Case Western Reserve Journal of International Law

Volume 11 | Issue 3

1979

Forum Selection Covenants in American Practice: Bremen in Perspective

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Volume 11, Number 3, Summer 1979

Forum Selection Covenants in American Practice: Bremen in Perspective

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Messrs. Liebman and Werlin provide the reader with a concise survey of the post-Bremen case law on forum selection covenants, analyzed with insight and clarity. Forum selection covenants relate to the theme of foreign investment because they facilitate transactions between parties by assuring that any disputes will be resolved in a predetermined forum chosen through arms-length bargaining.

I. INTRODUCTION

COMMERCIAL AGREEMENTS OFTEN produce multi-jurisdictional contacts empowering many forums, some forseeable, others fortuitous, to resolve possible disputes. Forum selection covenants allow the parties to these agreements to avoid uncertainty by designating, or prorogating, a particular and exclusive forum for dispute resolution. Since the United States Supreme Court's decision in *M/S Bremen v. Zapata Off-shore Co.*,[1] approving the use of forum selection covenants in international admiralty agreements, American courts generally have approved their use[2] based on the standards set forth in that decision.[3] The intent of this article is to provide practitioners with some guidance concerning the use, effect and desirability of forum selection

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[1] 407 U.S. 1 (1972).

[2] The contract in *Bremen* was between private international parties. Forum selection covenants have also been approved in contracts with foreign governments and no presumption is entertained that such agreements are adhesive in nature. Republic Int'l Corp. v. Amco Eng'r, 516 F.2d 161 (9th Cir. 1975).

[3] However, as noted by one commentator, the scope of *Bremen* remains clouded since the Court appeared to rely on several factors present "whose absence may well become the basis of future distinctions." 2 A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 47 (1973).

covenants[4] based primarily upon decisions of United States federal courts applying the *Bremen* standards.

II. FACTUAL AND LEGAL SETTING

In *Bremen,* the United States Supreme Court, sitting in admiralty, upheld a forum selection covenant in an agreement between American and German corporations for the towing of an oil drilling rig from Louisiana to Ravenna, Italy. The towing agreement, which was submitted by the German towing corporation, Unterweser, to the American rig owner, Zapata, for approval, contained a forum selection covenant requiring any disputes arising from the agreement to be submitted to the London Court of Justice. The case came before the Supreme Court after the lower federal courts[5] had refused to enforce the covenant when Zapata sued Unterweser *in personam* and Unterweser's tug, the Bremen, *in rem,* in a district court in Florida where the rig was towed by Unterweser, at Zapata's direction, after storm damage. The *Bremen* court found that forum selection covenants were presumptively valid and set forth basic standards for their enforcement in admiralty agreements involving multi-jurisdictional contacts. These standards have been adverted to by all American courts in evaluating the enforceability of these covenants, each case in accordance with its particular facts. Therefore, an understanding of the subsequent judicial interpretation of the meaning, scope and applicability of these standards is essential to the effective use of forum selection covenants which may come before the American judiciary.

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[4] This article does not address the use of contractual agreements to arbitrate. Notwithstanding the United States Supreme Court's reference to such clauses as "a specialized forum selection clause," Sherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974), subsequent decisions have held that such agreements are to be evaluated exclusively in terms of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1947); Sam Reisfeld & Son Import Co. v. S. A. Eteco, 530 F.2d 679 (5th Cir. 1976). *Cf.* Incontrade, Inc. v. Oilborn Int'l S.A., 407 F. Supp. 1359 (S.D.N.Y. 1976) (the court validated an arbitration agreement citing Gaskin v. Stumm-Handel, *infra,* note 25, a case determining the validity of a forum selection covenant under *Bremen* standards).

[5] The United States District Court for the Middle District of Florida denied Unterweser's motion to stay Zapata's action pending the outcome of litigation before the chosen forum in London and further enjoined Unterweser from prosecuting that action. In re Unterweser Reederei, Gmbh, 296 F. Supp. 733 (M.D. Fla. 1969), *aff'd,* Zapata Offshore Co. v. M/S Bremen, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc* Zapata Offshore Co. v. M/S Bremen, 446 F.2d 907 (5th Cir. 1971).

