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Choice of Forum Clauses— A Brief Survey of Anglo-American Law

Introduction

Judicial jurisdiction is the legal power and authority of a court to make a valid decision binding on the party or parties concerned in any matter properly brought before it.¹

One of the very important but little discussed legal problems involves the determination of what court has the power to hear a controversy. Competency is not limited to internal jurisdictional questions—it arises with increasing frequency and has more complications on an international scale.

Where any case involves a foreign element and raises a question of jurisdiction, that question is not primarily which court of any particular country should hear the case, but which country can claim for its courts on principles of conflict of laws the power to do so. The expression "choice of jurisdiction" in the conflict of laws always means choice of the country which should exercise jurisdiction.²

Private international law, or conflicts law as it is known in the United States, is that law which governs the relations between individuals when more than one nation is involved. The rules of private international law are the internal laws of each country. This means that there is no uniform body of private international law, although the diversity is not so great as other areas of internal law, since there is at the base of private international law a general uniformity of purpose.³

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¹R.H. GRAVESON, *THE CONFLICT OF LAWS* 90 (5th ed. 1965).

²*Id.*

³*Id.* 4–5.

Up until the middle of the nineteenth century, most nations of the world were autonomous, self-sufficient, and had relatively little economic contact with one another. As trading increased, the need for settling disputes became greater. Nations began adopting rules to govern which law would be applied, and whether or not its courts were competent to handle the issues brought before them. With international trade expanding to more countries, nations which had not the time or tradition to develop their own body of private international law, looked to nations which had developed rules and adopted them in whole or in part.

Essentially this process continues today. This is done through comparative law, the simultaneous study of

several systems of law and legislation in order to ascertain similarities, differences, and, especially, relations, and thus to contribute to science, to the internal and external creation and interpretation of the law. It broadens perspectives, experimentally widens horizons, permits observation *in vivo* of the application of a new legal rule through previous consideration of its introductions, effects, reactions and results in other nations.⁴

This article will attempt to bring these above-mentioned concepts together. Because of the complexity and breadth of the topic, however, this author feels that it would be of greater advantage to limit the study to the area of international commercial law, more particularly to choice of forum clauses in international contracts. To accomplish this purpose, the author hopes to look briefly at a general view of choice-of-forum clauses, and more specifically at the effect of these clauses in the United States and Great Britain, as articulated in the case of *M/S Bremen v. Zapata Off-Shore Co.*⁵

The Will of the Parties— Choice of Law and Forum

Since the trend of the past century has been to increase commercial ties between nations,⁶ it has been necessary to have a corresponding development in international commercial law. This law,

must be developed with a knowledge and understanding of the practice and needs of the business community. Such needs require the establishment of

⁴H. Valladao, *Private International Law, Uniform Law and Comparative Law*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW, LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 108 (1961).

⁵407 U.S. 1 (1972). See also *Unterweser Reederei, GmbH v. Zapata Off-Shore Co.* (The Chaparral) [1968] 2 Lloyd's Rep. 158, 162-63 (C.A.).

⁶Note perhaps the outstanding example of the European Economic Community which began as an economic unit, but is rapidly expanding into legal, social and political harmonization between member states. For an informative look at the EEC, see A.E. WALSH AND J.

procedures for the speedy adjustment of controversies between traders of different countries, so as to maintain good trade relations.⁷

One concept which has provided much relief for the problems frequently incurred is that of the "autonomie de la volonté."⁸ Generally this concept is considered more when speaking of civil law than with common law régimes. However, the concept dates back to the sixteenth century French jurist Demoulin, although its prominence in the field of private international law was not a fact until the end of the nineteenth century.⁹

Translating this idea, one finds that autonomy is a grant to individuals to control their relations. Generally this may be done in a number of ways, but roughly they fall into one of two groups: choice of law and choice of forum (jurisdiction). Usually party autonomy will be expressly read into a contract through utilization of a specific clause stating the choice agreed upon. In some instances the choice will be implied by the courts,¹⁰ but sometimes the implication of a choice will not be allowed by the courts.

While choice of law and choice of forum clauses can be said to be related in their attempt to remove uncertainty from international contracts, they proceed in a different manner. A choice of law is made when the parties seek to specify what substantive law will be applied if any dispute arises under a contract.¹¹ On the other hand, a choice of forum clause intends

to grant jurisdiction to courts of a certain country or place to the exclusion of other courts that might be equally or more competent to take jurisdiction; it

PAXTON, INTO EUROPE, THE STRUCTURE AND DEVELOPMENT OF THE COMMON MARKET (1972).

⁷M. Domke, *Arbitral Awards without Written Opinions: Comparative Aspects of International Commercial Arbitration*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW, LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 249 (1961).

⁸Translated as "the autonomy of the will."

⁹M. Lienard-Ligny, *L'Autonomie de la volonté face aux lois impératives dans les contrats internationaux*, in ANNALES DE LA FACULTÉ DE DROIT DE LIEGE, TREIZIEME ANNÉE 5-6 N.6 (1968 No.1). "Bien que la règle d'autonomie ait déjà été énoncée par Demoulin, elle n'acquies la fortune qu'on lui connaît qu'à la fin du siècle dernier. Vue sur cette évolution historique: Batiffol, *Conflicts de lois en matière de contrats*, Paris 1938 pp 19 et s."

