Forum Non Conveniens in Louisiana

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I. INTRODUCTION

Forum non conveniens is an equitable doctrine allowing a court, in its discretion, to refuse exercising jurisdiction that would otherwise be proper when it deems the action could be more appropriately tried elsewhere. Both the federal system and the great majority of states recognize the need for forum non conveniens and utilize it in some form. Louisiana, one of the first states to apply forum non conveniens, has been inconsistent in its treatment of the doctrine and does not seem to adhere to a reliable and workable scheme. In its most recent attempt to codify the doctrine, the Louisiana Legislature has written a somewhat loose statute. This comment will analyze the decline and attempted resurrection of forum non conveniens in Louisiana. It will provide an overview explaining the need for, purpose, and evolution of forum non conveniens in general, and will analyze the relevant federal jurisprudence on the matter. Following this overview

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is a brief examination of the application of forum non conveniens in other states governed by a code of civil procedure similar to Louisiana's, and a discussion of the failed legislative effort to pass a forum non conveniens statute at the 1997 Regular Session. This analysis of federal and state jurisprudence is essential in that those cases may be able to provide the guidance needed to fill the gaps in the new law. The final section of this comment discusses the most recent enactment of a forum non conveniens statute by the Louisiana Legislature during the 1999 Regular Session and points out some of its shortcomings. The conclusion contains a proposal for a more efficient legislative solution.

II. PURPOSE

Forum non conveniens is a useful tool for this country's courts because of America's status as a magnet forum, drawing foreign plaintiffs as a result of favorable laws and process. State and federal courts are attractive to foreign plaintiffs for two reasons: lower barriers to suit and higher recoveries for damages. It is easier and much less costly for plaintiffs to bring suit in American courts because of certain practices unique to the American legal system, such as payment via the contingency fee and the absence of a residual rule requiring a losing plaintiff to pay the defendant's legal fees. Higher recoveries are facilitated by plaintiff-friendly features of American law, such as trial by jury, the broad scope of pretrial discovery, and more favorable liability rules.

Coupled with the overall attractiveness of American law, vis-à-vis that of other nations, is the ease with which a plaintiff can access a state court. The accessibility of state courts has become critical in transnational personal injury cases because federal forum non conveniens often prevents those cases from being tried in federal court, leaving state courts as the only remaining American forum. In Louisiana, for example, district courts have subject matter jurisdiction over "all civil... matters" while personal jurisdiction is available up to the limits of Constitutional Due Process, and proper venue is easily

4. For the purposes of this part of the analysis, "American" refers to features of federal and state courts, including Louisiana.
6. Id.
7. American juries award higher damages, even under foreign heads of damages, because of higher standards of living in this country and the expectation that attorneys' fees will be deducted from the award. Id. at 216-17.
8. Goldsmith, supra note 5, at 218. Even after "tort reform" it is more likely that American liability rules will be broader than foreign law. See also Piper v. Reyno, 454 U.S. 235, 252 n.18, 102 S. Ct. 252, 264 n.18 (1981).
11. See La. Code Civ. P. art. 6(B)("[A] court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and with the Constitution of the United States."), La. R.S. 13:3201(B) (1991) of our Long Arm statute contains an almost identical
attainable.12 Today’s plaintiffs have a variety of jurisdictions in which they can legally bring suit and go forum shopping to find the jurisdiction most favorable to their claims, hoping to force the defendant into an inflated13 or unmerited14 settlement. Forum non conveniens alleviates this issue.

III. UNITED STATES SUPREME COURT JURISPRUDENCE

A. Canada Malting Co. v. Patterson Steamships, Ltd.

Forum non conveniens is generally recognized as a doctrine of Scottish origin, although at least one commentator believed it was borrowed from continental practice.15 First used in Scottish estate law, the most frequent consideration of forum non conveniens in the United States was in admiralty.16

An early expression of forum non conveniens principles was seen in Canada Malting Co. v. Patterson Steamships, Ltd.17 The suit arose out of a collision between two Canadian vessels in American waters, and the plaintiffs, the owners of cargo carried on one of the vessels, sued in the Western District of New York.18 The district court declined to exercise its jurisdiction, and the Supreme Court affirmed.19 Justice Brandeis wrote that the district court properly declined jurisdiction in the suit between two foreigners because it could be better heard in the foreigners’ home tribunal.20 He reasoned “the proposition that a court having jurisdiction must exercise it, is not universally true . . .” and stated this theory applied not only for cases in admiralty, but also in cases of equity and law.21 The suit was a clear example of forum shopping as the foreign plaintiffs sued in the United States because they had a much greater chance of achieving full recovery under American collision law than under corresponding Canadian law.22 The Court never explicitly used the term forum non conveniens, but the factors it considered were the citizenship of the parties and the location of the witnesses.23 The Court

15. Joseph Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867, 881 (1935). In footnote 58, Dainow admits he is unable to trace it to any precise continental practice.
17. 285 U.S. 413, 52 S. Ct. 413 (1932).
18. Id. at 417, 52 S. Ct. at 413.
19. Id. at 419-20, 52 S. Ct. at 414.
20. Id. at 423-24, 52 S. Ct. at 415-16.
21. Id. at 422-23, 52 S. Ct. at 415.
22. Id. at 418, 52 S. Ct. at 413-14.
23. Id. at 423, 52 S. Ct. at 416.
also recognized that the bill of lading was only for shipment between Canadian ports.24

B. Gulf Oil Corp. v. Gilbert

The seminal Supreme Court case is the 1947 decision Gulf Oil Corp. v. Gilbert.25 There, a Virginia plaintiff sued a Pennsylvania corporation (licensed to do business in Virginia and New York) in the Southern District of New York for a tort occurring in Virginia and resulting in the destruction of the plaintiff's property.26 In the diversity action, the district court dismissed the suit on the grounds of forum non conveniens.27 The Court of Appeals for the Second Circuit reversed.28 The Supreme Court held district courts do possess the inherent power to dismiss a case when it could be tried more properly elsewhere.29 First, the Court stated that the ability to exercise this discretion presupposes at least two forums where the case could be heard and that the doctrine "furnishes criteria for [a] choice between them."30 As a doctrine of discretion, the Court admitted that forum non conveniens cannot be tested by rigid standards.31 However, the Supreme Court did provide general guidelines for a court to consider when deciding whether or not to dismiss a case. Those guidelines were broken into two broader considerations: those of private interest and those of public interest. The private interest factors to be considered are:

1. relative ease of access to sources of proof;
2. availability of compulsory process for attendance of unwilling witnesses;
3. cost of attendance for willing witnesses;
4. possibility of view of the premises; and
5. other practical problems that make trial easy, expeditious and inexpensive, and enforceability of judgment, if obtained.32

The public interest factors are:

1. administrative difficulties when litigation is piled up in congested courts;
2. the burden of jury duty on a community with no relation to the litigation;

24. Id.
26. Id. at 503, 67 S. Ct. at 840.
27. Id.
28. Id.
29. The Court noted that the United States doctrine originated in the state courts. Id. at 505 n.4, 67 S. Ct. at 841 n.4.
30. Id. at 507, 67 S. Ct. at 842.
31. Id. at 508, 67 S. Ct. at 843.
32. Id.
(3) a local interest in having local controversies settled at home;
(4) conflict of laws problems; and
(5) the difficulty in applying foreign law.

Using these guidelines, the Court found dismissal to be appropriate in light of the fact that neither the parties nor the cause of action was connected with New York, making Virginia the more convenient forum.

