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# Practice and Procedure--Forum Non Conveniens, 32 S. C. L. Rev. 149 (1980).

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# PRACTICE AND PROCEDURE—FORUM NON CONVENIENS

## I. INTRODUCTION

In *Braten Apparel Corp. v. Bankers Trust Co.*,[1] the South Carolina Supreme Court adopted the doctrine of *forum non conveniens*.[2] Under this doctrine, a court with proper jurisdiction of a case may, in its discretion, dismiss an action "when such [dismissal] would further the ends of justice and promote the convenience of the parties."[3] By giving the trial court discretion to dismiss a case within its jurisdiction when a more appropriate forum is available and when maintenance of the action in the original forum would cause the defendant unnecessary hardship, the doctrine of *forum non conveniens* promotes traditional notions of fair play and substantial justice.[4] Although on two previous occasions the court had recognized the doctrine,[5] it decided in those cases that the facts and circumstances did not warrant a dismissal on the grounds of *forum non conveniens*.[6] Neverthe-

1. ___ S.C. ___, 259 S.E.2d 110 (1979).

2. *Id.* at 111.

3. *Id.* at 112-13 (quoting Nienow v. Nienow, 268 S.C. 161, 167, 232 S.E.2d 504, 507 (1977)).

4. Nienow v. Nienow, 268 S.C. 161, 167, 232 S.E.2d 504, 507 (1977).

5. *See* Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977); Chapman v. Southern Ry., 230 S.C. 210, 95 S.E.2d 170 (1956).

6. *See* note 5 *supra*. In *Nienow*, appellant, a South Carolina resident, sought alimony, attorney's fees, and costs from her former husband, a Florida resident. The trial court held that appellant's residence in South Carolina was "*mala fide*" as opposed to "*bona fide*" and concluded that the South Carolina courts should not exercise jurisdiction over the matter. The supreme court reversed. First, it held that the wife had a right to maintain an independent action for alimony, attorney's fees, and costs pursuant to the divisible divorce doctrine in the courts of South Carolina regardless of whether her residency was "*mala fide*" or "*bona fide*." Next, the court considered whether the doctrine of *forum non conveniens* applied and concluded that, since defendant's contacts with South Carolina were substantial and plaintiff was a resident of the state, the court should not dismiss the case on that ground.

In *Chapman*, decedent was fatally injured in Georgia while employed by defendant railway company. The administrator of deceased's estate, a resident of South Carolina, sought damages under the Federal Employers' Liability Act alleging that defendant's negligence caused deceased's death. Defendant, a foreign corporation doing business in South Carolina, moved to dismiss on grounds of *forum non conveniens* and the trial

less, the court expressed a favorable attitude toward adoption of the doctrine in a more appropriate case.[7] In *Braten Apparel Corp.*, the court decided it was presented with such a case.

Plaintiff, Braten Apparel Corporation (BAC), a New York corporation, maintained offices in New York as well as in South Carolina, where it was qualified to do business. Defendant, Bankers Trust Company, also a New York corporation, transacted business and owned property in South Carolina. In August, 1977, BAC instituted an action against Bankers Trust in the Court of Common Pleas for Anderson County seeking actual and punitive damages on four causes of action: (1) breach of financing agreements pursuant to which Bankers Trust was to furnish financing for BAC and three South Carolina corporations with which BAC dealt; (2) Bankers Trust's fraud accompanying its breach of the financing agreements; (3) Bankers Trust's conversion of certain of BAC's personal property in South Carolina; and (4) Banker Trust's tortious interference with BAC's business relations with its South Carolina customers.[8]

Bankers Trust moved initially to dismiss the case for lack of subject matter jurisdiction pursuant to section 15-5-150 of the South Carolina Code,[9] the state's "door-closing" statute.[10] Find-

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court denied the motion. On appeal, the supreme court affirmed the decision of the trial court stating that

> [t]he conclusion is inescapable that when a resident of this state sues a foreign corporation upon a transitory cause of action, where such corporation is doing business in this state, it would not be consistent with sound public policy to deny such resident access to the courts of this state for the adjudication of his rights.
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> In this case we need not reject or adopt the doctrine of *forum non conveniens*. However, conceding the advisability of adopting such doctrine, it should not be applied in this case where the plaintiff is a resident of South Carolina.

230 S.C. at 215-16, 95 S.E.2d at 173.

7. *See* note 6 *supra*.

