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ARTICLE

Give Me Freedom of Contract or Give Me Death: The Obscurity of Article 44(A) of the Louisiana Code of Civil Procedure

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GIVE ME FREEDOM OF CONTRACT OR GIVE ME DEATH: THE OBSCURITY OF ARTICLE 44(A) OF THE LOUISIANA CODE OF CIVIL PROCEDURE

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"Qui dit contractuel dit juste"[1]

". . . freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses."[2]

I. INTRODUCTION

"Freedom of contract" is a bedrock principle of American law. Contracting parties are, in essence, their own lawmakers, constructing the confines of their agreement strictly according to their preferences. However, the notion of freedom of contract is a misnomer; this "freedom" is limited. Contracting parties are constricted by legislative guidelines that provide exceptions to otherwise boundless liberty.

In the larger commercial context, parties rely upon this freedom in constructing an agreement that satisfies each individual's particular needs. Of recent import, parties insert clauses that, in anticipation of future

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1. ALFRED FOUILLÉE, LA SCIENCE SOCIALE CONTEMPORAINE 410 (Paris, 1880).

2. Justice Charles Evans Hughes, Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911).

disputes, select the forum in which the respective parties will litigate disagreements that may arise from time to time. "Forum selection clauses" are of great significance to both transactional and litigation attorneys, as well as the parties themselves, because they provide legal certainty when judicially enforced.

In Louisiana, however, a Codal provision appears to exempt forum selection from the otherwise generally unbridled freedom granted to contracting parties and clouds this contractual "certainty."[3] While Louisiana courts recognize the prima facie validity of forum selection clauses, Article 44(A) of the Louisiana Code of Civil Procedure seems to provide otherwise: "An objection to the venue may not be waived prior to the institution of the action."[4]

The ultimate outcome of the battle between the *jurisprudence constante* and the legislative will has critical effects for contracting parties. Part II of this Article addresses the freedom of contract principle and its effect on the enforcement of forum selection clauses. Part III assays Article 44(A) of the Louisiana Code of Civil Procedure by discussing the article's historical development, present language, and interpretations thereof. Finally, Part IV considers the effect of Article 44(A) and Louisiana public policy on the ability of contracting parties to locate their dispute in any particular forum, and, as a consequence, the enforceability of these provisions. Ultimately, this Article concludes that while forum selection clauses violate Louisiana statutory public policy, courts have nonetheless chosen to enforce these clauses. Whether this *choice* is proper in light of present commercial realities or whether this *choice* damages Louisiana's civil tradition is a debate for the ages.

II. "FREEDOM OF CONTRACT"

In 1911, the United States Supreme Court decided *Chicago, Burlington, and Quincy Railroad Company v. McGuire*, wherein Justice Hughes, writing for the majority, addressed at length the right of every citizen to freely contract.[5] In *McGuire*, the Court considered the effect of legislative enactments on this freedom and ultimately concluded that "freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses."[6] Instead, the liberty granted to contracting parties is constrained by a legislature's authority "to maintain peace and security, and to enact laws for

3. LA. CODE CIV. PROC. ANN. art. 44(A) (2008).

4. *Id.*

5. Chicago, Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911).

6. *Id.*

the promotion of the health, safety, morals and welfare of those subject to its jurisdiction."[7]

The Supreme Court's early formulation of this freedom's boundaries remains equally germane to present day commercial transactions: parties may draft contracts according to their preferences so long as such actions do not conflict with public policy or express legislative limitations.

By 1972, parties began concocting various methods of obtaining jurisdiction and venue in forums more suited to their individual needs and desires. In the seminal case *M/S Bremen v. Zapata Off-Shore Company*, the Supreme Court once again found itself at the forefront of the freedom of contract dilemma.[8] *M/S Bremen* involved a contractual choice of forum clause that chose the London Court of Justice as the forum for the adjudication of disputes between the parties.[9] In particular, the Court reviewed the decision of the United States Court of Appeals for the Fifth Circuit, wherein the Fifth Circuit concluded that enforcement of forum selection clauses violated public policy.[10] The Supreme Court reversed the Fifth Circuit and established the quintessential rule of law with respect to forum selection clauses: "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[11]

With this holding, the Court painted a monochromatic picture with broad strokes; yet, the Court left room for colorful modifications. Particularly, the Court agreed that such clauses would be unenforceable where "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[12]

The Court created another exception to enforcement of forum selection clauses: inconvenience.[13] Under this exception, a court may deny enforcement of a contractual choice of forum if the chosen forum is inconvenient to one of the parties.[14] However, the party seeking to declare the clause unenforceable must do more than show mere inconvenience; she must show that enforcement would, for all practical purposes, deprive her

7. Chicago, Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 568 (1911).
8. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 1 (1972).
9. *Id.* at 2.
10. *Id.* at 8.
11. *Id.* at 10.
12. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).
13. *Id.* at 17-18.
14. *Id.*

of her day in court.[15] This showing of inconvenience, however, is made difficult by an arms-length agreement between two sophisticated parties who arguably evaluate the consequences of the forum selection clause during negotiations. Exemplary of this difficulty, the Court concluded that the contractual clause at issue in *M/S Bremen* did not rise to the level of inconvenience necessary to overcome the presumption of enforceability.[16]

Nevertheless, since 1972, parties seeking to invalidate a forum selection clause have been at pains to satisfy the heavy burden established in *M/S Bremen*. Much of the Court's decision rested on the practical implications of a rule of law prohibiting such clauses: Forcing foreign parties to resolve all of their disputes with U.S. citizens in U.S. courts and according to U.S. law (a "parochial concept") could stifle, rather than encourage, the growth of American business.[17] This *ratio decidendi* has carried significant weight in current disputes over the enforceability of such clauses while simultaneously reinforcing the principle of freedom of contract.