III. CONTRACTUAL VALIDITY

Bremen requires that courts initially evaluate forum selection covenants in terms of their contractual validity. The covenant in *Bremen* was part of a tailored contract proposal submitted to Zapata at its request. Zapata approved the contract only after the opportunity to review other submitted proposals. The Court found that Zapata and Unterweser were sophisticated parties who had bargained for performance in the tow of expensive property over a vast ocean expanse, a patently ambitious and highly technical project. Applying traditional American contract principles, the Court found the agreement was freely negotiated at arms length, unaffected by fraud, undue influence or overreaching on the part of Unterweser and therefore a valid and enforceable promise.

A. *Traditional Contract Theory*

The evaluation of forum selection covenants as valid contractual agreements ordinarily should not present significant difficulties to the prudent practitioner. However, some noteworthy problems have arisen.

1. Absence of Mandatory Language

Courts occasionally have refused to enforce a forum selection covenant on the ground that the party seeking enforcement had drafted an agreement stating that a particular forum was proper but not necessarily exclusive. For example, in *Keaty v. Freeport Indonesia, Inc.*,[6] the court found the following clause did not mandate transfer of an action: "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York."[7] The court construed this language against the drafting party and found that it was merely a stipulation to submit to New York jurisdiction if the action were brought there.

In *First Nat'l Bank v. Nanz, Inc.*,[8] the plaintiff attempted to enforce a forum selection covenant drafted into its standard domestic loan agreement which provided that, "[T]he Supreme Court of the State of New York, within any county of the city of New York shall

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[6] 503 F.2d 955 (5th Cir. 1974).

[7] *Id.* at 956.

[8] 437 F. Supp. 184 (S.D.N.Y. 1975).

have jurisdiction of any dispute [between the parties] . . . ."[9] Defendant contended that this did not constitute an agreement to confer venue exclusively on the New York State courts. Construing the agreement against the bank, the drafting party, the court found that the action could properly be removed to the district court in New York.

However, in *Republic Int'l Corp. v. Amco Eng'r., Inc.*,[10] the court noted that the following provision did constitute a mandatory and exclusive forum selection covenant: "For the purposes of this contract, the contracting parties place themselves under the jurisdiction and competence of the courts of the Republic of Uruguay."[11]

The courts have also refused to construe contractual submissions to *in personam* jurisdiction as *de facto* forum selection covenants. For example, in *Weisenberger Servs., Inc. v. Response Analysis Corp.*,[12] the court found the following provision did not constitute an agreement to litigate only in New York State courts:

> This agreement may not be amended, modified, or discharged except in writing. This agreement shall be governed by, and construed in accordance with the laws of the State of New York, other than conflicts of law rules; and both of us agree that we will be and remain subject to the *in personam* jurisdiction of the courts of the State of New York with regard to this agreement.[13]

Accord, M. Lowenstein & Sons, Inc. v. Austin,[14] where a contract contained the following language:

> It is agreed that this guarantee constitutes a business transaction entered into between the parties in the State of New York and shall be construed pursuant to the laws of the State of New York. The undersigned hereby consent to and confer personal jurisdiction over the undersigned by the Courts of the State of New York for any action to enforce this guarantee, by personal service of process upon the undersigned either within or without the State of New York . . . .[15]

2. The Dispute Must Relate to the Contract

Courts have required that a dispute sought to be transferred pursuant to a forum selection covenant must arise out of or relate to the

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[9] *Id.* at 186.

[10] 516 F.2d 161 (9th Cir. 1975).

[11] *Id.* at 168.

[12] 365 F. Supp. 258 (S.D.N.Y. 1973).

[13] *Id.*

[14] 430 F. Supp. 844 (S.D.N.Y. 1977).