8. ___ S.C. at ___, 259 S.E.2d at 111-12.

9. S.C. CODE ANN. § 15-5-150 (1976). This statute provides:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: (1) By any resident of this state for any cause of action; or (2) By a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within this State.

*Id.*

10. ___ S.C. at ___, 259 S.E.2d at 112.

ing that the causes of action arose within this state,[11] the trial court denied the motion. Reserving its jurisdictional objections, Bankers Trust answered the complaint and moved to dismiss on the ground of *forum non conveniens*.[12] The trial court denied this motion as well and Bankers Trust appealed.[13] Noting that plaintiff was not a resident of South Carolina, that more than a dozen law suits related to the present action were pending in New York, and that the inability of the South Carolina courts to compel the attendance of important witnesses could result in incomplete relief, the supreme court held that the trial court's denial of defendant's *forum non conveniens* motion constituted an abuse of discretion.[14] In order to ascertain the practical impact on South Carolina law, the doctrine announced in *Braten Apparel Corp.* must be examined against its development in other jurisdictions.

## II. The Doctrine as Developed in Other Jurisdictions

The precise genesis of *forum non conveniens* in American law is nebulous. In a frequently cited article published in 1929,[15] Paxton Blair noted that "the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Moliere's M. Jourdain, who found he had been speaking prose all his life without knowing it."[16] With the publication of his article, Blair familiarized the phrase *forum non conveniens* and the doctrine it embodied.[17] It was not until 1947, however, that the doctrine came of age in this country; in two cases decided on the same day,[18] the United States Supreme Court recognized the doctrine's validity. In *Gulf Oil Corp. v. Gilbert*,[19] a diversity action instituted in

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at ___, 259 S.E.2d at 114.
15. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929).
16. *Id.* at 21-22.
17. Note, *Forum Non Conveniens in Georgia: A Critical Analysis and Proposal for Adoption*, 7 Ga. L. Rev. 744, 748 (1973).
18. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518 (1947).
19. 330 U.S. 501 (1947).

federal district court in New York by a Virginia citizen against a Pennsylvania corporation, the Supreme Court enunciated the classic statement of the doctrine as follows:

> The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. 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.[20]

The Court posited two sets of considerations to guide the determination of when *forum non conveniens* should apply—those relevant to the private interest of the parties and those relevant to the public interest of the courts:

> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
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> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled

20. *Id.* at 507.

> at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[21]

Since the decision in *Gulf Oil Corp.*, a majority of states have adopted the doctrine of *forum non conveniens*.[22] Although states adopting the doctrine accept the standards established by the Supreme Court in *Gulf Oil Corp.*,[23] emphasis placed upon the various factors differs from jurisdiction to jurisdiction.[24]

The doctrine of *forum non conveniens* can be applied only when the court has jurisdiction[25] and an alternative forum is available.[26] Generally, appropriate alternative forums in the United States will be assumed unless contested by plaintiff.[27] Some jurisdictions, however, have limited the range of alternative forums to those in which plaintiff, in initially filing his action, could have served process on defendant.[28] If within this limitation there is no alternative forum, the court in those jurisdictions will decline to dismiss a case on *forum non conveniens* grounds.[29] By so limiting alternative forums, courts seek to avoid depriving plaintiff of a forum in which to bring his action. This approach, however, imposes a substantial limitation on the court's exercise of its discretion.

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21. *Id.* at 508.

22. Note, *supra* note 17, at 750.

23. *Id.* at 759.

24. *Id.* at 759-60.

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

26. *E.g.*, Dorati v. Dorati, 342 A.2d 18, 22 (D.C. 1975); *see* Cray v. General Motors Corp., 389 Mich. 382, 395, 207 N.W.2d 393, 398 (1973).

27. Comment, *Forum Non Conveniens, Injunctions Against Suit and Full Faith and Credit*, 29 U. CHI. L. REV. 740, 742 n.11 (1962).

28. *See* Bagarozy v. Meneghini, 8 Ill. App. 2d 285, 291, 131 N.E.2d 792, 795 (1955); Hill v. Upper Miss. Towing Corp., 252 Minn. 165, 172, 89 N.W.2d 654, 657 (1958); Note, *Requirement of a Second Forum for Application of Forum Non Conveniens*, 43 MINN. L. REV. 1199, 1199-1200 (1959).

29. *See* note 28 *supra*.