M/S Bremen comports with earlier decisions that selectively restrained the ability of sophisticated business people to negotiate freely for all particulars in every context.[18] Most notably, the Court recognized the ability of state legislatures and courts to dictate a state's public policy.[19] Should a state legislature or court determine that forum selection clauses violate the public policy of the state, such clauses should be held unenforceable.[20]

A. LOUISIANA JURISPRUDENCE

The majority of Louisiana's jurisprudence adopts the formulation established by the Supreme Court in *M/S Bremen*. As a matter of *jurisprudence constante*, forum selection clauses are prima facie valid and enforceable unless enforcement in any particular action: (1) would be unreasonable and unjust; (2) would be the result of fraud or overreaching; or (3) would "contravene a strong public policy of the forum where the suit is brought."[21] This heavy burden requires that the party challenging

15. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17-18 (1972).

16. *Id.* at 19.

17. *Id.* at 9.

18. *See, e.g.*, Nashua River Paper Co. v. Hammermill Paper Co., 111 N.E. 678 (1916); Benson v. E. Bldg. & Loan Assn., 66 N.E. 627 (1903); Nute v. Hamilton Mut. Ins. Co., 72 Mass. 174 (1856).

19. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

20. *See id.*

21. *See, e.g.*, Vallejo Enter., L.L.C. v. Boulder Image, Inc., 05-2649, p. 3 (La. App. 1 Cir. 11/3/06); 950 So. 2d 832, 835. *See also* Town of Homer v. United Healthcare of La., Inc., 41,512,

enforcement of the clause adduce evidence that the clause was a product of fraud or coercion.[22] Moreover, a party seeking to invalidate a forum selection clause on the grounds of inconvenience must show more than mere adversity; instead, the party must illustrate how enforcement of the clause will deprive the party of its day in court.[23]

Some courts in Louisiana have adopted alternative approaches and views with respect to the presumed validity of such clauses. The Louisiana Court of Appeals for the Second Circuit, on separate occasions, has documented the debate as to the validity of choice of forum provisions under Louisiana law.[24] The Louisiana Fourth Circuit, on another occasion, conflated the notion of venue and jurisdiction *ratione personae* in determining that parties cannot agree to jurisdiction before a particular court in another forum in the absence of minimum contacts.[25] In light of the jurisprudence of a majority of Louisiana courts, however, the issue becomes not one of whether courts recognize the rule of law enunciated in *M/S Bremen*, but rather whether a strong public policy exists under Louisiana law preventing enforcement of forum selection clauses. Article 44(A) of the Louisiana Code of Civil Procedure takes center stage.

III. ARTICLE 44(A) OF THE LOUISIANA CODE OF CIVIL PROCEDURE

"An objection to the venue may not be waived prior to the institution of the action."[26] Louisiana's unique civil law tradition, which is embraced by no other state in the Union, treats statutory law as the highest order.[27] In *Prytania Park Hotel, Ltd. v. General Star Indemnity Co.*, the United States Court of Appeals for the Fifth Circuit highlighted the heightened importance of statutory law in Louisiana: "It is axiomatic that in Louisiana, courts must begin every legal analysis by examining primary sources of

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p. 6 (La. App. 2 Cir. 1/31/07); 948 So. 2d 1163, 1167; ACG Mediaworks, L.L.C. v. Ford, 03-978, p. 6 (La. App. 5 Cir. 3/30/04); 870 So. 2d 1097, 1101.

22. *See* Vallejo Enter., L.L.C. v. Boulder Image, Inc., 05-2649, p. 3-4 (La. App. 1 Cir. 11/3/06); 950 So. 2d 832, 835.

23. *Id.* at p. 5-6; 836-37.

24. *See* Town of Homer v. United Healthcare of La., Inc., 41,512, p. 3 (La. App. 2 Cir. 1/31/07); 948 So. 2d 1163, 1171 (Caraway, J., dissenting) (noting that the enforceability of a forum selection clause "has been under a legislative cloud from inception"); La. Safety Ass'n of Timbermen Self Ins. Fund v. A-1 Pallet Co., 37,648, p. 3 (La. App. 2 Cir. 9/24/03); 855 So. 2d 895, 898 (choosing not to discuss "the parties' contractual provision regarding venue" as "[s]uch provision is in question under Louisiana law and the jurisprudence").