C. Piper Aircraft Co. v. Reyno

In 1981, the Supreme Court decided another forum non conveniens case using the Gilbert standard. In Piper Aircraft Co. v. Reyno, the plaintiff brought suit in California state court on behalf of several Scottish estates seeking damages for the deaths of Scottish citizens and residents killed in a plane crash in Scotland. The defendant manufacturers removed the case to a federal district court in California, which then transferred the case to United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404. The Pennsylvania court dismissed the case on the grounds of forum non conveniens, and the Court of Appeals for the Third Circuit reversed, holding that forum non conveniens dismissal is barred when the law of the alternate forum is less favorable to the plaintiff than that of the chosen forum. The Supreme Court reversed the appellate court and held that less favorable law in the alternate forum, on its own, is not sufficient to preclude forum non conveniens dismissal. In addition, the Court determined the normal deference given to a plaintiff's choice of forum is accorded less weight when the plaintiff is a foreigner. It reasoned that anything less would further burden the already congested American courts. As to the facts in the particular case, the Court approved of the district court's application of the Gilbert factors, which found the real parties at interest were Scottish or English, all the witnesses were in the British Isles, and the wreckage was in Scotland. Also important to the Court was Scotland's interest in the litigation because the accident occurred in Scottish airspace and harmed Scottish citizens, triggering the sovereign nation's interest in having "localized controversies decided at home."

33. **Id.** at 508-09, 67 S. Ct. at 843.
34. **Id.** at 511-12, 67 S. Ct. at 844.
36. **Id.** at 238-39, 102 S. Ct. at 257.
38. Piper, 454 U.S. at 244, 102 S. Ct. at 260.
39. **Id.** at 254-55, 102 S. Ct. at 265. There, Scottish law did not recognize strict liability in tort, and also prescribed narrower recovery for wrongful death damages. **Id.** at 240, 102 S. Ct. at 258.
40. **Id.** at 256, 102 S. Ct. at 266.
41. **Id.** at 252, 102 S. Ct. at 264.
42. **Id.** at 242, 102 S. Ct. at 259.
43. **Id.** at 260, 102 S. Ct. at 268.
A. Stewart v. Litchenberg

Twenty-seven years before the Gilbert opinion, in Stewart v. Litchenberg, the Louisiana Supreme Court discussed and analyzed its jurisdiction to hear a case using what today one would call a forum non conveniens analysis. There, a Nebraska citizen sued another Nebraska citizen for a breach of contract concerning the sale of land and timber in Pointe Coupee Parish. The defendant was personally served in Pointe Coupee Parish, which subjected him to the court's jurisdiction under Article 165(5) of the Code of Practice of 1870. The court reasoned the statute was:

[n]ot intended to permit foreigners or citizens of other states, in no way owing allegiance to this state or its laws, to invoke the offices of our courts in determining controversies between them and other foreigners or nonresidents at their pleasure, when they have their adequate remedy in their own courts or those of their adversaries.

Justice Dawkins, writing for the court, also discussed the rule of comity, a courtesy exercised among states that permits a court of one state to exercise jurisdiction over nonresidents when they are personally served in the forum state and it is “within their power to do full and complete justice between the parties.” However, he elaborated that the courts may decline this jurisdiction when:

[i]t appears that they may not be capable of doing full and exact justice between the parties because of a want of knowledge of the laws of another state, or where the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and the investigation will be surrounded with great difficulties, which can be avoided by suing at the defendant's domicile.

As authority for the proposition, the court cited the English case of Logan v. Bank of Scotland, an early case often discussed for its analysis of forum non conveniens dismissal. Ultimately, the Louisiana Supreme Court affirmed the trial
court’s decision to exercise jurisdiction over the defendant.\textsuperscript{52} This was the result of an error in the defendant’s pleadings.\textsuperscript{53} Although the court gives no clear indication of what the exact plea should have been, it stated that the defendant only pleaded exceptions of no jurisdiction \textit{ratione personae} and no jurisdiction \textit{ratione materiae},\textsuperscript{54} and failed to plead what is essentially forum non conveniens. The court’s deliberations are interesting because the 1870 Code of Practice had no forum non conveniens provision. Yet the court indicated that it would have had the discretion to decline jurisdiction had the defendant properly pleaded the inconvenience argument.\textsuperscript{55} The reasoning implies that even under the Code of Practice of 1870, the Louisiana courts recognized the court’s inherent power to utilize forum non conveniens.\textsuperscript{56}

\textbf{B. Trahan v. Phoenix Insurance Co.}

Despite the dicta in \textit{Stewart}, the Louisiana courts of appeal continued to vacillate over whether or not to apply the doctrine.\textsuperscript{57} An important and somewhat misinterpreted decision during this period was \textit{Trahan v. Phoenix Insurance Co.}\textsuperscript{58} In \textit{Trahan}, the First Circuit Court of Appeal reviewed the trial court’s decision to transfer a suit from one proper venue to another based on forum non conveniens. The plaintiff, a resident of Calcasieu Parish, sued two individuals and their insurance companies in East Baton Rouge Parish for an accident that took place in Beauregard Parish.\textsuperscript{59} One of the defendant insurance companies requested, and was granted, a transfer to Beauregard Parish based on forum non conveniens. The movant claimed East Baton Rouge Parish had little interest in the suit, that another suit arising out of the same action was pending in Beauregard Parish, and all witnesses were present there as well.\textsuperscript{60}

\begin{itemize}
\item[52.] \textit{Stewart}, 86 So. at 736.
\item[53.] \textit{Id.}
\item[54.] The 1870 Code of Practice used civilian concepts of jurisdiction. Jurisdiction \textit{ratione personae} is similar to venue, and jurisdiction \textit{ratione materiae} is the equivalent of subject matter jurisdiction. La. Code. Civ. P., Intro., at 2.
\item[55.] \textit{Stewart}, 86 So. at 736.
\item[56.] The Code of Practice of 1870 was essentially the same as the Code of Practice of 1825 except for the deletion of all references to slavery. During the period of 1870-1960 Anglo-American procedure began to extend to Louisiana partly as a result of the usage of Codes of Civil Procedure by the states. These were largely modeled on New York’s David Dudley Field Code of Procedure of 1848 (which was initially inspired by the Louisiana Code of Practice of 1825). Henry G. McMahon, \textit{The Louisiana Code of Civil Procedure}, 21 La. L. Rev. 1, 14 (1960).
\item[57.] Compare Smith v. Globe Indem., 243 So. 2d 882 (La. App. 1st Cir. 1971) and Union City Transfer v. Fields, 199 So. 2d 206 (La. App. 1st Cir. 1940) (recognizing its applicability but finding the facts of the particular cases do not warrant dismissal), \textit{with} \textit{Trahan v. Phoenix Ins. Co.}, 200 So. 2d 118 (La. App. 1st Cir. 1967) \textit{and} \textit{Kassapas v. Arkon Shipping Agency}, 485 So. 2d 565 (La. App. 5th Cir. 1986) (holding forum non conveniens is not applicable in Louisiana).
\item[58.] 200 So. 2d 118 (La. App. 1st Cir. 1967).
\item[59.] \textit{Id.} at 119.
\item[60.] \textit{Id.} at 120.
\end{itemize}
The district judge found authority to transfer under Louisiana Code of Civil Procedure article 122. The court of appeal held that Article 122 was specifically reserved for cases where the movant was able to show "undue influence of an adverse party" or "prejudice existing in the public mind" and that absent express statutory authority, a Louisiana court does not have the power to transfer a suit from one proper venue to another proper venue within the state for reasons of convenience.