[15] *Id.* at 845.

contract which contains the covenant. This issue arose in *Cruise v. Castleton, Inc.*,[16] when the plaintiff brought an action in New York for negligent misidentification of its horses. The defendant association sought dismissal pursuant to an association by-law providing, in effect, that suit by a member against the association could be brought only in Ohio. Plaintiff argued that it would be unreasonable to read that by-law provision to apply to "all conceivable litigation between members of the Association." However, under the facts of that case, the court found the dispute sufficiently related to the relationship between plaintiff and the association to be governed by the by-laws.

In *Roach v. Hapag-Lloyd, A.G.*,[17] a longshoreman brought an action for injuries sustained while unloading goods from defendant's vessel. Defendant filed a third party complaint for indemnity against the packer of the goods who injured plaintiff. The packer sought to remove the third party action to West Germany pursuant to its bill of lading with the vessel owner which provided that, "Any dispute arising under this bill of lading shall be decided by the Hamburg courts."[18] The court apparently found a sufficient relationship between the bill of lading and the indemnification action to enforce the covenant.

3. Waiver

Even assuming the existence of a valid forum selection covenant, enforcement of these covenants has been opposed on the basis of waiver.[19] In *Smith, Valentino & Smith, Inc. v. Superior Court*,[20] party A had contracted to bring actions under the contract only in Los Angeles, California. However, after a dispute arose, party A filed for an attachment in Pennsylvania and took party B's default. Party B, who had promised to bring an action under the contract only in Philadelphia, Pennsylvania, thereafter filed a complaint for damages in Los Angeles. In resisting a motion to transfer that action to Philadelphia under the forum selection covenant, party B argued that A's application for attachment in other than the agreed upon forum ". . . should bar [party A] from enforcing the clause against [party

[16] 449 F. Supp. 564 (S.D.N.Y. 1978).

[17] 358 F. Supp. 481 (N.D. Cal. 1973).

[18] *Id.* at 482.

[19] A waiver consists of a voluntary relinquishment of a known right often manifested by an act inconsistent with the intent to rely on such right. *See, e.g.*, Weisbart & Co. v. First Nat'l Bank, 568 F.2d 391, 396 (5th Cir. 1978).

[20] 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976).

B]."[21] Rather than interpreting A's conduct in terms of waiver, the Court found that,

> [A's] conduct . . . was a relevant factor. . . in determining whether enforcement of the clause would be unreasonable. . . . Institution of the earlier Pennsylvania action may indeed have constituted a breach of the clause, but [B] elected to ignore that breach. . . . Moreover, given the relatively minor nature of the prior action when compared to the present proceedings, the trial court might reasonably have concluded that [A's] prior breach of the clause was de minimis.[22]

In *Morse Electro Products Corp. v. S.S. Great Peace,*[23] the Court found that the parties' joint failure to raise foreign law after a specific request by the Court indicates a "desire to abandon whatever rights or liabilities were created thereunder."[24]

4. Lack of Mutual Assent

In *Gaskin v. Stumm-Handel,*[25] the Court rejected the argument that a contract, written in a language foreign to plaintiff, was invalid for lack of consent. The Court found that negligence in making of a contract would not defeat operation of the forum selection covenant.

B. *Choice of Law*

A question which has yet to receive extensive judicial scrutiny from American courts is the choice of law to apply in evaluating the contractual validity of forum selection covenants. The *Bremen* court evaluated the validity of the covenant before it under American notions of contract law even though the court intimated that the parties had stipulated to apply the substantive law of England. The only cases to have addressed this issue are those which have come before the federal district courts under diversity jurisdiction when the court must decide whether state or federal law should determine the issue. For example, in *Leasewell, Ltd. v. Jake Shelton Ford, Inc.,*[26] plaintiff brought suit in West Virginia to enforce a default judgment obtained

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[21] 17 Cal. 3d at 496, 551 P.2d at 1209.
[22] 17 Cal. 3d at 497, 551 P.2d at 1210.
[23] 437 F. Supp. 474 (D.N.J. 1977).
[24] *Id.* at 488.
[25] 390 F. Supp. 361 (S.D.N.Y. 1975).
[26] 423 F. Supp. 1011 (S.D.W. Va. 1976).