25. *See* Tulane Indus. Laundry, Inc. v. Quality Lube & Oil, Inc., 00-0610, p. 6 (La. App. 4 Cir. 1/24/01); 779 So. 2d 99, 102 ("[I]n the absence of minimum contacts, parties to a contract cannot agree that a particular court will have jurisdiction to decide a contractual dispute.").

26. LA. CODE CIV. PROC. ANN. art. 44(A) (2008).

27. *See* LA. CIV. CODE ANN. art. 1 (2008).

law: the State's Constitution, codes, and statutes. Jurisprudence, even when it rises to the level of *jurisprudence constante*, is a secondary law source in Louisiana."[28] Why, then, have Louisiana courts ignored an article of the Code of Civil Procedure that, by any analysis, is straightforward and facially unambiguous?

Whether by utter recalcitrance or inartful drafting, Louisiana state court decisions often fail to acknowledge this distinctive hierarchy when examining forum selection clauses. While the Civil Code and other courts explicitly recognize the order of statutory law over jurisprudential law, the inception of the latter, much to the chagrin of civilian lawyers, has firmly taken hold in state adjudications. Nevertheless, the conclusion logically follows that if Article 44(A) of the Louisiana Code of Civil Procedure does indeed represent strong public policy against the capacity of parties to agree to any particular forum in advance of litigation, then jurisprudence to the contrary is erroneous and of no avail. Thus, the answer lies not in the decisions of Louisiana jurists, but rather in the text of Article 44(A) and the precursors thereto.

A. Historical Formation and Interpretation of Article 44(A): Article 162 of the Code of Practice of 1870

The Official Revision Comments of 1960 to Article 44 of the Louisiana Code of Civil Procedure address the historical origin of section (A).[29] Comment (a) notes that section (A) seeks to clarify Article 162 of the Code of Practice of 1870.[30]

Article 162 underwent numerous revisions in the years preceding the 1870 version. Prior to 1861, Article 162 read: "It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicil [sic] or residence."[31] The legislature revised Article 162 in 1861 to add the following language: " . . . and shall not be permitted to elect any other domicil [sic] or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law."[32] The 1870 version of Article 162 tracked verbatim the language adopted in the 1861 revisions.

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28. Prytania Park Hotel, Ltd v. Gen. Star Indem. Co., 179 F.3d 169, 175 (5th Cir. 1999) (emphasis in original).

29. LA. CODE CIV. PROC. ANN. art. 44 official revision cmt. (1960).

30. LA. CODE CIV. PROC. ANN. art. 44 cmt. (a) (2008).

31. *See* Jex v. Keary, 18 La. Ann. 81, 86 (La. 1866); Audubon Ins. Co. v. Schoell, 77 So. 2d 53, 54 (La. Ct. App. 1955).

32. *See Jex*, 18 La. Ann. at 86; *Audubon Ins. Co.*, 77 So. 2d at 54.

Interpretation of Article 162 as set forth in the Code of Practice of 1870 is critical in determining the surprisingly cryptic language of Article 44(A). One of the earliest cases to assay the effect of the language added in 1861 is *Jex v. Keary*.[33] In *Jex*, the Louisiana Supreme Court considered whether a stipulation in an act of mortgage that designated a particular forum was enforceable under Louisiana law.[34] Ultimately, the Court enforced the forum selection clause, but did so only after concluding that the 1861 amendments did not apply retroactively.[35]

The Court, however, discussed *ad nauseam* the effect of the 1861 amendment to Article 162.[36] The Court opined that the legislature amended Article 162 "to prevent also the obligor from waiving his domicile in advance, and at the time of the contracting of the obligation."[37] Whereas, until 1861, a party was free to contractually waive his right to be sued in his personal domicile,[38] the legislature's actions in 1861 constituted strong evidence that any waiver of a party's domicile by agreement was "prohibited and not binding."[39]

The decision of the Louisiana Supreme Court in *Jex* supplies other interesting insights that aid in understanding the legislature's vision in adopting Article 162, and its distant cousin, Article 44(A). First, in examining Article 162, the Court recognized a temporal distinction with respect to waiver of venue: Pre-litigation versus post-litigation attempts to waive venue.[40] The addition of prohibitory language by the legislature in 1861 signaled a bar to pre-litigation agreements waiving domicile; however, Article 162 *did* permit renunciation of one's right to be sued before his or her own domicile *following* the institution of litigation.[41] Indeed, Article 44(C) of the Louisiana Code of Civil Procedure currently embodies this temporal distinction and Louisiana courts have, on many occasions, upheld waiver of venue *after* the commencement of litigation.[42]

In 1888, the Louisiana Supreme Court again recognized this temporal distinction. In *Lyons v. Kelly*, the Court upheld a pre-litigation waiver and

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33. *Jex*, 18 La. Ann. at 81.

34. *Id.* at 85.

35. *See id.* at 89.

36. Jex v. Keary, 18 La. Ann. 81, 86-88 (La. 1866).

37. *Id.* at 89.

38. *Id.*

39. *Id.*

40. *Id.*

41. Jex v. Keary, 18 La. Ann. 81, 89 (La. 1866) (noting that parties may "renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and it is not contrary to the public good").

