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### Recommended Citation

George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 Md. J. Int'l L. 311 (1978).  
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## CHOICE OF FORUM AND CHOICE OF LAW CLAUSES IN INTERNATIONAL COMMERCIAL AGREEMENTS

*George A. Zaphiriou\**

The initial concern when drafting a transnational agreement is to determine first, the forum for resolving disputes related to the agreement, and secondly, the law governing its validity, interpretation and performance. Preselection of forum and of law provide reasonable predictability of the law that will be applied in the event of a dispute. In modern-day drafting, rights and obligations are generally specified within the written agreement, yet, this does not dispense of the need for a choice of law clause. Rights and obligations, even if detailed, cannot be construed in a vacuum. The chosen law will determine their validity and effect and the forum selected by the parties will ensure that their choice of law is upheld and applied. Forum as used here includes courts and arbitral tribunals or processes. The arbitration clause is in effect a specialized kind of choice of forum clause.<sup>1</sup>

Forum selection and choice of law will vary depending upon whether the contract is a government contract or a contract between enterprises. The former raises questions of sovereign immunity and service of process. It may also preclude the choice of a particular law as well as the submission to a particular court or to arbitration. The present article is concerned with private trade rather than public trade or investment. It generally relates to business contracts for the sale, use or carriage of goods, for the transfer of technology, for the acquisition of business enterprises, for services, or for construction work. The purpose of this article is to focus on the trends in English, American and European Community law as to choice of law and choice of forum clauses. Special reference will be made to the Draft Convention between the United Kingdom and the United States on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters.<sup>2</sup> Certain clauses of the Convention reflect the trend in the Anglo-American approach to choice of law and choice of forum clauses.

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1. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

2. The Convention is found in 16 I.L.M. 71-87 (1977).

The Convention has been initialed by the two delegations and will be submitted to the United States Senate for its advice and consent.

## I. THE ANGLO-AMERICAN APPROACH

### A. *Choice of Law Clauses*

The weight of precedent in the United Kingdom favors free choice of the law governing the parties' contractual obligations. In 1939, *Vita Food Products v. Unus Shipping Co.*<sup>3</sup> went so far as to decide that if the parties choose the law of a particular state, that state need not be connected with the transaction. The case dealt with the carriage of goods from Newfoundland to New York. The bill of lading which was issued in Newfoundland provided expressly that English law was to govern. The question was whether a certain exception clause in the bill of lading exempting the carrier from liability was valid. The Newfoundland Carriage of Goods by Sea Act of 1932 and the United States Carriage of Goods by Sea Act of 1936<sup>4</sup> were enactments of the Hague Rules. The Rules represent a codification of certain regulations applicable to bills of lading. They provide for minimum standards of liability imposed on a carrier of goods by sea. Clauses in a bill of lading which attempt to relieve the carrier from liability beyond the minimum standards are held to be void. Practically every country in the world has embodied the Hague Rules into its legislation.

According to both the Newfoundland Carriage of Goods by Sea Act of 1932 and the United States Carriage of Goods Act of 1936, the exception clause in the particular bill of lading would have been void. The Judicial Committee of the Privy Council held that English law was to govern. The English Carriage of Goods by Sea Act of 1924 (also an enactment of the Hague Rules) was applied, according to an express provision therein, only to outgoing United Kingdom shipments. The exception clause was thus declared valid.

The decision led to the odd result that a shipment of goods from a state which had adopted the Hague Rules to another state also adopting them escaped their application. Regrettable as the outcome may be, it illustrates in no uncertain terms the extreme position that the Court took on choice of law by the parties to a

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3. [1939] A.C. 277.

4. Carriage of Goods by Sea Act, 1936, 46 U.S.C. § 1300 *et seq.* (1970).

contract. Although decisions of the Judicial Committee of the Privy Council are only persuasive and not binding, English law followed the precedent. The words of Lord Wright that the law chosen by the parties is conclusive provided it is "bona fide and legal,"<sup>5</sup> generally represents the law of the United Kingdom.<sup>6</sup>

The position under United States law is not as extreme. American law, unlike English law, has traditionally objected to the concept that the express or implied intention of the parties determines the law governing their contractual obligations.<sup>7</sup> More recent developments, however, as expressed in the Uniform Commercial Code § 1-105(1) and in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) acknowledge choice of law by the parties provided there is a reasonable relationship between the state whose law was chosen and the transaction. The Uniform Commercial Code refers to "state[s] or nation[s]" and lays down a principle applicable both to interstate and transnational conflicts. Rules in the Restatement relate to interstate conflicts but logically the same rule would apply in this context to transnational transactions.<sup>8</sup> Thus, the more recent tendency in the United States is to refer to the connection between the parties and/or the transaction, and the state whose law the parties chose. In England, the relationship between the transaction and the law rather than the state is preferred. For the most part, the distinction is without significance but in some cases submission to a neutral jurisdiction or arbitration creates a connection with a particular legal system.<sup>9</sup> In East-West trade, it is common practice to submit disputes to arbitration in Sweden and to provide that Swedish law governs even though the transaction is entirely unconnected with Sweden.<sup>10</sup>

Whether some connection is required between the parties, the transaction, and the chosen law, is to a great extent academic. In most cases the parties will choose a legal system which is connected with either of them, with the transaction, or with the

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5. [1939] A.C. at 290.

