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The Jones Act's Specific Venue Provision: Does it Preclude Forum Non Conveniens Dismissal?

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Timothy P. O'Shea

Abstract

This Note argues that the doctrine of forum non conveniens should be applied uniformly to all cases brought by non-U.S. seamen under the Jones Act in U.S. courts. Part I reviews Jones Act legislation, case law, and the doctrine of forum non conveniens. Part II analyzes modified forum non conveniens case law and diversity forum non conveniens case law. Part III argues that diversity forum non conveniens analysis best interprets the congressional intent underlying the Jones Act, and best follows the guidelines established by the U.S. Supreme Court's forum non conveniens and Jones Act case law. This Note concludes that U.S. courts should uniformly apply the doctrine of forum non conveniens to all Jones Act claims by non-U.S. seamen to maintain consistency with congressional intent and U.S. Supreme Court decisions.

THE JONES ACT'S SPECIFIC VENUE PROVISION: DOES
IT PRECLUDE *FORUM NON CONVENIENS*
DISMISSAL?

INTRODUCTION

Section 20 of the Merchant Marine Act of 1920 (the "Jones Act" or the "Act")¹ contains a specific venue provision

1. 46 U.S.C. § 688 (1988). The Merchant Marine Act of 1920 (the "Jones Act" or the "Act") provides that

- (a) [a]ny 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.*
- (b) (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—
- (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by [a] vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
- (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention of the Continental Shelf.
- (2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—
- (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or
- (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Id. (emphasis added) (footnote omitted).

that affords plaintiffs a U.S. forum in which to adjudicate their admiralty disputes.² Although the Jones Act provides for a specific venue, U.S. courts disagree over whether the provision

2. *Id.* § 688(a); *see supra* note 1 (containing text of section 688(a)); *infra* notes 44-62 and accompanying text (discussing Jones Act's specific venue provision). Although the Act speaks of jurisdiction, "the provision is not intended to affect the general jurisdiction of the District Courts . . . but only to prescribe the venue for actions brought under the [Jones Act]." *Panama Ry. Co. v. Johnson*, 264 U.S. 375, 385 (1924). Venue concerns the location of the litigation, and is limited in federal courts by statutes. *See* 28 U.S.C. §§ 1391-1412 (1988). Venue is the "choice in locality of suit, as opposed to [jurisdiction which is the] authority to adjudicate granted by Congress." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939).

Besides venue, all plaintiffs seeking a remedy in a U.S. federal court must establish subject matter jurisdiction, and personal jurisdiction over the defendant. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945); 28 U.S.C. §§ 1331-1361 (1988). According to *International Shoe* personal jurisdiction is determined by whether the defendant has "minimum contacts" with the chosen forum. *See id.* at 316. However, "[t]he test for personal jurisdiction . . . [in] admiralty . . . may be broader." Robertson, *Conflict of Laws and Forum Non Conveniens Determinations in Maritime Personal Injury and Death Cases in United States Courts*, in *NEW DIRECTIONS IN MARITIME LAW 1984*, 57 n.27 (D. Sharpe & W. Spicer eds. 1985). For maritime personal injury claims, subject matter jurisdiction has two components: locality (*i.e.*, on navigable waters) and traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). Although venue in admiralty is generally proper if the court has personal jurisdiction, the Jones Act includes a specific venue provision. *See* 46 U.S.C. § 688(a) (1988); Robertson, *supra*, at 57 n.29 (discussing proper venue in admiralty cases); *infra* notes 44-58 and accompanying text (discussing Jones Act's specific venue provision).

When seamen are injured, they have three means by which to recover from their employers. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958). The first is common law maintenance and cure. *Id.* The second is negligence using the Jones Act. *Id.* The third is common law unseaworthiness. *Id.* Seamen may allege all three theories in the same cause of action. *Id.*

A recovery of maintenance and cure is not dependent on either the shipowner's or seaman's fault. 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 1:9, at 29-30 (4th ed. 1990). Maintenance and cure is the provision of or the payment for the injured seaman's basic right to shelter, sustenance, and medical attention, not only for the remainder of the voyage but also for that time ashore in which the seaman still suffers from the injury. *Id.*

Unlike maintenance and cure, to receive a recovery for unseaworthiness, the unseaworthy condition of the vessel must be proven, but only as that condition relates to the injured seaman. 2 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 298, at 3 (1975). If a defective condition on the ship is the proximate cause of the seaman's injury, the ship is unseaworthy as to that seaman regardless of the ship's seaworthiness in other respects for other seamen. *Id.* The shipowner has a non-delegable absolute duty to make the vessel seaworthy for seamen. *Id.* § 301, at 9. Injured seamen, therefore, do not need to allege the shipowner's negligence to recover under an unseaworthiness theory. *Id.* To recover under the Jones Act, however, seamen must prove their shipowners' negligence in connection with the injuries sustained. *Id.*

mandates that all Jones Act suits be heard in a U.S. forum, or whether courts may dismiss Jones Act cases on *forum non conveniens* grounds.³

Courts use two procedural methods in Jones Act cases, modified *forum non conveniens* and diversity *forum non conveniens*.⁴ Courts using modified *forum non conveniens* perform a choice of law analysis to decide whether the Jones Act applies to the case.⁵ If the Jones Act applies, the court must accept jurisdiction over the case.⁶ If the Jones Act does not apply to the case,

3. Compare *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987) (en banc) (advocating use of diversity *forum non conveniens*), cert. granted, judgment vacated and remanded on other grounds sub nom. *Pan Am. World Airways Inc. v. Lopez*, 490 U.S. 1032 (1989) and *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (per curiam) and *Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979, 985-90 (S.D.N.Y. 1990) and *Sherrill v. Brinkerhoff Mar. Drilling*, 615 F. Supp. 1021, 1033-35 (N.D. Cal. 1985) (applying diversity *forum non conveniens*), aff'd in part, rev'd in part, vacated in part, modified and remanded sub nom. *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988) with *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1481-87 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988) and *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483-85 (10th Cir. 1983) and *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1194-96 (11th Cir. 1983) (applying modified *forum non conveniens*).

In *Gulf Oil Corp. v. Gilbert*, the U.S. Supreme Court defined the principle of *forum non conveniens* as the doctrine that

a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. . . . 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.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). In addition, *forum non conveniens* is defined as the doctrine invoked by a court that "will not exercise jurisdiction if it is a seriously inconvenient forum." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, at 251 (1971).

4. See *Air Crash*, 821 F.2d at 1163-64 n.25 (advocating diversity *forum non conveniens*); *Cruz*, 702 F.2d at 48 (advocating diversity *forum non conveniens*); *Gazis*, 729 F. Supp. at 985-90 (applying diversity *forum non conveniens*); *Sherrill*, 615 F. Supp. at 1033-35 (applying diversity *forum non conveniens*); *Zipfel*, 832 F.2d at 1481-87 (applying modified *forum non conveniens*); *Needham*, 719 F.2d at 1483-85 (applying modified *forum non conveniens*); *Szumlicz*, 698 F.2d at 1194-96 (applying modified *forum non conveniens*).

5. See *Anastasiadis v. S.S. Little John*, 346 F.2d 281, 283 (5th Cir. 1965). The court in *Little John* determined that "the criteria set out in [*Lauritzen*] serve as an appropriate yardstick for a district court in deciding whether the United States courts should accept or decline jurisdiction of a controversy which is essentially foreign." *Id.*; see *Zipfel*, 832 F.2d at 1482-83; *Needham*, 719 F.2d at 1483; *Szumlicz*, 698 F.2d at 1194-95 (making initial choice of law determination as dictated by modified *forum non conveniens*).

6. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2d Cir. 1959) (holding that "[u]nder 28 U.S.C. § 1331, once federal law is found applicable the court's power to adjudicate must be exercised"); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987) (holding that because Jones Act constructed similar to

the courts apply the doctrine of *forum non conveniens* to determine whether the case should be dismissed or retained.⁷ Conversely, the diversity method does not mandate an initial choice of law determination.⁸ Rather, diversity method courts make a *forum non conveniens* determination in all cases brought under the Jones Act.⁹

This Note argues that the doctrine of *forum non conveniens* should be applied uniformly to all cases brought by non-U.S. seamen under the Jones Act in U.S. courts. Part I reviews Jones Act legislation, case law, and the doctrine of *forum non conveniens*. Part II analyzes modified *forum non conveniens* case law and diversity *forum non conveniens* case law. Part III argues that diversity *forum non conveniens* analysis best interprets the congressional intent underlying the Jones Act, and best follows the guidelines established by the U.S. Supreme Court's *forum non conveniens* and Jones Act case law. This Note concludes that U.S. courts should uniformly apply the doctrine of *forum non conveniens* to all Jones Act claims by non-U.S. seamen to maintain consistency with congressional intent and U.S. Supreme Court decisions.

I. THE JONES ACT, ITS SPECIFIC VENUE PROVISION, AND THE DOCTRINE OF FORUM NON CONVENIENS

A. The Jones Act

Congress enacted the Jones Act in 1920 to grant seamen¹⁰

Federal Employers' Liability Act ("FELA"), and Jones Act provides for specific venue, "the *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act"), *cert. denied*, 486 U.S. 1054 (1988).

7. *Zipfel*, 832 F.2d at 1487; *Needham*, 719 F.2d at 1483; *Szumlicz*, 698 F.2d at 1195.

8. See *Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979, 985-88 (S.D.N.Y. 1990); *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987) (en banc), *cert. granted, judgment vacated and remanded on other grounds sub nom. Pan Am. World Airways Inc. v. Lopez*, 490 U.S. 1032 (1989); *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983); *Sherrill v. Brinkerhoff Mar. Drilling*, 615 F. Supp. 1021, 1033-35 (N.D. Cal. 1985), *aff'd in part, rev'd in part, vacated in part, modified and remanded sub nom. Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

9. See *Gazis*, 729 F. Supp. at 985-88; *Sherrill*, 615 F. Supp. at 1033-35; see also *Air Crash*, 821 F.2d at 1163-64 n.25; *Cruz*, 702 F.2d at 48.

10. Seamen are individuals other than scientific personnel, sailing school instructors and students engaged or employed in any capacity on board a vessel. 46 U.S.C. § 10101(3) (1988). *But see Steuer v. Nederl-Amerik Stoomvaart Maatschappf, N.V.*, 362 F. Supp. 600 (S.D. Fla. 1973) (holding that rabbi on cruise ship appointed as chaplain but treated as passenger not entitled to seamen's remedies when injured

a negligence indemnity remedy.¹¹ Congress effectuated this

during cruise); *see also* *Bullis v. Twentieth Century Fox Film Corp.*, 474 F.2d 392 (9th Cir. 1973) (holding that actors in mock-up Japanese warship injured during filming of "Tora! Tora! Tora!" were not seamen); *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973) (denying Jones Act remedy against shipowner to injured hairdresser employed by ship's independently-run beauty shop).

11. 46 U.S.C. § 688(a) (1988). In 1903, the U.S. Supreme Court barred negligence indemnity recoveries by seamen for their work-related injuries. *See The Osceola*, 189 U.S. 158 (1903). In *The Osceola*, a seaman sustained injuries while carrying out an improvident order by the ship's master. *Id.* at 159. The seaman was ordered to raise the ship's gangway with a derrick under windy conditions. *Id.* The wind caused the gangway to pull the derrick over onto the seaman, thereby injuring him. *Id.* A unanimous Supreme Court denied the seaman's right to a negligence indemnity remedy, limiting his remedy to "maintenance and cure." *Id.* at 175. Congress, intending to remove the bar on seamen's recoveries in negligence, enacted a statute in 1915. *See* LaFollette Act, 38 Stat. 1164 (1915). Congress, however, incorrectly understood the Supreme Court's holding in *The Osceola* to distinguish between injuries caused by the negligence of fellow servants and those caused by the negligence of a ship's master. *See* G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 325 (2d ed. 1975). Section 20 of the LaFollette Act eliminated this distinction. *See* LaFollette Act, 38 Stat. 1164 (1915). Section 20 stated, in part, that "[s]eamen having command shall not be held to be fellow servants with those under their authority." *Id.*

In 1918, the Court explained more clearly its denial of an indemnification remedy in seamen's negligence claims. *See Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). *Chelentis* involved a crewman who sustained a broken leg while on the deck of the vessel *J.L. Luckenbach* during a heavy wind performing duties at the behest of an incautious master. *Id.* at 378. Plaintiff, relying on the 1915 act, did not make a claim for maintenance and cure. *Id.* at 379. Rather, he claimed full indemnity for his master's negligent order. *Id.* The *Chelentis* Court found that the case involved a maritime contract, thereby squarely positioning the suit within admiralty jurisdiction. *Id.*

The *Chelentis* Court criticized the 1915 act, stating that it failed to provide ships' crew members with the same right to a negligence remedy that land-based workers enjoyed. *Id.* at 384-85. The Court found section 20 of the Act irrelevant to the case. *Id.* at 384; *See* G. GILMORE & C. BLACK, *supra*, at 326. The *Chelentis* Court stated that because the fellow servant doctrine had never been a bar to recovery, its abrogation by Congress was of no consequence, leaving matters as they had always been. *Chelentis*, 247 U.S. at 384. G. GILMORE & C. BLACK, *supra*, at 326. Regardless of the relationship between the injured seaman and the negligent person, therefore, the uniform general maritime law imposed a liability on shipowners to pay only wages and maintenance and cure, and not full indemnity. Congress subsequently enacted the Jones Act to provide seamen with a negligence indemnity remedy. 46 U.S.C. § 688(a) (1988). *See supra* note 1 for the text of the Jones Act.