¹⁰See *Sayres v. International Drilling* [1971] 3 A11 E.R. 163. The case is known for its extremely difficult characterization question, but it does involve the determination of the proper law to be applied to an international contract, where no law was specifically chosen by the parties, and the court attempts to determine their intention.

¹¹It must be noted here that a simple choice-of-law clause may provide difficulty in subsequent adjudication if the parties refer only to the law of some State. This is because each State has its own conflicts rules, and a simple reference to the law of a State may be interpreted to refer to the "whole law"—i.e. the internal laws and the conflict of laws rules—thus necessitating the application of another law and frustrating the intention of the parties to have the internal law of the chosen State apply to their contract. In another context, this view toward the "whole law" is one of the bases of the doctrine of *renvoi*, which will not be discussed here.

contemplates that the latter courts will defer to the parties' choice in the event that one party later reneges by bringing suit in such a non-chosen tribunal.¹²

In addition to involving the parties' freedom of contract, choice of forum clauses also touch upon the legal concept of jurisdiction as defined above, as the power to adjudicate controversies.¹³ In the field of jurisdiction, the choice-of-forum clause incorporates two separate ideas: that the forum of a specified State be granted the right (competence) to adjudicate, and all other States (forums) be denied that right.

In the common law there are no terms of art which reflect this legal difference, although judicially created descriptions such as "granting" and "ousting" are frequently used. Civil law, however, does have specified legal terms for these concepts. As used in this text, a prorogation denotes a granting or acceptance of a given jurisdiction by the parties; derogation, on the other hand, implies that the parties have chosen not to allow action in a jurisdiction.¹⁴

The acceptance of a choice-of-forum agreement as granting competency to adjudicate yet another field of law—public international law. In the law of nations, the concepts of sovereignty and territoriality allow States to govern matters arising within their sphere of influence without restraints from other States. Adjudication by one State will often be given effect in another by recognition and enforcement of the foreign judgment. This may be accomplished through specific treaties and reciprocal agreements, or by utilizing the doctrine of comity. Recognition may be denied on the grounds that the court did not have competency (jurisdiction).

In considering the validity of a choice of forum as a grant of jurisdiction in the public international law sense, it should be noted that the courts of Austria, Belgium, Brazil, Denmark, France, Germany, Greece, Norway, Poland, Sweden and Switzerland have "recognised the validity and effect of party exclusion of domestic jurisdiction"¹⁵ by either refusing jurisdiction when a clause so required or recognising a judgment based upon such a clause.¹⁶

But it must be realized that these States reserve the right of qualify the

¹²M. Friedman, *The Validity and Efficacy of Choice-of-Law Clauses in International Contracts*, 5 *LIBERIAN L.J.* 71, 71-72 (1969).

¹³A. Aballi, Jr., *Comparative Developments in the Law of Choice of Forum*, 1 *N.Y.U.J. OF INT. L. AND POLITICS* 178, 179 (1968). See, *supra* note 1.

¹⁴M. Schwind, *Derogation Clauses in Latin American Law*, in *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 *AM. J. COMP. L.* 157, 162 (1964).

¹⁵A. Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements,"* 15 *RUTGERS L. REV.* 414, 419 (1961).

¹⁶*Id.*

application of choice-of-forum clauses, and may choose to disregard the clause entirely if public policy *ordre public*, or manifest injustice to one of the parties is involved.¹⁷ However, these countries differ in the handling of litigation brought in contradiction to such clauses,¹⁸ some countries treating the choice of forum as an exclusive grant of jurisdiction while others do not.

Early American and British Law

The United States and Britain are the two bastions of the common-law tradition. This provides much similarity, especially as they share the same early heritage.¹⁹ However, with American independence there began a divergence which is most apparent in case law. This separation provides an excellent opportunity to observe how legal concepts differ in application in each country and note the advantages and/or disadvantages in importing new concepts.

There are two basic differences between American and English conflicts rules which must be considered in any comparison: first American conflicts law is more concerned with interstate rather than international conflicts; second, American law is controlled to a great extent by a number of Constitutional provisions—*e.g.* the due process, and full faith and credit clauses.

English conflicts law dates from the beginning of the seventeenth century.²⁰ Before that time, English courts always applied English law. This might be considered unusual as, by this time, most Western European countries were already well on their way to developing an intricate body of conflicts laws. However, it must be noted that the common-law courts were not exclusive, there existed at this time courts of equity and courts of the law merchant. It must be noted that the union of England and Scotland under James I served to unite to some extent the common law of England and the civil law of Scotland. This means that, although English courts did

¹⁷*Id.* J. Perillo, Jr., Selected Forum Agreements in Western Europe, in *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 AM. J. COMP. L. 157, 165 (1964).

¹⁸See generally, Perillo, Jr., *supra* note 17 at 162 et seq. which provides a brief survey of the treatment of these issues in Western European countries.

¹⁹This section owes most of its existence and body to R.H. GRAVESON, *THE COMPARATIVE EVOLUTION OF PRINCIPLES OF THE CONFLICT OF LAWS IN ENGLAND AND IN THE U.S.A.*, 1960 1 *Recueil des Cours* 21, 26 et seq.