in New York against defendant pursuant to a provision that defendant consented to the jurisdiction of New York courts and agreed that disputes should be litigated only in New York. In choosing which law to apply to evaluate the validity of this clause, the court found that,

> . . . it is obvious that the contract should be tested under whichever law is applicable had the questioned provision not been in the contract [citation omitted]. To do otherwise would be to permit the clause to 'pull itself up by its own bootstraps.' In deciding an issue of conflicts of laws, a federal district court must apply the conflicts rules of the state in which it sits [citation omitted]. West Virginia conflicts rules require that West Virginia law be applied to the contract since both the place of performance and the place of execution of the contract are in West Virginia.[27]

Although the court did not explain further the bootstrap analogy, it was obviously reluctant to permit operation of a choice of law provision to validate a forum selection clause which was argued to be against the forum's public policy.

Davis v. Pro Basketball, Inc.,[28] is another diversity case involving a forum selection covenant. The action was brought for a breach of contract. When the choice of law question was raised, the federal court found that it "should assume no more and no less jurisdiction than a state court would if the latter were presiding over the same matter."[29] Without further explanation, the court found that it would look to the New York rule on forum selection clauses rather than the New York conflicts rule for the determinaton of which law to apply.

There are two major policies which a court might consider in determining the law to apply in evaluating a forum selection covenant. First, if the agreement contains a choice of law provision, the court may wish to give this provision effect and determine the validity of the clause based upon the chosen law. *The Restatement (Second) of Conflicts of Laws* Sections 198-202, takes the position that issues of contract validity are to be determined under contractually chosen law unless the party resisting the operation of the agreement can demonstrate that the choice of law provision is itself the product of the particular invalidity asserted. Thus, a party resisting a certain forum not otherwise proper except by a choice of law provision[30] would have

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[27] *Id.* at 1014.

[28] 381 F. Supp. 1 (S.D.N.Y. 1974).

[29] *Id.* at 3.

[30] Otherwise, the law evaluating the contract is irrelevant.

to demonstrate that fraud or overreaching produced the choice of law provision in question. This approach gives recognition to one of the main objectives of prorogation—to give certainty to the effect of an agreement notwithstanding the impact of adjudication in a fortuitous forum.

The second policy which the forum court might wish to pursue is to evaluate these covenants based on law selected under the forum's choice of law principles. As set forth above, this has apparently been the initial reaction of many American courts. This approach recognizes that the court must decide the question of enforcement in terms of its own judicial power. However, if the original and fortuitous forum renders the forum selection covenant invalid, a legitimate objective of the parties concerning the place and manner of dispute resolution has been destroyed.

It is suggested that courts evaluate forum selection covenants based on the *Restatement's* approach which recognizes the "vital certainty"[31] necessary to international agreements. In the event contractually chosen law validates an agreement which is so antithetical to the contract principles of the forum that the court cannot in good conscience uphold it, it might be invalidated under the third criterion set forth in *Bremen* for the evaluation of forum selection covenants, i.e., offense to a public policy of the original forum, which will be discussed *infra*.

IV. CONVENIENCE

The second major criterion set forth by the *Bremen* court is whether operation of the covenant would result in such inconvenience that the resisting party would be denied his day in court. In essence, the court will not make itself an accomplice to a contract which results in a denial of due process.

Convenience of the chosen forum is determined as of the time of litigation.[32] The courts have considered six factors in evaluating convenience. Each factor will be discussed in succession.

A. *The Substantive Law to be Applied*

In *Bremen*, the court noted that the London Court of High Justice was a neutral forum with special expertise in resolving admiralty

[31] Bremen v. Zapata Off-shore Co., 407 U.S. at 17.

[32] Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344 (3d Cir. 1966); Goff v. AAMCO Automatic Transmissions Inc., 313 F. Supp. 667 (D. Md. 1970).

disputes. As such, it could assure the parties of their day in court. In *Dorizos v. Lemos and Peteras, Ltd.*[33] (an action for payment of wages under a contract of employment stipulating a Greek forum), the court took into consideration the fact that Greek law would have to be applied where all parties to the action had some connection with the chosen forum and that the American forum was totally fortuitous, having resulted from the vessel's choice of port.