Courts in New York, utilizing a more flexible approach, seek to protect plaintiff's interests by granting conditional dismissals.[30] This approach may require defendant to stipulate, as a condition of dismissal, that he will consent to the jurisdiction of another court, accept service of process, and waive any defense based on the statute of limitations.[31] Moreover, some courts following the New York rule have required as a condition of dismissal that defendant pay costs and attorney's fees incurred by plaintiff in filing the action in the original forum.[32] Although this approach allows the court more flexibility in relieving defendant of the hardship imposed by trial in an inconvenient forum, it becomes ponderous when a defendant, attempting merely to delay the proceedings, refuses to comply with his stipulations.[33] In such a situation, depending on how the court's order of dismissal is framed, plaintiff may be forced to bring another action in the original court to enforce the order, resulting in undue inconvenience and expense to him.[34]

Perhaps the best approach for preserving plaintiff's right to a forum is that followed by Wisconsin. A Wisconsin trial court, rather than dismissing a plaintiff's suit, enters an order to stay the proceedings for a period of five years.[35] During that time the

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30. *See, e.g.*, Foley v. Rohe, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1979); Bader & Bader v. Ford, 66 A.D.2d 642, 414 N.Y.S.2d 132 (1979); Johnson v. Syntex Laboratories, Inc., 36 A.D.2d 919, 320 N.Y.S.2d 878 (1971); Jones v. United States Lines, Inc., 36 A.D.2d 601, 318 N.Y.S.2d 557 (1971).

31. *See* note 30 *supra*.

32. *E.g.*, Vargas v. A.H. Bull Steamship Co., 44 N.J. Super. 536, 131 A.2d 39, *aff'd*, 25 N.J. 293, 135 A.2d 857 (1957).

33. Note, *supra* note 17, at 764; *see* Note, *supra* note 28, at 1208.

34. See note 33 *supra*.

35. WIS. STAT. ANN. § 801.63 (West 1977). This statute provides:

> (1) **Stay on initiative of parties.** If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with sub. (3) enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate consent to suit in the alternative forum and waive right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state. A stay order may be granted although the action could not have been commenced in the alternative forum without consent of the moving party.
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> . . . .
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> (4) **Subsequent modification of order to stay proceedings.** Jurisdiction of the court continues over the parties to a proceeding in which a stay has been ordered under this section until a period of 5 years has elapsed since

court retains jurisdiction over the parties and may take any action concerning the proceedings that "the interests of justice require."[36] This procedure assures plaintiff a forum when defendant refuses to comply with his stipulations or when an alternative forum declines to exercise jurisdiction over the case.[37]

Assuming the availability of alternative forums, the doctrine of *forum non conveniens* provides criteria for choosing among them.[38] In the exercise of their discretion, various courts emphasize different factors, depending upon their view of the policy underlying the doctrine.[39] Some courts appear to place primary importance on those factors relevant to the convenience of the parties, while others emphasize those pertinent to the convenience of the courts.[40] It has been suggested, however, that convenience to the court is not the controlling consideration.[41] According to the United States Supreme Court, "the ultimate inquiry is where the trial will best serve the convenience of the parties and the ends of justice."[42]

In all states having accepted the doctrine, residency of the parties and the place where the cause of action arose are primary considerations.[43] Some jurisdictions attach controlling significance to these factors, effectively establishing them as condi-

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the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require. When jurisdiction of the court over the parties and the proceeding terminates by reason of the lapse of 5 years following the last court order in the action, the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action.

*Id.*

36. *Id.* § 801.63(4).

37. Note, *supra* note 17, at 764.

38. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).

39. *See* Barrett, *The Doctrine of* Forum Non Conveniens, 35 CAL. L. REV. 380 (1947).

40. *Id.* at 408.

41. *Id.* at 409.

42. Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518, 527 (1947).

43. *E.g.*, Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967); Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978); Killingsworth v. Montgomery Ward & Co., 327 So. 2d 50 (Fla. 1976); Fender v. Saint Louis Southwestern Ry., 125 Ill. App. 2d 211, 260 N.E.2d 373 (1970), *rev'd on other grounds*, 49 Ill. 2d 1, 272 N.E.2d 353 (1972); Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); Braten Apparel Corp. v. Bankers Trust Co., ___ S.C. ___, 259 S.E.2d 110 (1979).