²⁰It must be noted that Louisiana bases its law upon the civil law, owing to its early French associations. As suggested above, civil law countries have generally accepted choice-of-forum clauses. The implications of the civil law effect on U.S. conflicts law, however, will not be considered in this article.

not consider foreign law, they did have to consider a number of internal conflicts of jurisdiction.

Essentially this was the state of English law when it arrived in the American colonies. As the law was the same for all the colonies, the significant conflicts involved jurisdiction. As the relations between English and American law have always been cordial, it is not unusual to find exchange of ideas.

But it is interesting to find that one man in particular stands out in both American and English conflicts law, and that this man is the famous American jurist Joseph Story.²¹ While up until this point the common law systems of the United States and the United Kingdom remained similar in application, there were growing points of divergence. One of these divergencies was in the effect given to choice-of-forum clauses.

English Law

As has been pointed out in the preceding section, American and English law developed along much the same lines until at least the early portion of the nineteenth century. This cannot be said of English and Western European law.²² The civil law, constructed on the foundation of the Roman law of obligations, had developed a sophisticated commercial law based upon the concept of "party autonomy." The starting point of the civil law jurisdiction was the principle that the parties' choice of forum should, subject to a few exceptions, always be given effect.

England, on the other hand, had retained almost feudal legal concepts until the Industrial Revolution made necessary a more flexible commercial law. The change greatly differed from the civil law. One factor attributed as an important reason for this difference is that in England the judiciary played (and continues to play) a more significant role in the formulation of law. Along with this larger role, there was the desire of the judiciary to guard its right to jurisdiction.

The first case in the area was *Gienar v. Meyer*,²³ in which a Dutch seaman brought suit against the master of a Dutch ship. Defendant's contention was that the articles of incorporation provided a forum selection clause favoring the courts of the Netherlands. The court said that "no

²¹Story's major contribution to the field was his *COMMENTARIES ON THE CONFLICT OF LAWS* (1834), in which he introduced the writings of civilian jurists, especially the Dutchman Huber, into English. Until this time English authorities had tended to ignore these civilians. Story's translations were the first contacts many common law scholars and jurists had with the concepts of civil law, and this would have great effect on the direction of conflicts law in both countries. *Id.* at 33.

²²The following discussion is based in large part on A. Aballi, Jr., *supra* note 13.

²³126 Eng. Rep. 728 (C.P. 1796).

persons in this country can by agreement between themselves exclude themselves from the jurisdiction of the king's courts . . . yet . . ."²⁴ proceeded to frame an exception and dismissed the suit.²⁵

The principle of autonomy gained ground in England; however, difficulties arose when the defendant was an alien and not resident in England. In order to do justice, the Common Law Procedure Act, 1852²⁶ was promulgated allowing discretionary service outside of England.²⁷ In the Common Law Procedure Act, Parliament also provided the means for staying litigation where the underlying contract so necessitated.²⁸ The Act was originally thought to oust the jurisdiction of the courts, but this interpretation was specifically rejected in *Cook v. Cook*.²⁹

This left the way clear for the landmark case of *Law v. Garret*.³⁰ In that case proceedings were commenced in contravention of a forum-selection agreement and a stay was granted. In doing so the court treated the agreement as a submission to arbitration and held that the arbitration statute applied. It is interesting to note that the court did not bother to cite either *Gienar v. Meyer*³¹ or *Johnson v. Machielsne*,³² although both could have furnished a basis for the decision.³³

However in *Law v. Garret* jurisdiction was originally assumed and then a stay was granted. This was translated by the courts into what essentially became known as the ouster rule: "The courts, in considering contracts with forum-selection clauses, assumed in the first instance that the jurisdiction of an English court could not be ousted by agreement between the parties."³⁴ But the court within its discretion could decline to exercise that jurisdiction or entertain an action to stay the proceedings.³⁵ Thus the law in England developed so that the underlying principle of contract was to give the greatest possible effect to the intentions of the parties,³⁶ subject to certain exceptions.

²⁴*Id.* at 730.

²⁵See also *Johnson v. Machielsne*, (3 Camp.) 170 Eng. Rep. 1300 (N.P. 1811).

²⁶17 & 18 Vict., c. 125.

²⁷GRAVESON, *supra* note 1, at 102. This concept is now embodied in Order 11, rules 1 and 2, of the Rules of the Supreme Court discussed *infra*, text at note 47.

²⁸Aballi, Jr., *supra* note 13, at 182.

²⁹4 Eq. 77 (1867).

³⁰8 Ch. D. 26 (C.A. 1878).

³¹*Supra* note 23.

³²*Supra* note 26.

³³Z. Cowen and D. Mendes da Costa, The Contractual Forum: Situation in England and the British Commonwealth, in *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 AM. J. COMP. L. 157, 182 (1964).

³⁴A. Aballi, Jr., *supra* note 13, at 192-93.

³⁵*Law v. Garret* is held to encompass this notion. See *Re Schintz* [1926] Ch. 710 (C.A.). See also DICEY AND MORRIS, *THE CONFLICT OF LAWS*, Rule 160, Third case at 973 et seq. (8th ed. 1967).