6. A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 728-732 (9th ed. 1973); R. GRAVESON, *CONFLICT OF LAWS* 419-434 (6th ed. 1969).

7. J. BEALE, *THE CONFLICT OF LAWS* 1079-80 (1935); *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931).

8. A. LOWENFELD, *INTERNATIONAL PRIVATE TRADE* § 4.22 (1975).

9. See *Tzortzis v. Monark Line, A/B*, [1968] 1 W.L.R. 406, where submission of a contract for the sale of a ship to arbitration in London was held to amount to an express selection of English law as the proper law of the contract.

10. Holtzman, *Arbitration in East-West Trade*, 9 INT'L LAW. 77 (1975).

court that was chosen to determine future disputes. The requirement of some association raises the further problem of how substantial it must be. Is the fact that insurance or financing was secured in a particular place sufficient to create a connection even though neither insurance nor finance is directly at issue? In *Vita Food*,<sup>11</sup> Lord Wright referred to the fact that the underwriters who insured the risk were likely to be English and this to some degree influenced the result.

While the United States evolved toward an acceptance of the proper law of the contract to be determined according to the express or implied choice of the parties provided there is reasonable relationship with the transaction, English law made a small concession to the law with which the contract is most substantially connected. It is now conceded that the parties cannot by an express choice of law evade the mandatory provisions of the law with which the contract has the most substantial connection.<sup>12</sup> Nevertheless, this is by no means a surrender to the so-called objective proper law. The strength of the law which was chosen by the parties is illustrated by the decision in *Tzortzis v. Monark Line, A/B*.<sup>13</sup> It was there held that a contract for the sale of a ship which provided for arbitration in London was to be governed by English law even though the contract was most substantially connected with Sweden. Lord Denning, M.R., who has been a proponent of the objective proper law formulated the rule as follows:

It is clear that if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary. But where there is no express clause it is a matter of inference from the circumstances of the case.<sup>14</sup>

The application of the law with which the contract is most substantially connected, in case of evasion of its mandatory provision, is supported by the Draft United Kingdom-United States Convention on the Reciprocal Recognition and Enforce-

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11. [1939] A.C. at 291.

12. *Boissevain v. Weil*, [1949] 1 K.B. 482 (C.A.) per Denning, L.J.; *In re Helbert Wagg & Co., Ltd.*, [1956] 1 Ch. 323, 341; *The Fehmarn*, [1958] 1 W.L.R. 159, 162 (C.A.), Lord Denning, M.R.; A. DICEY & J. MORRIS, *supra* note 6, at 730.

13. [1968] 1 W.L.R. 406.

14. *Id.* at 411.

ment of Judgments in Civil Matters. Article 8(d) of the Convention provides as follows:

If the defendant or his successor in interest so requests recognition or enforcement of a judgment is not required by this Convention: . . . (d) where, under the rules of private international law of the court addressed, its own law would have been applicable to the case if it had been brought in that court and the judgment disregards provisions of that law which would have been applied by that court even if the parties had chosen another system of law; . . . .

The effect of the provision is that the court where the judgment is sought to be recognized or enforced (*i.e.*, the court addressed) may refuse to recognize or enforce, at the request of the defendant, a judgment applying the law chosen by the parties to govern their contract, under circumstances which, according to the conflict rule of the court addressed, would require application of its own law as the law with which the contract is most substantially connected. Thus, if an English court applied English law to a contract which contained an express choice of English law, but which was substantially connected with New York, thereby avoiding the application of a mandatory provision of the Securities Exchange Act of 1934, for example, a court in the United States would be entitled under the Convention, at the request of the defendant, to refuse to recognize or enforce the English judgment.

### B. *Choice of Forum Clauses*

English courts have been traditionally inclined to accept jurisdiction pursuant to a choice of forum clause. The author knows of no case in which an English court rejected the parties' submission on the ground that it was not a convenient court. In Scotland,<sup>15</sup> however, as in the United States, a court may decline jurisdiction in favor of a more convenient court.<sup>16</sup>

The courts in the United Kingdom will generally refrain from exercising jurisdiction in derogation of a choice of forum clause submitting disputes to the exclusive jurisdiction of a foreign court.