On the recommendation of the Louisiana Law Institute, the Louisiana Legislature enacted Code of Civil Procedure article 123 to overrule the holding in Trahan. As the holding in Trahan only addressed transfer for convenience, the purpose of Article 123 was "to provide for transfer of cases for the convenience of witnesses and parties in the interest of justice." The comment to the article explains that the text "substantially follows" 28 U.S.C. § 1404, the federal venue transfer statute. The source is especially useful in evaluating a court's ability to dismiss for forum non conveniens.

Neither Trahan nor 28 U.S.C. § 1404 was devoted to the power to dismiss, rather they focused on the ability to transfer. Therefore, it could be inferred that the absence of a dismissal provision in the legislation did not statutorily overrule that power. In the federal system courts clearly retain an inherent power to dismiss independent of the venue transfer statute. Such power would be consistent with the nature of Louisiana's courts whereby "[t]he court's authority for intrasystem transfer is usually statutory [and] authority for forum non conveniens dismissal is typically inherent." This reasoning supports the proposition that the Louisiana state courts should retain dismissal power independent of express statutory authority.

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61. La. Code Civ. P. art. 122 ("Any party by contradictory motion may obtain a change of venue upon proof that he cannot obtain a fair and impartial trial because of the undue influence of an adverse party, prejudice existing in the public mind, or some other sufficient cause. If the motion is granted, the action shall be transferred to a parish wherein no party is domiciled.").
62. Trahan, 200 So. 2d at 121-22.
63. La. Code Civ. P. art. 123 (A) (1970) ("For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.").
64. La. Code Civ. P. art. 123 cmt.
C. Fox v. Board of Supervisors of Louisiana State University

*Fox v. Board of Supervisors of Louisiana State University*\(^\text{68}\) arose when a Minnesota college student was injured while playing in a rugby tournament at Louisiana State University. The plaintiff brought suit in East Baton Rouge Parish against L.S.U., the university's insurer, St. Olaf College of Minnesota, and its two insurers.\(^\text{69}\) The trial court dismissed the claims against L.S.U. and its insurer on summary judgment.\(^\text{70}\) It also dismissed St. Olaf College and its insurers based on the absence of in personam jurisdiction. The first circuit court of appeal affirmed the dismissal of claims against L.S.U. and its insurer on summary judgment and the finding that there was no in personam jurisdiction over St. Olaf College.\(^\text{71}\) However, it found a Louisiana court could exercise personal jurisdiction over St. Olaf College's two insurers based on their business activity in Louisiana.\(^\text{72}\)

After this determination, all that remained in Louisiana was a suit between a Minnesota college student and the Minnesota college's insurers. The court of appeal then applied forum non conveniens to decline jurisdiction over the matter.\(^\text{73}\) Dismissal was granted because Louisiana had no residents involved in the lawsuit, and the court thought the burden and cost of a jury trial should not be imposed on Louisiana or its citizens for a matter of such minimal state interest.\(^\text{74}\) On rehearing, the court of appeal modified the trial court's dismissal with prejudice.\(^\text{75}\) Voicing concern for the open courts provision of the Louisiana Constitution,\(^\text{76}\) the court of appeal amended the decision and dismissed the suit without prejudice, stipulating the plaintiff would be able to reopen the suit in Louisiana if unable to find a more appropriate forum elsewhere.\(^\text{77}\)

The appellate court's reasoning in *Fox* was a straightforward application of forum non conveniens principles. The possible insurance payment owed by St. Olaf College's insurers to its student was of little interest to Louisiana. To the extent that the accident actually occurred in Louisiana, the trial court and court of appeal held that L.S.U. had no duty to the plaintiff. As a result, L.S.U. had no liability to the plaintiff, thus leaving litigation between the insurers and the insured as the only triable issue.

The dependence on the open forum provision of the constitution may have been overly technical. The court of appeal could have reached the same result using a fundamental precept of forum non conveniens—that availability of an

\(^{68}\) 576 So. 2d 978 (La. 1991).

\(^{69}\) Id. at 980.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) Fox v. Board of Supervisors of La. State Univ., 559 So. 2d 850 (La. App. 1st Cir. 1990).

\(^{74}\) Id. at 861.

\(^{75}\) Id.

\(^{76}\) La. Const. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.").

\(^{77}\) Fox v. Board of Supervisors of La. State Univ., 559 So. 2d 850 (La. App. 1st Cir. 1990).
alternate forum is a prerequisite to dismissal. Most states deal with this prerequisite by staying the proceedings until the action is reinstated elsewhere or by granting conditional dismissal requiring the defendant to submit to the alternate forum's jurisdiction.

The Louisiana Supreme Court accepted writs in Fox to resolve a split among the circuits as to whether the ability to dismiss for forum non conveniens was an inherent power of the Louisiana judiciary. The supreme court held that Louisiana courts do not have the inherent power, outside legislative enactment, to dismiss under the doctrine of forum non conveniens. At first glance, the holding appears to be based on civilian concepts; however, the actual reasoning used appears to be somewhat inconsistent with the decision.

The court stated "[o]bviously, the common law is not a part of Louisiana law and this approach cannot serve as a basis for finding that Louisiana courts have the inherent power to dismiss for forum non conveniens." Yet later in the opinion, the court refers to Professor Dainow's law review article distinguishing the common law and civil law need for the doctrine predicated upon the basic court access mechanisms in the two systems. This commentator's analysis indicated the court systems of civil law countries, specifically France, were generally closed to other nationalities, obviating the need for a forum non conveniens doctrine. As a matter of fact, Dainow stated that systems of this type actually use a forum conveniens device to allow more access to the courts than the law provides. The "closed courts" model is essentially the opposite of the common law "open courts" model. The court indeed recognized that Louisiana's open court system is more similar to the common law model yet refused to follow the common law approach, suggesting the reason is because Louisiana is a civil law jurisdiction.

A further contradiction within the reasoning concerns Louisiana's approach to venue and jurisdiction, which expressly follows the common law model. At the time the Louisiana Code of Civil Procedure was adopted, other common law jurisdictions and the federal system recognized the inherent power of the courts necessary for the exercise of its jurisdiction even though not granted expressly by law.

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81. Id. at 989. But see La. C. Civ. P. art. 191 ("A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law.").
82. Fox, 576 So. 2d at 989.
83. Id. at 990.
84. See Dainow, supra note 15, at 885-86.
85. Id.
86. Fox, 576 So. 2d at 989.
88. The federal system still has not codified a forum non conveniens dismissal provision; however, it fully utilizes the doctrine.
to dismiss for forum non conveniens, but had not yet codified the doctrine.⁸⁹ That background could support the inference that the 1960 revision of the Code of Civil Procedure did not reject common law controls on jurisdiction and venue not expressly written into the code.⁹⁰ Moreover, the Fox holding is difficult to reconcile with the objectives of the redaction of the Louisiana Code of Civil Procedure, one of which was:

[t]he granting of more power, authority, and discretion to the trial judge. The shackling of the trial judge in the United States during the past century and a quarter was largely a result of the influence of Jacksonian democracy, which was distrustful of the judiciary and sought to control procedural decisions through the adoption of minute and rigid statutory rules.... Here, the new code has adopted the approach of the Federal Rules of Civil Procedure in granting necessary power, authority, and discretion to the trial judge.⁹¹

Indeed, the supreme court often uses the common law and federal models to remedy deficiencies in the Code of Civil Procedure. An example of this usage was seen in the supreme court’s treatment of compulsory joinder in State Department of Highways v. Lamar Advertising Co.⁹² In Lamar, Justice Tate recognized Louisiana’s treatment of necessary and indispensable parties had “not proven a satisfactory guide for our courts” and concluded that the proper method to determine those issues was to use the amended Federal Rule 19 as a guide.⁹³ Similarly, in Stevens v. Board of Trustees,⁹⁴ the supreme court used amended Federal Rule 23 as a standard for determining class certification in Louisiana.⁹⁵ The federal models were borrowed to clarify a less than clear solution in Louisiana’s Code of Civil Procedure. Louisiana’s substantive civil law tradition in no way impeded these efforts.