tions precedent to applying *forum non conveniens.* For example, in *Houston v. Caldwell,*[44] the Florida Supreme Court held that the doctrine of *forum non conveniens* applies only when neither party is a resident and the cause of action accrued outside the state.[45] The Illinois Supreme Court espoused a similar rule in *Fender v. Saint Louis Southwestern Railway.*[46] Underlying this conception of the proper application of *forum non conveniens* is the fundamental state interest in providing a forum for the resolution of controversies between residents.[47] Although residency of the parties and the place where the cause of action accrued should be significant factors in applying *forum non conveniens,* adherence to such rigid technical requirements deprives the doctrine of the flexibility necessary to achieve all its objectives. Interestingly, the state with perhaps the most solidly established precedent[48] for adherence to such inflexible technical requirements recently denounced its long standing rule. In *Silver v. Great American Insurance Co.,*[49] the New York Court of Appeals dismissed a defamation action against a New York corporation brought by an Hawaiian resident even though defendant was a resident of the state. The reason advanced by the court for overruling its long established rule was that "[t]he great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation."[50]

In *Silver,* New York adopted the more reasoned approach in which residence of the parties and the place where the cause of action arose, though important factors in determining whether to dismiss a case on grounds of *forum non conveniens,* are not controlling.[51] Nevertheless, the significance of the parties' resi-

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44. 359 So. 2d 858 (Fla. 1978).

45. *Id.* at 860-64.

46. 125 Ill. App. 2d 211, 260 N.E.2d 373 (1970), *rev'd on other grounds,* 49 Ill. 2d 1, 272 N.E.2d 853 (1972).

47. Houston v. Caldwell, 359 So. 2d 858, 861 (Fla. 1978).

48. *See* de la Bouillerie v. de Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949); Gregonus v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923); Annot., 32 A.L.R. 1, 29-33 (1923).

49. 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

50. *Id.* at 362, 278 N.E.2d at 622, 328 N.Y.S.2d at 402-03.

51. *Id.* at 363-64, 278 N.E.2d at 622-23, 328 N.Y.S.2d at 403-04.

dence and the state in which the cause of action arises should not be underestimated. States do have a fundamental interest in providing a forum in which their residents can resolve disputes and it is only in extraordinary cases that a trial court will be justified in dismissing on *forum non conveniens* grounds a case in which a resident of the forum is a party to the action.[52] For example, a California court has dismissed a case involving a state resident when that party was a nominal California resident suing on behalf of foreign beneficiaries or creditors.[53]

New York courts generally focus on the relationship between the state and the issues in dispute. The place where the cause of action arose is considered the most important factor in these cases which usually involve foreign causes of action[54] or real property situated in another jurisdiction.[55] New York courts also have demonstrated an inclination to look beyond mere form in considering residency of the parties. In *Bader & Bader v. Ford,*[56] the court of appeals dismissed a stockholder derivative action brought by a New York resident against Ford Motor Company, a Delaware corporation, recognizing that the real party in interest was the corporation and that plaintiff was merely a nominal representative of the corporate defendant.[57]

As the foregoing discussion illustrates, party residence and situs of the cause of action strongly influence the court's ultimate determination whether to dismiss on grounds of *forum non conveniens.* Nevertheless, these factors are preliminary considerations which alone are not determinative. Courts also consider the other factors set out in *Gulf Oil Corp.* in determining whether trying the action in its original forum would cause seri-

52. Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 742-43, 427 P.2d 765, 768-69, 59 Cal. Rptr. 101, 104-05 (1967).

53. Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 859-60, 544 P.2d 947, 951, 126 Cal. Rptr. 811, 815 (1976).

54. Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). In *Silver,* the New York Court of Appeals dismissed defamation actions by an Hawaiian physician against a New York corporation stating that the actions "refer to and deal with matters originating in Hawaii where the plaintiff resides and practices medicine and that none of his contentions in any way whatsoever relate [sic] to incidents or events in New York." *Id.* at 360, 278 N.E.2d at 621, 328 N.Y.S.2d at 401.

55. Regal Knitwear, Inc. v. Hoffman & Co., 96 Misc. 2d 605, 409 N.Y.S.2d 483 (1978).

56. 66 A.D.2d 642, 414 N.Y.S.2d 132 (1979).

57. 66 A.D.2d at 644, 414 N.Y.S.2d at 134.

ous inconvenience to defendant.