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15. *The Atlantic Star*, [1973] 2 W.L.R. 795, 810 per Lord Wilberforce; *Société der Gaz de Paris v. Armateurs Français*, (1926) S.C. (H.L.) 13; *Ewing v. Orr Ewing*, 10 App. Cas. 453; *Argyllshire Weavers, Ltd. v. Macaulay (Tweeds), Ltd.*, (1962) S.C. 388.

16. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 84 (1971).

They will hold the parties to their bargain, unless it can be proved that trial by the foreign court would, under the circumstances, be inequitable or unjust.

In *The Fehmarn*,<sup>17</sup> a 1958 decision, the Court of Appeal did not find this general rule to be applicable. An English company had received turpentine from a Russian foreign trade organization at an English port on a German ship. The bill of lading provided that all claims and disputes were to be adjudicated in the U.S.S.R. Upon its arrival in England, the turpentine was tested and found to be contaminated. The trade organization brought an action in England. The German shipowner applied for a dismissal or alternatively for a stay of proceedings. The judge of first instance found that he had admiralty jurisdiction and refused to exercise his discretion to stay the action finding that on a balance of convenience the case should be tried in England.<sup>18</sup> The witnesses were more readily available there and there was no conceivable reason for the case to be tried in Russia. It merely appeared to be an attempt by the shipowners to make matters difficult for the plaintiffs. The decision of the court of first instance was unanimously upheld by the Court of Appeal.<sup>19</sup>

The decision in *The Fehmarn* was reconsidered several years later by the Court of Appeal in *Unterweser Reederei G.m.b.H. v. Zapata Off-Shore Co. (The "Chaparral")*.<sup>20</sup> The same judge who had delivered the judgment in *The Fehmarn*, since elevated to the Court of Appeal, stated the rule as follows, "The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country."<sup>21</sup>

Thus, the English court instead of applying a doctrine of *forum non conveniens* in the American sense,<sup>22</sup> i.e., to decline jurisdiction conferred by a choice of forum clause, reserved to itself the discretion to exercise jurisdiction contrary to a clause when convenience so demands.

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17. [1958] 1 W.L.R. 159 (C.A.).

18. [1957] 2 All E.R. 707.

19. [1958] 1 W.L.R. 159 (C.A.).

20. [1968] 2 Lloyd's List L.R. 158 (C.A.); See as to the facts *Bremen v. Zapata Off-Shore Co.*, *infra* at xx.

21. Lord Justice Willmer at 163.

22. See *supra* note 16.

In a later decision, known as *The Eleftheria*,<sup>23</sup> the English judge stayed an action which was brought contrary to a clause submitting disputes to the Greek courts on the ground that the plaintiffs had not discharged their burden of proving a strong cause not to stay. The judge said that the following matters should be taken into consideration in the exercise of the court's discretion to stay: (1) the country in which the evidence is to be found and its effect on the expense and convenience of the trial; (2) the law to be applied and its difference from English law in any material respects; (3) the countries with which the parties are connected and the closeness of the connections; (4) whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages; (5) whether the plaintiffs would be deprived by having to sue in a foreign court because they would: (a) be deprived of security for that claim, (b) be unable to enforce any judgment obtained, (c) be faced with a time-bar not applicable in England, or (d) for political, racial, religious or other reasons be unlikely to get a fair trial.

The pendulum, however, seems to have continued its momentum away from the general jurisdictional proposition as evidenced in the more recent decision of *Evans Marshall & Co., Ltd. v. Bertola S.A.*<sup>24</sup> The case concerned an alleged premature termination of an agency and dealership agreement. The defendant principal was in Spain and the plaintiff dealer was in England. The dealership agreement provided that disputes would be submitted to the Barcelona Court of Justice. The plaintiff applied to the Court for leave to serve notice of the writ outside the jurisdiction. Order 11 Rule 1 of the Rules of the Supreme Court of Judicature states the situations in which a court *may* at its discretion grant leave for service of the writ outside the jurisdiction. Order 11 Rule 1 is considered to contain the principles of adjudicatory jurisdiction of the English courts in transnational situations. The judge acknowledged that under Order 11 Rule 1 the plaintiff has a heavier burden of proof than a defendant seeking a stay. In fact, the judge should have said that a defendant seeking a stay in compliance with a choice of forum clause has no burden at all. He merely produces the agreement and it is up to the plaintiff to prove that it is void or voidable or that it would be unfair or unjust under the circumstances for the

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23. [1970] P. 94.

24. [1973] W.L.R. 349.



case to be heard by the foreign court. The judge then proceeded to grant leave for notice of the writ to be served abroad principally on the ground that "the substance is exclusively concerned with this country."<sup>25</sup> Important to the decision reached was the fact that all the material witnesses were in England and the uncertainty that the Spanish judge would understand the English language or English marketing conditions, the latter being a particularly important issue in the case.

