a forum non conveniens plea.).

87. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (Supreme Court held that the device is to effect "but a change of court rooms," not of applicable law). See also Note, 36 J. AIR L. & COM. 759 (1970).

88. *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953).

89. See a general discussion of the concept in Note, 36 J. AIR L. & COM. 759 (1970).

90. See Note, 58 CALIF. L. REV. 491 (1970).

91. Note, 44 FORDHAM L. REV. 413, 420 (1975).

92. See Note, 36 J. AIR L. & COM. 759, 769 (1970).

93. E.g., Granger, *The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation*, 6 OTTAWA L. REV. 416, 436 (1974) (Canada).

94. 330 U.S. 501 (1947).

95. 28 U.S.C. § 1404(a) was subsequently passed and codified much of this holding. See text at note 105, *infra*.

96. 330 U.S. at 508 ("The proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners.").

which were whether the chosen forum was accessible to sources of proof, had available compulsory process for witnesses, could view the premises if necessary, and could enforce the judgment.⁹⁷ The Court, in language that provided a stronger presumption in favor of the plaintiff's choice of forum than has been borne out subsequently in foreign seamen's suits, held that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."⁹⁸ Subsequently the concepts of forum non conveniens were codified for purely domestic cases⁹⁹ involving alternate United States forums: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."¹⁰⁰

Notwithstanding this general framework which could be applied in a foreign seaman's personal injury suit, *Lauritzen* is inexplicably believed to be the "essential text" governing a court's decision to retain a suit for trial.¹⁰¹ It will be recalled that *Lauritzen* dealt largely with conflict of law principles and only referred to one concept which it felt would be applicable in rendering a forum non conveniens decision.¹⁰² For example, it is doubtful that the flag a ship flies has anything to do with whether the parties to a suit are inconvenienced by a United States forum,¹⁰³ and this is especially true when such flag represents neither the domicile of the defendant nor the domicile of the plaintiff.¹⁰⁴ Likewise irrelevant to a forum non conveniens holding should be the fact that a seaman signed the shipping articles in the United States for the voyage on which he was injured, but this conflict of law principle is often con-

97. 330 U.S. at 508.

98. *Id.*

99. The Supreme Court has never decided a case concerning forum non conveniens in a suit between foreigners in admiralty, and subsequent to the passage of 28 U.S.C. § 1404(a) discussions of the concept in general have been venue problems associated with changes of forum within the United States. See *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960). Thus, forum non conveniens in the foreigner's case is not completely analogous to domestic problems of the same general nature, because 28 U.S.C. § 1404(a) is a change of venue provision.

100. See general discussion of the statute in Cohn, *supra* note 1, at 969-70.

101. Compare G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 472 (2d ed. 1975) with *id.* at 482.

102. That concept was inaccessibility of a foreign alternate forum. See text at note 39, *supra*.

103. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651 (4th Cir. 1960).

104. *Groves v. Universe Tankships, Inc.*, 308 F. Supp. 826 (S.D.N.Y. 1970); *Yee Ying Ching v. M/V Maratha Endeavour*, 301 F. Supp. 809 (E.D. Va. 1968).

fused by the courts as bearing on their discretion to retain a suit for trial.¹⁰⁵

However, *Lauritzen* did note the forum non conveniens factor of inaccessibility of alternate forums¹⁰⁶ as one factor which a court should consider in deciding whether to retain a foreign seaman's suit for trial.¹⁰⁷ *Lauritzen* had not discussed the place of injury as a forum non conveniens concept, but the holding of *Gulf Oil* was at least implicitly to the effect that the forum in which a tort occurs is usually the most appropriate in which to try a suit resulting from it.¹⁰⁸ These two factors are perhaps most significant in any forum non conveniens discussion.