The goal is not to achieve minimum expense or inconvenience[58] to determine the perfect forum, but rather to avoid hardship to defendant.[59] Generally it is agreed that the burden is on defendant to demonstrate that maintaining the trial in the original forum would result in real hardship[60] and unless the balance of factors weighs heavily in his favor, plaintiff's choice of forum rarely should be disturbed.[61] To sustain the burden, bare allegations of inconvenience are not sufficient; defendant must show the particulars which require dismissal.[62] He usually is not required to prove, however, that plaintiff's choice of forum was motivated by an actual intent to harass or vex defendant.[63]

The preceding analysis suggests what must be established before a court can dismiss a case on *forum non conveniens* grounds. Initially, the court must have jurisdiction of the case.[64] If jurisdiction is established and the court is assured that there is an alternative and more appropriate forum available,[65] the court may dismiss if, in its discretion, it finds that maintaining the action in the original forum would work a hardship on defendant.[66] Residence of the parties and the place where the cause of action arose weigh heavily in directing the court's decision.[67] In assessing the appropriateness of the alternative forums, the court is guided by the considerations outlined in *Gulf Oil Corp.*[68] Only when these considerations weigh heavily in favor of defendant and dismissal will avoid hardship to defen-

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58. Radigan v. Innisbrook Resort & Golf Club, 150 N.J. Super. 427, 375 A.2d 1229 (1977).

59. Mr. Steak, Inc. v. Ken-Mar Steaks, Inc., 522 P.2d 1246 (Colo. App. 1974).

60. *See, e.g., id;* States Marine Lines v. Domingo, 269 A.2d 223 (Del. 1970); Parvin v. Kaufman, 236 A.2d 425 (Del. 1967); Civic S. Factors Corp. v. Bonat, 65 N.J. 329, 322 A.2d 436 (1974).

61. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, *quoted in* ___ S.C. at ___, 259 S.E.2d at 113.

62. States Marine Lines v. Domingo, 269 A.2d 223 (Del. 1970); Parvin v. Kaufman, 236 A.2d 425 (Del. 1967).

63. Mergenthaler Linotype Co. v. Leonard Storch Enterprises, Inc., 66 Ill. App. 3d 789, 383 N.E.2d 1379 (1978).

64. *See* note 25 and accompanying text *supra.*

65. *See* notes 26-34 and accompanying text *supra.*

66. *See* notes 58-63 and accompanying text *supra.*

67. *See* notes 43-57 and accompanying text *supra.*

68. *See* note 21 and accompanying text *supra.*

dant, should *forum non conveniens* be applied.[69] To gain some insight into how the doctrine may operate in South Carolina, *Braten Apparel Corp.* will be examined against this general framework.

## III. The Doctrine in South Carolina

The policy underlying *forum non conveniens*—the avoidance of unnecessary hardship and expense to defendants—can be accomplished more readily if South Carolina courts maintain an expansive view of the availability of alternative forums, permitting a defendant to waive procedural and jurisdictional objections in those forums more appropriate for the action. *Braten Apparel Corp.* reveals nothing about the South Carolina Supreme Court's inclination to sanction such conditional dismissals. In the earlier case of *Nienow v. Nienow*,[70] however, the court manifested a favorable attitude toward conditional dismissals, observing that "a dismissal [on *forum non conveniens* grounds] is usually conditional upon the moving defendant's agreement not to assert jurisdictional or statute of limitation defenses in the alternative forum."[71] Although the dismissal in *Braten Apparel Corp.* was unconditional, it reflects no inclination against recognizing the availability of alternative forums in which defendant ordinarily would not be subject to suit.

The court's cursory consideration of jurisdiction and the relevance of residency of the parties and the situs of the cause of action to the jurisdictional question is the most problematic aspect of *Braten Apparel Corp.* South Carolina's long arm statutes[72] were intended to afford its courts the full reach of jurisdiction permitted by the due process clause of the United States Constitution.[73] Under the due process clause, a court may assume personal jurisdiction over an individual defendant not present within the forum or of a foreign corporation, if a defendant has certain "minimum contacts" with the forum state such that the exercise of jurisdiction does not offend traditional notions of

69. *See* note 21 and accompanying text *supra*.
70. 268 S.C. 161, 232 S.E.2d 504 (1977).
71. *Id.* at 168 n.6, 232 S.E.2d at 508 n.6.
72. S.C. Code Ann. §§ 36-2-802, -803 (1976).
73. Duplan Corp. v. Deering Milliken, Inc., 334 F. Supp. 703 (D.S.C. 1971).