³⁶GRAVESON, *supra* note 1, at 342.

[W]here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention is bona fide and legal, and provided there is no reason for avoiding the choice of the ground of public policy.³⁷

Modern English law continues the tradition of party autonomy. It is embodied as a principle in English law and is a basis for the unique procedure of service of a writ outside of the jurisdiction under Order 11, Rules of the Supreme Court.³⁸

[J]urisdiction in the English courts in matters of conflict of laws depends to a great extent, though not entirely, on the purely practical consideration of whether the court can make its judgment effective; whether in other words, any judgment given can be enforced effectively so as to achieve in practice what the judgment seeks accomplish. . . . The basis of jurisdiction . . . lies in the administration of justice.³⁹

It was this notion of the administration of justice that prompted the growing idea that there were instances where the British courts would not have jurisdiction and that this might result in disregard of a plaintiff's rights. By combining this feeling with the concept of party autonomy there developed the principle that the courts will have jurisdiction to entertain an action *in personam* against a person who voluntarily submits to that jurisdiction, even if the individual would otherwise not be within the jurisdiction of the courts.⁴⁰

Since 1875 it has been held that a voluntary submission by means of a choice-of-forum clause will be sufficient to confer jurisdiction.⁴¹ This contract stipulation need not be express, but may be inferred from the terms of

³⁷*Per* Lord Wright in *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A.C. 277, noted in GRAVESON, *supra*, note 19 at 701. Although this expression involves only the proper law, it states the principle of party autonomy, which encompasses forum-selection clauses.

³⁸*See* *Mackender v. Feldia* [1966] 3 All E.R. 847; *The Chaparral* [1968] 2 Lloyd's Rep. 158 (discussed in detail, *infra*, text at note 80); *The Eleftheria* [1969] 2 All E.R. 641.

The history of the Rules of the Supreme Court begins with the passage of the Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66. This and succeeding Acts were designed to improve the administration of justice in England by defining and allocating jurisdiction. A compilation was made in 1925, 15 & 16 Geo. 5 c. 49.

The Rules were promulgated to regulate and prescribe procedure and practice to be followed in the Court of Appeal and the High Court and to govern wherever proper jurisdiction was to be had, s. 99 (1). These Rules are to be made by a body consisting of "the Lord Chancellor together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court, and two practising barristers being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society, s. 99 (4).

³⁹GRAVESON, *supra* note 1, at 92-93.

⁴⁰*Id.* at 99. DICEY and MORRIS, *supra*, note 35 at 179.

⁴¹GRAVESON, *supra* note 1, at 99 note 87. *Copin v. Adamson* (1875) L.R. 1 Ex. D. 17. Also international conventions, e.g. Carriage of Air Act, 1961 s.8.

the contract.⁴² This is now embodied in Order 11, Rule 2, of the Rules of the Supreme Court.

Although England rapidly proceeded to accept choice-of-forum clauses in fact, it was done under the theory that it came under the Arbitration Act of 1889. This fiction was not overturned until 1944 in *Racecourse Betting Control Board v. Secretary of the Air*⁴³ when MacKinnon, L.J. deplored the use of the Arbitration Act holding that: "[i]n truth the power and duty arose under a wider principle, namely, that the court makes people abide by their contracts, and, therefore will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined."⁴⁴ Although the case involved domestic arbitration its dicta was followed in *The Fehmarn*,⁴⁵ which concerned an international choice-of-forum clause.

The discussion, thus far, has concentrated mainly upon the choice-of-forum clause in its entirety. It is necessary to consider the two aspects of every such clause—the derogation and prorogation effects.⁴⁶ Prorogation is generally accepted upon the theory of submission or consent to jurisdiction and need not be belabored further. However, before continuing with the second aspect of choice-of-forum—namely derogation—a unique British procedure respecting prorogation deserves brief mention.

By virtue of Order 11, Rule 1, of the Rules of the Supreme Court, an English court may exercise jurisdiction over a non-resident alien in certain instances—*i.e.* breach of contract with a forum-selection clause. However this rule is discretionary. In order to serve the non-resident alien with process, there is the corresponding Order 11, Rule 2A. Under this rule:

where parties to a contract have agreed either (a) to give the court jurisdiction over any matter arising from the contract or (b) as to the place or manner of service of a writ in any such matter, or both (a) and (b), service in accordance with the agreement shall be good, wherever the parties are resident. If no place or mode of service or person is indicated, service out of England may be ordered.⁴⁷

⁴²DICEY and MORRIS, *supra* note 35, at 180. The role governing contracts assumes jurisdiction of the courts when a contract "(iii) is by its terms or by implication governed by English law." GRAVESON, *supra* note 1, at 192. Rule 25(6). See Order 11, r. 1(1)(f). See also, N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., Ltd. [1927] , A.C. 604; *The Metamorphosis* [1953] 1 W.L.R. 543; *Matthews v. Kuwait Bechtel Corp.* [1959], 2 Q.B. 57 (C.A.), noted *id.* at 195-96.

⁴³[1944] 1 Ch. 114 (C.A.).

⁴⁴*Id.* at 126. Aballi, Jr., *supra* note 13, at 194; Z. Cowen and D. Mendes da Costa, *supra*, note 33 at 182-83.