That a seaman is injured within the territorial waters of the United States ought to be a very weighty factor in favor of retaining a suit for trial in the United States. For example, a ship explosion in a United States harbor, where United States agencies perform relief services and investigate the accident, might create evidentiary difficulties if tried in a far removed foreign court.¹⁰⁹ United States hospitalization of a seaman with easy accessibility to medical records for trial as well as the acquisition of accident details should be major factors favoring retention of a foreign seaman's suit for trial.¹¹⁰ Nevertheless, this argument has not always been successful.¹¹¹ Conversely, that an injury occurred on the high seas should be irrelevant in deciding whether the United States is a convenient forum for the parties to litigate a controversy;¹¹² nevertheless, a high seas injury moots completely a *locus delicti* argument for holding trial in the United States. A possible exception to this reasoning arises when a foreign seaman injured on the high seas initiates his suit by an in rem seizure¹¹³ of the vessel on which he received his injuries. The

105. *E.g.*, *Rode v. Sędco, Inc.*, 394 F. Supp. 206 (E.D. Tex. 1975); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 323 F.2d 873 (2d Cir. 1963).

106. See text at note 39, *supra*.

107. See text at note 101, *supra*.

108. 330 U.S. at 508.

109. See, *e.g.*, *Erazo v. M/V Ciudad de Neiva*, 270 F. Supp. 211 (D. Md. 1967).

110. See, *e.g.*, *Gkiazis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967); *Conte v. Flota Mercante Del Estado*, 277 F.2d 664 (2d Cir. 1960). It should be noted that this criterion can work both ways. In *Downer v. Flota Mercante Grancolombiana, S.A.* 1963 A.M.C. 698 (C.P. 1963), the court declined jurisdiction precisely because medical testimony was more readily available in another jurisdiction.

111. *E.g.*, *In Re Complaint of Lidoriki Maritime Corp.*, 404 F. Supp. 1402 (E.D. Pa. 1975).

112. *Alegria v. Grand Bassa Tankers, Inc.*, 337 F. Supp. 401 (S.D.N.Y. 1971); *Yee Ying Ching v. M/V Maratha Endeavour*, 301 F. Supp. 809 (E.D. Va. 1968).

113. See discussion of the various ways jurisdiction over the parties is perfected by seamen in *Cohn*, *supra* note 1, at 969.

court may find that, although the tort occurred while the vessel was on the high seas, the place of the tort, *i.e.*, the vessel itself, is then within the court's territorial limits of effective service with opportunity for all parties to investigate the facts of the injury and to collect other evidence.¹¹⁴

The consideration that alternative forums must be available to the foreign seaman if his suit is to be dismissed, as discussed in *Lauritzen* and developed analogously by statute, has been taken into account by some courts in retaining a foreign seaman's suit over forum non conveniens objections.¹¹⁵ This is largely a factual determination, although it is complicated by arguments that an alternate forum does not exist for a foreign seaman's case when the only alternate forum available has previously precluded his chances for recovery by a judicial opinion.¹¹⁶ Another closely related legal concept concerns the appropriateness of a dismissal of a maritime suit in rem on forum non conveniens grounds at all.¹¹⁷ The availability of the vessel on which the seaman was injured for both security and evidentiary reasons might be jeopardized irreparably by a deferral of his suit to trial in a foreign country.¹¹⁸

A third major consideration which could make the United States the most appropriate forum to litigate a foreign seaman's personal injury suit is the presence of either litigant in this country. The implications of United States domicile of a litigant on choice of law have been reviewed,¹¹⁹ but it is clear that a contact less than domicile or allegiance by

114. In an in rem delictual action the fictitious offender is the ship itself. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 616 (2d ed. 1975).

115. *E.g.*, *Georgoussis v. Extramar Panama, S.A.*, 194 F. Supp. 181 (S.D.N.Y. 1960); *Gonzales v. D/S/K Dania A.S.*, 108 F. Supp. 908 (S.D.N.Y. 1952).

116. Compare Robinson, *Admiralty Law: The Plaintiff's Choice of the Forum*, 14 *NACCA L.J.* 184, 194 (1954) with *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977).