fair play and substantial justice.[74] Once jurisdiction is established under the expansive provisions of the long arm statute, the court nevertheless may dismiss the case on the ground of *forum non conveniens*. Thus, *forum non conveniens* may operate to restrict the expansive jurisdictional scope afforded state courts by the "minimum contacts" doctrine of *International Shoe Co. v. Washington*[75] when such is required to further the ends of justice and the convenience of the parties.[76]

Because defendant in *Braten Apparel Corp.* was a foreign corporation, however, the court's jurisdiction required more than a finding of personal jurisdiction pursuant to the long arm statutes. Under South Carolina's "door-closing" statute,[77] the circuit courts lack subject matter jurisdiction of an action against a foreign corporation unless plaintiff is a resident of the state, the cause of action arises within the state, or the subject of the action is situated within the state.[78] Before a circuit court can apply *forum non conveniens* to dismiss an action against a foreign corporation, it must conclude that the jurisdictional requirements of the "door-closing" statute are satisfied. The cursory consideration given this issue by the supreme court in *Braten Apparel Corp.* understates the significance of this intriguing interplay between the "door-closing" statute and the newly adopted doctrine of *forum non conveniens* in South Carolina.

Plaintiff's residence is a primary consideration in the operation of the "door-closing" statute as well as *forum non conveniens*. If plaintiff is a resident, the court has subject matter jurisdiction under the "door-closing" statute. Nevertheless, as the supreme court noted in *Braten Apparel Corp.*, the existence of jurisdiction under section 15-5-150 of the South Carolina Code does not preclude the court from dismissing the case on the grounds of *forum non conveniens*.[79] A South Carolina court rarely will dismiss a case when plaintiff is a resident; the court

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74. *Id.*

75. 326 U.S. 310 (1945).

76. *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 362-63, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 403 (1972).

77. See note 9 *supra*.

78. *Id.* In Nix v. Mercury Motor Express, Inc., 270 S.C. 477, 242 S.E.2d 683 (1978), the South Carolina Supreme Court construed S.C. CODE ANN. § 15-5-150 (1976) as a limitation on the subject-matter jurisdiction of the circuit courts.

79. ___ S.C. at ___, 259 S.E.2d at 114.

has consistently emphasized a resident plaintiff's right to access to the state courts.[80] In *Nienow*[81] and *Chapman v. Southern Railway*,[82] that plaintiff was a state resident appeared to be determinative of the question whether to dismiss for *forum non conveniens*.[83] The court in *Chapman* indicated that the doctrine should not be applied, at least under the facts of that case, when the plaintiff is a resident of South Carolina.[84] Before dismissing the action in *Braten Apparel Corp.*, the court again emphasized that the case did not involve the rights of a resident plaintiff.[85] Thus, although the existence of jurisdiction under the "door-closing" statute does not preclude dismissal on grounds of *forum non conveniens*, when that jurisdiction is based upon residence of a plaintiff in this state, the decision on the jurisdictional issue may be determinative of the *forum non conveniens* issue. If South Carolina adopts the approach followed by the Florida and Illinois courts which precludes the application of *forum non conveniens* when either party is a resident,[86] the determination of the jurisdictional issue will always be determinative of the *forum non conveniens* issue. If residency of the parties is not deemed to be controlling in South Carolina, the court may dismiss a case on *forum non conveniens* grounds even though jurisdiction is established by plaintiff's residence in the state. Though the doctrine will be of limited application in this situation, it nevertheless affords the court some discretion and allows it a measure of flexibility in exercising its jurisdiction not recognized prior to *Braten Apparel Corp.*

When plaintiff is nonresident, the place where the cause of action arose or the place where the subject of the action is situated becomes a primary consideration in determining whether the court has subject matter jurisdiction of the case.[87] Such considerations are also factors in determining whether dismissal on

80. *See* Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977); Chapman v. Southern Ry., 230 S.C. 210, 95 S.E.2d 170 (1956).

81. 268 S.C. 161, 232 S.E.2d 504 (1977).

82. 230 S.C. 210, 95 S.E.2d 170 (1956).

83. See note 6 and accompanying text *supra*.

84. 230 S.C. at 215-16, 95 S.E.2d at 173.

85. ___ S.C. at ___, 259 S.E.2d at 112-13.