Also noteworthy is the court’s suggestion that if the Louisiana courts did have the inherent power to dismiss, the open access provision of the Louisiana Constitution would not be a major hurdle.⁹⁶ However, as support for its holding, the court cites a Texas decision,⁹⁷ which held Texas courts do not have the inherent power to dismiss because that power had been legislatively abrogated by what is essentially an open forum statute.⁹⁸ The court also bolstered its argument with

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⁹⁰. See La. Code Civ P. art. 191 (“A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not expressly granted by law.”).
⁹². 279 So. 2d 671 (La. 1973).
⁹³. Id.
⁹⁴. 309 So. 2d 144 (La. 1975).
⁹⁵. Id.
legislative history by pointing out that the legislature recently had been unable to pass a forum non conveniens statute. However, the veto message to that bill cited the open forum guarantee of the Louisiana Constitution as cause for the veto.\textsuperscript{99}

Overall, Fox creates some questions as to the decision not to follow accepted common law procedural jurisprudence and also to the reasoning that the issue does not revolve around open forum concerns. Despite being clear on these two statements, the court's reasoning on both points seemingly leads one to conclusions opposite those actually reached by the court.

\textbf{D. American Dredging Co. v. Miller}

The United States Supreme Court decision in \textit{American Dredging Co. v. Miller}\textsuperscript{100} prevented any application of forum non conveniens in reverse \textit{Erie} proceedings, which are most common in the field of admiralty. \textit{Miller} began in Louisiana in the Civil District Court for Orleans Parish when a Mississippi resident filed suit for an injury sustained while working on the Delaware River.\textsuperscript{101} The defendant was a Pennsylvania corporation with its principal place of business in New Jersey.\textsuperscript{102} The claim was brought under the "saving to suitors" clause,\textsuperscript{103} which allows a state court to hear certain maritime claims. The trial court dismissed on grounds of forum non conveniens, and the Louisiana Fourth Circuit Court of Appeal affirmed, finding authority to do so under the federal doctrine because the underlying substantive law in the case would be federal.\textsuperscript{104} The Louisiana Supreme Court reversed, holding that the federal law of forum non conveniens does not preempt state law procedure in matters before a state court.\textsuperscript{105} The United States Supreme Court affirmed the Louisiana Supreme Court decision, holding that forum non conveniens was merely a procedural device, and Louisiana procedural law would control in a case before the state court, even if it was applying federal substantive law.\textsuperscript{106}

\textsuperscript{99} H.B. 602 (1986). The veto message states that "The Code of Civil Procedure for many years has included only a \textit{forum non conveniens} doctrine which permits the transfer, rather than dismissal, of an action to another court in the state, thus preserving the right of every person to access our state courts as mandated by Article I, Section 22 of our state constitution. This bill is completely antiethical to that mandate."

\textsuperscript{100} 510 U.S. 443, 114 S. Ct. 981 (1994).

\textsuperscript{101} \textit{Id.} at 445, 114 S. Ct. at 984.

\textsuperscript{102} \textit{Id.}


\textsuperscript{105} \textit{Id.} at 445-46, 114 S. Ct. at 984.

\textsuperscript{106} \textit{Id.} at 453, 114 S. Ct. at 988.
This decision created additional confusion. According to the decision in Miller, in Louisiana, a nonresident could bring suit in state court for a maritime claim under the “saving to suitors” clause, even one that would merit forum non conveniens dismissal in federal court. Essentially, this encouraged injured seamen to file suit in state courts to avoid federal dismissal based on identical facts. In his dissent in Miller, Justice Kennedy made the interesting observation that “the state of Louisiana commands its courts to entertain the forum non conveniens objection in all federal civil cases except for admiralty, the very context in which the rule is most prominent and makes most sense.”

Justice Kennedy’s comment was in response to former Code of Civil Procedure article 123(B). Although it may not have seemed as significant as in a case with similar facts (both parties American), the holding was broad enough to apply to transnational cases, which potentially relegated the Louisiana courts to the status of judiciary for the world.

It will be interesting to see how cases with facts similar to those in Miller will be handled with the recent enactment of forum non conveniens legislation in Louisiana. Chances are that many of the future challenges to the statute will arise in admiralty cases, which are the most fertile ground to apply the doctrine. As will be discussed in Part VII of this paper, the Louisiana statute has some holes that need to be filled. As long as such ambiguities remain in the new statute, foreign plaintiffs may still seek access to Louisiana state courts in admiralty cases to exploit the new law’s possible weaknesses. The best approach to deal with those cases would be to use the ample amount of guidance provided by the federal judiciary. Adopting the federal model would prevent the problem that was so manifest in Miller, forum shopping in state court. However, as Miller clearly states, Louisiana remains able to apply its own interpretation of forum non conveniens in “saving to suitors” cases.

E. Russell v. CSX Transportation, Inc.

The pre-1999 death knell for forum non conveniens in Louisiana came in Russell v. CSX Transportation, Inc. The court held Louisiana Code of Civil Procedure article 123(B) to be unconstitutional under the Supremacy Clause of the United States Constitution. Article 123(B) was a legislative attempt to enable state courts to dismiss an action brought under federal law when the acts or omissions giving rise to the claim occurred outside Louisiana. At first glance, the

107. Id. at 462-63, 114 S. Ct. at 993. In his concurrence, Justice Stevens also observed that “Louisiana has chosen to bear the various costs of entertaining far-flung claims.” Id. at 461 n.2, 114 S. Ct. at 992 n.2.
108. See infra notes 111-114 and accompanying text.
110. 689 So. 2d 1354 (La. 1997).
111. La. Code Civ. P. art. 123 was amended by 1988 La. Acts No. 818 to add subsections (B) and (C).
112. U.S. Const. art. VI, cl. 2.
provision appeared significant, however subsection (C) exempted Jones Act and other maritime claims from subsection (B) dismissal. This exception weakened Article 123(B), as forum non conveniens was used most effectively in admiralty.

In *Russell* the plaintiff was a resident of Florida who was injured while working at the defendant's plant in Georgia. Suit was filed in the Civil District Court for Orleans Parish, Louisiana, seeking recovery under the Federal Employers Liability Act. All witnesses were located in either Florida or Georgia. The trial court refused to grant the defendant's motion to dismiss for forum non conveniens on the grounds that Article 123(B) of the Code of Civil Procedure was unconstitutional. The Louisiana Supreme Court did not follow the trial court's reasoning, but came to its own conclusion. It ruled that Article 123(B) violated the Supremacy Clause because the statute allowed a state court to hear a case predicated on state law, while permitting dismissal of a claim arising out of an identical fact situation solely because it was based on federal law. The new legislation has eliminated this problem.

