International Lawyer

Volume 7 | Number 3 Article 3

1973

The Supreme Court Supports Enforcement of Choice-of-Forum Clauses

Willis L. M. Reese

WILLIS L. M. REESE*

The Supreme Court Supports Enforcement of Choice-of-Forum Clauses

The Zapata litigation[1] is of great interest and of great significance with respect to choice-of-forum clauses. It is of great interest because the proceedings both in England and in the United States illustrate the two effects of such clauses, namely as providing a basis for the exercise of judicial jurisdiction as well as a reason why a court should refrain from exercising such jurisdiction as it possesses.

The litigation is of great significance because of the decision by the Supreme Court that, subject to certain exceptions, a suit brought in a state which is not the chosen forum should be dismissed. This decision should henceforth be controlling in all areas governed by federal law; it should also be of persuasive influence in situations where state-law controls.

Statement of the Case

The facts are complicated and must be long in the telling. Zapata Off-shore Company, a Houston-based United States corporation, solicited bids for the towage of its drilling rig Chaparral from Louisiana to a point off Ravenna, Italy in the Adriatic Sea. Unterweser Reederei, a German corporation, was the lowest bidder, and Zapata requested it to submit a draft contract. This contract contained clauses providing that "[a]ny dispute arising thereunder must be adjudicated before the London Court of Justice" and that Unterweser should not be held "responsible for defaults and/or errors in the navigation of the tow."

Zapata apparently made no attempt to amend these provisions, although it did suggest other changes in the contract, all of which were accepted by Unterweser. Shortly after the tow began, the Chaparral was seriously damaged during a storn in international waters in the Gulf of Mexico. At

*Charles Evans Hughes Professor of Law and Director, Parker School of Foreign and Comparative Law, Columbia University; Reporter, RESTATEMENT (SECOND), CONFLICT OF LAWS.

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

Zapata's instructions, she was towed to Tampa, Florida, the nearest port of refuge, and there Zapata brought an action, alleging negligent towage and breach of contract, against Unterweser in the federal district court, in violation of its agreement to litigate "any dispute" in the London courts.

Unterweser moved to dismiss on the basis of the choice-of-forum clause in the towage contract, and of *forum non conveniens* and, in the alternative, sought to stay the action pending submission of the dispute to the London courts. Before the district court had ruled on the motion to dismiss or stay, Unterweser brought an action against Zapata seeking damages for breach of the towage contract in the Court of Justice in London. Zapata appeared in that court to contest jurisdiction, but the court ruled that jurisdiction over Zapata had been conferred upon it by the choice-of-forum clause, and this ruling was affirmed on appeal.[2]

In the meantime, Unterweser had made a difficult decision. The six-month period for filing a limitation action against Zapata and other claimants was about to expire, and the federal district court in Tampa had not yet ruled on the motion to dismiss or stay. Unterweser accordingly filed a limitation action in that court which issued the customary injunction against pursuing additional remedies in other courts. Then, shortly after the six-month limitation period had expired, the district court denied Unterweser's motion to dismiss or stay.

Relying on the traditional view in the United States that agreements in advance of controversy, which purport to vest exclusive jurisdiction in a particular court are unenforceable on public policy grounds, the court gave little, if any, weight to the choice-of-forum clause. Instead, the court treated the motion to dismiss as based essentially on the *forum non conveniens* doctrine, and denied it because, under this doctrine, a plaintiff's choice-of-forum should not be disturbed unless the balance of convenience is strongly in favor of the defendant. Thereafter, the court denied a further motion by Unterweser to stay the limitation proceeding, pending determination of the controversy by the High Court of Justice in London and granted Zapata's motion to restrain Unterweser from taking further steps in that action.[3]

On appeal, a panel of the Court of Appeals for the Fifth Circuit, with Judge Wisdom dissenting, affirmed,[4] and on rehearing *en banc* the panel decision was adopted with, however, six of the fourteen judges dissenting.[5] In support of its decision, the majority noted that "Zapata's substantive

[2]Unterweser Reederei GmBH v. Zapata Off-Shore Co., [1968] 2 Ll. L. Rep. 158.
[3]296 F. Supp. 733 (M.D. Fla. 1969).
[4]428 F.2d 888 (5th Cir. 1970).
[5]446 F.2d 907 (5th Cir. 1971).

rights . . . [might] be materially affected if the dispute is litigated in an English court," since the provision in the contract excusing Unterweser from liability "for defaults and/or errors in the navigation of the tow" would be unenforceable as against public policy under federal law in the United States, but would be valid and enforceable in England.