The decision in *Evans Marshall* creates in the author's opinion a dangerous precedent. It was up to Evans Marshall & Co. when it entered into the agreement to insert an appropriate choice of forum clause setting out eventualities that may require determination of the dispute in England. All the factors referred to by the Court were foreseeable eventualities and risks which the plaintiff had decided to either forego or bear in order to get the business.

In the United Kingdom the enforcement of an arbitration clause depends on whether the agreement which provides for arbitration is a domestic one or not. A domestic arbitration agreement is an agreement which (1) does not either expressly or by implication provide for arbitration in a state other than the United Kingdom; and (2) to which neither party is an individual who is a national or habitually resident in a state other than the United Kingdom nor a corporation incorporated or having a center of management and control outside the United Kingdom.<sup>26</sup>

Domestic arbitration agreements come under section 4(1) of the Arbitration Act of 1950.<sup>27</sup> The judge *may* at his discretion stay proceedings concerning a dispute which has been submitted to arbitration by a valid and enforceable domestic agreement. The court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration. The discretion must be exercised judicially, but it will not be readily interfered with on review.<sup>28</sup> The burden of showing cause why effect should not be

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25. *Id.* at 363.

26. Arbitration Act, 1975, §1(4). See in HALSBURY'S STATUTES OF ENGLAND, vol 45, 32 (3rd ed. Continuation vol. 1975) or C. SCHMITTHOFF, INTERNATIONAL COMMERCIAL ARBITRATION, vol. 1, app. 1 at 21 (1974).

27. See in HALSBURY'S, *supra* note 26, Arbitration and SCHMITTHOFF, *supra* note 26, vol. 1, at 433.

28. Charles Osenton & Co. v. Johnston, [1942] A.C. 130.

given to the agreement to submit is upon the party opposing the stay.<sup>29</sup>

In the case of a non-domestic arbitration agreement, if an original party or a party claiming under him applies for a stay of the proceedings, the judge *must grant the stay unless he finds that the agreement is null and void, inoperative, or incapable of being performed*. The application for a stay must be made before any pleadings are delivered and before any other step is taken in the proceedings. This prerequisite is stipulated in section 1 of the Arbitration Act of 1975<sup>30</sup> which implemented in the United Kingdom the United Nations Convention on Recognition and Enforcement of Foreign Arbitration Awards.<sup>31</sup> Article II of the United Nations Convention provides as follows:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In 1975, the United Kingdom ratified the United Nations Convention without any reservation. The United Kingdom did not reserve the application of the Convention to only commercial disputes. It is also noteworthy that Article II of the Convention was made applicable to all nondomestic arbitration agreements irrespective of whether the parties are citizens, residents, are

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29. *Vawdrey v. Simpson*, [1896] 1 Ch. 166; *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, 388.

30. Arbitration Act, 1975, § 1(1).

31. See in C. SCHMITTHOFF, *supra* note 26, vol. 1 at 9.

incorporated in or have a center of management in a state which has ratified the United Nations Convention. It is also immaterial whether the arbitration is to take place in one of the ratifying states. Article 4(2) of the Arbitration Act of 1950 relating to arbitration agreements under the Geneva Protocol of 1923<sup>32</sup> and which also provided for a mandatory stay has now been repealed and superseded by section 1 of the Arbitration Act of 1975.<sup>33</sup>

American courts, including both federal and state, have traditionally been reluctant to recognize choice of forum clauses. Not so long ago, in *Carbon Block Export, Inc. v. The S.S. Monrosa*,<sup>34</sup> an admiralty action *in rem* for cargo damage, the court of first instance and the Court of Appeals of the Fifth Circuit refused to comply with a clause in the bill of lading submitting disputes to the *in personam* jurisdiction of the Italian courts. The customary American view was expressed as follows: "[A]greements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."<sup>35</sup> Scant authority in the other direction<sup>36</sup> provided justification for the cautious rule as expressed in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) to the effect that, "the parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."

The emphasis has since distinctively changed after the 1972 Supreme Court decision in *The Bremen v. Zapata Off-Shore Company*.<sup>37</sup> The Supreme Court by an eight to one decision in an opinion delivered by Chief Justice Burger upheld a clause in a towage contract, between Unterweser, a German shipowner, and Zapata, a Houston-based American corporation, providing that any dispute be treated before the London Court of Justice.

The difference arose under a transaction completely unconnected with the United Kingdom and English law. It concerned the towage of the Chaparral, an ocean-going, self-elevating drilling rig owned by Zapata, from Louisiana to a point off Ravenna, Italy. The towage was effected by Bremen, a tug owned

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32. *Id.* at 434.

33. Arbitration Act, 1975, § 8(2)(a).

34. 254 F.2d 297 (5th Cir. 1958), *cert. denied*, 359 U.S. 180 (1959).