42. *See* LA. CODE CIV. PROC. ANN. art. 44(C) (2008).

confession of judgment based solely upon a crafty application of the facts therein.[43] In *Lyons*, the plaintiff presented to the defendant the petition in advance of the actual filing.[44] The defendant accepted service, waived citation, and confessed judgment by indorsement, but later challenged the judgment on the grounds that Article 162 prohibited pre-litigation agreements to waive venue.[45] The Court concluded that this was "not the election of domicile . . . prohibited by either the letter or spirit of" Article 162.[46] The fact crucial to this conclusion, however, was that the defendant had been presented with the actual petition that plaintiff intended to file.[47] The Louisiana Supreme Court's consistent acknowledgment of this temporal distinction serves to highlight the important individual functions of sections (A) and (C) of Article 44.

The second interesting facet of the *Jex* decision is the Court's conflation of the legal concepts of jurisdiction *ratione personae* and venue.[48] While the two often intermingle, one should not forget that jurisdiction *ratione personae* and venue are two distinct concepts. Jurisdiction over the person is defined as "the legal power and authority of a court to render a personal judgment against a party to an action or proceeding."[49] Venue, on the other hand, "means the parish where an action or proceeding may properly be brought and tried under the rules regulating the subject."[50] However, in addressing the defendant's argument that he was not amenable to the jurisdiction of a court outside of his domicile, the *Jex* Court noted that prior to the 1861 amendment of Article 162, "a party in contracting a debt, could agree to waive his domicile, and *submit to the jurisdiction* of another competent Court [other] than that of his residence."[51] Twenty-two years later, the Court, in deciding *Lyons*, returned to this amalgamation, and held that "[i]t is now the settled jurisprudence that parties may, by consent, *waive personal jurisdiction*, and submit their controversy to the determination of another tribunal than that of their domicile."[52]

The legislature, by placing Article 44(A)'s prohibition within the

43. Lyons v. Kelly, 4 So. 480 (La. 1888).

44. *Id.* at 480-81.

45. *Id.* at 481.

46. *Id.*

47. *Id.* at 480.

48. Jex v. Keary, 18 La. Ann. 81, 89 (La. 1866).

49. LA. CODE CIV. PROC. ANN. art. 6 (2008).

50. LA. CODE CIV. PROC. ANN. art. 41 (2008).

51. *Jex*, 18 La. Ann. at 89 (emphasis added).

52. Lyons v. Kelly, 4 So. 480, 481 (La. 1888) (citing Stackhouse v. Zuntz, 36 La. Ann. 531 (La. 1884)).

venue provisions, may have sought to avoid the consternation potentially created by this judicial merger of jurisdiction *ratione personae* and venue. As evidenced by the Court's decisions in *Jex* and *Lyons*, among others, these two notions overlap significantly, thereby creating difficulty in determining which exception a party should plead in seeking to challenge or enforce a forum selection clause. Indeed, in 1982, then-Attorney General William J. Guste, Jr. noted that "[i]n some cases, personal jurisdiction is confused with venue."[53] One could sensibly presume, then, that the relative isolation of Article 44(A) amongst other venue provisions indicates that its application is limited solely to venue.

Thus, it is apparent that Article 162 of the Code of Practice forms an important part of any analysis concerning the meaning and effect of Article 44(A). The adoption of the Code of Civil Procedure signaled the concomitant disassembly of Article 162 of the Code of Practice of 1870. However, Article 162 lives on in new form. The first clause of Article 162 represents the general rule of venue in Louisiana and is found in substantially similar form at Article 42 of the Louisiana Code of Civil Procedure.[54] The legislature detached the second clause of Article 162, which it added in the 1861 amendment, and relocated the revised language to Article 44(A).[55] This is where the salient feature, for our purposes, lies, as the legislature remained true to its original form. While Article 162 was "born-again" in Article 44(A), its life, if it ever had one, was short lived.

B. ARTICLE 44(A) IN ITS CURRENT FORM

Article 44(A) simply states: "An objection to the venue may not be waived prior to the institution of the action."[56] Short, sweet, and facially unambiguous, this Article has proved most elusive. The straightforward interpretation proposed here is that this Article means precisely what it says: a party may not contractually choose to waive venue *before* another party institutes an action. Indeed, if Article 44(A) does *not* constitute a ban on freely-negotiated contractual forum selection clauses, then what, if

53. La. Att'y Gen. Op. No. 81-850, 1982 WL 190710 (La. Att'y Gen. 1982).

54. *Compare* LA. CODE PRAC. art. 162 (1870) ("It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicil [sic] or residence."), *with* LA. CODE CIV. PROC. ANN. art. 42 (2008) ("The general rules of venue are that an action against: (1) An individual who is domiciled in the state shall be brought in the parish of his domicile; or if he resides but is not domiciled in the state, in the parish of his residence . . . .").

55. *Compare* LA. CODE PRAC. art. 162 (1870) (" . . . and shall not be permitted to elect any other domicil [sic] or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law."), *with* LA. CODE CIV. PROC. ANN. art. 44(A) (2008) ("An objection to the venue may not be waived prior to the institution of the action.").

56. LA. CODE CIV. PROC. ANN. art. 44(A) (2008).

anything, can it mean? In Louisiana, things are not always what they seem.