⁴⁵[1958] 1 W.L.R. 815; [1958] 1 W.L.R. 159 (C.A.).

⁴⁶*Supra* note 14.

⁴⁷GRAVESON, *supra* note 1, at 99.

This service is again discretionary although, *prima facie*, the parties' choice of jurisdiction would be upheld absent any public policy considerations which would be frustrated by upholding the original choice-of-jurisdiction clause.⁴⁸ The discretionary nature of Order 11, Rules 1 and 2, undoubtedly arises from the continuing validity of the ouster doctrine—that the parties cannot deny or “oust” a court of its jurisdiction. It is contrary to public policy to do so under domestic law, although it has been argued that the English courts “may be more willing to allow parties to exclude a foreign system of law than English law.”⁴⁹ The discretion is exercised so as not to prejudice the non-resident alien.⁵⁰

The second aspect of choice of forum clauses is that it acts in derogation of jurisdiction for those forums not designated in the clause. This was discussed in *Racecourse Betting Control Board v. Secretary of the Air*.⁵¹ However the derogation side of a choice-of-forum clause is treated somewhat differently from that of prorogation. As noted above, a prorogation agreement will be made out either expressly or impliedly. This has been extended to a submission of jurisdiction of a foreign court,⁵² but there is much more reluctance to do so.

First it must be noted that when speaking of a prorogation agreement, it was done with the term “consent to jurisdiction.” This is not done in derogation. The doctrine of ouster discussed above has much to do with the reluctance/refusal to use the term, and has resulted in a dual treatment for choice-of-forum clauses. The courts have skirted the refusal to accept the idea of party autonomy in derogation clauses by holding that the agreement will be respected on the theory that the court will not participate in a breach of contract, absent some overriding considerations of public policy.

What this means in the mechanical sense is that the court will have jurisdiction to entertain all actions, but has the discretionary power to stay proceedings brought in breach of a choice of forum agreement.⁵³ “The ground on which the court grants a stay is . . . that the court makes people

⁴⁸Cowen & Mendes da Costa, *supra* note 33, at 186; A. Bissett-Johnson, *The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English & Australian Law*, 19 INT. AND COMP. L.Q. 541, 543 (1970).

⁴⁹A. Bissett-Johnson, *supra* note 48, at 545 note 7. See *Addison v. Brown* [1954] 2 All E.R. 213.

⁵⁰GRAVESON, *supra* note 1, at 103. See remarks of Karminski, J. in *The Metamorphosis* [1953] 1 W.L.R. 543.

⁵¹*Supra* note 43.

⁵²DICEY and MORRIS, *supra*, note 35 at 979; *Blohn v. Desser* [1962] 2 Q.B. 116, 123; *Sfeir & Co. v. National Ins. Co. of New Zealand* [1964] 1 Lloyd's Rep. 330, 339–40; cf. the 7th ed. of DICEY and MORRIS at 1025.

⁵³The *Fehmarn* [1957] 1 W.L.R. 815; [1958] 1 W.L.R. 159 (C.A.). See also DICEY and MORRIS, *supra* note 35, at 1087 et seq. Aballi, Jr., *supra* note 13, at 194–95.

abide by their contracts.”⁵⁴ It must be made clear that the choice of a foreign forum is respected only through judicial discretion while choice of an English court is considered a grant of jurisdiction.

This discretionary power to stay an action, however, is not limited to choice-of-foreign forum clauses.

The court has jurisdiction to interfere, whenever there is vexation or oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceedings, or to restrain the institution or continuation of proceedings in foreign courts or the enforcement of foreign judgments.⁵⁵

The burden of proof in denying a stay lies with the plaintiff—where the action was brought in breach of a forum agreement.⁵⁶

If judgment is rendered in a foreign court in accordance with a choice-of-forum clause, its jurisdiction is accepted in England under the Foreign Judgments (Reciprocal Enforcement) Act, 1933.⁵⁷ Likewise a judgment rendered in a forum contrary to such an agreement will not be recognised.⁵⁸ Thus England recognises choice-of-forum clauses in both domestic and international jurisdiction, subject only to certain public policy considerations usually under the idea of administration of justice, and has done so for quite some time.

American Law

American law has the unusual distinction of developing many of its conflicts rules from interstate rather than international litigation. This means that the courts were bound by the full faith and credit clause of the United States Constitution. This meant that sister-state judgments had to be recognised unless it could be proven that the original court did not have jurisdiction. Thus much of American conflicts law is concerned with the problems of adequate jurisdiction.

Since English law had not developed any set rules on choice of jurisdiction at the time of the American Revolution, American courts were free to

⁵⁴DICEY and MORRIS, *supra* note 35, at 1087.

⁵⁵*Id.* at 1081. Rule 183 (footnote omitted).

⁵⁶Cowen and Mendes da Costa, *supra* note 33, at 186. See *The Fehmarn*, *supra* note 53.