A determination that the forum court must apply law different from that of its own jurisdiction is not a major factor in determining convenience.[34] However, where a novel question of foreign law is presented the court may wish to have a court of the substantive law's jurisdiction decide such questions. The original forum might refuse to validate the forum selection covenant based on public policy notions of comity or abstention.[35]

B. *Calendar of the Original Forum*

The federal courts have a crowded docket and an interest in avoiding litigation. Therefore, they favor forum selection covenants[36] which keep litigation out of the federal courts. *See, Telephone Workers' Union v. New Jersey Bell.*[36]

C. *Location of Evidence*

In *Copperweld Steel Co. v. Demag*,[37] a forum selection covenant was invalidated when evidence relating to the subject matter of the action, a steel casting plant, could not be moved to the chosen forum. The court concluded that the covenant was unreasonable because the plant in question might have been the subject of intensive inspection during trial. Such a finding suggests that the court did not require the resisting party to make a substantial showing to avoid the presumptive validity of the forum selection covenant.

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[33] 437 F. Supp. 120 (S.D. Ala. 1977).

[34] *See* Hall v. Kitay, 396 F. Supp. 261, 265 (D. Del. 1975); Atlantic Richfield Co. v. Stearns-Rogers, Inc., 379 F. Supp. 869, 872 (E.D. Pa. 1974). Both cases were decided under a motion to change venue pursuant to 28 U.S.C. § 1404(a).

[35] *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). *Cf.* Meredith v. Winter Haven, 320 U.S. 228, (1943) (federal court's difficulty in interpreting state law insufficient basis for abstention under diversity jurisdiction).

[36] 584 F.2d 31, 33 (3d Cir. 1978).

[37] 54 F.R.D. 539 (W.D. Pa. 1972), *reh.* 347 F. Supp. 53 (W.D. Pa. 1972), *reh.* 354 F. Supp. 571 (W.D. Pa. 1973), *aff'd* 578 F.2d 953 (3d Cir. 1978).

D. *Language*

In *Demag* the court articulated a disturbing factor which it considered in its decision that the forum selection covenant was unreasonable. The court found that, "Practically everything done in connection with this transaction has been done in the English language. Similarly, almost all witnesses are English speaking. To conduct this litigation before a German court would require translation with its inherent inaccuracy."[38] Legitimizing the use of language as a criterion in evaluating forum selection covenants clearly militates against policies articulated in *Bremen*. The court found that foreseeable difficulties in litigation[39] could not be the basis for concluding that enforcement of a forum selection covenant was unreasonable unless for all practical purposes the objecting party would be denied his day in court. Clearly, certain inaccuracies in translation are inherent in any agreement between American and foreign parties where the native language of the latter is other than English. Consideration of language as a factor in the evaluation of the reasonableness of enforcing the forum selection clause does not demonstrate what *Bremen* considered " . . . an appreciation of the expanding horizons of American contractors, who seek business in all parts of the world . . . "[40]

In only one other case, *Dorizos v. Lemos and Pateras, Ltd.*,[41] did a court consider language in evaluating enforcement of a forum selection covenant. *Dorizos* involved an action between Greek nationals and the court noted that a trial in the United States would require an interpreter for those witnesses (including plaintiff) from Greece or elsewhere. However, it is not clear from the opinion whether the court was considering language inaccuracies or the expense of an interpreter in determining reasonableness.

E. *Relationship Between Chosen Forum and Contract Subject Matter*

Courts have been reluctant to enforce forum selection covenants where the chosen forum had no relation to the subject matter of the contract. In *Bremen*, the court noted that the chosen forum, the London Court of Justice, was a neutral forum with a special expertise in

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[38] 54 F.R.D. at 542.

[39] It will be assumed that language differences are a forseeable difficulty.

[40] 407 U.S. at 11.