35. *Id.* at 300-01.

36. *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341 (3d Cir. 1966); *Cent. Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (1965).

37. 407 U.S. 1 (1972).

by Unterweser. The damage to the Chaparral which gave rise to the dispute occurred in international waters in the middle of the Gulf of Mexico. Zapata, ignoring the agreement submitting disputes to the High Court in London brought an action *in personam* against Unterweser and *in rem* against the Bremen in the United States District Court in Tampa, Florida. The district court rejected the defendant's plea to dismiss the action or to stay the proceedings holding that the *forum non conveniens* doctrine did not apply. On appeal, a divided panel of the court of appeals affirmed and on rehearing en banc the panel's opinion was adopted, with six of the fourteen judges dissenting. In the meantime, Unterweser had brought an action in the High Court of England alleging breach of contract by Zapata. The English Court of Appeal unanimously held that the choice of forum clause was enforceable unless it was shown that it was not "fair and right."<sup>38</sup>

An important feature of the case was that trial before the High Court would lead to the application of an exculpatory clause that would excuse Unterweser from liability whereas trial in the United States would not enforce the exculpatory clause as being contrary to public policy.

In *The Bremen*, a most internationally minded decision, the United States Supreme Court held that the choice of forum clause should be enforced and that the burden of proof was on Zapata to show that, "trial in the contractual forum will be so gravely difficult and inconvenient that he will, for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain."<sup>39</sup>

Even though, strictly speaking, the *Bremen* decision applies to federal courts sitting in admiralty, it has been generally hailed as laying down the proposition that there is a strong presumption in favor of a choice of forum with regard to all commercial contracts and that the heavy burden is on the defendant to show that the clause is unreasonable.<sup>40</sup>

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38. The Chaparral, [1968] 2 Lloyd's List L.R. 158 (C.A.).

39. 407 U.S. at 18.

40. Becker and Collins, *The Chaparral/Bremen Litigation: Two Commentaries*, 22 INT'L & COMP. L.Q. 329 (1973); Costello, *The Enforcement of Forum Selection Provisions in International Commercial Agreements*, 11 COLUM. J. TRANSNAT'L L. 449 (1972); Leflar, *The Bremen and the Model Choice of Forum Act*, 6 VAND. J. TRANSNAT'L L. 375 (1973); Nadelmann, *Choice-of-Court Clauses in the*

The author agrees with the view expressed<sup>41</sup> that the *Bremen* decision gives judicial support to the Model Choice of Forum Act which was adopted by the National Conference of Commissioners on Uniform State Laws.<sup>42</sup> Section 1 of the Model Choice of Forum Act provides that it applies to interstate and transnational conflicts. Section 2 deals with assumption of jurisdiction in compliance with a choice of forum clause and states that submission will be accepted provided the court is reasonably convenient and the defendant has been properly served. The submission will only be declined if the court has no power under the law of the state to entertain the action, or if the agreement regarding the place of the action was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means. Section 2 states the law in exactly the same manner that it was defined and applied by the English Court of Appeal in the *Unterweser* case.<sup>43</sup> Section 3 of the Model Choice of Forum Act deals with derogation. It provides that if an action is brought in a court in derogation of a choice of forum clause,

[T]he court will dismiss or stay the action, as appropriate, 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.

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*United States: The Road to Zapata*, 21 AM. J. COMP. L. 124 (1973); Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L LAW. 530 (1973).

41. Leflar, *supra* note 40.

42. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219 (1968). The Model Act follows closely the Hague Convention on the Choice of Court which was signed at the Tenth Session of the Hague Conference on Private International Law. This is now open to ratification. The United States abstained in the vote which approved the Convention. See the text of the Convention in 13 AM. J. COMP. L. 629 (1964).

43. The Chaparral, [1968] 2 Lloyd's List L.R. 158 (C.A.).

The Model Act closely reflects the present position of American law with regard to choice of forum clauses subject to two possible qualifications. The first qualification concerns the status of the law in New York. In *Lev v. Aamco Automatic Transmissions*,<sup>44</sup> the court assumed jurisdiction contrary to a clause in a franchise agreement choosing a Pennsylvania forum and applied New York law. Referring to New York law as binding on a federal court sitting in a New York district it held that New York had not joined the trend in enforcing choice of court clauses. *Lev* was decided before the *Bremen* case; nevertheless, that court disregarded well-known decisions in which choice of forum clauses were enforced.<sup>45</sup>

The second possible qualification regards choice of forum and choice of law clauses in bills of lading or other documents of title. The preamble to the United States Carriage of Goods by Sea Act (COGSA)<sup>46</sup> provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.*

Section 13 of COGSA reiterates the applicability of the Act to all contracts as described in the preamble.