In 1879, the Louisiana Supreme Court, interpreting the Code of Practice of 1870, distinguished Article 93, an exception to the rule that a defendant must be sued in the place of his domicile, from the last clause of Article 162.[57] The Court wrote that the final clause of Article 162 "provides that no one shall be permitted *to elect* any other domicile *for the purpose of being sued*. Is it not manifest that this clause relates to causes where parties by agreement and with a view to *a future suit* designate a place to bring it?"[58] In *Frederick v. Popich Marine Construction, Inc.*, the Louisiana Court of Appeals for the First Circuit noted that Article 162 "means that a party may not contract or agree in advance of the filing of a suit against him to be sued in an alien court."[59] Yet, somewhere between the 19th and 21st centuries, and despite the clear linkage between Article 162 and Article 44(A), Louisiana courts had a change of heart.

Today, the view towards forum selection clauses has changed dramatically, and under the standard set forth in *M/S Bremen*, forum selection clauses have received presumptive enforceability.[60] Article 44(A), on the other hand, has played a limited role in the jurisprudence. And, even where raised, Louisiana courts have given short shrift to the claim that Louisiana law prohibits such clauses as a matter of public policy.[61]

However, if Article 44(A) cannot be said to prohibit forum selection clauses, then there must be another rational explanation for its inclusion in the Louisiana Code of Civil Procedure. One potential explanation is that Article 44(A) represents the legislature's intent to prohibit contractual waiver of "non-waivable" venue provisions. A cursory review of Article 44 renders this explanation implausible as *any* attempted waiver of "non-waivable" venue provisions is null and void *ab initio*.[62] Therefore, this interpretation would result in the conclusion that Article 44(A) and 44(B) recite the same rule of law, albeit by utilizing different language. This would violate the cardinal rule of statutory interpretation that each provision be interpreted to give it effect.[63] An interpretation that concludes

57. Phipps v. Snodgrass, 31 La. Ann. 88, 90-91 (La. 1879).

58. *Id.*

59. Frederick v. Popich Marine Const., Inc., 136 So. 2d 423, 427 (La. Ct. App. 1961) (dictum).

60. BUS. & COM. LITIG. IN FED. CTS. § 92:12 (2008).

61. *See* Nat'l Linen Serv. v. City of Monroe, 39,199 (La. App. 2 Cir. 12/15/04); 889 So. 2d 1186; UDS Mgmt. Corp. v. Ebarb Waterworks Dist. No. 1, 32,103 (La. App. 2 Cir. 2/24/99); 728 So. 2d 952.

62. *See* LA. CODE CIV. PROC. ANN. art. 44(B) (2008) ("The venue provided in Articles 2006, 2811, 2812, 3941, 3991, 4031 through 4034 and 4542 may not be waived.").

63. *See generally* LA. CIV. CODE ANN. arts. 10, 12 (2008).

that section (A) and section (B) address the same legal issue renders at least one of those sections superfluous and meaningless. Such an interpretation is patently absurd.

Another, admittedly more plausible, explanation is that Article 44(A) signals an attempt to prohibit Louisiana residents from agreeing with other Louisiana residents to bring suit in, for example, Pennsylvania.[64] If this interpretation is correct, then why the disparity between a scenario involving two contracting Louisiana citizens and one involving a Louisiana citizen and a citizen of a sister state? While such an interpretation does not raise a problem on its face, further inspection reveals that such a protection, if intended, could be rendered useless by the defendant's assertion that the foreign court lacks personal jurisdiction.[65] Moreover, while this interpretation might have been legitimate under Article 44(A)'s predecessor, which explicitly referenced residents of this State, the present version of Article 44(A) contains no such similar qualification. Instead, Article 44(A) represents a blanket prohibition not tied to citizenship – foreign or domestic.

Despite the fact that Louisiana courts generally disregard Article 44(A) when determining the enforceability of a forum selection clause in any given case, there is support for the proposition that the enforceability of these clauses is by no means a *fait accompli*. Judge Caraway of the Louisiana Court of Appeal for the Second Circuit, in dicta, highlighted this debate by writing that parties' contractual forum selection clauses are "in question under Louisiana law and the jurisprudence."[66] Judge Caraway returned to this discussion in *Town of Homer v. United Healthcare of Louisiana, Inc.*, a case in which the majority enforced a forum selection clause.[67] In dissent, Judge Caraway wrote that a "contractual choice of venue . . . has been under a legislative cloud from inception."[68] Judge Caraway suggested that Louisiana Revised Statutes section 51:1407, which prohibits contractual forum selection clauses in the context of solicitation, sheds light on the true meaning of Article 44(A).[69]

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64. *See* Audubon Ins. Co. v. Schoell, 77 So. 2d 53, 54 (La. Ct. App. 1955) (holding that Article 162 "necessarily, of course, applies to those whose residences or domiciles are within the State").

65. *See* Tulane Indus. Laundry, Inc. v. Quality Lube & Oil, Inc., 00-0610, p. 6 (La. App. 1 Cir. 1/24/01); 779 So. 2d 99, 102 ("[I]n the absence of minimum contacts, parties to a contract cannot agree that a particular court will have jurisdiction to decide a contractual dispute.").