[41] 437 F. Supp. 120.

the subject matter of the contract. In *Morse Electro Products Corp. v. S.S. Great Peace*,[42] an action for breach of contract for shipment of goods from Kobi, Japan to Newark, New Jersey the bill of lading designated China[43] as the proper forum and the Chinese Merchant Marine Act of 1929 as the chosen law. The court noted that the parties " . . . are free to choose a venue for litigation of their disputes arising out of their contracts, provided the jurisdiction chosen has some relationship to the parties or the contract."[44] However, the court went on to invalidate the forum selection covenant apparently on the basis that the parties had waived or abandoned it.

F. *Presence of Parties to Litigation Who Are Not Parties to the Forum Selection Covenant*

In *Roach v. Hapag, Lloyd, A.G.*,[45] discussed earlier, the third party defendant sought dismissal because the bill of lading involved there contained a forum selection clause. In attempting to defeat operation of that clause, the third party plaintiff argued that its complaint arose out of a defense to an action in a forum other than that selected by contract. Presumably, the third party plaintiff argued that it would be unreasonable to require two separate trials in two separate forums where liability arose out of the same transaction. The court gave effect to the forum selection covenant holding that the third party plaintiff did not clearly show that enforcement would be unreasonable and unjust.

In *Tai-Kien Indus. Co., v. M/V Hamburg*,[46] a clearer policy was articulated. There, a vessel owner sought damages in an *in rem* action against the vessel's tug when the vessel broke loose off the coast of Guam. The owner also sought indemnity from the tug for a contemporaneous action filed by the United States for damages caused by obstruction to navigation and a resulting oil spill. In dismissing plaintiff's *in rem* action, the court found that there was nothing unreasonable or unjust about giving effect to the parties' agreement that any dispute be referred to the Supreme Court of Justice in Lon-

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[42] 437 F. Supp. 474.

[43] The court apparently assumed that the chosen forum was Nationalist China although the only designation appearing in the forum selection clause is "the court in China." Practitioners may wish to avoid such ambiguities.

[44] 437 F. Supp. at 487.

[45] 358 F. Supp. 481.

[46] 528 F.2d 835 (9th Cir. 1976).

don. The Court noted that the forum selection covenant did not provide an exception to cover circumstances of third party involvement in litigation governed by the forum selection covenant. The Court stated that,

> Pendency of the contemporaneous action brought by the Government arising from the same occurrence is not a reason for avoiding the clause. It is quite foreseeable that if a vessel sinks, third persons, who are not parties to a contract for the voyage, will be injured or bring suit. But the parties did not provide an exception to the forum selection clause for such a foreseeable event, and the appellant has shown no reason why we should imply such a term.[47]

It is not suggested that the six factors set forth above are exclusive. Rather, any circumstances which might affect the convenience of the parties should be brought to the court's attention.

V. LIMITS ON OPERATION OF THE FORUM SELECTION COVENANT

The third criterion articulated by *Bremen* for evaluating forum selection covenants is their effect on the public policy, declared by statute or judicial decision, of the original forum. The necessary impact of public policy has been evinced in a number of instances.

A. *Where the Original Forum Has Exclusive Jurisdiction Over the Subject Matter of the Complaint*

Forum selection clauses have been invalidated where a claim under American law would be lost because the transferee court lacked jurisdiction. An American court's exclusive jurisdiction of such claims demonstrates a policy decision that they should be determined by a court with special expertise and in a manner which will result in uniform decision.[48] For example, in *Indussa Corp. v. S.S. Ransborg*,[49] the court invalidated a forum selection clause contravening the policies of the Carriage of Goods at Sea Act (COGSA).[50] The *Indussa* court,

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[47] *Id.* at 836.

[48] *See* Joseph Muller Corp. Zurich v. S.A. de Gerance, 451 F.2d 727 (2d Cir. 1971).

[49] 377 F.2d 200 (2d Cir. 1967).

