

TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: KINGSHILL

	)	CASES NOS. 606/92; 608/92; 609/92
	)	611/92; 615/92; 629/92
IN RE:	)	632/92; 633/92; 634/92
	)	636/92; 638/92; 642/92
	)	644/92; 645/92; 646/92
	)	648/92; 649/92; 650/92
ST. CROIX SEAMEN'S ASBESTOS	)	653/92; 654/92; 656/92
CASES	)	657/92; 658/92; 661/92
	)	662/92; 665/92; 666/92
	)	672/92; 680/92; 681/92
	)	685/92; 687/92; 688/92
	)	694/92; 697/92; 699/92
	)	700/92; 701/92; 703/92

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GYPSUM COMPANY)

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 2

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IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 3

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IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 4

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IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 5

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PETERSEN, Senior Sitting Judge

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 6

MEMORANDUM OPINION AND ORDER
(JUNE / 8 , 1993)

This Matter is before this Court on Defendants' Motion to Dismiss for Forum Non Conveniens. For the reasons stated herein, the Motion to Dismiss is Granted.

FACTS

Complaints have been filed in the Virgin Islands on behalf of living and deceased Merchant Mariners. These complaints allege that these seamen were exposed to asbestos during their career as sailors on American ships. The Defendants in these cases can be classified in three categories. The first category are the Shipowner Defendants. The second category of Defendants are manufacturers of boilers, generators and other machinery installed in these vessels ("Machinery Manufacturers Defendants"). The third category of Defendants are manufacturers of asbestos and asbestos containing products used on the ships ("Asbestos Products Defendants").

Out of the approximately 100 actions initially filed here, 61 cases were removed to the United States District Court. Presently, these cases are awaiting a Conditional Transfer Order to be further removed to the Multi District Litigation panel where Judge Weiner will decide Plaintiffs' Motion for Removal and Defendants' Motion to Sever. Of the 39 cases which remain

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 7

pending in this Court, there are approximately 52 Motions to Dismiss on the grounds of Forum Non Conveniens.

DISCUSSION

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §84 (1971) describes forum non conveniens as the principle whereby "[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." The doctrine of forum non conveniens serves to limit misuse of venue by plaintiffs more concerned with "justice blended with harassment" than with their rights and remedies. Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947). Under this doctrine, a court can dismiss a case when trial of the action would establish oppressiveness and vexation to the defendant out of proportion to plaintiff's convenience. Id. at 507; Koster v. American Lumbermen Mut. Casualty Co., 330 U.S. 518 (1947); Lony v. E.I. DuPont de Nemours and Co., 935 F.2d 604 (3rd Cir. 1991). This doctrine is also properly exercised when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems. Gulf Oil, 330 U.S. at 510. The law of forum non conveniens does not apply if there is either an absence of jurisdiction or a mistake of venue. Id. at 504. In order to decline jurisdiction it must first exist. As

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 8

summarized by Professors Wright and Miller,

"the doctrine of *forum non conveniens* does not come into play unless the court in which the action was brought has both subject matter and personal jurisdiction and is a [statutorily] proper venue."

C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* §3828, at 287 (2d ed. 1986). (citations omitted). Consequently, this Court must first decide the issue of jurisdiction even if in the exercise of its discretion, jurisdiction is declined under the doctrine of *forum non conveniens*.

Having resolved the jurisdictional issues, this Court must now determine whether this Motion to Dismiss on the grounds of *forum non conveniens* should be granted.

Plaintiffs called this Court's attention to Zipfel v. Halliburton Co., 832 F.2d 1477, 1487(9th Cir. 1987) which held that the doctrine of *forum non conveniens* cannot be applied to Jones Act cases. The arguments against the application of the *forum non conveniens* doctrine in Jones Act cases center around the specific venue provision of the Jones Act. The Jones Act incorporates the Federal Employer's Liability Act ("FELA"). See 46 U.S.C. §688(a). Both acts have specific venue provisions. The FELA provides in relevant part:

Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 9

defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action.

45 U.S.C. §56.

The Jones Act provides, in pertinent part:

Jurisdiction in [actions under this act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. §688(a).

The Supreme Court in Baltimore and Ohio R.R. Co. v. Kepner, 314 U.S.44 (1941) found that FELA'S specific venue provision precluded a forum non conveniens analysis. The defendant in Kepner had argued that, although venue was proper under the FELA's special venue provision, the plaintiff was acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction. Id. The Kepner court observed that "[A] privilege of venue granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense". Kepner 314 U.S. at 53. The Supreme Court in Gulf Oil subsequently held that the reasoning of Kepner applied to all cases involving specific venue provisions.

In response to Kepner and Gilbert, Congress drafted 28

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 10

U.S.C.A. 1404(a)¹ which provides that:

For the convenience of the parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1 (1950), a FELA case, the Supreme Court stated that Kepner did not limit the power of a State to deny access to its courts to persons seeking recovery under FELA if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially.