86. See notes 44-47 and accompanying text *supra*.

87. See notes 77-78 *supra*.

grounds of *forum non conveniens* is warranted.[88] When a nonresident plaintiff sues a foreign corporation on a foreign cause of action in which the subject of the action lies outside the state, the court lacks subject matter jurisdiction under the "door-closing" statute.[89] Having no jurisdiction, the court is without authority to apply the doctrine of *forum non conveniens*.[90]

As discussed previously, cases dismissed on the basis of *forum non conveniens* have ordinarily involved foreign causes of action.[91] In Florida and Illinois, the cause of action must arise outside the forum before *forum non conveniens* can be applied.[92] Even though a foreign cause of action is not a prerequisite in New York, the courts attach much significance to the place where the cause of action arose or where the subject of the action is situated.[93] Based on the cases arising in Florida, Illinois, and New York, the utility of the doctrine of *forum non conveniens* is realized to its fullest extent in situations in which a nonresident plaintiff sues on a transitory cause of action which arose outside the forum. Yet in South Carolina, when the action is against a foreign corporation, the application of the doctrine is precluded by prior operation of the "door-closing" statute which serves essentially the same purpose. The adoption of *forum non conveniens*, therefore, is superfluous when a nonresident plaintiff sues a foreign corporation on a foreign cause of action.

*Braten Apparel Corp.* involved an action brought by a foreign corporation against another foreign corporation.[94] The supreme court, in cursory fashion, assumed that the court had jurisdiction under the "door-closing" statute.[95] Since the action was brought by a nonresident, jurisdiction presumably was based on a finding that the cause of action arose within the state or that the subject of the action was situated within the state.[96] Nevertheless, the court dismissed the case on *forum non con-*

88. See notes 43-55 and accompanying text *supra*.
89. See notes 77-78 *supra*.
90. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).
91. *See* notes 43-55 and accompanying text *supra*.
92. *See* notes 44-47 and accompanying text *supra*.
93. *See* notes 51-55 and accompanying text *supra*.
94. ___ S.C. at ___, 259 S.E.2d at 111.
95. *Id.* at ___, 259 S.E.2d at 114.
96. At the trial level, Judge Ballenger found that the causes of action arose within South Carolina and held, therefore, that the circuit court had jurisdiction under the "door-closing" statute. *Id.* at ___, 259 S.E.2d at 112.

*veniens* grounds. In other jurisdictions, only rarely will a court dismiss when the cause of action arises within the the state. In Florida and Illinois a *prerequisite* to the application of *forum non conveniens* is that the cause of action arise outside the state[97] and in New York the nexus of the cause of action to the forum is a significant factor swaying the balance in favor of retaining jurisdiction over the case.[98]

In *Braten Apparel Corp.*, the South Carolina Supreme Court demonstrated that it would not attach controlling significance to the fact that the cause of action arose within the state or that the subject of the action was situated within the state. Weighing the factors of public and private convenience, it determined that defendant had carried his burden by demonstrating that such considerations weighed heavily in favor of dismissal. The court concluded that

> [i]t is true that unless the balance of factors strongly favors the defendant, the plaintiff's choice of forum should be left undisturbed. . . . However, access to the already voluminous discovery transcripts, the pre-trial record and sources of proof in New York; the availability of witnesses and the opportunity to achieve complete relief in the New York forum; and the expense of duplicative litigation imposed on both parties and upon the State of South Carolina in providing a second forum for these nonresidents to relitigate their claims preponderate so heavily in favor of the exercise of the doctrine that failure on the part of the trial judge to grant Bankers' motion to dismiss amounts to an abuse of discretion.[99]

Even though the court in *Braten Apparel Corp.* dismissed a case in which the cause of action sued upon presumably arose within the state, if the courts of South Carolina follow the pattern of other jurisdictions, dismissal on grounds of *forum non conveniens* will rarely be granted in such situations. Indeed, a defendant seeking dismissal under these circumstances will bear a heavy burden. *Braten Apparel Corp.* is a case involving exceptional circumstances, warranting dismissal on grounds of *forum non conveniens* even though the cause of action arose within South Carolina. In actions against foreign corporations, the op-

97. *See* notes 44-47 and accompanying text *supra.*
98. *See* notes 49-54 and accompanying text *supra.*
99. ___ S.C. at ___, 259 S.E.2d at 114.

eration of the "door-closing" statute in most circumstances will limit the utility of the doctrine of *forum non conveniens*. Nevertheless, as *Braten Apparel Corp.* illustrates, the adoption of the doctrine affords South Carolina courts the flexibility needed to resist exercising its jurisdiction when an alternative forum would better serve the ends of justice and convenience to the parties.

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