[50] 42 U.S.C. §§ 1300-1315. Section 1303(8) provides in pertinent part: "any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability of loss or damage to or in connection with goods, arising from

indicated that even if a foreign tribunal could apply the COGSA, a covenant requiring an American plaintiff to assert his claim only in a foreign court,

> lessens the liability of the carrier quite substantially, particularly when the claim is small. . . . A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability.[51]

In *Ashby v. Vantage Press,*[52] plaintiff brought an action under the 1933 Securities Act[53] and 1934 Securities Exchange Act[54] based on transactions arising out of a contract to print and market a book. That contract contained a forum selection covenant limiting litigation to state court. Without explaining the basis of its decision, the court refused to give effect to the forum selection covenant. Presumably, the court refused to validate the covenant since to do so would conflict with the exclusive jurisdiction provision of the 1934 Act[55] and result in plaintiff's loss of that claim.

However, in *Wydell Assoc. v. Thermosal Ltd.*,[56] one of plaintiff's claims was based upon an alleged breach of warranty under the Texas Deceptive Trade Practices Act,[57] which vested exclusive jurisdiction in the Texas state courts and provided that violations could not be waived. Plaintiffs sought dismissal based on the parties' contract, which provided that disputes relating to that contract should be decided by arbitration in the state of New York. While the Texas lawsuit was pending,

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negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

[51] 377 F.2d at 203.

[52] 74-75 FED. SEC. L. REP. (CCH) ¶ 95.109 (E.D. Ohio 1975).

[53] 15 U.S.C. §§ 77a-bbbb.

[54] 15 U.S.C. §§ 78a-hh-1.

[55] 15 U.S.C. § 78aa. District courts have exclusive jurisdiction over violations of this chapter. Any criminal proceeding may be brought in the district wherein any act or transaction which constituted the violation occurred.

[56] 452 F. Supp. 739 (W.D. Tex. 1978).

[57] VERNON, TEX. CODE ANNO., BUS. AND COMMERCE §§ 17.01-17.30 (1968).

defendant took plaintiff's default in the New York arbitration. Defendant thereafter counterclaimed for enforcement of the New York judgment confirming the arbitral award. The court granted defendant's motion for summary judgment based on the New York arbitration finding that the forum selection clause did not constitute an impermissible waiver of rights under the Texas Act because, in *dicta* difficult to understand, "the parties to a contract may specify the laws under which the contract is to be governed."[58]

B. *Statutory Venue*

Forum selection covenants have been held inoperative where the effect would be to limit a choice of venue under a remedial statute with liberal venue requirements. In *Krenger v. Pennsylvania R. Co.*,[59] the court rejected a post accident contract limiting venue under the Federal Employer's Liability Act.[60] The court found that plaintiff's extensive choice of venue as provided under the Act could not be impaired by contract. Judge Learned Hand, concurring, noted that the Federal Employer's Liability Act implicitly recognized the disadvantage at which employees bargained and the purpose of the liberal venue provision which was to equalize that disadvantage.[61]

In *Photovest Corp. v. Fotomat Corp.*,[62] a forum selection covenant was held unenforceable to the extent it attempted to fix venue of an antitrust action[63] in a particular United States district court. Under the facts recited by the *Photovest* court, the parties appeared to have equal bargaining power.

In *Poseidon Schiffahrt, GmbH v. M/S Netuno*,[64] the court was requested to exercise *in rem* admiralty jurisdiction involving a collision between Brazilian and German vessels. Each was subject to an interna-

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[58] 452 F. Supp. at 742. The court apparently believed it did not have jurisdiction to apply the Texas Act, having already held federal substantive law to be controlling.

[59] 174 F.2d 556 (2d Cir. 1949). *Contra,* Herrington v. Thompson, 61 F. Supp. 903 (W.D. Mo. 1945).

[60] 45 U.S.C. §§ 51-60.

[61] It could be argued that the policy behind such liberalized venue provisions relaxes the resisting party's burden to demonstrate unreasonableness. In view of Judge Hand's remarks, it could also be argued that the party seeking enforcement must demonstrate the absence of overreaching where a liberal venue provision is invoked.