The majority further pointed out that the Chaparral had never "escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court." So far as the potential witnesses were concerned, the majority submitted, a trial in Florida would be as convenient as a trial in England, whose "only relationship [to the case] is the designation of her courts in the forum clause."

The Supreme Court reversed by an 8-1 majority, with Chief Justice Burger writing the opinion of the Court, Justice White writing a brief concurring opinion and Justice Douglas dissenting. The Chief Justice stated:

> We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect was given to the forum clause in resolving this controversy . . .
> Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . .
>
> Forum selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy" or that their effect was to "oust the jurisdiction" of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty . . . It accords with ancient concepts of freedom of contract and reflects an affirmation of the expanding horizons of American contractors who seek business in all parts of the world.[6]

The Chief Justice went on to note that the choice-of-forum agreement was not the product of "fraud, undue influence, or overweening bargaining power."[7] Unterweser was but one of several bidders, and the fact that Zapata did make changes in the contract demonstrated that this was "not simply a form contract with boilerplate language."[8]

[6]407 U.S. at 8-11.
[7]407 U.S. at 12.
[8]*Id.* note 14.

Undoubtedly, the choice-of-forum clause was "a vital part" of the towage contract since "there were countless possible ports of refuge along the route over which the Chaparral was to be towed, and the elimination of uncertainties as to the place of suit by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[9]

Chief Justice Burger was not impressed by Zapata's argument that the choice-of-forum clause should not be enforced because the English courts, in contrast to those in the United States, would give effect to the clause in the contract which would absolve Unterweser from liability for damage to the Chaparral that might occur during the course of the tow.

He stated that the United States rule was concerned only with towage strictly in the waters of the United States, and that the policy reasons underlying this rule—namely that exculpatory agreements of this type may be the product of "overweening bargaining power," and may not sufficiently discourage negligence were not implicated in the present case, since the evidence showed that the contract had been negotiated freely, and whatever negligence there may have been occurred in international waters outside the jurisdiction of the United States.[10]

The Chief Justice concluded by admitting the possibility that a choice-of-forum clause which is the product of fair bargaining, and does not contravene any important public policy of the forum, "may nevertheless be 'unreasonable' and unenforceable if the chosen forum is *seriously* inconvenient for the trial of the action." This, however, was not such a case, since "selection of the London forum was clearly a reasonable effort to bring vital certainty to this international transaction, and to provide a neutral forum experienced and capable in the resolution of admiralty litigation."

Also "[w]hatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting."[11] The case was remanded to the district court

> to allow Zapata opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of trial in Tampa . . . but also that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court. . . .[12]

Discussion

As is well illustrated by the present case, a choice-of-form clause has

[9]407 U.S. at 13-14.
[10]407 U.S. at 15-16.
[11]407 U.S. at 17-18.
[12]407 U.S. at 19.

two effects. It has an affirmative effect in that it amounts to a consent by the parties to the exercise by the chosen court, of jurisdiction over them with respect to issues falling within the scope of their agreement. Accordingly, the ruling of the English courts that they had jurisdiction over Zapata was clearly correct.

To be sure, England, so far as appears, had no contact with either the parties or the towage contract. But in their contract, the parties had provided that "Any dispute arising must be treated before the London Court of Justice." By doing so, they gave their consent to the exercise of jurisdiction by that court.[13] And it is, of course, well established that a court, which is otherwise competent, may render a valid judgment against a person on the basis of his consent.[14] This affirmative effect of a choice-of-forum clause is well established, and does not require further discussion.