In Vargas v. A.H. Bull Steamship Co., 131 A. 2d 39 (N.J. 1957), residents of Puerto Rico brought actions against a New Jersey corporation for injuries sustained in Puerto Rico on defendants' ships. Plaintiffs argued that the Jones Act and FELA precluded a forum non conveniens analysis. The court, referring to the Missouri case, held that the doctrine of forum non conveniens was applicable in state court proceedings of Jones Act lawsuits.

Likewise in Anderson v. Great Lakes Dredge and Dock Co., 304 N.W. 2d 539 (Mich. 1981), where a Florida seamen brought an

¹The Revision Notes states that "this [rule] was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see [Kepner]"... See Revisor's Notes to 28 U.S.C.A. 1404(a).

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 11

action under the Jones Act for injuries that occurred in Florida while he worked on a dredge owned by a Delaware corporation which did business in Michigan, the plaintiff argued that the doctrine of *forum non conveniens* would frustrate the federal policy of giving Jones Act plaintiffs latitude in their choice of forum. The court noted that plaintiffs in Jones Act or FELA cases have latitude in the "initial" choice of forum. The court, however, stated that the fact that the transfer provision of 28 U.S.C. §1404 (a) applies to any "civil action" - including a Jones Act or FELA case - demonstrates implicit federal recognition that a Jones Act or FELA suit, like other types of actions may be initiated in an inappropriate forum. Finding that the application of *forum non conveniens* would not "disparage" any federal concerns, the court held that the doctrine of *forum non conveniens* was applicable to the Jones Act.

In accordance with the pronouncements in both Anderson and Vargas, the Territorial Court also finds that it is not barred from applying the doctrine of *forum non conveniens* to these Jones Act cases.

Locally, 5 V.I.C. §4905 codifies the doctrine of *forum non conveniens*. It provides that:

When the Court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 12

or dismiss the action in whole or in part on
any conditions that may be just.

5 V.I.C. §4905

It is well settled that the defendant has the burden to establish the elements of forum non conveniens. The Buccaneer Hotel Corporation v. Reliance Internal. Sales Corp., 17 V.I. 249 (Terr. Ct. St.C. 1981). Initially, the defendant must establish that an adequate alternative forum exists as to all defendants. Lacey v. Cessna Aircraft Co., 932 F.2d 170 (3rd Cir. 1991). The requirement of an adequate alternative forum is generally satisfied when the defendant is amenable to process in another jurisdiction. Piper Aircraft Co. v. Reyno., 454 U.S. 235 (1981).

Only after a defendant establishes that an adequate alternative forum exists will a court review the public and private factors. Lacey, 932 F.2d at 180. The Supreme Court in Piper noted that the mere availability of an alternative forum will not suffice where the remedy provided is "so clearly inadequate or unsatisfactory that it is no remedy at all." Piper, 454 U.S. at 254. Defendants' submissions to the jurisdiction of alternative forum renders that forum "available" for purposes of a forum non conveniens analysis. Feenerly v. Swiftdrill, Inc., 706 F.Supp. 519 (E.D.Tex. 1989); Interpane Coatings v. Australia and New Zealand, 732 F.Supp. 909 (N.D. Ill. 1990).

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 13

In the instant case, the Plaintiffs do not dispute that they could adequately enforce their rights on The United States mainland. Many of these Defendants have already agreed to submit to jurisdiction in an alternative forum upon this Court's dismissal of the case. An agreement by all Defendants to submit to service of process in another jurisdiction, to waive the assertion of any limitation defenses and to agree to discovery will establish an adequate alternative forum. See Baris v. Sulpico Lines, Inc., 932 F.2d 1540 (5th Cir. 1991). Once the defendant satisfies this burden, it must then show that the private and public factors weigh heavily in favor of dismissal. Lacey, 932 F.2d at 180.

The Court in Davis v. Vieques Air Link Inc., 22 V.I. 292 (D.V.I. 1986) outlined the following private and public factors which a court should consider:

- (A) Private Factors
 - (1) amenability of parties to personal jurisdiction in other forums
 - (2) private interest of litigant
 - (3) ease of access to sources of proof
 - (4) availability of compulsory process
 - (5) cost of obtaining willing witnesses
 - (6) other practical problems
- (B) Public Factors
 - (1) administrative difficulties
 - (2) burden on local jurors and community
 - (3) having cases in forum that is familiar with the law which governs the case.

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 14

Gulf Oil, Piper and Lacey also outlined the private and public factors. According to Lacey, the private factors must include the following:

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 a trial of a case easy, expeditious, and inexpensive.

Lacey, 932 F.2d at 180 and the public interest factors:

the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in application of federal laws; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. at 180.