⁵⁷S. 4(2)(iii). See also *Feyerick v. Hubbard* (1902) 71 L.J.K.B. 509; *Copin v. Adamson* (1875) 1 Ex. D. 17 (C.A.); *Jeannot v. Fuerst* (1909) 25 T.L.R. 424; *Bank of Australasia v. Harding* (1850) 9 C.B. (N.S.) 241; *Vallee v. Dumergue* (1849) 4 Exch. 290; *Blohn v. Desser* [1962] 1 Q.B. 116; CHESHIRE, *PRIVATE INTERNATIONAL LAW* 549-51 (7th ed. 1965); READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH* 171-77 (1938) noted in DICEY and MORRIS, *supra* note 35, at 973-74 note 52.

⁵⁸Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4(3)(b) in DICEY and MORRIS, *supra* note 35, at 988, Rule 160 Exception 1.

fix their own body of law. Consent to jurisdiction, as in England found no difficulty in becoming well established as a principle of law, and prorogation as such need not be discussed here as the similarity with English law is unmistakable. However, derogation is another matter.

Justice Story in his *Commentaries* advanced the proposition that absent any reason of public policy, forum selection clauses should not be enforced by the courts but left to the parties.⁵⁹ The first case concerning a stipulation by the parties was *Nute v. Hamilton Mutual Ins. Co.*⁶⁰ which involved not a choice of jurisdiction but choice of venue in a state. The opinion by Chief Justice Shaw noted that there was an absence of precedent but felt that such a contractual provision would change procedural rules, and that no agreement should be given effect which would allow the parties to determine in what courts an action could be brought.⁶¹

The ouster doctrine as an inflexible rule became firmly entrenched in American courts.⁶² The doctrine was used to retain jurisdiction where the clause in question involved submission to arbitration. Eventually arbitration clauses received express approval through legislative action. Even though the courts would enforce an arbitration agreement, they would not enforce a choice-of-forum clause, despite Judge Cardozo's reference to the fact that "in the one case we yield to regular and duly organized agencies of the state and in the other to informal and in a sense irregular tribunals."⁶³

Cardozo's statement was not the first to note a need for deviation from the ouster doctrine. The Massachusetts court, the same court that decided the *Nute* case in 1856 reversed itself in one instance in 1903 in the case of *Mittenthal v. Mascagni*.⁶⁴ This case involved a contract dispute between two Italians—a promoter and a well-known conductor—over the handling of an American concert tour. The contract provided that exclusive jurisdiction be granted to the courts of Florence, Italy, the domicile of one of the parties. The court considered the forum-selection clause as only one factor

⁵⁹*Commentaries* § 620 in *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 452 (1874); Aballi, Jr., *supra* note 13, at 185-86.

⁶⁰72 Mass. (6 Gray) 174 (1856).

⁶¹A. Lenhoff, *supra* note 15, at 431.

⁶²*See* *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N.E. 678 (1916) which reiterated the proposition that the *Nute* case stood for the ouster doctrine. This case was decided after the same court in *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N.E. 425 (1903) gave effect to a stipulation of a foreign forum. *See infra*, text at note 64.

⁶³*Meacham v. Jamestown, F & C R.R.*, 211 N.Y. 346, 353, 105 N.E. 653, 655 (1914) in F. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49, 52-53 (1972).

⁶⁴*Supra* note 62.

to be used in considering whether or not the court should hear the case, or dismiss under the doctrine of forum non conveniens.

Thus it may be seen that at the time English courts were routinely giving effect to forum-selection clauses, absent some overriding public policy, American courts were refusing to give effect to such clauses. The doctrine of forum non conveniens was one way in which the courts could refuse to entertain a suit that involved a choice-of-forum clause. As with the English courts' treatment of forum selection in derogation, the use of forum non conveniens is discretionary. However forum non conveniens is a doctrine of limited use, for it applies only where the contacts with the forum state are of a very limited nature. And residence of one of the parties in the forum state is almost sure to preclude the application of the doctrine.

Of course there were judges who felt that holding an arbitration clause valid should also be extended to choice-of-forum clauses, but only one case so held.⁶⁵ Although most of these pronouncements involved extension of the treatment of arbitration clauses to forum selection clauses, occasionally a lone judge would wonder why these clauses could not be given effect in their own right.⁶⁶ The policy of not giving effect to forum-selection clauses was buttressed by the first Restatement of the Conflict of Laws, which refused to give any effect to party stipulations involving either choice of law or forum.

The turning point has been considered by many the 1949 concurring opinion of Judge Learned Hand in *Krenger v. Pennsylvania R.R. Co.*⁶⁷ in which he noted: "In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement, they are invalid only when unreasonable. . . ."⁶⁸

It is at this point that an interesting phenomenon occurred. England and the United States, being common law systems, develop much of their law through the process of judicial decision and the doctrine of stare decisis. Civil law, on the other hand, does not have this advanced development of

⁶⁵*Kelvin Engineering Co. v. Blanco*, 125 Misc. 728, 210 N.Y.S. 10 (Sup. Ct. 1925) which noted at 733, 210 N.Y.S. at 15 that "[i]t would be too strict and narrow a limitation of the intention of the parties as expressed to hold an agreement to submit to courts of foreign jurisdiction, should not be treated as a submission to the arbitration within the purview of the arbitration law." *Aballi, Jr.*, *supra* note 13, at 188-89. *Juenger, supra* note 63, at 52-53 note 17, notes that *Kelvin* is the only case that followed Judge Cardozo's statement, *supra* note 63.