It was held in *Indussa Corp. v. S.S. Ranborg*<sup>47</sup> that the COGSA provisions forbid an American court from a holding that might cause a bill of lading covering an ocean shipment to or from the United States to be subjected to foreign rather than American law in litigation. The view has also been expressed that the preamble to the Act contains a conflict of laws rule that an ocean bill of lading to or from a port of the United States must always be subject to COGSA even if it contains a clause providing that a law other than American law applies.<sup>48</sup>

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44. 289 F. Supp. 669 (E.D.N.Y. 1968).

45. See the cases referred to *supra* note 36.

46. 46 U.S.C. § 1300 *et seq.* (1970).

47. 377 F.2d 200, 203 (2d Cir. 1967) (*en banc*).

48. Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L. 365 (1973).

The *Indussa* case, like *Lev*, also preceded *Bremen*. A federal court in the exercise of its admiralty jurisdiction is now bound to give effect to the choice of forum clause unless the plaintiff can discharge the heavy onus which is imposed on him and bring himself within one of the defenses. The fact that the foreign court will not apply the United States COGSA thereby excluding or lessening the liability of the carrier contrary to § 3(8) of the Act provides no convincing argument. Trial of the *Bremen* case by the High Court in England would have led to an application of the exculpatory clauses, yet, the Supreme Court upheld the choice of forum clause. Once the American court decides that the foreign court has jurisdiction according to the choice of forum clause it need not inquire into the American conflict rule; it will be up to the foreign court to follow its own conflict rule and decide whether the U.S. Carriage of Goods by Sea Act applies to the case or not.

The decision in *Bremen* is to be welcomed not only because of its international outlook but because it restored an existing imbalance between choice of foreign court clauses and submission to foreign arbitration. The United States, by ratifying and implementing in 1970 the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>49</sup> [hereinafter referred to as the United Nations Convention] has undertaken the obligation to recognize an agreement to arbitrate unless the agreement is found to be void.<sup>50</sup> There is no conceivable reason to have less faith in foreign courts than foreign arbitrators.

A few years after implementation by the United States of the United Nations Convention, the United States Supreme Court in *Scherk v. Alberto-Culver Company*,<sup>51</sup> by a slender majority of five to four, overturned a decision of the Court of Appeals of the Seventh Circuit thereby enforcing a clause which submitted disputes exclusively to foreign arbitration. The dispute impinged on the sensitive area of application of Section 10(b) of the Securities Exchange Act of 1934<sup>52</sup> and Rule 10b-5.<sup>53</sup> The section and the rule under it concern misrepresentations as to securities and are intended to protect investors. The decision allowing exclusive foreign arbitration was based on the international

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49. [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997; 9 U.S.C. § 201 *et seq.* (1970).

50. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, 330 U.N.T.S. 38.

51. 417 U.S. 506 (1974).

52. 15 U.S.C. § 78j *et seq.* (1970).

53. 17 C.F.R. § 240.10b-5 (1951).

character of the agreement. The agreement was between Scherk, a German citizen residing in Germany and Alberto-Culver, a corporation organized in Delaware with publicly held stock listed on the New York Stock Exchange and headquarters in Illinois. The contract concerned the acquisition by Alberto-Culver of two corporations in Germany and one in Liechtenstein which were owned by Scherk together with all their rights to trademarks in cosmetics. The only contact with the United States was that Alberto-Culver was organized and based in the United States and that the agreement was initially negotiated in the United States. The agreement provided for settlement of disputes exclusively by arbitration according to the rules of the International Chamber of Commerce in Paris, France. It also provided that it was to be governed by the law of Illinois.

Alberto-Culver disregarded the arbitration clause and brought an action in the district court in Illinois to rescind the contract and recover damages. Rescission was sought on the ground that Scherk had misrepresented the trademarks as being unencumbered thereby violating section 10b-5. The court distinguished its previous decision in *Wilko v. Swan*,<sup>54</sup> on the ground that the *Wilko* case dealt with a domestic and not an international situation and, therefore, came within the reach of U.S. securities regulation. Unfortunately, the court did not have to face the issue whether the United Nations Convention of its own force would require enforcement of the agreement to arbitrate.<sup>55</sup> Article II of the United Nations Convention requires enforcement of an agreement to arbitrate by an American court (whether federal or state) unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed."

The minority opinion delivered by Justice Douglas relied on the effect of § 29(a) of the Securities Exchange Act of 1934 which makes agreements to arbitrate liabilities void. The agreement of the parties was to be governed by Illinois law and Article II of the United Nations Convention provides that void agreements to arbitrate are unenforceable. Article V(2) of the United Nations Convention further provides that recognition or enforcement of an award may be refused if the difference is not arbitrable or on

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54. 346 U.S. 427 (1953).