[62] 1977-1 TRADE CAS. ¶61,529 (S.D. Ind. 1977).

[63] Venue of antitrust actions is proper in any judicial district where a corporate defendant is an inhabitant, may be found, or conducts business. 15 U.S.C. § 22.

[64] 361 F. Supp. 412 (S.D. Ga. 1973).

tional treaty fixing venue for collision disputes. In *dicta*, the court noted that,

> An international compact entered into by the sovereigns of colliding vessels should be accorded a dignity and force of at least equal that possessed by a private forum-selection clause such as the one dealt with in *The Bremen*. If a ruling were required, this Court would likely hold that the Convention of 1952 has the same effect as a private contract as far as judicial deference by our admiralty courts is concerned in the case of jurisdiction over collisions of foreign vessels.[65]

Forum selection covenants have also been held invalid where they would contravene statutorily imposed venue. In *General Motors Acceptance Corp. v. Codiga*,[66] the court refused to uphold a contractual provision specifying a particular county in which a contract action would be tried, since it would have contravened statutory venue for such actions.

A statutory scheme to transfer actions may also have impact on the effect of a forum selection covenant.[67] For example, motions to transfer venue between United States district courts are governed by Title 28, U.S.C. Section 1404.[68] In *Plum Tree, Inc. v. Stockment*,[69] the court analyzed the effect of the motion in an action involving a forum selection covenant.

> [W]e note that the existence of a valid forum-selection clause whose enforcement is not unreasonable does not necessarily prevent the selected forum from ordering a transfer of the case under § 1404(a). Congress set down in § 1404(a) the factors it thought should be decisive on a motion for transfer. Only one of these—the convenience of the parties—is properly within the power of the parties themselves to affect by a forum-selection clause. The other factors—the convenience of witnesses and the interest of justice—are third party or pub-

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[65] *Id.* at 417.

[66] 62 Cal. App. 117, 216 P. 383 (1923).

[67] *Cf.* Bremen, 407 U.S. at 7. The court ruled that treating forum selection covenants as one element of a *forum non conveniens* analysis was improper. *Id.* However, the doctrine of *forum non conveniens* is judge-made and not imposed by statute. *See* Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947).

[68] Subsection (a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

[69] 488 F.2d 754 (3d Cir. 1973).

lic interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of purely private agreement between the parties. Such an agreement does not obviate the need for an analysis of the factors set forth in § 1404(a) and does not necessarily preclude the granting of the motion to transfer."[70]

VI. CONCLUSION

The foregoing analysis is suggestive of several considerations in drafting an effective forum selection covenant.

First, the clause should be couched in specific and mandatory terms. Thus, in addition to designating the law to control the interpretation and construction of the agreement, or any controversies arising therefrom, the clause should require that any and all disputes be adjudicated in the chosen forum.

Second, though contractual prorogation of a forum will not necessarily derogate the fortuitous American forum, as seen above, a contractual submission to the *in personam* jurisdiction of the chosen forum may be persuasive.

Third, to avoid unnecessary or false conflicts of law issues, it is suggested that the choice of law provision designate the local law of the chosen forum, and specifically exclude the chosen forum's conflicts of law rules.

Fourth, to avoid a more remote but potential point of difficulty, it is suggested that the language to be used in connection with the resolution of any disputes be specified.

Fifth, although it may not be possible to avoid a threshold determination of contractual validity by an original fortuitous forum, the forum selection covenant should embrace a recitation of the parties' agreement that the law of the chosen forum is to be applied in determining all questions arising in connection with the agreement, including its validity, and not simply to disputes arising thereunder.

Finally, it is suggested that the forum which is prorogated be carefully selected on the basis of its relation to the subject matter of the contract or on the basis of its special expertise in connection with the subject matter.

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[70] *Id.* at 757-58. *See also* Brown v. Gingiss Int'l Inc., 360 F. Supp. 1042 (E.D. Wis. 1973) apparently citing *Bremen* for authority that the impact of forum selection clauses should be one factor in deciding a § 1404(a) motion.