*Fox*, *Miller* and *Russell* abolished forum non conveniens in Louisiana for all claims, including those based on federal substantive law, that might not be heard in any other state or federal court. Those suits having little or no interest to the people of Louisiana were entertained by its courts. The ramifications of these suits were that Louisiana residents were called upon to sit on juries, the adjudication of Louisiana disputes was delayed due to court congestion, and taxpayer money was wasted. Louisiana also could be a proper forum for those plaintiffs seeking to "vex and harass" a defendant. The limits of *in personam* jurisdiction were inadequate to protect the defendants and the system from claims because a case could only be declined if it offended due process, a theory that initially focused on whether the state had authority over a defendant, as opposed to forum non conveniens, which

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114. *Id.*
116. *Id.*
117. *Id.*
118. The trial court held Louisiana Code of Civil Procedure article 123(B) unconstitutional under the Privileges and Immunities Clause of the Constitution, the Equal Protection Clause of the United States Constitution and the Louisiana Constitution and the access to courts guarantee of the Louisiana Constitution. *Russell*, 689 So. 2d at 1356.
119. *Id.* at 1358. See also H.R. 307, Reg. Sess. (La. 1995). Introduced on the recommendation of the Louisiana Law Institute, this bill sought to eliminate 123(B) and (C) on the grounds of its questionable constitutionality. This became an issue as a result of the *Fox* holding. This proposed bill also seems to lend credence to the idea that Louisiana courts did have inherent power to dismiss. Otherwise, the Institute would have found 123(B) and (C) to be unconstitutional before they were ever added in 1988.
121. See La. Code Civ. P. art. 6 ("Jurisdiction over a person is the legal power and authority of a court . . . .").
was designed to hold litigation in a convenient forum for trial. Arguably, this may have hurt business development in the state.\textsuperscript{122} The prudent corporation might have concluded that the only way to prevent being a wide open target to unrelated transnational litigation brought in the state would be by defeating the suit on grounds of personal jurisdiction. In other words, the best way to avoid being subject to world-wide claims would have been to have as little do with Louisiana as possible.\textsuperscript{123}

V. STATE APPROACHES

A. Uniform Laws

The desirability of a forum non conveniens mechanism has been recognized by the National Conference of Commissioners on Uniform Laws since 1962. The Uniform Interstate and International Procedure Act\textsuperscript{124} contains a general inconvenient forum provision that allows a stay or dismissal of an action after an evaluation of various factors.\textsuperscript{125} Likewise, the American Law Institute adopted a similar provision in the Restatement (Second) of Conflict of Laws.\textsuperscript{126} The statute was promulgated in recognition of the plaintiff's ability to pick among various forums and acknowledged the temptation to choose one that places a greater burden on the defendant.\textsuperscript{127} Comment (b) to the statute states that dismissal power rests largely upon the trial judge's discretion and the facts of the case.\textsuperscript{128}

Although the Uniform Laws and the Restatement provide a basic model for the states to follow, most states utilize the doctrine with some variation. For the purposes of this comment, the schemes of Ohio, California and New York will be examined. Each of these states uses a code of civil procedure similar to Louisiana's, and their solutions are demonstrative of the different approaches states have taken on the issue.

\textsuperscript{122} See supra note 64.
\textsuperscript{123} See, e.g., Lopez v. Afrim Lines Co., 696 So. 2d 273 (La. App. 4th Cir. 1997) (court upheld foreign defendant's exception of improper venue in Jones Act and "saving to suitors" suit brought by Puerto Rico resident for accident that occurred in England because defendant was not licensed to do business in Louisiana and had no office there); Head v. Bent Transp. Corp., 715 So. 2d 698 (La. App. 4th Cir 1998) (court upheld exception of improper venue in maritime suit brought by Mississippi resident injured in St. Louis against a foreign corporation because defendant is not licensed to do business in Louisiana and had no office there).
\textsuperscript{124} Uniform Interstate and International Procedure Act § 1.05, 13 U.L.A. 355 (1986) ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.").
\textsuperscript{125} The comment to Section 1.05 includes factors to be considered in applying the article such as amenability of the parties to personal jurisdiction in the state and in the alternate forum, convenience of the parties and witnesses, differences in conflict of law rules and other factors having a bearing upon selection of a convenient, reasonable and fair place of trial.
\textsuperscript{126} Restatement (Second) of Conflict of Laws § 84 (1971) ("A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.").
\textsuperscript{127} Restatement (Second) of Conflict of Laws § 84 cmt. a (1971).
\textsuperscript{128} Id. at cmt. b.
B. Ohio

The Supreme Court of Ohio held, despite the lack of a specific provision in its Rules of Civil Procedure, that its courts do have an inherent right to dismiss a case for forum non conveniens. In *Chambers v. Merrell-Dow Pharmaceuticals*, several plaintiffs from the British Isles brought suit in Ohio state court against a British manufacturer’s American parent company for alleged birth defects caused by the nausea drug Debendox. The defendant was a Delaware corporation with its principal place of business in Ohio, establishing Ohio as a proper venue. The Ohio Rules of Civil Procedure did contain a provision for transfer of venue, but did not include a forum non conveniens dismissal provision. The court said the power to dismiss for forum non conveniens was within the inherent power of the court. It bolstered its argument by citing Ohio Civil Rule 1(B), which provides that the Civil Rules “shall be construed and applied to effect just results by eliminating delay, unnecessary expense, and all other impediments to the expeditious administration of justice.” On this point, the court appeared most concerned with the judiciary’s ability to further efficiency and the speedy administration of justice. This is in contrast with Fox’s concentration on narrower distinctions.

The appellant argued forum non conveniens was precluded by the access to courts provision of the Ohio Constitution. The court dismissed this contention by stating that the open forum provision of the Ohio Constitution is not an absolute guarantee, comparing forum non conveniens dismissal to other judicial limitations such as summary judgment or a tolled statute of limitations, which can prevent a case from being heard in its entirety. This theory seems to comport with the Louisiana Supreme Court’s statement in *Fox*, yet as stated earlier, the reasoning behind that statement leaves some questions as to whether the court would, in fact, hold this way if the question was explicitly before it.

The Ohio Supreme Court approved of the trial court’s application of the doctrine to the facts of the particular case. It also noted the importance of the foreign sovereign’s interest in the litigation since the drug was manufactured, tested and licensed in Great Britain, sold by Great Britain firms and injured British citizens. The dissent believed the Ohio courts, as a judiciary functioning under

129. 519 N.E.2d 370 (Ohio 1988).
130. Id.
131. Id. at 377.
132. Id. at 378.
133. Id.
134. Id.
135. Id.
136. The supreme court approved the consideration of the following: documents and witnesses in Ohio, travel expenses for real party plaintiffs, travel expenses of several witnesses in British Isles, unfamiliarity with British law, lack of subpoena power, a high probability of the chance of a flood of similar litigation should the particular case be heard, burden on the Ohio judiciary which could potentially deny Ohio courts to its own citizens. Id. at 378-79.
137. Id. at 379.
a code system, do not have discretionary power outside those sanctioned by the legislature.\textsuperscript{138} This reasoning is more in line with the Fox majority.

The international aspect of this case may seem to make the decision to apply forum non conveniens easier than one in which the parties are merely from other states. However, in a broader sense, the Merrell court confronted a problem identical to the one before the Fox court, yet it reached the completely opposite conclusion. The Merrell court was able to reach this conclusion by focusing on larger issues of judicial efficiency as opposed to the narrower issue of the codification of the doctrine in its rules.