55. Scherk, 417 U.S. at 520-21. The majority opinion considered the United Nations Convention merely in a footnote and observed that it provided strong persuasive evidence of congressional policy consistent with the opinion.



grounds of public policy. However, enforceability of the award and enforceability of the agreement to arbitrate are not linked in the Convention.<sup>56</sup> Non-arbitrality of the dispute or public policy considerations may prevent the enforcement of a foreign award but these factors are not related to the enforceability of the agreement to arbitrate. The minority opinion also raised a matter which will become increasingly important in the near future, *i.e.*, the impact of internal regulatory legislation on the conduct of transnational corporations.

The decisive factor which weighed heavily with the majority was that disregard of an arbitration clause in an international agreement with a defendant whose assets were outside the jurisdiction would amount to an exercise in futility. Effectiveness is one of the most important considerations in the formulation of a pragmatic conflict rule. It is clear from the majority opinion that the Justices were swayed by the complications that could have arisen if the court refused to enforce the arbitration clause; Scherk could have easily sought and obtained the assistance of the French courts.

The effect of the decision in *Scherk* is important as well in the area of antitrust. The view that securities regulation and antitrust are matters of public interest is incontrovertible.<sup>57</sup> On the other hand, they both raise the problem of effectiveness in connection with truly international situations. While matters dealing with the criminal or administrative aspects of securities regulation and antitrust are not arbitrable, matters relating to validity or rescission of an international business contract cannot escape the effectiveness of an arbitration clause. Whether a party is entitled to raise as a defense the invalidity of an agreement or clause because it allegedly violates an antitrust provision is a matter which should be left to the arbitrator chosen by the parties.

The United States, as mentioned earlier, has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but with the reservation that it will only apply to differences arising under a commercial relationship, whether contractual or not. This is implemented by § 202 of the United States Arbitration Act<sup>58</sup> which provides as follows:

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56. *Id.* at 530.

57. Nissen, *Antitrust and Arbitration in International Commerce*, 17 HARV. INT'L J. 110 (1976).

58. United States Arbitration Act, 9 U.S.C. § 202 (1970).

An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

The Draft Convention between the United Kingdom and the United States on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters renders support to choice of court and choice of arbitration clauses. Article 6(b) deals with derogation and provides as follows:

Recognition or enforcement of a judgment is not required by this Convention if: (b) the judgment was given in proceedings brought in violation of an agreement between the parties to the original proceedings giving exclusive jurisdiction to a court or other authority, or to an arbitral tribunal; . . . .

Conversely, Article 10(d) of the Draft Convention provides that a judgment given by a court which assumed jurisdiction pursuant to a choice of forum clause will satisfy the jurisdictional requirements of a court in the United States or United Kingdom, as the case may be, in which recognition or enforcement is being sought. The only prerequisites are: (1) that the defendant was not acting pursuant to a statutory requirement; (2) that the agreement to submit was express and in writing or confirmed in writing; and (3) that the choice of forum pertain to present or future disputes regarding a specified legal relationship. The only prerequisite that requires some explanation is that the submission was not in compliance with a statutory requirement. Its purpose is to avoid legislative provisions compelling a person to submit to local jurisdiction. By the use of such a device a state could extend the jurisdiction of its courts beyond the proper limits.

## II. THE EUROPEAN COMMUNITY APPROACH

### A. *Choice of Law Clauses*

Europe for the most part has traditionally accepted the autonomy of the parties to choose the law governing contractual

obligations.<sup>59</sup> However, there was much talk about the influence of a planned economy on the free choice by the parties. One would have thought that the change from economic *laissez faire* to state ownership in the East with a mixed and planned economy in varying degrees elsewhere, excluding the United States, was bound to affect the autonomy of the parties. Yet, the evidence points the other way. If anything, the United States adhered to the law where the contract was made. State enterprises in Eastern Europe and the Soviet Union, in their thirst for technology, have been prepared to submit their agreements to a law unconnected with the transaction (e.g., Swedish law or the Swiss law of obligations).

A thorough analysis of existing trends with reference to decided cases was undertaken within the well informed and resourceful atmosphere of the World Bank and reveals that autonomy still prevails.<sup>60</sup> Complete party autonomy is expressed in Article 2 of the Hague Convention on the Law Applicable to the Sales of Goods of 1955.<sup>61</sup> The European Community's Draft Convention on the Law Applicable to Contractual Obligations<sup>62</sup> provides in Articles 3 and 4 that the law governing contractual obligations is the law either expressly or impliedly chosen by the parties. It is only in the event of lack of choice that the law with which the contract is most closely connected applies. The public policy corrective which excludes the application of the normally

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59. The Institut de Droit International resolved as early as 1908 that the law expressly chosen by the parties should apply; See 22 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 289-292 (1908). Article 7 of the Polish law entitled the Private International Law of 1926 provided for a limited choice out of five possible laws (law of nationality, law of domicile, *lex contractus*, *lex solutionis* or the law of the situation of a thing.) Article 25 § 1 of the 1965 Polish law requires only some connection between the chosen law and the transaction; See A. MAKAROV, GRUNDRIG DES INTERNATIONALEN PRIVATRECHTS 123-25 (1970). The Greek Civil Code in 1940 provided in Article 25 that contractual obligations are governed by the law chosen by the parties and failing a choice by the law which according to all the particular circumstances is suited to the contract.