The Third Circuit Court of Appeals has found that the task of balancing the private and public interest factors is qualitative and not quantitative in nature. Lacey, 932 F.2d at 182. The Lacey court stated that:

"although the Gulf Oil Court presented its eleven private and public interest factors as rough equals, the Supreme Court surely did not promulgate a mechanical jurisprudence. We believe instead that, depending on the case, some factors are 'more equal' than others. If, for example,

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 15

the barriers to obtaining access to essential sources of proof in the foreign forum are so severe as to render that forum (practically speaking) an inadequate alternative, that consideration (i.e., "ease of access to sources of proof") cannot be viewed as a run-of-the-mill criterion easily trumped by a countervailing numerical count." Id.

In reviewing the private interest factors, this Court must scrutinize the substance of the dispute between the parties to evaluate what proof is required and determine whether the pieces of evidence cited by the parties are critical, or even relevant to the Plaintiffs' cause of action and to any potential defenses to the action. Van Cauwenberghe v. Biard, 486 U.S. 517 (1988).

In these cases, the amenability of the parties to personal jurisdiction in other forums has already been discussed. The private interest of the litigant factor involves the plaintiff's choice of forum. Normally, the plaintiff's choice of forum should rarely be disturbed. Gilbert, 330 U.S. at 508. But where the plaintiff does not reside in the chosen forum, the court is entitled to be far less deferential toward its choice in conducting a forum non conveniens analysis. Interpane Coatings, 732 F.Supp. at 915. It is uncontested that the Plaintiffs in these cases do not reside in the Virgin Islands. Accordingly, this Court will not consider the Plaintiffs' choice of forum as controlling.

The access to sources of proof, compulsory process, cost

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 16

and practical problems factors weigh heavily in the Defendants' favor. There are no known sources of proof in this territory. The Defendants do not maintain any employees and records in the Virgin Islands. Defendants' assertion that records pertaining to employment of seamen, ownership, operation or maintenance of their vessels, or their purchasing of supplies and equipment for use aboard vessels, are not located in the Virgin Islands have not been refuted by the Plaintiffs. The Plaintiffs have not indicated that there are any witnesses in the Virgin Islands. The Defendants have indicated that they will not utilize any local expert witnesses on liability and medical issues. The Court's compulsory process could not reach any unwilling witnesses. Even if all of the witnesses were willing to travel here to testify, the cost of transportation and housing would be substantial, if not prohibitive. See Syndicate 420 at Lloyd's London v. Early Am. Ins., 796 F.2d 821 (5th Cir. 1986). While it may be true that witnesses and other sources of proof in maritime cases tend to be spread throughout the United States and its territories, the Plaintiffs have not demonstrated that their sources of proof here are closer to the Virgin Islands than the continental United States.

As a practical matter, conducting a lawsuit several hundred miles away from witnesses and the sources of proof would amount to needless delay and inordinate expense. See Feenerly, 706

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 17

F.Supp at 519. Moreover, this Court has an interest in not expending judicial resources where the parties are so remotely connected to the Virgin Islands. See e.g., Quintero v. Klaveness Ship Lines, 914 F.2d 717 (5th Cir. 1990).

Reviewing the public interest factors throws the Court into the merits of the underlying dispute. To evaluate these factors, the Court must consider the locus of the alleged culpable conduct of a disputed issue and the connection of the conduct to the Plaintiffs' chosen forum. Van Cauwenberghe, 486 U.S. at 528. In these cases there is insufficient indication as to the locus of the alleged conduct and its relationship to the Virgin Islands.

Additionally, the administrative considerations, burden of jury duty, and local interest in the case also weigh heavily in the Defendants' favor. The Virgin Islands Territorial Court recently expanded both its civil and criminal jurisdiction. This new jurisdiction will require greater administrative muscle. These 39 multi-party cases will present a particularly onerous administrative burden on this Court at this historical time. Moreover, the trial of complex maritime and products liability asbestos cases would impose an unusually heavy burden on the Virgin Islands as well as on those individuals leaving their home, work and businesses to serve as jurors. Additionally, the timely scheduling and hearing of these

IN RE: SEAMEN'S ASBESTOS LITIGATION CASES
CIVIL NOS. 604-703/1992
MEMORANDUM OPINION AND ORDER
FORUM NON CONVENIENS
PAGE 18

oftentimes lengthy jury trials with no substantial nexus to this Territory may well have the potential of denying timely or speedy access to this Court by its residents. As previously stated, none of the Plaintiffs reside here. The vast majority of the over 150 Defendants conduct no business here, are not licensed to do business here, have no place of business herein. These cases have no factual connection to the Virgin Islands. Thus, these cases can hardly be characterized as local controversies.

Accordingly, this Court finds that both the public and private interest factors support dismissing these cases on forum non conveniens grounds.


EILEEN R. PETERSEN