C. California

California has statutorily recognized forum non conveniens since 1969.\textsuperscript{139} The statute is worded broadly, allowing the court to use its discretion. The judge is given guidance, however, as the comment to the rule lists several factors for the court to weigh.\textsuperscript{140} Further, the California Supreme Court has recognized that dismissal is ordinarily not appropriate when the plaintiff is a state resident.\textsuperscript{141} The limitation is based on the belief that a California resident should be afforded the protection of the state's courts, and incorporates the state's interest in the welfare of its residents.\textsuperscript{142}

A somewhat expansive application of forum non conveniens dismissal is seen in Stangvik v. Shiley, Inc.,\textsuperscript{143} where the California Supreme Court affirmed the trial court's dismissal of a product liability suit brought by Scandinavians against the California manufacturer of defective heart valves.\textsuperscript{144} The court found an alternate forum did exist and the action would be tried more appropriately there.\textsuperscript{145} The court dismissed the suit based on an analysis of the Gilbert private and public interest factors, and although the plaintiffs claimed the California forum to be convenient, the court recognized that they were probably more interested in the possibility of obtaining a higher recovery in the state's courts.\textsuperscript{146}

\textsuperscript{138} Id. at 380-381.
\textsuperscript{139} Cal. Civ. Proc. Code § 410.30 (West 1977) states: "(a) When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. . . ."
\textsuperscript{140} Cal. Civ. Proc. Code § 410.30 (West 1977) Comment-Judicial Council. The comment includes numerous factors, including those from the UPA § 1.05, Restatement (Second) Conflict of Laws, § 84 and Gilbert.
\textsuperscript{141} Id.
\textsuperscript{143} 819 P.2d 14 (Cal. 1991) (en banc).
\textsuperscript{144} Id. at 17.
\textsuperscript{145} Id. at 16-17.
\textsuperscript{146} Id. at 25.
D. New York

Perhaps the broadest administration of forum non conveniens dismissal is under the New York scheme. Once again, the actual statute is phrased in general terms, with the express provision that domicile or residence in the state of any party to the action does not preclude dismissal.\textsuperscript{147} Part (b) is an exception barring dismissal when the parties have submitted to New York law and jurisdiction and the contract is worth over one million dollars. The comment to the rule states this provision is indicative of the state's bias in favor of commercial transactions.\textsuperscript{148} The textual commentary seems to proactively rebut the argument that a plaintiff may find himself without a forum if all states dismiss his claim. The commentary explains that a forum non conveniens dismissal in the first state would be given great weight by the second state when making its own determination.\textsuperscript{149}

The New York Court of Appeal, in a decision written by Judge Simons with four judges concurring, extended the rule in \textit{Islamic Republic of Iran v. Pahlvi}.\textsuperscript{150} This case involved a suit brought by the Republic of Iran against a former Shah of Iran who was living in New York.\textsuperscript{151} The plaintiff claimed the former Shah accepted bribes, misappropriated funds, and embezzled and converted $35 billion in Iranian funds during his reign as Shah.\textsuperscript{152} The Republic wanted to recover those funds plus an additional $20 billion in exemplary damages. It also wanted the court to freeze the Shah's assets throughout the world.\textsuperscript{153} The Republic claimed that Iran did not present an adequate alternate forum and argued the New York court could not dismiss the action based on forum non conveniens.\textsuperscript{154}

The New York Court of Appeal, in a novel interpretation, characterized the requirement of an alternate forum set forth by the Supreme Court in \textit{Gilbert} as dicta and compared this type of dismissal to cases of unclean hands or immunity, where the court declines jurisdiction even if no alternate forum exists.\textsuperscript{155} The dissenter vigorously disagreed with the majority and suggested the decision was more a

\textsuperscript{147} N.Y. Civ. Prac. L. & R. 327 (McKinney 1990) provides: "(a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. (b) Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum where the action arises out of or relates to a contract, agreement or undertaking to which Section 5-1402 [submission to NY law and forum/more than $1 million] of the general obligation law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part."


\textsuperscript{151} Pahlvi, 467 N.E.2d at 246-47.

\textsuperscript{152} Id.

\textsuperscript{153} Id. at 247.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 248-249
VI. 1997 FAILED LEGISLATIVE EFFORT

Although the Louisiana Legislature had enacted forum non conveniens legislation in the field of family law,¹⁵⁸ until 1999 it still had been unable to adopt a statute for general application. During the 1997 Regular Session, the Louisiana Senate, in response to the decision in *Russell*, considered an amendment to Article 123.¹⁵⁹ Senate Bill No. 1086 intended a complete revision of Sections (B) and (C).¹⁶⁰

Part (B) proposed dismissal in state claims when the events giving rise to the cause of action originated outside the state.¹⁶¹ It also eliminated the differentiation between state and federal causes of action that *Russell* held unconstitutional.¹⁶² A provision also was added, apparently allowing dismissal if the claim was brought by a foreign national regardless of whether the act or omission occurred in the state. Such a provision does not comport with a *Gilbert*-type analysis, as most of the factors would point to Louisiana as the most appropriate forum if the actions giving rise to the claim occurred in the state, regardless of the plaintiff's nationality.

Part (C) attempted to guarantee that plaintiffs with dismissed claims could reopen them in Louisiana if they are unable to obtain an alternate forum. The text can be viewed as an additional procedural protection for plaintiffs. Yet this may not

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¹⁵⁶. *Id.* at 255.
¹⁵⁷. *Id.* at 250.
¹⁵⁸. See *La. R.S.* 13:1706 (1999). The comments note that the article is similar to § 7 of the Uniform Child Custody Jurisdiction Act.
¹⁵⁹. A similar bill was introduced in the House and referred to the Committee on Civil Law and Procedure but it appears that no action was taken from there. *H. R. 936, Reg. Sess. (La. 1997).*
¹⁶⁰. S. 1086, Reg. Sess. (La. 1997) as introduced provided as follows:

B. Upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated upon acts or omissions originating outside the territorial boundaries of this state, or involving a foreign national claimant not a resident of this state at the time of the act or omission, when it is shown there exists a more appropriate forum outside this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice.

C. In the interest of justice, and before the rendition of the judgement of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription that has matured since the commencement of the action in Louisiana, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction in a foreign forum within sixty days from the rendition of the judgement of dismissal. The court may further condition the judgement of dismissal to allow for reinstatement of the action in the same forum in the event a suit on the same cause of action is commenced in an appropriate foreign forum within sixty days after the rendition of the judgement of dismissal is refused by such foreign forum or such foreign forum is unable to assume jurisdiction over the parties or the cause of action.

¹⁶¹. *Id.*
¹⁶². *Id.*
be necessary considering the doctrine of forum non conveniens typically is not applied unless the determination that there is an adequate alternate forum has already been made.  

Senate Bill 1086 was sent to the Senate Committee on Judiciary A, where it was amended to include several details, apparently in some effort to codify the public and private interest factors set forth in Gilbert and its progeny. 163 This version of the bill was an overly technical attempt to codify a doctrine that, by its nature, requires discretion and elasticity. Rather than letting the trial judge decide the issue using prior jurisprudential tests, 164 the legislation aimed to convert the forum non conveniens analysis into a rigid checklist, which might have created more problems than it would have solved. Regardless, the bill was defeated by a vote of 13 to 12. 165 The bill's sponsor did move to reconsider the vote, but the bill finally was withdrawn. 166 An initial concern with the legislation as written was that it could