117. In a domestic maritime context it has been debated whether a court can order a change of venue under 28 U.S.C. § 1404(a) of an in rem suit pursuant to that statute's requirement that the change be to a court where the original suit "might have been brought." Obviously, if a suit in rem was instituted by a seizure in one court's district at a given time, it could not have been instituted in another district at the same time because the ship was not present. *Hughes v. S.S. Santa Irene*, 209 F. Supp. 440 (S.D.N.Y. 1962); *Leith v. S.S. Rocroi*, 203 F. Supp. 48 (S.D. Tex. 1962). The Supreme Court has rejected such technical niceties in maritime forum non conveniens actions both in rem and in personam. *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23 (1960) ("A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose."). Nevertheless, the controversy over strictly in rem suits continues. See Cohn, *supra* note 1, at 974.

118. An in rem proceeding in Canada often precludes the applicability of forum non conveniens. Comment, *Conflict of Laws—Forum Shopping—Forum Conveniens*, 52 *CAN. B. REV.* 315, 327 (1974).

119. See text at note 34, *supra*.

a litigant within the United States, although not sufficient to constitute an overriding factor in applying United States law to a controversy in preference to the law of the flag, can yet be quite significant in retaining a suit for trial in the United States over a defendant's forum non conveniens exception.¹²⁰ Thus, the residence of a foreign seaman in the United States either before¹²¹ or after¹²² his injury arguably should preclude the application of forum non conveniens to his suit for personal injuries because it is unlikely that the defendant's inconvenience could be remedied without inconveniencing the plaintiff more.¹²³ Likewise, the corporate presence of the defendant vessel owner in the United States, insufficient to require application of United States law, may be sufficient to deny a forum non conveniens finding, because an international corporation with business and legal ties world-wide will not in fact find the United States an inconvenient forum to try an injured seaman's suit.

There are other possible considerations to be weighed in deciding a forum non conveniens question. The rather nebulous charge in 28 U.S.C. § 1404(a), dealing with United States venue, that a judge effect "the interest of justice"¹²⁴ in deciding the question could lead a court by analogy to examine the varied remedies a seaman has in other jurisdictions¹²⁵ and to keep the case because of the prospect of a perceived¹²⁶ inequitable result for the seaman.¹²⁷ A fear of foreign injustice¹²⁸ and a "neutral forum" view of the United States ought not to be weighty con-

120. See Bickel, *supra* note 4, at 29.

121. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959); *Rode v. Sedco, Inc.*, 394 F. Supp. 206 (E.D. Tex. 1975); *Muoio v. Italian Line*, 228 F. Supp. 290 (E.D. Pa. 1964); *McMurchie v. S.S. Valmar*, 1958 A.M.C. 2280 (E.D.N.Y. 1958); *Gantuz v. Dominican S.S. Line*, 22 Misc. 2d 567, 198 N.Y.S.2d 421 (N.Y.M. 1960). See also G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 476 (2d ed. 1975).

122. *Argyropoulos v. S.S. Manes*, 1961 A.M.C. 2644 (E.D. Va. 1961).

123. See text at note 93, *supra*. See also *Erazo v. M/V Ciudad de Neiva*, 270 F. Supp. 211 (D. Md. 1967), where the financial burden of bringing suit in such a far removed place was cited.

124. See implications of the concept of "justice" in forum non conveniens discussed in Harolds, *supra* note 17, at 314.

125. See Comment, *United States: Suits by Foreign Seamen; Jurisdiction and Choice of Law*, 9 AM. J. COMP. L. 508, 511 (1960), where the diverse remedies available to seamen in the Atlantic community countries are discussed.

126. *E.g.*, *Karros v. S.S. Liryc*, 247 F. Supp. 554 (E.D. Va. 1965); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 323 F.2d 873 (2d Cir. 1963).

127. See Note, 1 ST. MARY'S L.J. 247, 254 (1969), where "equity" is advocated as a criteria for applying United States law to foreigners.