Chelentis upheld the concept of one uniform general maritime law. *Chelentis*, 247 U.S. at 382. This concept was first stated in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In *Jensen*, a longshoreman, while reversing a small electric truck out of a ship's gangway without looking back and without ducking, died of a broken neck when his head hit the ship. *Id.* at 208. The New York State Court of Appeals awarded the deceased longshoreman's widow, in a suit against the employer under the New York worker's compensation statute, funeral expenses and a weekly stipend for life. *Id.* at 207-10.

The U.S. Supreme Court reversed the New York Court of Appeals, holding that, in admiralty cases, states can afford plaintiffs non-maritime common law remedies

remedy by incorporating into the Jones Act the railroad workers negligence remedy available under the Federal Employers' Liability Act (the "FELA").¹² Any seaman may invoke the Jones Act after suffering a personal injury in the course of his employment.¹³ In addition, the Act allows the personal representatives of seamen killed in the course of their employment to bring a Jones Act suit on behalf of the deceased.¹⁴ Moreover, the Jones Act provides for a specific venue for seamen or their representatives to bring their tort actions against the owners of the ships on which the seamen were injured.¹⁵ Interpreted literally, non-U.S. seamen without U.S. contacts could have invoked the Jones Act in a U.S. court to recover from their non-U.S. employers.¹⁶ The broadly-drafted Act, therefore, had a seemingly global reach.¹⁷ In *Lauritzen v. Larsen*,¹⁸ however, the U.S. Supreme Court imposed practical limitations on the Act.¹⁹

The plaintiff in *Lauritzen*, a member of the Danish Seaman's Union, contracted in New York to join the crew of *The Randa*.²⁰ The ship was registered in Denmark, flew the Danish flag, and was owned by a Danish citizen.²¹ The ship's articles, written in Danish, stated that Danish law governed the crew's

only in certain cases "sav[ed] to suitors." *Id.* at 216 (citing the Judiciary Act, ch. 20, § 9, 1 Stat. 76 (1789)). A case "saved to suitors" is not within the exclusive federal admiralty and maritime jurisdiction. N. HEALY & D. SHARPE, *CASES AND MATERIALS ON ADMIRALTY* 73 (2d ed. 1986). Rather, the plaintiff has a choice to bring the case either in federal court for a statutory or general maritime remedy, or in state court for a common law remedy. *Jensen*, 244 U.S. at 218. *Jensen* was not a case saved to suitors. *See id.* The suit, therefore, could only be brought in a federal court. *Id.*

12. 46 U.S.C. § 688(a) (1988) (Jones Act); 45 U.S.C. § 51 (1988) (FELA).

13. *See* 46 U.S.C. § 688 (1988).

14. *Id.*

15. *Id.*; *see* G. GILMORE & C. BLACK, *supra* note 11, at 326-27; *infra* notes 44-62 (discussing Jones Act's specific venue provision).

16. *See* 46 U.S.C. § 688 (1988); *see also* *Lauritzen v. Larsen*, 345 U.S. 571 (1953). The *Lauritzen* Court highlighted the absurdity of a strict reading of the Jones Act when it commented that "[i]f read literally, . . . a hand on a Chinese junk, never outside Chinese waters, would not be beyond [the Jones Act's] wording." *Id.* at 576-77.

17. *See* 46 U.S.C. § 688 (1988); *see also* *Lauritzen*, 345 U.S. at 576-77.

18. 345 U.S. 571 (1953).

19. *Id.* at 583. The *Lauritzen* Court established the basic criteria that must be weighed by a court when considering a *forum non conveniens* motion. *Id.*

20. *Id.* at 573.

21. *Id.*

rights.²² The plaintiff injured himself during the course of his employment while *The Randa* was harbored in Havana, Cuba, and sued in the U.S. District Court for the Southern District of New York for negligence under the Jones Act.²³ The district court ruled that U.S. law applied.²⁴ The U.S. Court of Appeals for the Second Circuit affirmed the district court's decision.²⁵ The U.S. Supreme Court, however, holding Danish law to be applicable, reversed the Second Circuit and remanded the case to the district court.²⁶

In *Lauritzen*, the U.S. Supreme Court established seven criteria for determining choice of law in Jones Act cases.²⁷ These factors limit the reach of the Act because courts may no longer apply the Jones Act to all seamen who invoke it.²⁸ Rather, Jones Act claims must contain a substantial contact or contacts with the United States.²⁹ Under *Lauritzen*, courts must consider the place of the employment contract and the place of the wrongful act.³⁰ In addition, courts must determine the domiciles of both the injured seaman and the defendant-shipowner.³¹ To complete the determination, courts must look to the accessibility of any alternative foreign forum, the law of the chosen forum, and the law of the vessel's flag.³² The *Lauritzen* Court emphasized the law of the flag as more powerful than the other six criteria because ships are considered to be part of the territory of the nation whose flag the ship flies.³³

22. *Id.*

23. *Id.*

24. *Id.*

25. *Lauritzen v. Larsen*, 196 F.2d 220 (2d Cir. 1952), *rev'd and remanded*, 345 U.S. 571 (1953).

26. *Lauritzen v. Larsen*, 345 U.S. 571, 593 (1953).

27. *Id.* at 583-91.

28. *Id.*

29. *See id.* The *Lauritzen* Court stated that "alone or in combination," its factors influenced choice of law. *Id.* at 583; *see Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 440-41 (2d Cir. 1959).

30. *Lauritzen*, 345 U.S. at 583-84, 588-89.

31. *Id.* at 586-88.

32. *Id.* at 584-86, 589-92. The law of the flag is the law of the territory of that sovereignty whose flag the ship flies. *Id.* at 584-86.

33. *Id.* at 584-86. The *Lauritzen* Court held that "the weight given to the ensign overbears most other connecting events in determining applicable law." *Id.* at 585; *see United States v. Flores*, 289 U.S. 137, 155-56 (1933) (deeming vessel part of territory of sovereign whose flag vessel flies).

In *Hellenic Lines Ltd. v. Rhoditis*,³⁴ however, the U.S. Supreme Court relegated the law of the flag to the shadow of a new factor, the shipowner's "base of operations."³⁵ In *Rhoditis*, the plaintiff, a Greek seaman, signed a contract of employment in Greece to work on a Greek-flag vessel and agreed to adjudicate all disputes with the shipowner in a Greek court using Greek law.³⁶ The defendant, a Greek citizen and a U.S. domiciliary, owned and managed the company out of New York.³⁷ The plaintiff's injury occurred in New Orleans, Louisiana. The plaintiff sued the defendant in the U.S. District Court for the Southern District of Alabama.³⁸ The district court asserted jurisdiction over the matter and the U.S. Court of Appeals for the Fifth Circuit subsequently affirmed the district court, retaining jurisdiction over the case and finding for the plaintiff.³⁹ The U.S. Supreme Court affirmed the court of appeals' decision, stating that in addition to the *Lauritzen* factors, courts, in their choice of law determinations, should also analyze the shipowner's base of operations.⁴⁰ The then-growing, now-universal, practice of convenient foreign registry⁴¹ prompted the Court's preemption of the law of the flag as the

34. 398 U.S. 306 (1970).

35. *Id.* at 309. The *Rhoditis* Court declared that "the shipowner's base of operations is another factor of importance." *Id.* (emphasis in original). In addition to this new dominant criterion, the *Rhoditis* Court claimed that other important factors may play a role in choice of law determinations besides the shipowner's base of operations and the seven factors enumerated by *Lauritzen*. *Id.* at 309.

36. See *Rhoditis v. Hellenic Lines, Ltd.*, 273 F. Supp. 248, 249 (S.D. Ala. 1967), *aff'd*, 412 F.2d 919 (5th Cir. 1969), *rev'd*, 398 U.S. 306 (1970).

37. *Id.*

38. *Id.* at 248-49.

39. *Id.* at 249-50; see *Hellenic Lines Ltd. v. Rhoditis*, 412 F.2d 919, 926 (5th Cir. 1969), *rev'd*, 398 U.S. 306 (1970).

40. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

41. See R. CARLISLE, *SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE* 171 (1981). The Liberian flag became so popular among shipowners that it

surpassed Panama in both numbers and tonnage by 1956, [and] . . . overtook those of both Great Britain and the United States in 1966, when it became the largest registry in the world.

The causes of the rapid growth in Liberia's registry could be found in the conjunction of a favorable legal environment and pressing economic conditions. With the advantages of no taxation and lower operating costs, ship-owning corporations in the United States and elsewhere sought the flag with the best legal arrangements.

Id.

most important criterion.⁴² Today, seamen employed on ships owned by U.S.-based companies can cite the *Rhoditis* holding to take advantage of the Jones Act's specific venue provision to bring suit in a U.S. court.⁴³

B. *The Jones Act's Specific Venue Provision*

The Jones Act states, in part, that "jurisdiction" shall be in a U.S. court "of the district in which the defendant employer resides or in which his principal office is located."⁴⁴ Jurisdiction as used in the Act, however, has been interpreted to mean venue.⁴⁵ Because of the provision's confusing history, it is unclear whether courts with Jones Act jurisdiction over cases must exercise that jurisdiction.⁴⁶

In 1947, the U.S. Supreme Court in *Gulf Oil Corporation v. Gilbert*⁴⁷ stated that plaintiffs' choice of venue, in cases involving statutes with specific venue provisions, cannot be defeated for the sake of convenience.⁴⁸ The *Gilbert* Court based this holding on the reasoning in *Baltimore & Ohio Railway Company v. Kepner*,⁴⁹ an earlier U.S. Supreme Court decision which interpreted the specific venue provision of the FELA.⁵⁰ The *Kepner* Court held that when Congress specifically grants venue, that venue cannot be frustrated because of inconvenience or ex-

42. See *Rhoditis*, 398 U.S. at 315 (1970) (Harlan, J., dissenting). The *Rhoditis* dissent contended that the majority took "the phenomenon of 'convenient' foreign registry as a wedge for displacing the law of the flag." *Id.*

43. See, e.g., *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483-84 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); see also G. GILMORE & C. BLACK, *supra* note 11, at 327-28. Since the 1950s, seamen have used the Jones Act primarily to secure a jury trial, and used the doctrine of unseaworthiness, in the same suit, to recover for their personal injuries. *Id.*

44. 46 U.S.C. § 688(a) (1988); see *supra* note 1 (setting forth text of section 688). Other U.S. statutes also contain specific venue provisions. See, e.g., Lanham Trademark Act, 15 U.S.C. § 1121 (1988); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (1988).

45. *Panama Ry. Co. v. Johnson*, 264 U.S. 375, 384-85 (1924); see *supra* note 2 (discussing interpretation of "jurisdiction" to mean "venue" in Jones Act).

46. See *infra* notes 47-62 (discussing history of Jones Act's specific venue provision).

47. 330 U.S. 501 (1947).

48. *Id.* at 505.

49. 314 U.S. 44 (1941).

50. See *Kepner*, 314 U.S. 44; see also *Gilbert*, 330 U.S. at 505; *supra* note 6 (discussing FELA and its relationship with Jones Act).

pense.⁵¹ In both *Kepner* and *Gilbert*, other U.S. courts were allegedly the more convenient forums in which to adjudicate the disputes.⁵² Congress reacted to *Kepner* and *Gilbert* by enacting a statute that permits the transfer of venue from an inconvenient U.S. court to a more convenient U.S. court.⁵³

For thirty years following the 1948 codification of the Jones Act, courts increasingly offered the benefits of the Act's specific venue provision to non-U.S. seamen who alleged that the circumstances surrounding their injuries contained U.S. contacts.⁵⁴ In 1982, however, Congress amended the Act primarily to take away from non-U.S. citizens, injured while employed on non-North American continental shelf oil rigs, the right to sue in a U.S. court under the Jones Act.⁵⁵ The 1982 amendment addressed a growing backlog of oil rig tort suits in

51. *Kepner*, 314 U.S. at 54.

52. *Id.* at 48; see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947).

53. 28 U.S.C. § 1404(a) (1988). This subsection provides that "[f]or 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." *Id.*

54. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) (holding that assertion of Jones Act jurisdiction by plaintiff confers court with jurisdiction to determine if assertion is proper); *Sfridas v. Santa Cecilia Co., S.A.*, 265 F. Supp. 252 (E.D. Pa. 1966) (retaining jurisdiction notwithstanding a complete lack of U.S. contacts); *Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A.*, 168 F. Supp. 236 (S.D.N.Y. 1958) (holding that Panamanian-flagged vessel on which seaman was injured, owned by Panamanian company controlled by U.S. citizens, sufficient for U.S. jurisdiction); see also H.R. REP. NO. 863, 97th Cong., 2d Sess. 3 (1982).

55. See 46 U.S.C. § 688(b) (1988). The amendment states that

(1) [n]o action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while the person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by [a] vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

U.S. courts brought by non-U.S. seamen.⁵⁶ These tort actions negatively affected the financial condition of U.S. oil companies by increasing insurance and litigation costs, and ultimately by weakening the companies' abilities to compete internationally.⁵⁷ The amendment barred suits by non-U.S. citizens if another forum with which they had contacts already provided them with a remedy.⁵⁸

The amendment, therefore, limited the class of seamen who may take advantage of the Jones Act's specific venue provision.⁵⁹ The 1982 amendment preserved the right of U.S. seamen, however, to sue under the Jones Act regardless of where the injury or death occurred and regardless of the type of activity performed at the time of the injury or death.⁶⁰ The amendment did not mandate that U.S. courts take jurisdiction over all U.S. seamen's Jones Act suits. Rather, the amendment recognized that certain U.S. seamen's suits brought under the Act might be more conveniently tried in other fora.⁶¹ If these alternative fora could provide opportunities for the seamen to receive adequate remedies, the cases might be dismissed.⁶²

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Id. (footnote omitted).