The more important, and at the same time the more disputed, effect of a choice-of-forum clause is negative in nature. It is that, subject to some exceptions, a court which is not the chosen forum should refrain from exercising its jurisdiction in violation of the terms of the agreement. Until at least recently, most courts in the United States refused to give this negative effect to a choice-of-forum agreement or, stated in other words, did not let the fact that they were not the chosen forum deter them from hearing the case.[15]

One reason frequently advanced was that the parties cannot by their agreement "oust" a court of its jurisdiction. Clearly, this is correct and yet equally the objection lacks merit. For the question is not whether the parties can oust a court of its jurisdiction, but whether, in a proper case, a court should refrain from exercising such jurisdiction as it admittedly possesses in order to give effect to the parties' intentions as expressed in a choice-of-forum clause.[16]

The real basis for the courts' initial hostility to such clauses is obscure. Most probably it stemmed from that early time when courts in England were seeking to expand their jurisdiction and accordingly reacted adversely to any device that might be thought to restrict their powers.[17] Be this as it may, the English courts have long since overcome their initial hostility, and now make it a practice, in a proper case, to give effect to a choice-of-forum

---

[13]Unterweser Reederei GmBH v. Zapata Off-Shore Co., [1968] 2 Ll. L. Rep. 158.

[14]National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

[15]EHRENZWEIG, CONFLICT OF LAWS 148-153 (1962); Reese, *The Contractual Forum, Situation in the United States*, 13 AM. J. COMP. L. 187 (1964).

[16]RESTATEMENT (SECOND), CONFLICT OF LAWS § 80.

[17]*In re* Unterweser Reederei, GmBH 428 F.2d at 899 (dissenting opinion).

clause by refraining from exercising such jurisdiction as they possess.[18] A similar development has been slow to come in the United States.[19]

In recent years, a number of courts in this country have evinced a more sympathetic attitude toward choice-of-forum clauses.[20] They have come to realize that such clauses may represent a worthwhile attempt by the parties to bring some certainty into their transactions, by providing that suit should be brought in a forum that is both predictable and convenient. Accordingly, these courts have dismissed actions brought in violation of a choice-of-forum clause, whenever in their view this would be fair and reasonable.

On the other hand, they have refused to dismiss in situations where the clause was thought to be the product of overreaching, or of the unfair use of unequal bargaining power, or where the chosen forum would be a seriously inconvenient one for the trial of the particular action.[21]

An attempt to state what is, or at least what should be, the law in this area is made in Section 3 of the Model Choice of Forum Act, which states that a court should dismiss or stay an action brought in violation of a choice-of-forum clause unless

(1) the court is required by statute to entertain the action;

(2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;

(3) the other state would be a substantially less convenient place for the trial of the action than this state;

(4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or

(5) it would for some other reason be unfair or unreasonable to enforce the agreement.

An explanatory comment suggests that the fact that the choice-of-forum clause is contained in an adhesion or "take-it-or-leave-it," contract, may be a justifiable reason for entertaining a suit brought in violation of the clause. It seems likely that the courts will continue to follow earlier cases holding

[18]Collins, *Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws. Some Recent Developments in England*, 2 J. MAR. LAW 8 Comm. 363 (1970). Important English cases are The Fehmarn, [1958] 1 W.L.R. 159, [1958] 1 All E.R. 333; The Eleftheria, [1969] 1 Ll. L.R. 237.

[19]See Reese, note 15 *supra*.

[20]Important recent cases enforcing choice-of-forum clauses are Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3d Cir. 1966); Reeves v. The Chem Industrial Company, 495 P.2d 729 (Ore. 1972) ; Central Contracting Co. v. C. E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965).

[21]See, *e.g.*, Calzavara v. Biehl & Co., 181 So. 2d 809 (La. App. 1966).

that effect should be denied choice-of-forum clauses contained in insurance and other form contracts.[22]

Prior to *Zapata,* the status of a choice-of-forum clause in areas covered by federal law was unclear. In *Wm. H. Muller & Co. v. Swedish American Lines, Ltd.,*[23] the Court of Appeals for the Second Circuit affirmed dismissal of a suit brought outside the chosen Swedish forum. It held that, unless prohibited by statute, a choice-of-forum clause should be given effect when to do so would be reasonable, and that this would be so in the present case since (a) Sweden was a more convenient forum than New York for the trial of the action, and (b) the parties' consent to the inclusion of the choice-of-forum clause in the contract appeared to have been "freely given."

Muller, however, was overruled by the Second Circuit in *Indussa Corporation v. S. S. Ranborg,*[24] on the ground that the shipment of goods involved in *Muller* was governed by the provisions of the Carriage of Goods by Sea Act (COGSA),[25] and that, properly interpreted, this Act prohibited a federal court from dismissing a suit, over which it had jurisdiction, in order to give effect to an agreement by the parties that action be brought in a foreign country. Although the *Indussa* court did not in terms disagree with what had been said in *Muller* about the respect due choice-of-forum clauses in general, the overruling of *Muller* left its authority impaired on all counts.