128. This fear is discussed in *Morley*, *supra* note 5, at 42.

siderations in this matter because such considerations both contemplate applicable law rather than litigant convenience and invite other countries to adopt equally jingoistic rationalizations.¹²⁹

Additionally, the general forum non conveniens principle that a case should not be dismissed if judicial economy would be served by retaining it¹³⁰ has spurred an entire line of cases holding that a foreign seaman's entire personal injury claim must be entertained in the United States if the seaman alleges that it is pendent to a disputed wage claim against the same foreign employer. The right of a seaman of any nationality to claim unpaid wages from his employer on the basis of a lien against his vessel¹³¹ has been consistently recognized in western maritime nations since the Rules of Oleron,¹³² and federal statutory law specifically grants foreign seamen the right to enforce wage claims in the courts of the United States.¹³³ It is widely held that a court may not refuse to entertain a foreign seaman's suit to collect his wages.¹³⁴ Reasoning that a pendent claim of personal injuries should not be divorced from a compulsory claim for wage payment, the Second, Third and Fourth Circuits have all accepted foreign seamen's general maritime injury claims as pendent to their statutory wage claims. In the Second

129. Cf. *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) (where the Court stated, "[W]e cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."). See also the retaliation problem discussed in Note, 49 N.C.L. REV. 320 (1971).

130. *Gkiafis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967).

131. See *Pelaez, The Wages of Seamen*, 53 TEX. L. REV. 1410 (1975), where the entire spectrum of seamen's wages and the modes of their enforcement is fully discussed.

132. Runyan, *The Rolls of Oleron and the Admiralty Court in Fourteenth Century England*, 19 AM. J. L. HIST. 95, 101 (1975).

133. 46 U.S.C. § 596 requires in part that the master of any vessel, even foreign ones, tender wages at "the time such seaman is discharged" or within twenty-four hours after the cargo has been discharged. The penalty for the refusal to tender such wages is a sum payable to the seaman equivalent to two days' pay for each day payment is prolonged. 46 U.S.C. § 597 entitles every seaman, including foreign seamen while in United States ports, to receive "on demand" one-half of the balance of wages earned and due at every port where his vessel "shall load or deliver cargo before the voyage is ended." 46 U.S.C. § 599 makes all advances of unearned wages to a seaman a crime whether committed within or without the jurisdiction of the United States.

134. *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir. 1960); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 323 F.2d 873 (2d Cir. 1963); *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949). See also *S.S. Fletero v. Arias*, 206 F.2d 267 (4th Cir. 1953); *Lascaratos v. S/T Olympic Flame*, 227 F. Supp. 161 (E.D. Pa. 1964).

Circuit case of *Conte v. Flota Mercante*¹³⁵ the court granted a foreign seaman relief for causes of action based on negligence, unseaworthiness, breach of warranty, maintenance and cure, and counsel fees on the basis of his statutory wage claim, but was careful to note that such pendent action was solely within the discretion of the court. Third Circuit courts have made similar findings,¹³⁶ but the Fourth Circuit has been the primary haven for foreign seamen seeking pendent jurisdiction for their personal injuries. In *Katelouzos v. Othem*,¹³⁷ a district court in the Circuit observed that "[t]he tendency in this circuit is to retain jurisdiction for all purposes where there is a *bona fide* wage claim existing at the time of the filing of the libel."¹³⁸ The "tendency" to accept such pendent claims was subsequently extended into a "general rule" by various appellate panels in the Fourth Circuit.¹³⁹

From a forum non conveniens perspective the tendency of a court to retain a personal injury cause of action pendent to a foreign seaman's wage claim has merit if the two causes of action are related in the same general factual context and time frame.¹⁴⁰ A foreign employer will necessarily have to undergo some expense in defending the wage claim in the United States, and he can hardly argue that it is more convenient for him to incur double legal expenses in defending the wage claim in the United States and the personal injury claim in a foreign forum. There is a point, however, when forum non conveniens factors may become obscured by strict application of pendent jurisdiction rules,¹⁴¹ as was demonstrated in one Fourth Circuit Court of Appeals case¹⁴² which held that a good faith wage claim by a foreign seaman may be dismissed as meritless and his pendent personal injury claims nevertheless stand for trial.

The above considerations of *locus delicti*, alternate forums, domicile of the litigants, and judicial economy are not the exclusive factors in a court's decision whether to grant a forum non conveniens dismissal of a

135. 277 F.2d 664 (2d Cir. 1960).

136. *Lodakis v. Oceanic Petroleum S.S. Co.*, 223 F. Supp. 771 (E.D. Pa. 1963).