163. S. 1086 Engrossed, Reg. Sess. (La. 1997) amended the introduced bill as follows:
B. Upon the contradictory motion of any defendant, a civil case filed in a district court of this state may be dismissed on the ground of forum non conveniens. In considering forum non conveniens the court shall apply the following analysis:
(1) The court shall decide whether an available and adequate forum exists.
(2) If the court concludes an alternate forum exists, it shall consider all the relevant private interests. Private interest factors to be considered are:
(a) Relative ease to access of sources of proof.
(b) The availability of compulsory process for the attendance of unwilling witnesses.
(c) The cost of obtaining the attendance of willing witnesses.
(d) The possibility of view of the premises, if appropriate.
(e) All other practical problems that make trial easy, expeditious and inexpensive.
(3) The court should balance those factors weighing in favor of dismissal with deference given to plaintiff's choice of forum. The court need go no further if the private interest factors weigh in favor of dismissal on the grounds of forum non conveniens.
(4) If the private interest factors do not weigh in favor of dismissal, the court shall then consider the public interest factors. Public interest factors to be considered are:
(a) The administrative difficulties flowing from court congestion.
(b) The unfairness of burdening citizens in an unrelated forum with jury duty.
(c) The interest in having the trial in a forum that is familiar with the law that must govern the action.
(d) The avoidance of unnecessary problems in conflicts of law, or in the application of foreign law.
(e) The local interest in having localized controversies decided at home.
Subsection (C) remained unchanged.
164. The courts are fully capable of administering a general concept of law using jurisprudential tests as a guide. Under La. Code Civ. P. act 6 (B) and La. R.S. 13:3201 (B) (1991) the courts decide whether or not the exercise of personal jurisdiction would be consistent with "due process." The courts basically use the forum non conveniens factors to make this decision. The only difference being that the due process analysis is used to determine whether or not the state has power to exercise jurisdiction over a party, whereas the forum non conveniens test merely analyzes whether or not an alternate forum is a more appropriate one in which to conduct the litigation.
165. See Louisiana Senate Calendar June 6, 1997.
166. See Louisiana Senate Calendar June 19, 1997.
be used against a Louisiana resident injured in Louisiana. Although the statute did not expressly preclude such an event, it would be quite difficult to imagine a valid application of the Gilbert factors that would allow dismissal of a resident plaintiff’s suit for an injury that occurred in Louisiana. Another concern was for the multitude of seamen throughout the world who are injured and unable to seek redress anywhere except in Louisiana’s courts. This argument would fail under a traditional forum non conveniens analysis because dismissal would be granted only when proof of an alternate, more convenient forum existed. The argument was also deficient because it looked solely to an injured party, without considering the burden on a foreign defendant or on the Louisiana legal system and its citizens.

VI. THE NEW LAW

During the 1999 Regular Session, the Louisiana Legislature again attempted to enact a forum non conveniens statute. This time the legislature succeeded and passed House Bill No. 858. Act No. 536 amended and reenacted Code of Civil Procedure article 123(B) and (C) as follows:

B. Upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated upon acts or omissions originating outside the territorial boundaries of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which a plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article.

C. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription that has matured since the commencement of the action in Louisiana, provided that a suit on the same cause of action or any cause of action arising out of the same transaction or occurrence is commenced in a court of competent jurisdiction in an appropriate foreign forum within sixty days from the rendition of the judgment of dismissal. Such waiver shall be null and of no effect if such suit is not filed within this sixty-day period. The court may further condition the judgment of dismissal to allow for reinstatement of the same cause of action in the same forum in the event a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in an appropriate foreign forum within sixty days

167. Louisiana Senate Judiciary Committee A hearings, Apr. 22, 1997 (audio).
168. Id.
after the rendition of the judgment of dismissal and such foreign forum is unable to assume jurisdiction over the parties or does not recognize such cause of action or any cause of action arising out of the same transaction or occurrence. \(^{170}\)

The legislature is to be commended for enacting such legislation; however, the article in its final form raises a few new issues and leaves others unanswered.

First, the article, by its own terms, restricts the use of forum non conveniens to instances where the acts or omissions giving rise to the suit “originat[e] outside the territorial boundaries of this state. . . .” \(^{171}\) Some questions exist as to whether this is a prerequisite to invoking the procedural protection of the statute or merely a factor to be considered along with others. The language of the new statute suggests the location of acts outside Louisiana is a prerequisite and must be satisfied before “taking into account” the other enumerated factors. More traditional theory would hold that “acts originating outside . . . the state” are an important consideration, but not a prerequisite to applying forum non conveniens.

As the location of the acts or occurrences factor has always been given the utmost consideration, it is unnecessary to restrict the statute itself only to instances where the acts or occurrences take place outside of Louisiana. By making this consideration a prerequisite to applying forum non conveniens, rather than only one factor, the legislature has needlessly restricted the statute. Naturally, the courts are unlikely to dismiss a case when the acts giving rise to the suit happened in Louisiana, but there are instances where dismissal may be warranted despite the location of events in Louisiana.

An excellent example of a situation where traditional forum non conveniens principles would dictate dismissal, but the amended article would not allow it, is presented by the facts of Fox v. Board of Supervisors of Louisiana State University. \(^{172}\) As stated earlier, the suit involved a dispute between a Minnesota college student and the Minnesota college’s insurers. The dispute, however, arose out of an incident that took place in Louisiana. Under the “prerequisite” approach of amended Article 123, the suit could not be dismissed because the injury leading to the contract dispute took place in Louisiana.

Conversely, if the “location of operative events” consideration were only one factor, using the “traditional” approach, that suit, which had little to do with Louisiana, could be dismissed. Seemingly, this type of problem also could arise in many contractual disputes where the parties are not Louisiana residents but the contractual object is in Louisiana.

A related question is whether all or merely some of the acts must occur “outside the territorial boundaries of this state.” The problem is particularly acute if the courts find the requirement of the acts or omissions originating outside Louisiana an absolute prerequisite to invoking the statute.


\(^{171}\) Id.

\(^{172}\) 576 So. 2d 978 (La. 1991).
Under an "all acts" approach, a court could not dismiss a case using forum non conveniens unless all of the acts happened outside Louisiana. That more restrictive reading might favor plaintiffs, who may want to advocate the position that any acts taking place in-state preclude dismissal. If this were true, the opportunities to dismiss under forum non conveniens would be limited. On the other hand, if the courts decide only "some acts" must occur out of state to justify dismissal, then opportunities to dismiss would be magnified. Defendants could benefit from a less restrictive reading of the new law as it is often possible to connect an incident to out of state sources. The scope of the statute will have to be resolved by the courts.

Another prerequisite imposed by the statute is that "no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article." As an initial proposition, protecting Louisiana citizens and guaranteeing them the use of their own courts is a valid expression of the state's interest in its own citizens. However, Article 123(B) as amended states this protection is available only if the court is of competent jurisdiction and venue. This reasoning possibly creates loopholes in the Code of Civil Procedure.

It has always been understood that only an otherwise proper court can exercise the power to dismiss for forum non conveniens. This means the court must have jurisdiction and be a proper venue. The court cannot dismiss a suit under the doctrine of forum non conveniens if those prerequisites are not met. Therefore, the language of Article 123(B) need not discuss the presence of proper jurisdiction and venue.

At best the text is repetitive. However, if the article is read in the negative instance it may present some problems. Article 123(B) could be read to say that "even if a plaintiff is a Louisiana resident, if the court is not one of competent jurisdiction or proper venue, the court can dismiss for forum non conveniens." When read this way, the problems with the language of the article become serious. Although forum non conveniens is intimately tied to venue, the two are not the same. In Louisiana, venue concerns the power of the court to hear a dispute. If venue is improper the court has no power to hear the case. Improper venue is contrasted with forum non conveniens, where the court has the power to adjudicate the matter but chooses not to for other reasons. The revised article could be interpreted to allow forum non conveniens dismissal when the court is an improper venue. This was obviously not the drafters' intention but as written the statute may allow it. The implications of such a reading are large.