⁶⁶An example is Judge O'Brien who in *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931) said: "Unless their stipulations have a tendency to entangle national or state affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business." At 355, in *Lenhoff, supra* 15 at 433.

⁶⁷174 F.2d 556 (2d Cir. 1949).

⁶⁸*Id.* at 561, in *Aballi, Jr.*, *supra* note 13, at 195.

stare decisis. The civil law thus depends upon the writings of scholars to propound new ideas.

In the late 1940's there began to appear in the United States an ever-increasing number of articles and books, which were highly critical of the restrictive interpretation of the Restatement and the refusal of the courts to give effect to the parties' choice. What is unusual is not that the articles began to appear, but rather that they were to be increasingly used by the judiciary in a massive change in American conflicts law. This change did not come uniformly and resulted in much confusion.

The Court of Appeals of the Second Circuit led the way for the change in the decision of *Cerro de Pasco Copper Co. v. Knut Knutson, O.A.S.*,⁶⁹ which dismissed on forum-non-conveniens grounds an action brought by a New York company against a Norwegian shipowner, one of the major considerations being that a clause in the bill of lading granted exclusive jurisdiction to the Norwegian courts.

However the landmark decision did not come until 1955, again in the Second Circuit, with the case of *Wm. H. Muller & Co. v. Swedish American Lines, Ltd.*⁷⁰ In that case the court dismissed a suit upon the basis of a forum-selection clause, noting that while a forum-selection clause cannot oust jurisdiction, "if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to a forum to which he assented."⁷¹ *Muller* came to be known for several propositions: (1) that the ouster doctrine was still effective; (2) that forum-selection clauses could be used as grounds for dismissal for forum non conveniens; and (3) that the test to be used was if the clause was "reasonable" and the burden of proving this was on the plaintiff.

Muller went a long way in providing a basis for the acceptance of forum-selection clauses. However *Muller* represented only the views of the Second Circuit and its view toward giving validity to forum-selection clauses was not accepted elsewhere.⁷² This disparity remained and was

⁶⁹187 F.2d 990 (2d Cir. 1951). See Juenger, *supra* note 63, at 54.

⁷⁰224 F.2d 806 (2d Cir. 1955), *cert. denied*, 350 U.S. 903 (1955).

⁷¹*Id.* at 808.

⁷²See *Carbon Black Export v. The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958), which held that the presumption was against giving effect to a choice of forum clause, where the proceeding was *in rem*. The court restated the traditional view that the parties could not oust jurisdiction. *Id.* at 300-301. The *Muller* rule was accepted in *Central Contracting Co. v. Youngdahl*, 418 Pa. 122, 209 A.2d 810 (1965); *Export Ins. Co. v. Mitsui Steamship Co. Ltd.*, 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1966).

further heightened when the Second Circuit expressly overruled portions of *Muller* in the 1967 case of *Indussa Corp. v. S.S. Ranborg*.⁷³

The case involved a contract for the shipment of goods, and the choice-of-forum clause stipulated exclusive jurisdiction of the Norwegian courts. The district court dismissed on the basis of *Muller*, but the Court of Appeals reversed on the grounds that the Carriage of Goods by Sea Act⁷⁴ governed and precluded such an agreement. However, the *Indussa* case did not persuade every court that the rationale of the *Muller* decision should be completely disregarded.⁷⁵

The problem lay in the fact that the Supreme Court had not given an opinion on choice-of-forum clauses. However in 1964 the Court decided *National Equipment Rental, Ltd. v. Szukhent*⁷⁶ in which the question in issue was the effect of a clause in a sales contract, by which the defendants authorized an agent in the state of New York to receive service of process. The Court said that there was no reason to deny giving effect to this authorization, especially since the agent used reasonable diligence in informing the defendants of the pending suit.

It is interesting to note that while the Supreme Court in *National Equipment Rental* upheld the right of the parties to designate an agent, thereby accomplishing essentially the same thing as a choice-of-forum clause, no court ever extended an interpretation so far. The confusion remained until June, 1972 when the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*⁷⁷ finally ruled upon the effect of a choice-of-forum clause.

The *Zapata* case involved a contract between an American corporation and a German ocean-tug company, to tow an oil rig from the United States to Ravenna, Italy. The contract had several essential points; (1) that all disputes would be referred to the London Court of Justice, and (2) that there was contained in the contract an exemption-from-liability clause which would have been given effect in England, if English or German law applied but would not have been given effect in the United States courts.⁷⁸ When the rig was damaged on the high seas, it was towed into a Florida port on instructions from Zapata, who met the tug with a libel.⁷⁹ From

⁷³377 F.2d 200 (2d Cir. 1967).

⁷⁴46 U.S.C. §§ 1300-1315 (1964).

⁷⁵See *Geiger v. Keilani*, 270 F. Supp. 761 (E.D. Mich. 1967).

⁷⁶375 U.S. 311 (1964).

⁷⁷407 U.S. 1 (1972).

⁷⁸See *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

⁷⁹It must be noted that the case was brought in admiralty, which is civil law. Strictly speaking, the Supreme Court's decision applies only to federal courts sitting in admiralty. However, the Court strongly suggests that choice-of-forum clauses should be given effect in

there occurred a multiplicity of suits both in England and in the United States.