56. See H.R. REP. NO. 863, 97th Cong., 2d Sess. 3 (1982). The House report stated that

[o]n October 29, 1981, 82 cases against 14 offshore companies were pending. These cases involved a potential liability of approximately \$85 million.

A single law firm has filed suits claiming damages of \$2 billion on behalf of 167 persons killed in the collapse of the Alexander Kielland drilling rig in the North Sea.

Id.

57. *Id.*

58. See 46 U.S.C. § 688(b) (1988).

59. *Id.*; see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

60. 46 U.S.C. § 688(b) (1988). For the text of the 1982 Jones Act amendment, see *supra* note 55.

61. 46 U.S.C. § 688(b) (1988); see *Reyno*, 454 U.S. at 255-56 & n.23. The *Reyno* Court declared that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Id.* at 255-56. The Court qualified its assumption however, when it stated that "[a] citizen's forum choice should not be given dispositive weight As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Id.* at 256 n.23.

62. *Id.* at 254. The *Reyno* Court stated that "if the remedy provided by the alter-

C. *The Doctrine of Forum Non Conveniens*

1. History of the Doctrine of *Forum Non Conveniens*

The doctrine of *forum non conveniens* grants U.S. courts the discretion to decline jurisdiction, regardless of proper venue, if the court finds a more convenient forum outside of the United States in which the parties may adjudicate their dispute.⁶³ The concept of judiciously dismissing a case originated in nineteenth-century Scotland.⁶⁴ In the United States, *forum non conveniens* first appeared as early as 1801.⁶⁵ Not until 1941, however, was *forum non conveniens* referred to as a "familiar" doctrine in U.S. law.⁶⁶ Thereafter, as U.S. companies expanded overseas and foreign plaintiffs became aware of the relative generosity of U.S. juries in tort litigation, the doctrine became more widely recognized.⁶⁷

2. *Forum Non Conveniens* Case Law

The doctrine of *forum non conveniens* permits courts to subtly balance several criteria to determine whether to retain or

native forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." *Id.* (footnote omitted).

63. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). The *Gilbert* Court defined *forum non conveniens* as that principle by which "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.*

64. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386-87 (1947); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947); Note, *Forum Non Conveniens: Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals*, 5 FORDHAM INT'L L.J. 533, 535 (1982).

65. See *Willendson v. Forsket*, 29 F. Cas. 1283 (D.C. Pa. 1801) (No. 17,682); see also Note, *supra* note 64, at 537.

66. *Baltimore & Ohio Ry. Co. v. Kepner*, 314 U.S. 44, 55-56 (1941) (Frankfurter, J., dissenting); *supra* notes 49-52 and accompanying text (discussing *Kepner*).

67. See J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 33-34 (1981) (discussing wide recognition of generosity of U.S. tort juries); S. ROBOCK & K. SIMMONDS, *INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES* 26-27 (1989) (discussing expansion of U.S. companies overseas). Other important aspects of U.S. law that beckoned foreign plaintiffs to U.S. courts included the doctrine of strict liability, the availability of jury trials, and powerful discovery rules. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 251, 252 n.18 (1981); see also *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733-34 (C.A. 1982). Plaintiffs were drawn to the United States "[a]s a moth is drawn to the light." *Id.* at 733; see 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3828, at 284 n.20 (2d ed. 1986).

dismiss cases that contain both U.S. and non-U.S. contacts.⁶⁸ *Canada Malting Co. v. Paterson Steamships, Ltd.*⁶⁹ was the first post-Jones Act U.S. Supreme Court decision to deal with the forum of a suit in an admiralty setting.⁷⁰ *Canada Malting* was a collision case involving cargo owner plaintiffs and shipowner defendants.⁷¹ All of the parties were Canadian, as were the ports of departure and destination.⁷² The collision took place, however, in U.S. waters on Lake Superior.⁷³ The obvious alternative forum was Canada, whose laws regarding cargo recoveries in "both to blame"⁷⁴ collisions were not as favorable to the cargo interest as U.S. laws.⁷⁵

The U.S. Supreme Court dismissed the case on *forum non conveniens* grounds, holding that the location of the collision alone cannot dictate a suit's forum.⁷⁶ Subsequently, courts have interpreted this holding to infer that unfavorable law in the alternative forum does not bar a case's dismissal on *forum non conveniens* grounds.⁷⁷ Although the plaintiff in *Canada Malt-*

68. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

69. 285 U.S. 413 (1932).

70. *Id.*

71. *Canada Malting Co. v. Paterson S.S., Ltd.*, 49 F.2d 802, 802-03 (W.D.N.Y. 1931), *aff'd*, 285 U.S. 413 (1932).

72. *Id.* at 803.

73. *Id.* at 802.

74. *See United States v. Reliable Transfer*, 421 U.S. 397 (1975). The U.S. Supreme Court in *Reliable Transfer* overruled the mutual fault principal of divided damages that was in effect at the time the Court decided *Canada Malting*. *Id.* The doctrine of divided damages, first expressed in *The Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), required "the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their fault may have been." *Reliable Transfer*, 421 U.S. at 397. The *Reliable Transfer* Court held that

when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Id. at 411.

75. *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 418 (1932). Under the rule of *The Mandu*, the substantive law to be applied must be U.S. law which would include the doctrine of joint and several liability attaching to the right itself. *The Mandu*, 102 F.2d 459, 462 (2d Cir. 1939).

76. *Canada Malting*, 285 U.S. at 422.

77. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Reconciling *Canada Malting* with *Gilbert*, the *Reyno* Court stated that

[i]t is true that *Canada Malting* was decided before *Gilbert*, and that the doc-

ing did not seek a Jones Act remedy,⁷⁸ the *Canada Malting* Court, in dictum, implicitly approved of dismissing inconvenient Jones Act cases.⁷⁹

In *Gulf Oil Corporation v. Gilbert*,⁸⁰ the U.S. Supreme Court detailed the factors a court must consider to determine if a *forum non conveniens* dismissal is proper. In *Gilbert*, the plaintiff operated a public warehouse to which defendant Gulf Oil Corporation ("Gulf") delivered gasoline.⁸¹ The plaintiff alleged that Gulf negligently handled the delivery, causing an explosion and fire that destroyed the warehouse and all the merchandise in it, thereby affecting the profitability of the plaintiff's business.⁸² The plaintiff's suit in the U.S. District Court for the Southern District of New York was dismissed on *forum non conveniens* grounds.⁸³ The U.S. Court of Appeals for the Second Circuit overturned the district court, finding New York a proper forum in which to adjudicate the dispute.⁸⁴

The U.S. Supreme Court reversed the Second Circuit's decision.⁸⁵ The Court enumerated several public and private interest factors that a court must balance in determining

trine of *forum non conveniens* was not fully crystallized until our decision in that case. However, *Gilbert* in no way affects the validity of *Canada Malting*. Indeed, by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law.

Id. at 248-49 (footnotes omitted).

78. *Canada Malting*, 285 U.S. at 417.

79. *Id.* at 422-23. The Court observed that neither in personal injury claims between foreign seamen and owners of foreign vessels,

nor in other cases, has the bare circumstance of where the cause of action arose been treated as determinative of the power of the court to exercise discretion whether to take jurisdiction.

Obviously, *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 [sic] foreigners. Nor is it true . . . where for kindred reasons *the litigation can more appropriately be conducted in a foreign tribunal.*

Id. (emphasis added) (footnotes omitted).

80. 330 U.S. 501 (1947).

81. *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291, 291-92 (S.D.N.Y. 1945), *rev'd*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947).

82. *Id.* at 291.

83. *Id.* at 294-95.

84. *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947).

85. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947).

whether to dismiss on *forum non conveniens* grounds.⁸⁶ The public interest factors concern judicial efficiency, including choice of law,⁸⁷ and the interests of communities in the litigation.⁸⁸ The private interest factors concern the accessibility of key elements to the case,⁸⁹ the fairness and practicality of trying the case in a U.S. forum, and the enforceability of any judgment granted by a non-U.S. tribunal.⁹⁰ Based on the specific facts of each case, a court must weigh the relevant *Gilbert* criteria in an effort to determine the propriety of the plaintiff's chosen forum over other fora.⁹¹ The *Gilbert* Court determined that the district court's dismissal of the case on *forum non conveniens* grounds was within the bounds of the trial court's discretion.⁹² The Court, therefore, reversed the Second Circuit because that court had taken too restrictive a view of the doctrine of *forum non conveniens*.⁹³

Thirty-four years after *Gilbert*, in *Piper Aircraft Company v. Reyno*,⁹⁴ the U.S. Supreme Court applied the interest analysis established by the *Gilbert* Court.⁹⁵ In *Reyno*, five Scottish citizens and a Scottish pilot were killed when their U.S.-made aircraft, operated by a Scottish company, crashed in the Scottish

86. *Id.* at 508-09.

87. *Id.* First, administrative difficulties occur for courts in popular metropolitan centers. *Id.* Second, it is more appropriate to try diversity cases in a forum familiar with the state law governing the case, instead of burdening another court with conflicts of law and foreign law problems. *Id.*

88. *Id.* First, the court must look at the appropriateness of imposing jury duty upon people whose community has no interest in the litigation. *Id.* Second, litigation should be held in the view of those persons whose affairs the litigation touches. *Id.* Third, localized controversies should be decided in the locale of the controversy. *Id.*

89. *Id.* at 508. First, the court must discern the accessibility of sources of proof to the forum. *Id.* Second, the propriety of obtaining unwilling witnesses using compulsory process, and the cost and ease of obtaining willing witnesses, must be determined. *Id.* Third, the court must determine the convenience of viewing the scene of injury or death. *Id.*

90. *Id.*

91. *See id.* at 508-09.

92. *Id.* at 512.

93. *Id.* The *Gilbert* Court noted that the U.S. Supreme Court "has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances." *Id.* at 504. Thus, the U.S. Court of Appeals for the Third Circuit "took too restrictive a view of the doctrine as approved by [the U.S. Supreme Court]." *Id.* at 512.

94. 454 U.S. 235 (1981).

95. *Id.* at 257-61.

highlands.⁹⁶ The district court dismissed the case on *forum non conveniens* grounds, stating that a *forum non conveniens* dismissal is inappropriate only when the law of the forum to which the case will be dismissed fails to provide the plaintiff with substantive or procedural law benefits similar to those offered by the plaintiff's chosen forum.⁹⁷

The Third Circuit reversed the district court's decision,⁹⁸ but its decision was overturned by the U.S. Supreme Court. The Supreme Court held that the district court properly dismissed the case on *forum non conveniens* grounds.⁹⁹ The Court discounted the importance of differences in applicable law in the *forum non conveniens* analysis.¹⁰⁰ The *Reyno* Court also established a doctrine that, in effect, biases U.S. courts against non-U.S. plaintiffs.¹⁰¹ The doctrine states that a non-U.S. plaintiff's choice of a U.S. forum deserves less deference than a U.S. plaintiff's choice of a U.S. forum because a forum is presumed to be convenient only for citizens of the forum state.¹⁰²

The Supreme Court criticized interpretations of *Gilbert* that placed heavier emphasis on choice of law than on the other factors involved in *forum non conveniens* determinations.¹⁰³ The *Reyno* Court emphasized that *Gilbert's forum non conveniens*

96. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 728 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

97. *Id.* at 738.

98. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 171 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

99. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981).

100. *Id.* at 238. *Reyno* concluded that "the possibility of an unfavorable change in law [upon dismissal to a foreign forum] should not, by itself, bar dismissal." *Id.*

101. *Id.* at 255-56. *Reyno* cited with approval *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). *Reyno*, 454 U.S. at 256-57 n.24. In *Pain*, the U.S. Court of Appeals for the District of Columbia Circuit upheld dismissal of several wrongful death actions brought under the Death On the High Seas Act against the designer and manufacturer of a helicopter which crashed en route to an offshore drilling platform. *Pain*, 637 F.2d at 779.

102. *Reyno*, 454 U.S. at 256. *But see id.* at 255 n.23 (qualifying doctrine of preference stating that although "[c]itizens or residents deserve somewhat more deference than foreign plaintiffs, . . . dismissal should not be automatically barred when a plaintiff has filed suit in his home forum").

103. *Id.* at 251. The *Reyno* Court stated that "[i]f the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important." *Id.*; see *infra* notes 119-61 and accompanying text (discussing modified analysis cases).

factors do not exalt any one factor as most powerful.¹⁰⁴ With this in mind, the *Reyno* Court reaffirmed the holding in *Canada Malting* that the possibility of a difference in law unfavorable to the plaintiff, upon dismissal of the case, must not control a court's *forum non conveniens* analysis.¹⁰⁵

Notwithstanding *Reyno*'s criticism of choice of law analysis as a dispositive factor in *forum non conveniens* dismissals, some courts, when hearing Jones Act cases, continue to stress choice of law analysis.¹⁰⁶

3. The Relationship Between *Forum Non Conveniens* and Choice of Law

The doctrines of *forum non conveniens* and choice of law are analytically distinct.¹⁰⁷ Choice of law considerations determine the applicable law with which to adjudicate disputes.¹⁰⁸ *Forum non conveniens*, on the other hand, is a procedural tool used by courts to ensure that parties adjudicate their disputes in the most convenient and inexpensive forum.¹⁰⁹ Some courts, however, make *forum non conveniens* dependent on a choice of law analysis in Jones Act cases.¹¹⁰ This confusion stems largely from courts' reliance on the holding in *Bartholomew v. Universe*

104. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250-51 (1981); see *supra* notes 87-90 and accompanying text (discussing *Gilbert's* public and private interest factors).