66. La. Safety Ass'n of Timbermen Self Ins. Fund v. A-1 Pallet Co., 37,648, p. 3 (La. App. 2 Cir. 9/24/03); 855 So. 2d 895, 898.

67. Town of Homer v. United Healthcare of La., Inc., 41,512, p. 3 (La. App. 2 Cir. 1/31/07); 948 So. 2d 1163, 1171 (Caraway, J., dissenting).

68. *Id.*

69. *Id.*

Interestingly, section 51:1407 begins with the preface that a "contractual selection of venue or jurisdiction contrary to the provisions of the Louisiana Code of Civil Procedure" is "against the public policy of the state of Louisiana."[70] As such, section 51:1407 explicitly links Louisiana "public policy" to "the provisions of the Louisiana Code of Civil Procedure."[71] This might be an indication that the legislature, when drafting section 51:1407, looked to Article 44(A) for the "public policy" outlawing forum selection clauses. Indeed, Judge Caraway noted that "a legislative concern that rises to the level of a stated 'public policy' prohibition would not be expected to be limited in any manner unless the legislature expressly narrows the policy."[72]

In a slightly different context, the Louisiana Court of Appeal for the Fourth Circuit delicately recognized the prohibition on pre-litigation waiver of forum: "The Louisiana Supreme Court has acknowledged that a venue provision can be both 'mandatory' and 'waivable.' However, pursuant to Article 44(A) of the Louisiana Code of Civil Procedure, such a waiver can only occur after the institution of the relevant action."[73]

Further support for this interpretation may be found in the most recent Editor's Notes to Article 44. The Editor's notes state that "[f]orum selection agreements are generally enforceable."[74] If Article 44(A) did *not* prohibit forum selection clauses, or, at the very least, intend to address the same, then the most recent Editor's notes would be superfluous. The comment in and of itself is strong evidence that, in general, Article 44(A) addresses forum selection clauses, and, more specifically, that the drafters intended to prohibit the use of these clauses.

The conclusion of the analysis above is as follows: Article 44(A) is a facially unambiguous prohibition of not only the inclusion of contractual forum selection clauses in Louisiana, but also the enforcement of the same by Louisiana courts. The historical interpretation and application of Article 44(A)'s precursor, Article 162 of the Code of Practice of 1870; the plain meaning of the text of Article 44(A) and its placement amongst the venue provisions of the Code of Civil Procedure; the recent addition of the Editor's Note to Article 44; and even Judge Caraway's recognition of the lack of clarity surrounding Louisiana law on forum selection clauses bolster the conclusion that Article 44(A) is an outright limitation on parties'

70. LA. REV. STAT. ANN. § 51:1407 (2008).

71. *Id.*

72. Town of Homer v. United Healthcare of La., Inc., 41,512, p. 3 (La. App. 2 Cir. 1/31/07); 948 So. 2d 1163, 1171 (Caraway, J., dissenting).

73. Gerrets v. Gerrets, 06-0087, p. 7 (La. App. 4 Cir. 1/10/07); 948 So. 2d 343, 348.

74. LA. CODE CIV. PROC. ANN. art. 44, Editor's Notes (2008).

freedom of contract. The fact that a cloud of obscurity has shrouded Article 44(A) is more a consequence of the short shrift accorded, if any, by Louisiana courts to this little known Article than it is a consequence of inartful drafting. In the face of this historical analysis, which, much to the author's chagrin, is nowhere near entirely complete, it is difficult to surmise any other conclusion but that Article 44(A) prohibits the inclusion and enforcement of forum selection clauses in Louisiana.

The significance of a stated public policy prohibition on forum selection clauses should be clear from this analysis. As Article 44(A) would represent a legislative restriction on the freedom of contract, forum selection clauses would fall outside the ambit of the prima facie enforceability accorded by *M/S Bremen*.

What absolute "truths" may be gleaned from the analysis above remains unclear, however. And, while forum selection clauses are presumptively enforceable under most Louisiana jurisprudence, a chasm exists in those opinions with respect to the meaning, effect, and implications of the language embodied in Article 44(A).

While this Article concludes that Article 44(A) enunciates a strong public policy against forum selection clauses, despite its virtual nonexistence in Louisiana jurisprudence, civilian jurists and lawyers may find disturbing two larger and more apparent issues related to the complete disregard of this statutory language. First, given the facially clear and unambiguous language of Article 44(A) and the reasonable interpretation provided by analysis of its predecessor and concomitant jurisprudence, Louisiana courts appear to have ignored the civilian tradition that demands resort first and foremost to "primary sources of law: the State's Constitution, codes, and statutes."[75] Macrocosmically, the complete disregard of Article 44(A) represents erosion of the very principles underlying the civilian tradition.[76] Second, if this author's interpretation of Article 44(A) is correct, thereby rendering pre-litigation contractual forum selection clauses void for public policy, what practical effect, if any, does such a provision have on commercial realities, and, more particularly, those realities in Louisiana? The following Part discusses the latter issue.