In England, Unterweser Reederei, GmbH, the owners of the tug M/S Bremen brought an action for breach of contract against Zapata, and asked for service of writ outside of the jurisdiction under Order 11, Rule 2.⁸⁰ Service of the writ was granted and on appeal it was upheld, Willmer L.J. saying in part:

It is always open to the parties to stipulate (as they did in this case) that a particular Court shall have jurisdiction over any dispute arising out of their contract. . . . *Prima facie* it is the policy of the Court to hold parties to the bargain into which they have entered. . . . [T]he Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in holding parties to their bargain.⁸¹

In the United States District Court in Tampa, Unterweser attempted to stay or dismiss the action brought when the ship was arrested. The district court refused these attempts and also enjoined Unterweser from litigating further in England.⁸² This was upheld by the Fifth Circuit.⁸³

However, the Supreme Court in an 8-1 reversal said that *prima facie* choice-of-forum clauses should be given effect unless shown by the party bringing the action that the clause was unreasonable under the circumstances.⁸⁴ The Supreme Court conditioned this acceptance upon arm's length negotiation in a commercial setting. This now means that in federal courts, sitting in admiralty, forum-selection clauses will be given effect, absent public policy considerations.

Conclusion

It thus seems that, after many gyrations, English and American views of choice of forum clauses coincide. With the prorogation aspect there was never any doubt. But as to derogation, both systems considered that an agreement between the parties would not be enough to oust jurisdiction at approximately the same time. However in finding a method to give effect to

all situations, by positively stating that the instant case should be read in conjunction with *National Equipment Rental, Ltd. v. Szukhent*, *supra* note 76, in which the Court approves the parties' ability to consent to jurisdiction in a domestic setting.

⁸⁰See, *supra*, text at note 47.

⁸¹*Unterweser Reederei GmbH v. Zapata Off-Shore Co.*, *The Chaparral* [1968] 2 Lloyd's Rep. 158, 162-63 (C.A.).

⁸²*In re Unterweser Reederei, GmbH*, 296 F. Supp. 733 (M.D. Fla. 1969).

⁸³*In re Unterweser Reederei, GmbH*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing*, 446 F.2d 907 (5th Cir. 1971) (en banc) (8-6 decision).

⁸⁴*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10. Thus, this decision enforces choice-of-forum clauses notwithstanding the fact that the U.S. courts had proper jurisdiction in the international sense.

the parties agreement, the English courts preceeded the American courts by almost 100 years. Nevertheless, the method of giving effect to choice-of-forum clauses on the theory that the courts will not participate in a breach of contract absent some overriding public policy or sense of justice is remarkably similar, though couched in somewhat different terms.

Furthermore, the Anglo-American view is very much in line with the long-standing civil law tradition. This similarity may well be the ingredient necessary to promote increased uniformity in the difficult public international law area of recognition and enforcement of foreign judgments. In any event, there is now firm common law recognition that the parties may have some control over the choice of forum—and indirectly through that, of choice of law.

It is, in the author's opinion, to the advantage of American commercial interests that the U.S. Supreme Court has given its assent to choice of forum clauses. As has frequently been noted, a protective trade policy is not unusual for a developing nation in order to protect native industries. However, once these industries are self-sufficient, the protection need not, and should not be continued. One wonders whether or not Unterweser Reederei GmbH would ever have entered into negotiations with Zapata if it had known that it might have to submit against its wishes, to the jurisdiction of American courts on the basis of a subterfuge perpetuated by the plaintiff Zapata. This is only one instance in which a foreign corporation might have hesitated in contracting with an American corporation. There are numerous other instances in which a foreign corporation having minimal contacts in the U.S. would find the burden of litigation in American courts unbearable. Had the decision of the Court of Appeals been upheld, there might have been a marked effect upon United States commerce.

With ever increasing world trade, the United States courts must maintain a flexible attitude to provide for those exigencies of international trade which are bound to arise. The judicial system has not been contrived to control commerce. Rather it is a means for settling disputes which arise within the context of everyday life. It is doubtful that the courts would ever be capable of handling such an expanded role, considering present difficulties with overloaded dockets. The court's role is essentially that of an arbitrator. It therefore should be attuned to the needs of the parties before it, and one way to do so is to accept those limits on litigation set by the parties themselves in open negotiation.

Mechanical rules granting jurisdiction have no place in a modern commercial setting. If negotiation between the parties has been at arm's length, the parties have a contract, produced by means of compromise,

satisfactory to both parties. It is to neither party's advantage to have that contract set aside. This does not mean that the court must always defer to the will of the parties.

The English notion of fair play and the Supreme Court's interpretation of adherence contracts, allow the courts of both countries to disregard a choice of forum clause if it would produce injustice, and rightly so. However, the need is to give *prima facie* validity to such clauses and place the burden of proving the injustice on the party seeking to deny enforcement of the clause.

Acceptance of choice-of-forum clauses as one way in which to harmonize international trade is a very large step in the right direction. It recognises that the parties have a stake in the litigation as well as the states affected. Furthermore, it can be used to allow the courts to be flexible in their approach to the different problems arising in commercial transactions.

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