105. See Note, *supra* note 64, at 562.

106. See *infra* notes 119-61 and accompanying text (discussing modified *forum non conveniens* analysis).

107. Robertson, *supra* note 2, at 62.

108. See Watson, *Transnational Maritime Litigation: Selected Problems*, 8 MAR. LAW. 87, 89 (1983).

109. *Id.*

110. See Robertson, *supra* note 2, at 62; see also *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) (declaring that "[b]efore dismissing a case for *forum non conveniens*, a district court must first make a choice of law determination"); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) (stating that "[i]n order to apply the doctrine of *forum non conveniens*, the trial court must conduct a choice of law analysis in order to determine whether American or foreign law governs"); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983). The *Szumlicz* court declared that

[i]f United States law applies, the case should not be dismissed for *forum non conveniens*. If the court determines that United States law does not apply, it then examines the traditional considerations of *forum non conveniens* to determine whether the court should exercise its discretion and decline to assert jurisdiction over the case.

Id.

Tankships, Inc.,¹¹¹ the first U.S. court decision to apply a modified *forum non conveniens* analysis.

In *Bartholomew*, a foreign plaintiff was savagely beaten by a shipmate while working as a seaman on the U.S. defendant's vessel.¹¹² The plaintiff brought a suit in the U.S. District Court for the Southern District of New York for negligence, alleging that the defendant knew of the attacker's dangerous proclivities but, nonetheless, employed him.¹¹³ The district court upheld a verdict for the plaintiff for negligence damages.¹¹⁴ On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling.¹¹⁵ The appeals court reasoned that the district court had no discretion to dismiss a claim once the Jones Act applied because it was bound by the federal question statute to assume jurisdiction over Jones Act claims.¹¹⁶

II. MODIFIED AND DIVERSITY FORUM NON CONVENIENS

Two schools of thought have emerged regarding the doctrine of *forum non conveniens* in Jones Act cases with non-U.S. alternative forums. Diversity *forum non conveniens* treats choice of law as a *Gilbert* public interest factor, thereby according choice of law no more weight than any other factor.¹¹⁷ Modified *forum non conveniens*, on the other hand, argues that courts must perform a choice of law analysis to decide whether the Jones Act's application mandates the court's taking jurisdiction over the case.¹¹⁸

111. 168 F. Supp. 153 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959) (overruled by *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983) (per curiam)).

112. *Id.* at 155.

113. *Id.*

114. *Id.*

115. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 448 (2d Cir. 1957), *cert. denied*, 359 U.S. 1000 (1959) (overruled by *Cruz*, 702 F.2d at 48).

116. *Bartholomew*, 263 F.2d at 443.

117. See *Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979, 986 (S.D.N.Y. 1990) (admonishing courts using modified analysis because "[n]one of these courts . . . attempt to reconcile their decisions with the Court's holding in [*Reyno*] that choice of law is not dispositive in a *forum non conveniens* motion"); *infra* notes 162-89 and accompanying text (discussing diversity *forum non conveniens*).

118. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) (holding that "when the Jones Act applies to seaman's

A. *Modified Forum Non Conveniens Analysis Case Law*

Modified *forum non conveniens* begins with a choice of law ruling governed by the factors enunciated in *Lauritzen* and *Rhoditis*.¹¹⁹ If non-U.S. law applies to the case, a court conducts the *Gilbert* balancing test.¹²⁰ The test's results help the court determine whether or not the case warrants a *forum non conveniens* dismissal. If the court finds that U.S. law applies, the

claim, that claim may not be dismissed on the ground of *forum non conveniens*"); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) (declaring that "[i]f American law is applicable to the case, the *forum non conveniens* doctrine is inapplicable"); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) (stating that "[w]hether the Jones Act applies . . . involves a question of choice of law If United States law applies, the case should not be dismissed for *forum non conveniens*."); *infra* notes 119-61 and accompanying text (discussing doctrine of modified *forum non conveniens*); see also Note, *FNC—The Fifth Circuit's New Test Collides With Admiralty Law: In re Air Crash Disaster Near New Orleans, La.*, 13 TULANE MAR. L. J. 179 (1988) (stating that "[b]ecause the [*Reyno*] Court did not expressly extend its holding to admiralty, several circuits continued to use a different or 'modified analysis' for admiralty cases").

Prior to 1983, the prevailing view in cases alleging a Jones Act injury was to perform a choice of law analysis to determine whether the Act applied. If the Act applied, then the case could not be dismissed on *forum non conveniens* grounds. If the Act did not apply, the court performed a *forum non conveniens* analysis to determine whether the case should be dismissed to an alternative forum. This procedure is known as admiralty *forum non conveniens* analysis or modified *forum non conveniens* analysis. See *infra* notes 119-61 and accompanying text (discussing modified *forum non conveniens*).

In 1983, a second school of thought emerged based on the reasoning in *Reyno*: *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (stating that "possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry"). This new procedure, known as traditional *forum non conveniens* or diversity *forum non conveniens*, holds that in Jones Act cases, a *forum non conveniens* test can be made without first making a choice of law determination. Therefore, a case can be dismissed on *forum non conveniens* grounds even though the Jones Act applies. See *infra* notes 162-86 and accompanying text (discussing diversity *forum non conveniens*).

The former method will be referred to in this Note exclusively as modified *forum non conveniens* analysis and not as admiralty *forum non conveniens* analysis, and the latter method will be referred to as diversity *forum non conveniens* analysis and not as traditional *forum non conveniens* analysis.

119. See *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953); *Zipfel*, 832 F.2d at 1487; *Needham*, 719 F.2d at 1483; *Szumlicz*, 698 F.2d at 1195; *supra* notes 27-33 and accompanying text (discussing *Lauritzen* factors); *supra* notes 40-42 and accompanying text (discussing *Rhoditis* factor); see also Note, *supra* note 118, at 182 n.26.

120. See *Zipfel*, 832 F.2d at 1487; *Needham*, 719 F.2d at 1483; *Szumlicz*, 698 F.2d at 1195; see also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (listing public and private interest factors that must be weighed in *forum non conveniens* determination).

modified approach dictates that the court cannot use the *Gilbert* test to dismiss the case.¹²¹ The court must exercise jurisdiction pursuant to the Jones Act. Three circuits currently use modified *forum non conveniens* in Jones Act cases.¹²²

The latest court to adopt modified *forum non conveniens* analysis was the U.S. Court of Appeals for the Ninth Circuit.¹²³ In *Zipfel v. Halliburton Company*,¹²⁴ the court consolidated the actions of five plaintiff seamen arising out of a fatal airplane crash in Indonesia in 1981.¹²⁵ Four plaintiffs were non-U.S. citizens or their administratrices, and one plaintiff was the administratrix of a U.S. citizen.¹²⁶ The U.S. seaman and one of

121. See *Zipfel*, 832 F.2d at 1487; *Needham*, 719 F.2d at 1483; *Szumlicz*, 698 F.2d at 1195; see also *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981); Tate, *Fisher v. Agios Nicolaos V and Choice of Law: What Was All the Fuss About? and What the Fuss Should Have Been About (Maybe)*, 7 MAR. LAW. 199, 208 (1982) (stating that "forum non conveniens dismissal . . . concerns only cases in which a foreign seaman has no cause of action under United States law"); see also Note, *supra* note 118, at 183 (stating that under modified analysis approach, "if the court finds that U.S. law should be applied, it does not conduct the . . . *Gilbert* analysis and may not dismiss the case").

122. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983). In addition, one commentator points to *Kukias v. Chandris Lines, Inc.*, 839 F.2d 860 (1st Cir. 1988), as an example of modified analysis. T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-8, at 45 (Supp. 1989). *Kukias*, however, is not a Jones Act case. *Kukias*, 839 F.2d at 861. The U.S. Court of Appeals for the First Circuit found that the Act did not apply after analyzing the case under the eight *Lauritzen-Rhoditis* factors. *Id.* at 862-64. The U.S. District Court for the District of Puerto Rico dismissed the action without making a *forum non conveniens* determination. *Id.* at 861. The court of appeals, therefore, could not review any *forum non conveniens* determination. *Id.* Not only did the circuit court fail to remand the case to the district court for a *forum non conveniens* determination, or make such a determination itself, but also it did not mention in its decision the present split in the circuits. *Id.* at 861-65.

123. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

124. 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

125. *Sherrill v. Brinkerhoff Mar. Drilling*, 615 F. Supp. 1021, 1026 (N.D. Cal. 1985), *aff'd in part, rev'd in part, vacated in part, modified and remanded sub nom.* *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). Although the personal injuries and deaths at the focus of the suit occurred in an airplane crash, "[t]he Act applies to the death or injury of seamen occurring while being transported by their employer to or from the vessel." *Id.*; see *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 433 (5th Cir. 1977) (Jones Act applied to seaman killed in crash of helicopter ferrying him from drilling rig).

126. *Zipfel*, 832 F.2d at 1480-81. Two plaintiffs were administratrices suing their respective husbands' employers. *Id.* Decedent Craig was a U.S. citizen and his plaintiff-wife was Singaporean; decedent Zipfel was British and his plaintiff-wife was also Singaporean. *Id.* The other three plaintiffs were injured non-U.S. seamen. *Id.*

the non-U.S. seamen were employed by a Delaware corporation with its home office and base of operations in San Francisco.¹²⁷ Indonesian corporations owned and chartered the airplane.¹²⁸ The plane crashed while transporting the crew from Singapore to Indonesia, where they would have flown by helicopter to a U.S.-flag oil drilling vessel.¹²⁹ After making a choice of law determination based on the factors in *Lauritzen* and *Rhoditis*, the district court found that while the Jones Act did not apply to the non-U.S. seamen, it did apply to the U.S. seaman.¹³⁰ The district court then made a *forum non conveniens* determination, and dismissed each of the Jones Act claims against the various corporate defendants.¹³¹ The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the district court's decision.¹³² The appeals court reviewed the district court's choice of law determination, finding that it was not "clearly erroneous," and affirmed that court's decision to dismiss the Jones Act claims of the four non-U.S. citizens on *forum non conveniens* grounds.¹³³ Regarding the claim by the U.S. seaman's administratrix, however, the Ninth Circuit reversed the district court and retained jurisdiction.¹³⁴ The appeals court overturned the district court as to the claim concerning the U.S. seaman, reasoning that modified *forum non conveniens* analysis mandated the claim's retention by the court.¹³⁵

In *Needham v. Phillips Petroleum Company of Norway*,¹³⁶ the U.S. Court of Appeals for the Tenth Circuit also applied modified *forum non conveniens* analysis. In *Needham*, the decedent was an English citizen employed as a diver by a company incorpo-

Plaintiffs Chee and Albuquerque were Singaporean. *Id.* Plaintiff Grunke was Australian. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1480.

130. *Sherrill v. Brinkerhoff Mar. Drilling*, 615 F. Supp. 1021, 1029-30 (N.D.Cal. 1985), *aff'd in part, rev'd in part, vacated in part, modified and remanded sub nom. Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

131. *Id.* at 1030-33.

132. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1489 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

133. *Id.* at 1482-83.

134. *Id.* at 1480.

135. *Id.* at 1483.

136. 719 F.2d 1481 (10th Cir. 1983).

rated in the Channel Islands.¹³⁷ This Channel Island company contracted to provide divers to the Norwegian company, K/S Seaway Diving A/S (“Seaway Diving”), which in turn contracted to provide North Sea diving services to defendant Phillips-Norway.¹³⁸ Seaway Diving, which had no U.S. contacts,¹³⁹ also chartered the vessel *Seaway Falcon* to Phillips-Norway.¹⁴⁰ The vessel flew the Norwegian flag and carried Norwegian registration.¹⁴¹ Phillips-Norway’s principal office and base of operations was in Norway, although it was incorporated in Delaware.¹⁴²

While the decedent was aboard the *Seaway Falcon*, a smaller ship stored on the vessel loosened, skidded, and struck the decedent who died the next day in a Norwegian hospital.¹⁴³ The decedent’s estate brought a wrongful death action under the Jones Act in the Northern District of Oklahoma, where Phillips had an office.¹⁴⁴ On the basis of the *Lauritzen* and *Rhoditis* factors,¹⁴⁵ the district court concluded that U.S. law did not apply because there were substantial Norwegian contacts. Finding no abuse of discretion, the Tenth Circuit affirmed the lower court’s ruling to dismiss the case on *forum non conveniens* grounds.¹⁴⁶

The U.S. Court of Appeals for the Eleventh Circuit utilized modified analysis in *Szumlicz v. Norwegian American Line, Inc.*¹⁴⁷ The court barred a *forum non conveniens* dismissal in this Jones Act case after finding that U.S. law controlled. *Szumlicz* involved a ship that flew the Norwegian flag and was owned by a Norwegian company having its main office in Norway.¹⁴⁸ The company, however, operated a substantial Caribbean cruise business out of Florida and New York.¹⁴⁹ The plaintiff,

137. *Id.* at 1482.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1482-83.

146. *Id.* at 1484.

147. 698 F.2d 1192 (11th Cir. 1983).

148. *Id.* at 1194.