Contributing to the uncertainty was the fact that in *Carbon Black Export v. The S.S. Monrosa,*[26] the Court of Appeals for the Fifth Circuit stated with apparent approval, that

> the universally accepted rule [is] that agreements in advance of controversy . . . to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.

The Court went on to say, however, that it was not necessary to "espouse or reject" the *Muller* rule since, on the facts of the case, the United States was at least as convenient a place for the trial of the action as was Italy, the chosen forum. The Supreme Court initially agreed to review this decision, but later dismissed the writ of certiorari as "improvidently granted."[27]

---

[22]Ehrenzweig, *supra* note 15; Reese, *supra note 15,* at 189.
[23]224 F.2d 806 (2d Cir. 1955).
[24]377 F.2d 200 (2d Cir. 1967).
[25]46 U.S.C. §§ 1300-1315 (1964).
[26]254 F.2d 297 (5th Cir. 1958).
[27]359 U.S. 180 (1959).

Zapata has changed all this. It is now clear that in admiralty, and presumably in all other areas governed by federal law, choice-of-forum agreements "are prima facie valid" and, in the absence of a statutory directive to the contrary, require dismissal of an action brought in violation of their provisions unless the resisting party demonstrates that dismissal would be "unreasonable." Such unreasonableness can be shown by proving either that the agreement was the product of "fraud, undue influence, or overweening bargaining power," or that the chosen forum would be a "seriously inconvenient" place for the trial of the particular action.[28]

Also, although the opinion does not so state, it seems inevitable that there must be situations in which dismissal of the suit would be unreasonable because of the rule of law that the chosen forum would apply. In other words, situations can be imagined where the chosen forum would apply its own rule in deciding the case, and when this rule differs materially from the relevant rules of all states having a substantial concern with the parties and the issue involved.

Under such circumstances, a refusal to dismiss a suit brought outside the chosen forum might be justified, either on the ground that application of the rule of the chosen forum (a) would lead to a result that is incompatible with the public policy of the state in which suit is brought, and also perhaps with the public policy of all other concerned states, or (b) would be unfair to the parties, perhaps for the reason that they had molded their actions in reliance upon the application of the rule of some other state. More will be said on this point shortly.

The Supreme Court's decision in the *Zapata* case is not of constitutional dimension and hence does not have binding force in areas governed by state law. It should, however, have substantial influence upon the state courts because of the lucidity of its reasoning, the prestige of the court that decided it, and the time of its rendition. This may well prove to be a crucial period in the history of choice-of-forum clauses in this country.

The initial judicial hostility to such clauses appears to be on the wane, but their status in many states is uncertain, and in particular there is uncertainty with respect to the circumstances in which it is appropriate for a court that is not the chosen forum to entertain the suit. To a large extent, these uncertainties will be dispelled if the *Zapata* decision is followed. But what is more important, the courts that follow this decision will be on what is believed to be the correct path. As pointed out by Chief Justice Burger in his opinion, choice-of-forum clauses are an important device for bringing certainty and predictability into international transactions.

---

[28]See text covered by notes 7-11

Accordingly, in the absence of a statutory provision to the contrary, a suit brought in violation of the terms of such a clause should be dismissed, unless the party who brought the suit can convince the court that a dismissal would be unreasonable. Whether this would be so must inevitably depend upon the facts of the particular case. The opinion of the Chief Justice sets forth lucidly the more important factors that should be considered by a court in arriving at its decision.[29]

For this writer, the only disappointing part of the opinion is the relatively abrupt way in which the court dealt with Zapata's argument that its Florida action should not be dismissed because of the rule of law that would be applied in England, the chosen forum. On their face, choice-of-forum clauses are concerned only with the locale of the suit. Should they be given effect when to do so would affect choice of the applicable law? This question does not appear to have been given the consideration it deserves in these cases.

A refusal to dismiss a suit brought in violation of a choice-of-forum clause might, it is thought, be justified under these circumstances for either one of two reasons. The first is that application by the chosen forum of a particular rule of law would unfairly surprise the parties. The second is that application of this rule would be contrary to a strong policy underlying the relevant rule of the state in which suit is brought, and perhaps the rules of other interested states as well. The first of these reasons could not have been argued convincingly in *Zapata*. The second, however, might have had merit.