IV. A TWENTY-FIRST CENTURY SOLUTION TO A NINETEENTH CENTURY PROBLEM

The analysis thus far evidences a divide under Louisiana law with

75. Prytania Park Hotel, Ltd v. Gen. Star Indem. Co., 179 F.3d 169, 175 (5th Cir. 1999).

76. Of course, Louisiana's civil tradition properly recognizes the role that "custom" plays in our legal system. *See generally* LA. CIV. CODE ANN. art. 1 (2008).

respect to forum selection clauses. The primary source of law in Louisiana indicates a significant public policy prohibiting the inclusion of forum selection clauses in freely negotiated contracts.[77] Yet, Louisiana jurisprudence – a secondary law source – appears to overrule this written public policy through enforcement of these clauses.[78]

Perhaps one explanation for the discrepancy between the ideology embraced by the Louisiana legislature in Article 162 of the Code of Practice of 1870 and the jurisprudence of Louisiana courts today is the general notion of "protectionism."[79] One could argue that judicial politics in the nineteenth century differed in some ways from those found today. Indeed, protectionism could explain the early opposition to forum selection clauses.

Forum selection clauses, as discussed above, allow parties to contractually select the forum for any future dispute.[80] By their very nature, then, these clauses force courts in one jurisdiction to relinquish their power to adjudicate a dispute in favor of another jurisdiction. Of course, the "other" jurisdiction may be another town in the state or another state altogether. During the antebellum period, courts of one state may have distrusted the courts of sister states. Thus, the prohibition on parties' ability to choose their forum contractually represented a form of protectionism; that is, the ban on forum selection clauses protected citizens from the "errors" of other courts.

This explanation could pass muster if the drafting of the Code of Civil Procedure had *not* adopted the language prohibiting forum selection clauses previously contained in the last clause of Article 162. If the Louisiana legislature in 1861 had felt the need to protect citizens from going elsewhere to settle their disputes because of a concern for "protection," then why adopt the same prohibition in the mid-twentieth century? By the time of the adoption of the Code of Civil Procedure, judicial distrust seemed to be a relic of the past. Even if one believes that these policies were not a matter of "protectionism," but rather "skepticism," the same analysis appears to defeat this explanation.

This idea of protectionism, however, might be viewed as a significant

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77. *See supra* Part III.

78. *See supra* Part II.A.

79. In broad terms, "protectionism" is the general notion that a state looks more favorably upon its own citizens than citizens of a sister state, and, accordingly, will act with the best interest of its own citizens in mind. This favoritism can be played out in various arenas, including the courts wherein a state court in Louisiana might give less deference to a decision of a California state court, even if the parties contractually selected the California state court as the locus for resolution of disputes arising out of the contract.

80. *See supra* Part II.

pillar of the pre-*M/S Bremen* policy against forum selection clauses. In *M/S Bremen*, the Supreme Court explicitly recognized the ever-changing business world.[81] Commercial realities differed greatly from the 1860s to the 1970s. Whereas the former era represented trade of a somewhat limited scope, by the 1970s, an "expansion of American business and industry" had rapidly taken shape.[82] As such, the usefulness of a prohibition of forum selection clauses—an important part of which relied upon the notion of "protectionism"—became questionable. The Supreme Court relied upon the change in commercial realities to establish the presumption of enforceability.[83]

Importantly, the inclusion of the last clause of Article 162 in Article 44 of the Louisiana Code of Civil Procedure predates the Supreme Court's decision in *M/S Bremen*. Despite the decision in *M/S Bremen*, however, the Louisiana legislature did not amend Article 44(A) to reflect the recognition of a new commercial context. This inaction remains relevant because of the Supreme Court's jurisprudential loophole: courts need not enforce forum selection clauses where enforcement "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[84] The decision not to alter or remove the prohibition encompassed by Article 44(A) is nothing less than a deliberate expression of strong public policy against the inclusion of such clauses in any contract. And, *M/S Bremen* recognizes the ability of legislatures to render these clauses "unreasonable" as a matter of public policy.[85]

Perhaps the gap between Article 44(A) and forum selection clause jurisprudence in Louisiana is better represented as a specific example of the countervailing legal philosophies of formalism and realism. "Formalism" is the theory that judges adjudicate disputes through legal reasoning focused solely on application of the law to the facts of the particular case, and without regard to any outside considerations, such as politics, morals, or other social consequences.[86] To legal formalists, "the rules are the rules"[87]

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81. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

82. *Id.*

83. *Id.*

84. *Id.* at 15.

85. *Id.*

86. Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1474 (2006). That author defined legal formalism as:

> [a] normative legal theory that holds that the content of judicial reasoning should be limited to reasons provided by authoritative legal sources, and that legal reason should be narrowly conceived as the derivation of rules from precedent, the interpretation of legal texts, and the application of legal rules to particular facts.

Id.