137. 176 F. Supp. 954 (E.D. Va. 1959).

138. *Id.* at 955.

139. *Bekris v. Greek M/V Aristoteles*, 437 F.2d 219 (4th Cir. 1971); *Gkiasis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967). See also *S.S. Fletero v. Arias*, 206 F.2d 267 (4th Cir. 1953); *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949).

140. In *Grevas v. M/V Olympic Pegasus*, 557 F.2d 65 (4th Cir. 1977), the court accepted the argument that a seaman who leaves the ship for medical reasons is "discharged" pursuant to 46 U.S.C. § 596.

141. See a criticism of this practice in Comment, *United States: Suits By Foreign Seamen; Jurisdiction and Choice of Law*, 9 AM. J. COMP. L. 508, 515 (1960).

142. *Gkiasis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967).

foreign seaman's personal injury suit. The Supreme Court in *Gulf Oil* noted that such localized considerations as court docket crowding and jury tolerance in entertaining foreign suits should also enter the decision making process.¹⁴³ Additionally, the discretionary element of a forum non conveniens decision¹⁴⁴ should allow a court leeway in considering specific factors unique to a given case. As a practical matter, this deference to the wisdom of a district court may have been restricted to some extent, at least in the Fourth Circuit, by the rule that a district court must in all circumstances retain personal injury claims pendent to a foreign seaman's wage claim.

Conclusion

This comment has attempted to demonstrate when the doctrine of forum non conveniens is appropriately invoked in a foreign seaman's personal injury suit by discussing which elements of such a case involve the discretion of a court sitting in admiralty and which do not. However, before one can discuss the proper application of forum non conveniens, the proper law to be applied in a case must always be considered, because if the legislature has mandated the application of United States law to foreign seamen in certain circumstances the judiciary is not free to choose selectively to which foreign seamen and in which circumstances it will apply that mandated law. Forum non conveniens in the international context means more than a simple change of venue as envisioned in the United States Code. In the international context it means remanding a seaman's suit to a forum which in all likelihood will not apply United States law to the case at all. Thus, if the legislature has intended that foreign seamen benefit from United States law in certain circumstances, it is mandatory on the courts that they dispense the law in accordance with its intent.

However, it is not clear from a reading of the Jones Act, the major substantive law concerning seamen, to what extent the statute was meant to apply to foreign seamen. Nevertheless, the Supreme Court has interpreted the legislative intent of the Act to require that it be applied in the context of traditional international conflict of laws, and furthermore has indicated that the maritime principle of law of the flag is to govern the applicable law unless overridden by the United States domicile or allegiance of one of the litigants. This announcement of principle appears

143. 330 U.S. at 508 (categorized as factors of "public interest").

144. *Id.* ("Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts . . .").

solid enough, but, in part due to dicta in the Supreme Court's *Rhoditis* opinion, various courts have now launched on a *contacts* theory of applying the Jones Act to foreign seamen based on the significance of the foreign employer's connection with the United States. The application of the Jones Act is now de facto discretionary in the lower courts, because of the diverse, inconsistent and unenumerated theories of "contacts" now being used. Litigation in the federal courts is expensive and time consuming, and a foreign seaman's statutory right to relief in the United States ought not to be subject to the courts' self-styled interpretation of the Jones Act. The circuit courts are not in fact following the direction of *Lauritzen*, which for all its faults was consistent in theory. It is now incumbent upon the Supreme Court to reiterate clearly that earlier holding.

If discretion is not the proper basis for deciding the applicable law in a foreign seaman's suit, it has its proper place in deciding a forum non conveniens controversy. Discretion in rendering a forum non conveniens decision, however, is not unbridled. Factors such as a United States place of injury, unavailability of an alternate forum, or a United States presence by either of the litigants ought to weigh heavily in favor of retaining a foreign seaman's suit based on foreign law. In these instances the plaintiff would be much more prejudiced by remanding the suit to a foreign forum than the defendant would be by trying it in the United States. Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should be disturbed only in exceptional circumstances, because it is the plaintiff who initially seeks relief in a given court. His choice of forum should not be frustrated by a mere complained of inconvenience to the defense.

C. John Caskey