It will be recalled that the towage contract contained a provision purporting to excuse Unterweser from liability to Zapata, for damage resulting from "defaults and/or errors in the navigation of the tow." This provision would be ineffective under federal law but would be enforceable in England. Likewise, the court apparently assumed that an English court would apply English law to determine the enforceability of this provision, even though England, as it appears, had no contact whatsoever with either the parties or the towage contract. Under these circumstances, Zapata could hardly maintain that it would have been unfairly surprised, by application of English law to hold the provision enforceable.

To be sure, it is entirely possible that Zapata did not realize when it signed the contract, that a suit in England, the chosen forum, would entail application of English law. But it did consent to have the exculpatory provision included in the contract, and hence must be held to have agreed to be bound by its terms. Under the circumstances, it could hardly claim

[29]See text covered by notes 7-11

unfair surprise if the provision was held to be enforceable by application even of an unanticipated law. The case might well have been different if the relevant rules of England and of our federal system had been reversed. Here Unterweser at least might have been able persuasively to claim that it would be unfairly surprised by application of English law to hold the exculpatory provision unenforceable.

Apart from the issue of unfair surprise, there is the broader question of the extent to which a choice-of-forum clause should be permitted to affect choice of the applicable law. Clearly the answer must be that, usually at least, a choice-of-forum clause should not be given greater effect in this connection than would a provision directed squarely at choice of law. Stated in other words, it seems probable that the parties should not have been relegated in *Zapata* to an English forum, which would apply English law, unless a choice-of-law clause in the contract calling for application of English law would have been given effect by a court in the United States.

Whether this would have been the case is not an easy question to answer. It will be recalled that, so far as it appears, England had no contact whatsoever with either the parties or the towage contract. Hence it is difficult to conceive that any interest of England would be furthered by application of English law. As a result, a choice-of-law clause calling for application of English law, could only be given effect for reasons of freedom of contract, and in order to provide the parties with some measure of certainty and predictability.

These are important values which require in the usual case that a choice-of-law clause should be honored. Yet there will inevitably come a point when effect must be denied such a clause, out of deference to a fundamental policy of the state which would be that of the applicable law if the choice-of-law clause was to be disregarded.[30] No such fundamental federal policy was apparently involved in the *Zapata* case, in view of the statement by Chief Justice Burger that the federal rule denying effect to exculpatory agreements was concerned only with towage in the waters of the United States.[31]

Accordingly, the result reached in the *Zapata* case can be approved, although it is wished that the Court had discussed the problem more thoroughly. In this connection, it is to be regretted that apparently no attempt was made to ascertain the relevant rule of German law, since Germany, being the state of incorporation of the defendant, had an interest in the decision of the case that was second only to that of the United States.

[30]RESTATEMENT (SECOND), CONFLICT OF LAWS § 187.
[31]See text covered by note 10.

If it were to appear that the exculpatory provision was unenforceable under German law as well as under that of the United States, the *Zapata* decision would be more difficult to approve. For in such a case, enforcement of a choice-of-law clause would have led to the application of the rule of law different from the rules prevailing in the only two states having a substantial interest in the decision of the case.

It should perhaps be added that the towage contract in *Zapata* did not come within the provisions of the Carriage of Goods by Sea Act (COGSA).[32] Hence the Supreme Court decision in this case does not affect the earlier ruling of the Second Circuit in *Indussa Corporation v. S.S. Ranborg*,[33] that a choice-of-law provision contained in a contract covered by this Act is ineffective.

Conclusion

Chief Justice Burger's opinion in *Zapata* and Judge Wisdom's dissenting opinion in the court below, contain as good an exposition of the status that should be accorded choice-of-forum clauses, as can be found anywhere in the books. It is to be hoped that these opinions will be widely followed and will lead ultimately to the adoption, in all States of the United States, of a rule that a suit brought in violation of a choice-of-forum clause should be dismissed, unless the party who brought the suit can convince the court that in the particular case dismissal of the suit would be unfair and unreasonable.

[32] 46 U.S.C. §§ 1300-1315 (1964).
[33] 377 F.2d 200 (2d Cir. 1967).