149. *Id.* The ship called at Port Everglades, Florida every two weeks for four months of the year. *See id.*

a resident of Poland, was hired by the Norwegian American Line in Germany as a musician on one of its ships.¹⁵⁰ The ship's doctor failed to hospitalize the plaintiff for one week after he complained of chest pains.¹⁵¹ Not until plaintiff was hospitalized did he learn that he had suffered a heart attack.¹⁵²

The plaintiff later returned to Europe and collected the insurance benefits for which he had contracted under the Norwegian Seaman's Act as the defendant's employee.¹⁵³ Subsequently, the plaintiff brought a suit to recover damages for negligence in the U.S. District Court for the Southern District of Florida under the Jones Act.¹⁵⁴ The district court found that U.S. law applied and refused to dismiss the case for *forum non conveniens*.¹⁵⁵ Upon review, the Eleventh Circuit affirmed the district court's use of modified *forum non conveniens* to retain jurisdiction.¹⁵⁶

Many commentators argue in support of the modified method.¹⁵⁷ One commentator contends that *Reyno* is irrelevant to Jones Act cases.¹⁵⁸ This argument is based on the *Reyno*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1194, 1196 n.3. The court stated that the "[p]laintiff . . . was paid the monetary benefits provided for in the Norwegian Seaman's Act." *Id.* at 1194. In addition, "[t]he contract of employment . . . provided that certain insurance coverage for illness and accidents would be paid in accordance with the Norwegian Seaman's Act" *Id.* at 1196 n.3.

154. *Id.* at 1193; *see supra* note 2 (discussing doctrine of unseaworthiness and its relationship with Jones Act).

155. *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1194-95 (11th Cir. 1983).

156. *Id.* at 1195.

157. *See, e.g., Tate, supra* note 121, at 208 (1982) (stating that *Fisher* court "suggested that the initial inquiry in a *forum non conveniens* determination in a seaman's maritime case is appropriately the choice of law question"). The Honorable Albert Tate, Jr. argues in favor of modified *forum non conveniens* analysis. *Id.* His argument reiterates a holding from a prior Fifth Circuit case, for which he wrote the opinion of the court. *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981). *See generally Tate, supra* note 121. Judge Tate, however, also cited *Reyno*, a decision published after *Fisher*, recognizing that it is now possible for a Jones Act case to be dismissed for *forum non conveniens*. *Tate, supra* note 121, at 208 n.54.

158. *See Edelman, Forum Non Conveniens: Its Application in Admiralty Law*, 15 J. MAR. L. & COM. 517, 532 (1984). Mr. Paul Edelman, a New York-based lawyer, recently represented the plaintiff seaman in *Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979 (S.D.N.Y. 1990), a decision upholding diversity *forum non conveniens* analysis.

Court's approval of *Anastasiadis v. S.S. Little John*,¹⁵⁹ a Jones Act decision holding that *Lauritzen* controlled all admiralty choice of law determinations.¹⁶⁰ The argument infers that if *Reyno* approved of *Little John*, and *Little John* approved of *Lauritzen*, *Reyno* therefore approved of how *Little John* interpreted *Lauritzen*. Thus, *Reyno* does not displace *Lauritzen*'s control of Jones Act cases. Rather, *Lauritzen* should be applied to cases brought under the Jones Act to determine the propriety of their being tried in the United States.¹⁶¹

B. Diversity Forum Non Conveniens Analysis Case Law

Diversity analysis balances equally the *Gilbert* factors, including choice of law.¹⁶² Two circuits use diversity *forum non conveniens* analysis when hearing Jones Act cases.¹⁶³ The U.S. Court of Appeals for the Second Circuit in *Cruz v. Maritime Company of Philippines*¹⁶⁴ was the first circuit to utilize diversity *forum non conveniens* analysis.¹⁶⁵ *Cruz* involved the injury of a seaman, a Filipino citizen, aboard the *M.V. Zamboanga*, a Filipino flag vessel owned by a Filipino company with its principal place of business in the Philippines.¹⁶⁶ Using modified *forum non conveniens* analysis, the district court performed a choice of law analysis to determine whether the court must exercise jurisdiction under the Jones Act's specific venue provision.¹⁶⁷ Finding that Philippine law applied, the district court analyzed the case using *Gilbert's* and *Piper's forum non conveniens* balancing test, and dismissed the case on *forum non conveniens* grounds.¹⁶⁸ The Second Circuit affirmed the district court's dismissal, but

159. 346 F.2d 281 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966).

160. Edelman, *supra* note 158, at 532.

161. *Id.* at 531.

162. See Note, *supra* note 117, at 182 n.26.

163. *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983) (per curiam); see *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) (en banc), *cert. granted, judgment vacated and remanded on other grounds sub nom. Pan Am. World Airways Inc. v. Lopez*, 490 U.S. 1032 (1989).

164. 702 F.2d 47 (2d Cir. 1983) (per curiam).

165. *Id.* at 48. *Cruz* held that "when the Jones Act is applicable federal law is involved and the district court must exercise its power to adjudicate, absent some exceptional circumstances such as the application of . . . the equitable principle of *forum non conveniens*." *Id.*

166. *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285, 287 (1982), *aff'd on other grounds*, 702 F.2d 47 (2d Cir. 1983) (per curiam).

167. *Id.* at 288.

168. *Id.* at 289-91.

held that courts are not required to take jurisdiction simply because U.S. law applies to a case.¹⁶⁹ The Second Circuit thus expressly overruled the district court's use of modified *forum non conveniens*.¹⁷⁰

The U.S. Court of Appeals for the Fifth Circuit followed *Cruz's* reasoning in *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*.¹⁷¹ In *Air Crash*, 154 passengers and crew perished when Pan American World Airways ("Pan Am") flight 759 crashed shortly after take-off in Louisiana.¹⁷² The heirs of the flight's Uruguayan victims brought suit under the Warsaw Convention.¹⁷³ The district court consolidated the suits and denied defendant Pan Am's motion to dismiss on *forum non con-*

169. *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 47-48 (2d Cir. 1983) (per curiam).

170. *Id.*

171. 821 F.2d 1147 (5th Cir. 1987) (en banc), *cert. granted, judgment vacated and remanded on other grounds sub nom.* Pan Am. World Airways Inc. v. Lopez, 490 U.S. 1032 (1989). *Air Crash* expressly overruled eighteen cases that utilized modified analysis to determine *forum non conveniens* issues. *Id.* at 1163 n.25. The cases that *Air Crash* overruled were *McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313, 1317 (5th Cir. 1986); *James v. Gulf Int'l Marine*, 777 F.2d 193, 194 (5th Cir. 1985); *Cuevas v. Reading & Bates Drilling Co.*, 770 F.2d 1371, 1377-78 (5th Cir. 1985); *Ali v. Offshore Co.*, 753 F.2d 1327, 1330 (5th Cir. 1985); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984); *In re McClelland Engineers, Inc.*, 742 F.2d 837, 838 (5th Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 218 (5th Cir. 1984); *Gahr Developments, Inc., v. Nedlloyd Lijnen, B.V.*, 723 F.2d 1190, 1192 (5th Cir. 1984); *Diaz v. Humboldt*, 722 F.2d 1216, 1217 (5th Cir. 1984); *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861-62 (5th Cir. 1983); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843, 845-46 (5th Cir. 1983); *Bailey v. Dolphin Int'l Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 (5th Cir. 1983); *Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107, 1108 (5th Cir. 1982); *Volyrakis v. M/V ISABELLE*, 668 F.2d 863, 866 (5th Cir. 1982); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1017-18 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981).

The *Air Crash* court concluded that

a single and uniform approach to the analysis and application of the *forum non conveniens* doctrine best serves litigants and the courts. We, therefore, expressly disapprove of and overrule our Jones Act and general maritime caselaw [sic] that utilizes a modified *forum non conveniens* analysis. Henceforth, all cases, including Jones Act and maritime actions, are governed by the dictates of *Reyno* and this opinion.

Air Crash, 821 F.2d at 1164 n.25.

172. *Air Crash*, 821 F.2d at 1150.

173. *Id.*; International Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (Warsaw Convention).

veniens grounds.¹⁷⁴ On appeal, the Fifth Circuit, sitting en banc, affirmed.¹⁷⁵ The circuit court held that the district court did not abuse its discretion in retaining jurisdiction over the case.¹⁷⁶ In a footnote to its opinion, the court of appeals expressly overruled all prior Fifth Circuit modified analysis cases.¹⁷⁷ The dissent in the case, however, challenged this overruling as dictum because the Jones Act was not at issue in the case.¹⁷⁸

Air Crash recently received support from the U.S. District Court for the Southern District of New York in *Gazis v. John S. Latsis (USA) Inc.*¹⁷⁹ The court in *Gazis* commented that the Fifth Circuit's overruling was actually part of *Air Crash*'s hold-

174. *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 821 F.2d 1147, (5th Cir. 1987) (en banc), cert. granted, judgment vacated and remanded on other grounds sub nom. *Pan Am. World Airways Inc. v. Lopez*, 490 U.S. 1032 (1989).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1180 (Garwood, J., dissenting). The dissent argued that "the Jones Act issue is simply not before us in this case, and has not been raised, briefed, or argued," and thus the majority wrongly spoke to the issue. *Id.*

179. 729 F. Supp. 979, 988 (S.D.N.Y. 1990). Modified *forum non conveniens* analysis did not undergo a thorough and critical examination until *Gazis*. For example, *Cruz*, a per curiam opinion, only stated that a separate choice of law analysis is not involved in Jones Act disputes. *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (per curiam). *Cruz* went on to say, however, that "in 'exceptional situations,' such as where the abstention doctrine applies, the district court may dismiss despite the applicability of federal law. . . . A case involving *forum non conveniens*, like one involving abstention, presents just such an exceptional situation." *Id.* (quoting *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2d Cir.), cert. denied, 359 U.S. 1000 (1959) (*Bartholomew* involved the abstention doctrine and not *forum non conveniens*)); see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). The *Gilbert* Court stated that "[o]bviously, 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." *Id.* (quoting *Canada Malting Co. v. Paterson Steamship, Ltd.*, 285 U.S. 413, 422-23 (1933) (Brandeis, J.)).

Cruz did not analyze the doctrine of modified *forum non conveniens*. *Cruz*, 702 F.2d at 48. The U.S. Court of Appeals for the Second Circuit wrote "simply to point out that maritime choice of law principles are not involved in a *forum non conveniens* analysis and that the district court's discussion on the subject was therefore unnecessary." *Id.*

Similarly brief in its treatment of modified *forum non conveniens*, *Air Crash*'s express overruling of all prior Fifth Circuit modified analysis case law was contained in a footnote. See *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987) (en banc), cert. granted, judgment vacated and remanded on other grounds sub nom. *Pan Am. World Airways Inc. v. Lopez*, 490 U.S. 1032 (1989); *supra* note 171 and accompanying text (discussing Fifth Circuit's overruling of all its prior modified *forum non conveniens* cases).

ing.¹⁸⁰ *Gazis* involved a Greek citizen serving as a seaman aboard a Greek-flagged vessel, the *Lady Ema*, which was managed by a Greek company.¹⁸¹ The seaman fell on the deck of the *Lady Ema* while fastening the gangway.¹⁸² He sustained injuries from which he later died.¹⁸³ His estate sued John S. Latsis (USA) Inc. ("Latsis"), a U.S. corporation, alleging that Latsis owned the ship, and was therefore liable for the seaman's death under the Jones Act.¹⁸⁴ The district court recognized that although Congress intended to provide a U.S. forum to Jones Act plaintiffs, the court still had discretion to dismiss the case for *forum non conveniens*.¹⁸⁵ The court denied the defendant's motion to dismiss, and gave the plaintiff leave to conduct limited discovery on the relationships of the various defendants and the U.S. contacts of the defendants.¹⁸⁶

Several commentators, in addition to the courts noted above, argue in favor of diversity *forum non conveniens*.¹⁸⁷ The most compelling argument is that *Gilbert* never intended choice of law to mandate application of Jones Act cases.¹⁸⁸ Rather, U.S. courts should assume that non-U.S. conflicts of law criteria do not critically deviate from U.S. conflicts of law criteria. Non-U.S. courts thus will apply the Jones Act if, indeed, U.S. law should be applied to the case.¹⁸⁹

180. *Id.* at 988.

181. *Id.* at 981.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 987-88.

186. *Id.* at 992.

187. See, e.g., BENEDICT ON ADMIRALTY (7th ed. 1989); Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 210 (1987) (stating that *forum non conveniens* replaces "imbalance favoring plaintiffs in [U.S.] courts with an imbalance favoring defendants").

Benedict stated that simply because the Jones Act applies to a case "ought not to prevent a court from dismissing the action on grounds of *forum non conveniens*." BENEDICT, *supra*, § 129, at 8-42 n.1. Benedict further noted that "it seems that upon a proper showing a district court should be able to dismiss a Jones Act action for *forum non conveniens*." *Id.* § 127, at 8-32. According to Benedict, therefore, the modified analysis method's foundation "was undermined by the Supreme Court's decision in *Piper Aircraft*." *Id.* § 127, at 8-33 n.8.

188. See Watson, *supra* note 108, at 89-90. Watson argues that the "notion that [a U.S.] court may not dismiss if [U.S.] law is found to be applicable is erroneous. . . . Nothing in *Gilbert* indicates that the choice of law consideration was to be given . . . paramount importance." *Id.* at 90.