Code of Civil Procedure Article 925 states that improper venue is an objection that may be raised through the declinatory exception. The article

174. The problems arise in the treatment of improper venue. Although the statute also discusses "jurisdiction," the term is clearly a reference to subject matter jurisdiction, which can never be waived. The Code of Civil Procedure uses the term "jurisdiction" to refer to subject matter jurisdiction in other areas as well. See, e.g., La. Code Civ. P. arts. 462, 463.
demand that “[a]ll objections which may be raised through the declinatory exception, except the court’s lack of jurisdiction over the subject matter of the action, are waived therein.” Thus, if all declinatory exceptions are not pleaded together, those that are not included are waived. Does the wording of revised Article 123(B) provide a way to circumvent this rule?

For example, if a defendant made several declinatory exceptions prior to the answer but did not include improper venue, that exception would be procedurally waived. Forum non conveniens would not be waived because it would not be raised as a declinatory exception. A defendant could cite the language of Article 123(B), which as stated earlier, could easily be interpreted to say “even if a plaintiff is a Louisiana resident, if the court is not one of competent jurisdiction or proper venue, then the court can dismiss for forum non conveniens.” The defendant could try to have the suit dismissed under forum non conveniens when the real objection was improper venue.

The counterargument to such an interpretation is strong. The court could decide the statute was not meticulously drafted and reason that a reading that creates holes in the Code of Civil Procedure should not be permitted. There is support for such a position based on the fact that the Louisiana Code of Civil Procedure already provides for dismissal in response to an improper venue.

Part (C) of revised Article 123 includes the procedural hurdles the defendant must clear before a suit can be dismissed. First, the defendant must waive “any defense based upon prescription that has matured since the commencement of the action in Louisiana, provided that a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced... in an appropriate foreign forum...” Requiring the defendant to waive any defense based on prescription maturing since the suit’s commencement in Louisiana is logical when that waiver is only for the cause of action under which the Louisiana suit was brought. Extending the waiver of prescription to any cause of action arising out of the same transaction or occurrence can potentially lead to abuse by plaintiffs in the form of forum shopping.

For instance, a defendant to a contract action in Louisiana would have to waive any prescriptive defense to that cause of action in the foreign forum if it seeks to have the case dismissed in Louisiana. The waiver is useful to prevent a defendant from having an action dismissed in Louisiana and then defeating the suit based on

178. This argument has merit until July 1, 2000. All actions filed on or after July 1, 2000 will be governed by Code of Civil Procedure article 928(A) as amended by 1999 La. Acts No. 983. The amended article states in pertinent part, “The declinatory exception and the dilatory exception shall be pleaded prior to or in the answer and, prior to or along with the filing of any pleading seeking relief...”
179. La. Code Civ. P. art. 121 (“When an action is brought in an improper venue, the court may dismiss the action, or in the interest of justice transfer it to a court of proper venue.”); La. Code Civ P. art. 925 (“The objections which may be raised through the declinatory exception include... Improper venue...”).
COMMENT

a tolling of the statute of limitations when the action is finally brought in a foreign forum. It is fair to the defendant because he receives the protection that prescriptive periods are designed to provide, notice of suit. However, Article 123(C) also seems to require the defendant to waive any defense based on a tolling of the statute of limitations in the foreign forum for any cause of action arising out of the same transaction or occurrence.

The statutory waiver of prescriptive defenses to all causes of action has practical implications. For example, a defendant in a breach of contract action would have to waive all prescriptive defenses to have a suit dismissed. This includes a waiver for other causes of action, such as tort, that were never alleged in the initial suit. For plaintiffs, the threat of bringing suits on additional causes of action might be a hammer to deter defendants from trying to dismiss a single cause of action based on forum non conveniens. Such a broad waiver could circumvent the notice of suit that prescriptive periods are designed to ensure. An additional question is raised when the court is called upon to decide how broadly to interpret the phrase, “same transaction or occurrence.” The guidance that this phrase provides in the context of joinder181 would not apply to forum non conveniens dismissal.

A final issue arising under the new article is when the court is given the power to reinstate a cause of action when the foreign jurisdiction “does not recognize such cause of action or any cause of action arising out of the same transaction or occurrence.”182 If one of the main goals of forum non conveniens is to deter forum shopping, then this provision can be viewed as contrary to the purpose of the doctrine. Allowing a plaintiff to bring suit on a certain set of facts in Louisiana, only because that plaintiff’s home forum would not recognize a cause of action based on identical facts, is forum shopping. Furthermore, this seems to ignore the United States Supreme Court’s holding in Piper Aircraft Co. v. Reyno,183 which explicitly held that less favorable law in the alternate forum is only one factor to be considered in the total analysis and is not a bar to dismissal.

VIII. CONCLUSION

Forum non conveniens is a tool to ensure that suits are brought in a convenient forum. The doctrine is important to eliminate suits with little or no connection to the forum state. Without such a tool, the Louisiana judiciary may often be called upon to resolve cases with no nexus to the state. As our courts have continuously declined to assume such power, it was appropriate that the legislature addressed the issue. However, the recent legislative solution is somewhat lacking in clarity and guidance.

A more traditional statute that raises fewer issues could read as follows:

A. Upon proof of an adequate alternate forum outside this state, a judge may, in the interest of justice, stay or dismiss a suit on the grounds of forum non conveniens. The court shall consider:

(1) Location of operative events.
(2) Convenience of parties and witnesses.
(3) The burden on the court, including court congestion.
(4) The forum state's interest in localized controversies.
(5) Any other factors that effectuate the orderly and efficient administration of justice.

B. No dismissal shall be granted when the plaintiff is a Louisiana resident at the time the acts or omissions giving rise to the claim occurred.

A statute drawn in such a fashion would be useful to the Louisiana judiciary, because it provides guidelines, yet affords the court enough discretion to handle unique situations. The vast majority of states and the federal judiciary require that an alternate forum be available before dismissal is considered. This is provided in Section (A) of the proposed statute which does allow access to Louisiana's courts for those who may have no forum elsewhere. Likewise, Section (B) ensures an aggrieved Louisiana resident will never be denied access to the state's courts.

In terms of the Section (A) analysis, a broad reading of the factors should include the jurisprudential tests of Gilbert and its progeny. "Location of operative events" is potentially the most important and broadest consideration. It subsumes such considerations as availability of witnesses, view of the premises, access to sources of proof, choice of law concerns and sovereign state interests. "Convenience of parties and witnesses" would draw on traditional forum non conveniens concerns and be most applicable in situations arising outside of the United States. The "burden on the courts" and the "state's interests" factors would allow the court to evaluate the potential effect that the litigation would have on the administration of justice for the particular court, and the residents of Louisiana as a whole.

The above statute is certainly broad enough to make use of the paradigms drawn by other states and the federal judiciary. The language also is sufficient to allow the courts to expand or contract the statute as justice requires. Thus, the courts would be able to expand the doctrine in order to perpetuate the public good. This includes conditional dismissals and dismissals without prejudice.

The litigious nature of today's society has overburdened the courts with a deluge of suits, and it can often take years to bring a case to trial and make an appeal. A forum non conveniens statute is not a panacea for judicial delay and resource problems, yet it is one judicial tool that can be used to dismiss those suits with only a tenuous relation to the state. The civil law tradition provides no basis for rejecting such legislation.
No doubt exists that forum non conveniens might be viewed unfavorably by one group in the state: lawyers. Superficially, one might contemplate that the plaintiffs’ bar would bear the brunt of such legislation, though, in truth, the defense bar profits from defending such suits. With those thoughts in mind, the legislature is to be commended for enacting amended Article 123. However, the statute’s gray areas could possibly lead to confusion in the future and will necessitate resolution by the courts.

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