87. Scott Turow, *Scalia the Civil Libertarian?*, N.Y. TIMES MAG., Nov. 26, 2006, at 22.

and judges have no choice in the outcome of any particular case.[88] "Legal realism," on the other hand, focuses on the indeterminacy of the law and the notion that judges decide disputes on extraneous factors beyond the positive law (all the while ostensibly reaching the decision based solely on analysis of the law).[89] In the paraphrased words of Jerome Frank, a judge decides a case based upon what he ate for breakfast.[90]

In the context of the debate over the "proper" interpretation of Article 44(A), a legal formalist might argue that Article 44(A) dictates a clear result, namely that contracting parties may not agree to limit their dispute to a particular venue prior to the institution of the action. Therefore, under the theory of legal formalism, all external considerations of commercialism are irrelevant. The law is the law.

In ignoring Article 44(a), Louisiana courts *have* recognized the importance of domestic and foreign commercial transactions, and the concomitant ability of contracting parties to select an alternative forum in advance. Louisiana jurisprudence, then, reflects the theory of legal realism because Louisiana courts look to considerations of commercialism and contractual freedom to justify the end result: enforcement of forum selection clauses, contrary to positive law.

This is not necessarily a commentary on the judiciary of Louisiana. Louisiana's recovery post-Hurricanes Katrina and Rita highlights the importance of increased commercial transactions. Louisiana stands to benefit from increased revenue and commercial trade that might assist the region in speeding recovery, providing jobs for local citizens, and revitalizing Louisiana's economy. Importantly, it is the freedom of contract that gives parties wishing to do business in Louisiana the ability to inject some level of certainty into their commercial transactions. While the conflict over forum selection clauses in the primary and secondary sources of law pits the civil law tradition against the commercial realities of the twenty-first century, the question ultimately becomes one of practicality: Is the risk of decreased business in Louisiana as a result of this restriction on the freedom of contract worth recognizing Article 44(A)? Much to the chagrin of civilian traditionalists, the risk that parties will refuse to

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88. Carlo A. Pedrioli, *A Key Influence on the Doctrine of Actual Malice: Justice William Brennan's Judicial Philosophy at Work in Changing the Law of Seditious Libel*, 9 COMM. L. & POL'Y 567, 584 (2004).

89. *Cf.* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1023 n.58 (2007). *See also id.* at 1012 n.3 (quoting BRIAN LEITER, NATURALIZING JURISPRUDENCE 16 (2007)).

90. *See generally* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 999 (1993).

negotiate and enter into contracts in Louisiana because of their inability to select another forum for adjudication of the dispute, and thereby ensure certainty, is a risk too great to bear. The application of the theory of legal realism by Louisiana courts – whether intentional or unintentional – serves this purpose as American business transactions and Louisiana's recovery strongly advocate the enforcement of these clauses.

The larger concern is that this *ratio decidendi* will lead to a "slippery slope" effect. If courts may indiscriminately disregard the primary sources of law in Louisiana, what effect do these decisions have on the overall "rule of law?" The contradiction embodied by Article 44(A) and Louisiana jurisprudence regarding forum selection clauses represents a larger tension. While Louisiana may benefit from the enforcement of forum selection clauses in the commercial context, it remains to be seen whether Louisiana's civilian tradition, with its significant reliance on codes and statutes, will survive the ever-changing global context. Ultimately, the enforcement of forum selection clauses in Louisiana, despite the text of Article 44(A), concerns more than just the "freedom of contract."

V. CONCLUSION

Freedom of contract, in the context of forum selection clauses, can be viewed as a double-edged sword. Article 44(A), which previously existed in similar form in Article 162 of the Code of Practice of 1870, represents the drafters' inclusion of a stated public policy prohibiting contracting parties from utilizing forum selection clauses. Louisiana courts, however, have strongly maintained a different view. While enforcement of forum selection clauses recognizes present commercial realities and further empowers contracting parties by upholding the freedom of contract and providing some semblance of judicial certainty, this enforcement in contravention of Article 44(A) may simultaneously act to erode the remaining civil traditions present in the legal system of Louisiana.

One solution that would appease both the traditionalists and commercial parties would be for the legislature to amend Article 44(A) to reflect the present jurisprudence. However, one must ask whether this would be the equivalent of placing a band-aid over a gunshot wound: to amend Article 44(A) in capitulation to the jurisprudence would contemporaneously disregard the legislature's purpose in including the prohibition of forum selection clauses in the first place.

Ultimately, the debate about reconstruction versus traditional preservation, which is highlighted by the disparity between the Code of Civil Procedure and jurisprudence regarding forum selection clauses, will be adjudicated by our present sense impressions of the importance and

value of either side, or our ingenuity in creating beneficial compromises. And, while this Article concludes that Article 44(A) clearly prohibits the use of contractual forum selection clauses, Article 44(A) continues to remain cloaked in mystery and largely absent from the jurisprudential record of Louisiana. Whether Article 44(A) should be amended to reflect the view of Louisiana jurisprudence (as well as that of the majority of states in the United States) that forum selection clauses are presumptively enforceable, is a decision for the Louisiana legislature to make and is beyond the scope of this Article. However, until such action is taken by the legislature, Louisiana courts should look first to Article 44(A) and prohibit the use of forum selection clauses. Such adherence by the courts to the statutory law of Louisiana will force the legislature to make a decision that it deems best while simultaneously protecting the last bastion of the civilian tradition in the United States.