189. *Id.* The argument states further that

III. ARGUMENTS FOR A UNIFORM FORUM NON CONVENIENS DOCTRINE USING THE DIVERSITY METHOD

Several arguments support the uniform use of diversity *forum non conveniens* in Jones Act cases. First, diversity *forum non conveniens* is consistent with the judicial and congressional trend that has narrowed the Jones Act since its enactment, while modified analysis is not.¹⁹⁰ Second, the outcome of a case to which the more rigid modified analysis is applied will frequently be inequitable, compared to the outcome of the same case if the court had applied diversity analysis.¹⁹¹ Third, the diversity method is more flexible than the modified method, thus enabling diversity courts to effectuate the holdings in *Reyno*, *Rhoditis*, *Lauritzen*, and *Gilbert*.¹⁹² Finally, the modified courts' use of a *de novo* standard of reviewing to district courts' choice of law determinations evades the stringent abuse of discretion standard of review for *forum non conveniens* determinations. Under the *de novo* standard, appellate courts are able to overrule district court *forum non conveniens* determinations without finding that the district court abused their discretion, thus undermining the goals of judicial efficiency.¹⁹³

A. Statutes and Judicial Decisions Have Narrowed the Jones Act's Scope

The procedure for determining whether the Jones Act ap-

[t]here is no reason to believe that conflict of laws criteria applied by courts of other nations are significantly different than those applied by [U.S.] courts. Accordingly, if [a U.S.] court's determination that [U.S.] law is applicable is based on an honest attempt to weigh the relevant choice of law factors, there should be no reason to assume that the foreign courts will not reach the same conclusion and also apply [U.S.] law.

Id.

190. See *infra* notes 194-251 and accompanying text for the argument that judicial decisions and legislative enactments have narrowed the scope of the Jones Act, and that the diversity method, unlike the modified method, accords with this trend.

191. See *infra* notes 252-88 and accompanying text (arguing that cases utilizing modified method would have been decided more equitably if diversity method used instead).

192. See *infra* note 289-91 and accompanying text for the argument that the diversity method is more flexible than the modified method and, therefore, better effectuates the holdings of *Reyno*, *Rhoditis*, *Lauritzen*, and *Gilbert*.

193. See *infra* notes 292-99 and accompanying text (arguing that modified method's standard of review enables modified courts to "end-run" strict standard of review for *forum non conveniens* considerations that use *Gilbert's* factors).

plies to non-U.S. seamen has had a confusing evolution.¹⁹⁴ Since the enactment of the Jones Act, statutes and decisions have both broadened and narrowed the scope of the Act, thus breeding confusion as to the Act's reach, and fueling disagreement among courts as to the intent of Congress and the U.S. Supreme Court.¹⁹⁵ A trend toward narrowing the scope of the Jones Act, however, is clearly visible.¹⁹⁶

Diversity *forum non conveniens* provides a uniform standard that is consistent with a narrowing interpretation of the Act.¹⁹⁷ Unlike modified *forum non conveniens*, a diversity analysis restricts the Jones Act's reach in cases brought under the Act by foreign seamen by initially subjecting the cases to a *forum non conveniens* balancing.¹⁹⁸ Diversity *forum non conveniens* thus follows the judicial holdings and congressional enactments that signal a narrowing of the scope of the Jones Act.¹⁹⁹ U.S. courts should use the diversity method when deciding Jones Act suits because the diversity method best effectuates the narrow scope of the Act.

1. Signals from Pre-*Reyno* Decisions and Enactments Diverge Regarding the Scope of the Jones Act's Specific Venue Provision

Judicial decisions and legislative enactments before *Reyno* sent divergent signals to U.S. courts regarding the scope of the Jones Act's specific venue provision.²⁰⁰ *Reyno*, however, though not a Jones Act case, clarified the confusion surrounding the Act's scope when it elucidated the fundamental differ-

194. See *supra* notes 63-116 and accompanying text (discussing Jones Act's relationship with doctrine of *forum non conveniens*).

195. See *infra* notes 196-235 and accompanying text (discussing statutes and decisions that broaden or narrow scope of Act).

196. See *infra* notes 236-51 and accompanying text (discussing narrowing trend of statutes and decisions on Act).

197. See *infra* notes 244-51 and accompanying text (discussing narrowing interpretation of Jones Act).

198. See *supra* notes 162-86 and accompanying text (discussing diversity method).

199. See *infra* notes 206-21 and accompanying text (discussing narrowing of Act's scope by *Gilbert*, *Lauritzen*, and federal transfer statute); *infra* notes 225-42 and accompanying text (discussing narrowing of Act's scope by *Reyno* and 1982 Jones Act amendment).

200. See *infra* notes 201-24 for a discussion of how *Gilbert*, *Lauritzen*, and the federal transfer statute narrow the Jones Act's scope, but also noting that it is unclear whether *Rhoditis* narrows or broadens the scope of the Jones Act.

ences between the doctrines of *forum non conveniens* and choice of law.²⁰¹ Notwithstanding this clarification, some courts continue to substitute a choice of law determination for a *forum non conveniens* analysis in Jones Act cases.²⁰² The present confusion among lower federal courts stems mainly from inconsistent interpretation of the holding in *Reyno* by federal appeals courts.²⁰³ The use by all U.S. courts of a uniform *forum non conveniens* analysis when adjudicating Jones Act disputes would clear up confusion among the federal courts, leading to a more uniform standard of justice.

Prior to the U.S. Supreme Court's decision in *Reyno*, the Court and the U.S. Congress interpreted the scope of the Jones Act differently.²⁰⁴ *Gilbert*, *Lauritzen*, and the federal removal statute, for example, limited the scope of the Act, while *Rhoditis* broadened the Act's scope.²⁰⁵

The *Gilbert* Court's holding now restricts the reach of the Jones Act by requiring courts to consider public and private interest factors.²⁰⁶ For one year after the U.S. Supreme Court decided *Gilbert*, however, its holding did not affect the Jones Act²⁰⁷ because of the *Gilbert* Court's reliance on a previous U.S. Supreme Court decision, *Kepner*.²⁰⁸ The Court in *Kepner* had held that a plaintiff's satisfaction of the FELA's specific venue

201. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-55 (1981). The *Piper* Court noted that "[i]f the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important." *Id.* at 251.

202. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983) (applying modified *forum non conveniens*).

203. *Reyno*, 454 U.S. at 247-55; *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983).

204. Compare *Gilbert v. Gulf Oil Corp.*, 330 U.S. 501 (1947) and *Lauritzen v. Larsen*, 345 U.S. 571 (1953) with *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

205. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Rhoditis*, 398 U.S. 306; 28 U.S.C. § 1404(a) (1988).

206. See *Gilbert*, 330 U.S. at 508-09.

207. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

208. See *Gilbert*, 330 U.S. at 505-07; *Baltimore & Ohio Ry. Co. v. Kepner*, 314 U.S. 44 (1941); *supra* notes 47-51 and accompanying text (discussing *Kepner's* effect on *Gilbert*).

provision mandated U.S. courts to take jurisdiction.²⁰⁹ The *Gilbert* Court held on the basis of the FELA analysis in *Kepner* that plaintiffs' choice of venue, in cases involving statutes containing specific venue provisions, cannot be defeated simply because the chosen venue is inconvenient.²¹⁰ The *Gilbert* Court, however, limited *Kepner's* holding only to cases brought under specific venue statutes.²¹¹

One year after the Court decided *Gilbert*, Congress enacted a federal transfer statute.²¹² The transfer statute undermined *Kepner's* holding by allowing courts to transfer cases from venues chosen by plaintiffs, including venues specifically provided for in statutes, to more convenient forums within the United States.²¹³ Congress enacted the transfer statute to permit transfer of cases brought under statutes containing specific venue provisions, such as the FELA provision in *Kepner*.²¹⁴ After the enactment of the transfer statute, courts could balance *Gilbert's* public and private interest factors in cases brought under statutes, such as the Jones Act, that contain specific venue provisions.²¹⁵ Courts could thus decline jurisdic-

209. See *Gilbert*, 330 U.S. at 505-07; *Baltimore & Ohio Ry. Co. v. Kepner*, 314 U.S. 44 (1941); *supra* notes 47-51 and accompanying text (discussing *Kepner's* effect on *Gilbert*).

210. *Gilbert*, 330 U.S. at 505.

211. *Id.* The Court stated that "in cases under the [FELA] . . . we have held that plaintiff's choice of forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it. Those decisions do not purport to modify the doctrine [of *forum non conveniens*] as to other cases governed by the general venue statutes." *Id.* (emphasis added). See 28 U.S.C. §§ 1391-1412 for the general venue statutes.

The Court stated that "[t]he Federal Employers' Liability Act, as interpreted by *Kepner*, increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice." *Gilbert*, 330 U.S. at 506.

212. See 28 U.S.C. § 1404 (1988).

213. See 28 U.S.C. § 1404(a) (1988).

214. See 28 U.S.C. § 1404(a) note (1988) (abrogating *Kepner* Court's holding that mandated jurisdiction over cases brought under specific venue statutes).

215. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987) (en banc), cert. granted, judgment vacated and remanded on other grounds sub nom. *Pan Am. World Airways Inc. v. Lopez*, 490 U.S. 1032 (1989); *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (per curiam); *Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979, 985-90 (S.D.N.Y. 1990); see also *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (applying *forum non conveniens* inquiry to case brought under RICO); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir. 1977) (applying *forum non conveniens* inquiry to case brought

tion over Jones Act cases if a more convenient forum existed, in spite of the Act's specific venue provision.

Although *Gilbert* was not a Jones Act case, its *forum non conveniens* factors were capable of affecting the Act's specific venue provision. U.S. courts could use *Gilbert's forum non conveniens* factors to limit the reach of the Act's specific venue provision from all Jones Act cases to only those in which the United States was the more convenient forum.²¹⁶ The transfer statute invalidated *Kepner's* holding that satisfaction of a specific venue provision mandated U.S. courts to take jurisdiction. *Kepner* therefore no longer constrains *Gilbert's* application to cases brought under specific venue statutes such as the Jones Act. The transfer statute thus enables courts to use *Gilbert's* factors in Jones Act cases.

Like *Gilbert's forum non conveniens* factors, the *Lauritzen* Court's seven choice of law criteria narrowed the Jones Act's scope.²¹⁷ Prior to *Lauritzen*, the Act applied equally to U.S. seamen injured on U.S. vessels in U.S. waters, and non-U.S. seamen injured on non-U.S. vessels outside of U.S. waters.²¹⁸ The *Lauritzen* Court confined the Act's reach to the fulfillment of seven criteria establishing sufficient U.S. contacts to justify the application of the Jones Act.²¹⁹ The Court thus narrowed the scope of the Jones Act from all seamen to only those seamen whose claims sufficiently fulfilled the seven criteria to balance in favor of applying the Jones Act.²²⁰ The *Lauritzen* Court's choice of law criteria, however, did not displace the *Gilbert* Court's *forum non conveniens* factors.²²¹ The principles of choice of law and *forum non conveniens* remained distinctly defined even though they were now interwoven in Jones Act procedure.

Rhoditis added an eighth factor to the *Lauritzen* choice of law criteria, the shipowner's base of operations.²²² The inclu-

under Lanham Trademark Act); *supra* note 44 and accompanying text (discussing Lanham Act and RICO).

216. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505-09 (1947).

217. See *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953).

218. See *id.*

219. See *id.*

220. See *id.*

221. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *Contra Anastasiadis v. S.S. Little John*, 346 F.2d 281 (5th Cir. 1965).

222. See *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308-10 (1970).

sion of the eighth factor practically insures the Jones Act's application to cases in which the shipowner operates in the United States.²²³ Theoretically, the addition of the shipowner's base of operations broadens the scope of the Jones Act because more defendants come within the Act's reach. In practice, however, courts' exclusive reliance on this one factor effectively narrows the scope of the Act.²²⁴

2. *Reyno* and the 1982 Amendment to the Jones Act Limit the Scope of the Act's Specific Venue Provision

The U.S. Supreme Court's holding in *Reyno* and Congress's subsequent amendment of the Jones Act also effectuated a narrowing of the Jones Act's scope.²²⁵ *Reyno*'s holding does not speak directly to the Jones Act or even to statutes containing specific venue provisions.²²⁶ *Reyno* does, however, clarify the fundamental differences between the principles of choice of law and *forum non conveniens*, thereby highlighting the disparity between the modified and diversity methods.²²⁷

The *Reyno* Court held that choice of law is not dispositive in *forum non conveniens* determinations.²²⁸ Choice of law therefore is one of several factors to balance in a *forum non conveniens* inquiry, and not the sole factor. Because *forum non conveniens* and choice of law are two distinct doctrines, they should be analyzed separately using different factors.²²⁹ The argument that *Reyno*'s approval of *Little John* implicitly approved of modified *forum non conveniens* is thus incorrect.²³⁰

Reyno does not condone *Little John*'s approval of *Lauritzen*'s factors as the criteria to use in a *forum non conveniens* balanc-

223. *See id.*

224. *See, e.g.,* *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983).

225. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981); *see also* 46 U.S.C. § 688(b) (1988).

226. *See Reyno*, 454 U.S. at 247.

227. *See id.*

228. *Id.* at 250-51.

229. *See* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *supra* notes 87-90 (discussing *Gilbert*'s public and private interest factors); *see also* *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *supra* notes 27-35 and accompanying text (discussing *Lauritzen*'s choice of law factors).

230. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981). *Contra* Edelman, *supra* note 158.

ing.²³¹ Rather, *Reyno* places *Little John* into an historical *forum non conveniens* context. *Little John* was one of several decisions prior to *Reyno* that spoke to the issue of the propriety of dismissing cases to available non-U.S. forums that would have resulted in unfavorable changes in substantive law.²³²

Reyno approved of *Little John*'s holding that a *forum non conveniens* dismissal should be granted even though the alternative forum's law is less favorable to the plaintiff.²³³ *Reyno*'s holding that choice of law is not dispositive in *forum non conveniens* determinations, however, runs directly counter to *Little John*'s method of using choice of law factors exclusively in its *forum non conveniens* inquiry.²³⁴ Thus, although *Reyno* expressly approved of *Little John*'s reasoning, it also expressly disapproved of *Little John*'s method.²³⁵

The Jones Act amendment, like *Reyno*, did not expressly concern choice of law or *forum non conveniens*, yet the amendment affected both of these doctrines. Congress's denial of coverage to non-U.S. citizen oil rig seamen outside of U.S. waters was a response to both the great increase in non-U.S. oil rig injury suits, and *Reyno*'s holding against international forum shopping.²³⁶ Contrary to congressional intent in amending the Act, modified *forum non conveniens* favors seamen shopping for the most favorable international forum in which to bring their negligence suits.²³⁷

The modified *forum non conveniens* analysis contravenes congressional intent because once a U.S. court applying the modified method determines that the Jones Act applies, the

231. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981).

232. See, e.g., *Anastasiadis v. S.S. Little John*, 346 F.2d 281 (5th Cir. 1965), cert. denied, 384 U.S. 920 (1966).

233. *Reyno*, 454 U.S. at 250.

234. Compare *Reyno*, 454 U.S. at 249-51 with *Little John*, 346 F.2d at 283.

235. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-51 (1981); *Little John*, 346 F.2d 281.

236. See 46 U.S.C. § 688(b) (1988); *Reyno*, 454 U.S. at 240, 249-51. The *Reyno* Court reported that the plaintiff, "Reyno candidly admit[ted] that the action . . . was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland." *Id.* at 240. The Court declared, however, that a change in substantive law cannot be dispositive in a *forum non conveniens* inquiry. See *id.* at 249-51.

237. See, e.g., *Reyno*, 454 U.S. at 240; *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1194 (11th Cir. 1983) (stating that plaintiff seamen recovered monetary benefits under Norwegian Seaman's Act, but subsequently sought and won U.S. jury verdict for US\$35,000).

court cannot dismiss the case for *forum non conveniens* even if a convenient non-U.S. forum exists.²³⁸ Furthermore, such a result impliedly asserts that a Jones Act choice of law analysis takes the place of a *forum non conveniens* determination.²³⁹ This result is inconsistent with the holdings in both *Gilbert* and *Reyno*.²⁴⁰ The *Gilbert* Court held that choice of law was one of several factors that courts must balance in a *forum non conveniens* determination.²⁴¹ The *Reyno* Court held that courts cannot treat choice of law considerations in *forum non conveniens* inquiries as dispositive.²⁴²

The narrowing trend begun by *Gilbert*, *Lauritzen*, and the federal transfer statute thus continued with *Reyno* and the congressional amendment to the Jones Act. Recent modified analysis cases have, however, neglected any reconciliation with *Reyno* or the narrowing trend in general.²⁴³ In order for the narrowing trend to continue, modified *forum non conveniens* must be abandoned in favor of a uniform diversity method.

3. The Most Recent Case to Frame the Dispute Between Modified and Diversity Analysis Argues Convincingly for the Diversity Method

The U.S. District Court for the Southern District of New York's recent decision in *Gazis v. John S. Latsis (USA) Inc.*²⁴⁴ fits the trend narrowing the scope of the Jones Act.²⁴⁵ The decision described a deliberate movement away from modified analysis and toward diversity analysis in admiralty cases since

238. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) (applying modified *forum non conveniens*).

239. See *Anastasiadis v. S.S. Little John*, 346 F.2d 281, 283 (5th Cir. 1965); see also *Zipfel*, 832 F.2d at 1487, *cert. denied*, 486 U.S. 1054 (1988); *Needham*, 719 F.2d at 1483; *Szumlicz*, 698 F.2d at 1195.

240. Compare *Little John*, 346 F.2d 281 (5th Cir. 1965) with *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

241. See *Gilbert*, 330 U.S. at 509.

242. See *Reyno*, 454 U.S. at 249-51.

243. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983).

244. 729 F. Supp. 979 (S.D.N.Y. 1990).

245. See *id.*

the enactment of the Jones Act.²⁴⁶

The *Gazis* court relied primarily on congressional intent in its decision.²⁴⁷ Additionally, the *Gazis* court gleaned from other court opinions their treatment of other statutes that contain specific venue provisions.²⁴⁸ Furthermore, the *Gazis* court looked to the U.S. Supreme Court's decision in *Reyno* regarding *forum non conveniens* determinations.²⁴⁹ Moreover, the *Gazis* court parsed support from recent Jones Act case law.²⁵⁰ Based

246. *See id.* at 985-90.

247. *Id.* at 987. When Congress enacted 28 U.S.C. § 1404(a) (1988) (providing for transfer of venue due to inconvenience), it specifically cited *Kepner* "as an example of the need for the transfer provision." *Gazis*, 729 F. Supp. at 987. The *Gazis* Court asserted that this enactment was a signal from Congress that *Gilberts* statement that cases brought under specific venue statutes cannot be disturbed was inaccurate. *Id.* Cases brought under specific venue statutes could be transferred within the U.S. judicial system to more convenient forums. *Id.*

Another example of congressional intent is Congress's 1982 amendment to the Jones Act in response to

[t]he courts hav[ing] generally found that the substantive rights granted by the Jones Act do not extend to foreign nationals who lack sufficient contacts with the United States. . . . [This Amendment] codifies this case law and clarifies that the substantive rights granted by the Jones Act do not extend to foreign offshore workers.

Maritime Torts, 1982: Hearings on H.R. 4863 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 2d Sess. 7 (1982); see Gazis, 729 F. Supp. at 988. The Gazis court stated only that this enactment "suggests that Congress does not intend the reach of the Jones Act to be limitless." Id. (emphasis added).

248. *Gazis, 729 F. Supp. at 988. The Gazis court cited*

several courts [that] have held in the context of other statutes with specific venue provisions that *forum non conveniens* dismissal is appropriate. The Ninth Circuit . . . in *Wells Fargo & Co. v. Wells Fargo Express Co.* [regarding] the Lanham Act [as well as the Second Circuit] [i]n *Transunion Corp. v. Pepsico, Inc.* [regarding] RICO.

Id. (citations omitted); *see supra* note 44 and accompanying text (discussing Lanham Act's specific venue provision).

249. *Gazis, 729 F. Supp. at 988. Gazis argued that "the breadth of [Reyno]'s command . . . precluded an exception for Jones Act cases." Id.; see In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987) (en banc), cert. granted, judgment vacated and remanded on other grounds sub nom. Pan Am. World Airways Inc. v. Lopez, 490 U.S. 1032 (1989). Gazis also noted that none of the recent modified analysis circuit decisions "attempt[ed] to reconcile their decisions with the Court's holding in [Reyno] that choice of law is not dispositive in a forum non conveniens motion." Gazis, 729 F. Supp. at 986 (construing *Reyno*); *see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981)* (stating that "[i]f the possibility of a change in law were given substantial weight, . . . [c]hoice-of-law analysis would become extremely important").*

250. *Gazis v. John S. Latsis (USA) Inc., 729 F. Supp. 979, 987 (S.D.N.Y. 1990). The Gazis court*

on these past statutory enactments and judicial decisions, the *Gazis* opinion compellingly asserted a narrowed congressional and U.S. Supreme Court view of the Act.²⁵¹ Ultimately, all courts should recognize this trend and uniformly apply the diversity method to Jones Act cases.

B. *Cases Decided Under Modified Analysis Would Be Decided More Equitably Under Diversity Analysis*

Synthesizing the *Lauritzen* and *Rhoditis* choice of law considerations with the *Gilbert* and *Reyno forum non conveniens* determination yields a unified diversity method. *Gilbert* treats choice of law as a public interest factor.²⁵² Courts should determine this one *Gilbert* factor by weighing the choice of law factors from *Lauritzen* and *Rhoditis*. Consistent with *Reyno*, courts cannot give substantial weight to choice of law in this balancing.²⁵³ This unified method follows the holdings of *Gilbert*, *Lauritzen*, and *Reyno*, the most significant Supreme Court decisions relating to the doctrines of choice of law and *forum non conveniens*.

The choice of law determination in modified analysis is an obsolete appendage in Jones Act cases that unnecessarily mandates U.S. federal court jurisdiction in Jones Act cases. In fact, if the courts in *Szumlicz v. Norwegian American Line, Inc.*²⁵⁴ and *Zipfel v. Halliburton Company*²⁵⁵ had applied diversity *forum non conveniens* instead of the modified method, the courts would have dismissed the cases instead of retaining jurisdiction over them.²⁵⁶

decline[d] to follow *Zipfel* when the effect would be to remove [policy considerations weighing against *forum non conveniens* dismissals] from the court's determination and mandate that every case arguably implicating the Jones Act be heard in United States courts. Such a result would conflict with the well-established history of decisions under the Jones Act in which courts have declared that the United States should not become the forum and lawmaker for the world's maritime defendants.

Id. (citing *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 323 (5th Cir. 1987); *Pain v. United Technologies Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *Cruz v. Maritime Co. of Philippines*, 702 F. Supp. 47 (1983)).

251. See *Gazis*, 729 F. Supp. at 985-88.

252. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

253. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-51 (1981).

254. 698 F.2d 1192 (11th Cir. 1983).

255. 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

256. See *infra* notes 257-85 and accompanying text (analyzing facts in *Szumlicz* and *Zipfel* under diversity method).

To retain jurisdiction over the case, the *Szumlicz* court primarily relied on the *Rhoditis* Court's holding regarding the shipowner's base of operations.²⁵⁷ Based on the available facts, the *Szumlicz* court would have dismissed the case on *forum non conveniens* grounds if it had utilized the diversity method instead of the modified method. The court in *Szumlicz* based its holding primarily on one factor within the choice of law consideration—the defendant's base of day-to-day operations.²⁵⁸

The *Szumlicz* court's analysis is flawed because the day-to-day base of operations is difficult to ascertain. While the defendant's shipping agent booked cruises for U.S. citizens, other passengers boarded the vessel in Germany and Great Britain.²⁵⁹ It is unclear whether these non-U.S. passengers booked their cruises through the Florida office or through the defendant's main office in Norway.²⁶⁰ In addition, the length of time that the vessel was in one forum or the other cannot be used to determine the cruise line's day-to-day base of operations. The vessel on which the negligence occurred spent half of the year in Florida and various Caribbean ports, and the other half of the year cruising to and from its destination in Florida and presumably undergoing repair and inspection.²⁶¹ Even the one choice of law factor relied on by the court as dispositive of the Jones Act's application to the case, the cruise line's day-to-day base of operations, is therefore questionable because the relevant private interest factor in *Szumlicz* points to both the United States and Norway.²⁶²

Moreover, the analysis of the relevant public interest factors in *Szumlicz* was inconclusive because the factors do not favor one alternative forum over the other.²⁶³ The *Szumlicz*

257. See *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983).

258. *Id.* at 1195-96.

259. *Id.* at 1194.

260. *Id.*

261. See *id.*

262. *Id.* Sources of proof are accessible to both forums because the records needed to support the findings of both the ship's doctor and the doctor at port can be easily transferred to either forum. *Id.*

263. *Id.* It is unclear whether the shipowner's base of day-to-day operations is in the United States or Norway. *Id.* See *supra* notes 257-62 (discussing shipowner's base of operations in *Szumlicz*). Out of ninety-five U.S. federal district courts, the U.S. District Court for the Southern District of Florida ranked eighth in number of civil cases pending, and first in number of criminal cases pending in 1983. Administrative Office of the United States Courts, Federal Workload Statistics, A-8-9, 16-17 (1983).

court, however, ignored the inconclusive nature of the seaman's contacts with the United States and based its decision almost exclusively on the fact that the defendant employed a doctor and a shipping agent in Florida.²⁶⁴

If the district court in *Szumlicz* had applied the diversity method to the case, the public and private interest factors would not have pointed convincingly to either alternative forum. In its discretion, the U.S. District Court for the Southern District of Florida would have conditionally dismissed *Szumlicz* in favor of the jurisdiction of a Norwegian court on *forum non conveniens* grounds.

Sound reasoning suggests that a busy U.S. court should not take jurisdiction over a case which can be adjudicated in a non-U.S. forum with similar fairness, efficiency, and potential for adequate recovery. The U.S. forum choice of a non-U.S. plaintiff deserves less deference than the same choice by a U.S. plaintiff,²⁶⁵ and the non-U.S. forum in *Szumlicz* provided the plaintiff with an adequate remedy.²⁶⁶ The *Szumlicz* court's retention of jurisdiction over the case, therefore, based solely on the fact that the defendant shipowner had a base of operations in the United States, burdened the U.S. judicial system.

In *Zipfel*, the U.S. Court of Appeals for the Ninth Circuit based part of its decision merely on the citizenship of the seaman.²⁶⁷ The court permitted the surviving wife of a deceased U.S. seaman to bring a Jones Act claim in the United States.²⁶⁸ The court held that an injured non-U.S. seaman who possessed the same contacts as his U.S. shipmate could not bring a

Thus, that district's docket was one of the most crowded in the United States at the time *Szumlicz* was decided. *Id.* In addition, both the United States and Norway had an interest in the outcome of the litigation because the Norwegian company utilized South Florida as one of its bases of operations. *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1194 (11th Cir. 1983).

264. *Szumlicz*, 698 F.2d at 1194-96.

265. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (stating that "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

266. I INT'L ENCYCLOPEDIA OF COMP. L. N-81 (1972). The general rule in Norway is that "damage caused negligently . . . gives rise to compensation both in contract and tort." *Id.*

267. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1485-87 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988).

268. *Id.* at 1483.

Jones Act claim in the United States.²⁶⁹

If the *Zipfel* court had applied the diversity method instead of the modified method, the U.S. seaman's claim should have been dismissed along with the non-U.S. seaman's claim.²⁷⁰ Even under the *Lauritzen* and *Rhoditis* courts' choice of law factors, domicile is not dispositive of the Jones Act's application.²⁷¹ Under the *Gilbert* and *Reyno* courts' *forum non conveniens* factors, therefore, where choice of law is only one factor among several to be balanced, the plaintiff's domicile is not dispositive of a forum's convenience.

In *Zipfel*, both the public and the private interest factors overwhelmingly point away from the United States and toward Indonesia.²⁷² *Zipfel*, like *Reyno*, arose out of an airplane crash outside of the United States.²⁷³ Unlike *Reyno*, however, *Zipfel* does not concern the design and manufacture of the airplane.²⁷⁴ Rather, *Zipfel* solely concerns actions arising out of Indonesians' conduct while in Indonesia.²⁷⁵ This circumstance, coupled with the fact that the defendant's base of day-to-day operations was either in Indonesia or Singapore and

269. *Id.* at 1483-85.

270. See *infra* notes 272-84 and accompanying text (analyzing *Zipfel* under diversity method).

271. See *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953).

272. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1483-85 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). Sources of proof in Indonesia, such as documented flight records and accident reports, can be easily mailed or messengered to a U.S. court. *Id.* at 1480-81. The wreckage of the plane itself, however, cannot be as easily transported. *Id.* Because the cause of the crash is disputed, the site of the accident, an Indonesian airstrip, should be observed by the finders of fact. *Id.* In addition, as was noted in the district court opinion, "[n]o material witness [in this case] has been shown to be subject to the process of [the Northern District of California]." *Sherrill v. Brinkerhoff Mar. Drilling*, 615 F. Supp. 1021, 1032 (N.D. Cal. 1985), *aff'd in part, rev'd in part, vacated in part, modified and remanded sub nom. Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

The public interest factors, as well, point to Indonesia as the most convenient forum. Choice of law points to Indonesia because although the defendant operated primarily out of Northern California, the day-to-day operations of the vessel itself were carried out in Indonesia. *Sherrill*, 615 F. Supp. at 1032. The locale of the controversy is Indonesia. *Zipfel*, 832 F.2d at 1480; see *infra* note 276 and accompanying text (discussing how this litigation touches mainly non-U.S. citizens).

273. *Sherrill*, 615 F. Supp. at 1032.

274. See *id.* Compare *Sherrill*, 615 F. Supp. at 1023-24 with *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238-44 (1981).

275. See *Sherrill*, 615 F. Supp. at 1023-24.

not the United States, made *Zipfel* an even stronger case for dismissal on *forum non conveniens* grounds than *Reyno*.

In fact, the U.S. Court of Appeals for the Ninth Circuit in *Zipfel* conceded that because both the U.S. seaman and the non-U.S. seaman possessed the same contacts except for their domiciles, the court would have dismissed the claim pertaining to the U.S. seaman if it had performed a *forum non conveniens* inquiry.²⁷⁶ The court retained jurisdiction over the claim regarding the U.S. seaman, however, for two reasons. First, the claim was filed in a U.S. court on behalf of a U.S. citizen.²⁷⁷ Second, the appellate court affirmed the district court's finding that the Jones Act applied to the claim filed on behalf of the U.S. seaman.²⁷⁸ The court held that the modified method applied to such a claim and, therefore, a *forum non conveniens* inquiry by the court was improper.²⁷⁹

Both reasons are unpersuasive. The *Reyno* Court did not hold that a U.S. citizen's choice of a U.S. forum preempted any *forum non conveniens* consideration.²⁸⁰ Rather, the *Reyno* Court declared that even U.S. citizens' claims should be dismissed if their forum choices unnecessarily burden the courts.²⁸¹ The claim concerning the U.S. seaman in *Zipfel* was, on balance, burdensome to the court. All relevant public and private interest factors pointed to Indonesia as the most convenient forum.²⁸² Retaining jurisdiction, therefore, placed an unnecessary burden on the U.S. defendant and the U.S. court.

The Ninth Circuit's application of the modified method in this case highlights the fundamental inequity of that doctrine. The U.S. Supreme Court in *Reyno* held that choice of law is not dispositive in *forum non conveniens* inquiries.²⁸³ Yet the *Zipfel* court utilized modified *forum non conveniens* to retain jurisdic-

276. See *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1485-87 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988).

277. *Id.*

278. *Id.*

279. *Id.*

280. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.23 (1981).

281. *Id.* The *Reyno* Court declared that although "[c]itizens or residents deserve somewhat more deference than foreign plaintiffs . . . [a]s always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Id.*

282. See *supra* notes 272-75 and accompanying text (describing how *Zipfel's* relevant public and private interest factors point to Indonesia as most convenient forum).

283. See *Reyno*, 454 U.S. at 249-51.

tion over a case that it admits would otherwise have been dismissed.²⁸⁴ If the Ninth Circuit applied diversity *forum non conveniens* to *Zipfel*, its analysis would have resulted in a dismissal of all of the claims. Such a result would be consistent with the holdings in *Reyno*, *Rhoditis*, *Gilbert*, and *Lauritzen*.

The *Zipfel* court's use of the modified method burdened the court because it retained jurisdiction over a case that should have been decided in a more convenient and equally fair forum. The application of a uniform diversity *forum non conveniens* analysis ensures that cases like *Zipfel* result in the most efficient and equally fair outcome.

The facts underlying some cases point to the same result regardless of the method of analysis used. In *Needham v. Phillips Petroleum Company of Norway*,²⁸⁵ for example, the court dismissed the case after applying the modified analysis.²⁸⁶ Every relevant public and private interest factor pointed to Norway except for the defendant's principal place of business, which was in Oklahoma.²⁸⁷ Even under the diversity method, therefore, the case would have been dismissed.

Needham is an example of a fact pattern that dictates only one holding regardless of the method of analysis used. *Needham* and cases like it thus do not compel the use of one *forum non conveniens* method over the other. Cases like *Szumlicz* and *Zipfel*, on the other hand, spotlight both the inequity of the modified method and the flexibility of the diversity method.²⁸⁸

284. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486-87 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

285. 719 F.2d 1481 (10th Cir. 1983).

286. *Id.* at 1483-85.

287. *Id.* at 1482. The choice of law factors pointed to Norway. *Id.* The locale of the controversy was in Norway, as were the interested parties and the sources of proof. *Id.*

288. *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) (citing *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982)); *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5th Cir. 1981)). The U.S. Court of Appeals for the Eleventh Circuit held that "[w]hether the Jones Act applies in this case involves a question of choice of law, the determination of which requires a two-pronged inquiry." *Id.* The court in *Air Crash* overruled both *Volyrakis* and *Chiazor*. In re *Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1163-64, n.25. (5th Cir. 1987) ("We . . . expressly disapprove of and overrule our Jones Act and general maritime case law that utilizes a modified *forum non conveniens* analysis."), *cert. granted, judgment vacated and remanded on other grounds sub nom.* Pan Am.

C. *The Diversity Method Is More Flexible than the Modified Method*

The circumstances in *Szumlicz* evenly balanced the relevant *Gilbert* factors.²⁸⁹ The *Szumlicz* court, therefore, could have used its discretion to lighten the burden on the U.S. judicial system by dismissing the case in favor of a competent, efficient, and fair alternative forum. Instead, the court unnecessarily retained jurisdiction over the case, using an inconclusive "base of operations" test.²⁹⁰ Similarly, the *Zipfel* court needlessly retained jurisdiction over a claim that was ultimately based on the domiciles of the defendant and the seaman on whose behalf the claim was brought.²⁹¹

The claims in both *Szumlicz* and *Zipfel* would have been dismissed if the courts that decided those cases applied diversity

World Airways Inc. v. Lopez, 490 U.S. 1032, 1163-64 n.25 (1989); see *supra* note 171 (listing modified analysis cases Fifth Circuit expressly overruled in *Air Crash*).

The U.S. Court of Appeals for the Tenth Circuit held that "[i]f American law is applicable to the case, the *forum non conveniens* doctrine is inapplicable." *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) (citing *De Oliviera v. Delta Marine Drilling*, 707 F.2d 843, 845 (5th Cir. 1983) (per curiam)); *Bailey v. Dolphin Int'l., Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983). The court in *Air Crash* overruled both *De Oliviera* and *Bailey*. *Air Crash*, 821 F.2d at 1165 n.25; see *supra* note 165 (listing modified analysis cases Fifth Circuit expressly overruled in *Air Crash*).

Furthermore, other authorities cited by *Needham* and *Szumlicz* to support their holdings were properly decided in reliance on cases that were later expressly or impliedly overruled. See *Needham*, 719 F.2d at 1483. *Needham* cites as authority for its holding *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), and *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307, 310 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977). *Needham's* reliance on *DeMateos* is misplaced because *DeMateos* "conclude[d] that the District Court, recognizing that American Law would *not* apply, was justified in dismissing the complaint [on *forum non conveniens* grounds]." *DeMateos*, 562 F.2d at 902-03. The U.S. Court of Appeals for the Third Circuit, however, limited its holding in *DeMateos* to instances when U.S. law does *not* apply by noting that "[e]ven if we assume that Texaco, Inc.'s ownership of the stock of Texpan is a sufficient American contact to justify . . . the application of American law to Texpan's Panamanian employees . . . we do not think Congress, in enacting the Jones Act . . . intended that result." *Id.* at 902 (dictum).

Needham's citing of *Antypas* is misplaced, because *Antypas* "does not actually deal with a *forum non conveniens* issue. On its facts it can only be read to stand for the proposition that if the Jones Act applies the court may not dismiss for lack of subject matter jurisdiction." *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983). Thus, neither *DeMateos* nor *Antypas* supports *Needham's* holding.

289. *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983); *supra* notes 262-63 and accompanying text (analyzing *Szumlicz's* public and private interest factors under diversity method).

290. *Szumlicz*, 698 F.2d at 1195-96.

291. *Zipfel*, 832 F.2d at 1480-81, 1485-87.

forum non conveniens. Unifying *forum non conveniens* determinations in Jones Act suits under the diversity method will restore the flexible discretion to federal district courts unavailable under the rigid modified method. Courts need the diversity method's flexibility to effectuate the holdings in *Reyno*, *Rhoditis*, *Lauritzen*, and *Gilbert*.

D. *De Novo Review of a Modified Court's Choice of Law Decision May "End Run" the Abuse of Discretion Standard in a Forum Non Conveniens Review*

The standard of review for choice of law decisions is *de novo*.²⁹² The standard of review for *forum non conveniens* decisions, on the other hand, is abuse of discretion.²⁹³ Although the two doctrines' review standards are not the same, in certain cases an appellate court will disregard a district court's *forum non conveniens* determination without finding that the district court abused its discretion.²⁹⁴ For example, if a district court uses modified analysis to find that foreign law applied to a case, and then finds that the foreign forum was more convenient, the court would dismiss the case on *forum non conveniens* grounds.²⁹⁵ On appeal, the circuit court reviews *de novo* the district court's choice of law determination, using modified analysis.²⁹⁶ If it finds that U.S. law applies, the case cannot be dismissed for *forum non conveniens*.²⁹⁷ This holding disturbs the district court's *forum non conveniens* determination without finding that the district court abused its discretion in applying the *Gilbert* and *Reyno* tests.

292. See *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 84 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981); *Kukias v. Chandris Lines, Inc.*, 839 F.2d 860, 861 (1st Cir. 1988). *Contra* *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

293. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). The *Reyno* Court stated that "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion." *Id.*

294. See, e.g., *Zipfel*, 832 F.2d at 1480, 1487 (reversing district court's dismissal of claim filed on behalf of deceased American seaman because Jones Act applied to claim and therefore claim cannot be dismissed using *forum non conveniens*).

295. *Sherrill v. Brinkerhoff Mar. Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985), *aff'd in part, rev'd in part, vacated in part, modified and remanded sub nom. Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

296. See *Zipfel*, 832 F.2d at 1480, 1487.

297. See *id.*

De novo review of choice of law decisions, then, allows circuit courts to "end-run" the *Gilbert* Court's command not to overturn *forum non conveniens* dismissals without finding abuse of discretion.²⁹⁸ Regardless of a determination that the United States is not a convenient forum, cases thus may be kept in the United States solely because of choice of law determinations, a phenomenon that the Court in *Reyno* held strictly unacceptable.²⁹⁹

CONCLUSION

Forum non conveniens analysis of Jones Act cases should be unified. Since the Jones Act's enactment, both the courts and Congress have increasingly narrowed the scope of its specific venue provision. Modified analysis has proved to be inflexible, and thus inequitable. In addition, modified appellate courts' *de novo* reviews of choice of law in Jones Act decisions may contravene the diversity *forum non conveniens* standard of review. Unifying Jones Act *forum non conveniens* analysis will enable U.S. shipowners to compete more effectively in the international sphere by allowing them drastically to decrease their litigation expenses. This proposed unification would also provide a U.S. forum for injured or killed U.S. and non-U.S. seamen in accordance with Congress's and the Supreme Court's interpretations of the Jones Act's reach.

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298. *See id.*

299. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-56 (1981).

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