60. G. DELAUME, TRANSNATIONAL CONTRACTS, vol. 1, § 1.01, and generally §§ 4.01-4.06 (1976); See also H. BATIFFOL, LES CONFLICTS DE LOIS EN MATIÈRE DE CONTRATS (1938); A. TOUBIANA, LE DOMAINE DE LA LOI DU CONTRAT EN DROIT INTERNATIONAL PRIVÉ (1972).

61. See text in G. DELAUME, *supra* vol. 2, app. I. The Convention which is effective was ratified by a number of Western and Northern European countries.

62. Batiffol, *Project de convention C.E.E. sur la loi applicable aux obligations contractuelles*, 11 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 181-86 (1975).

governing law has been applied sparingly to contract cases.<sup>63</sup> It has even been said that the French concept of *fraude à la loi* which is intended to prevent the evasion of mandatory provisions by the choice of an unconnected law or by the creation of an artificial connection was mainly applied to cases not dealing with contractual obligations.<sup>64</sup> Although there are no leading French cases dealing with the application of *fraude à la loi* to international commercial agreements, in Continental Europe the influence of learned opinion (the "doctrine") on the application of the law is considerable. It is particularly so in the sphere of private international law. The argument in favor of the application of *fraude à la loi* is most convincing<sup>65</sup> and is comparable to the English concept of application of mandatory provisions. The two influences are bound to have effects in Europe and may find fertile ground in the United States where federal and state courts have never given their full-hearted support to free choice. The corrective of evasion will preserve as a rule freedom of choice and in exceptional circumstances, will provide protection for the public interest without the need to resort to public policy. Furthermore, it will find support in the increasing application of international standards of conduct and international guidelines to transnational corporations and the transfer of technology.<sup>66</sup>

### B. Choice of Forum Clauses

Common jurisdictional rules acceptable to the six original member states of the European Community are expressed in the Convention on Jurisdiction and the Enforcement of Judgments in

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63. G. DELAUME, *supra* vol. 1, at § 4.07.

64. *Id.* vol. 2 at § 10.06.

65. B. AUDIT, LA FRAUDE A LA LOI §§ 12, 15, 167, 219, 237 (1934); H. BATIFFOL, *supra* note 60, at §§ 61-71; H. BATIFFOL/LAGARDE, DROIT INTERNATIONAL PRIVÉ, vol. II at 221 (1971).

66. OECD Communique of June 22, 1976, on Independence, Development Cooperation, and Strategy for Sustained Economic Expansion; Declaration on International Investment and Multinational Enterprises with Annexed Guidelines of June 21, 1976, and Decisions of the OECD Council of June 21, 1976, reproduced in 15 I.L.M. 961 (1976); Drafts of an International Code of Conduct on Transfer of Technology by Group B and the Group of 77 within the framework of UNCTAD, reproduced in 14 I.L.M. 1333 (1975), and criticized by the author as to the applicable law in Zaphiriou, *An International Code of Conduct on Transfer of Technology*, 26 INT'L & COMP. L. Q. 210 (1977).

Civil and Commercial Matters<sup>67</sup> [hereinafter the European Convention]. It was ratified by the six states and became effective February 1, 1973. The new member states (Denmark, Ireland, Norway and the United Kingdom) are required to accede to the Convention under the Treaty Establishing the European Economic Community and the Act of Accession.<sup>68</sup>

Article 17 of the European Convention recognizes choice of forum clauses submitting disputes to the jurisdiction of the court of a Contracting State if at least one of the parties is "domiciled" in one of the Contracting States. The definition of domicile is left to the law of the court which is seized of the matter.<sup>69</sup> Whether a person (either natural or legal) is domiciled in another Contracting State is determined by the law of that Contracting State.<sup>70</sup> An association is domiciled where its "seat" is and the seat is determined according to the private international law rules of each Contracting State.<sup>71</sup>

A comparative analysis of rules for the determination of domicile and the seat of an association is outside the scope of this article. Divergent views as to domicile or residence of individuals and associations between member states and particularly between Ireland and the United Kingdom (the Common Law group) and the other member states (the Civil Law group) will prove troublesome in this and other topics. For the purpose of this article it will suffice to say that "domicile" means having a place of residence or place of business and that "seat" is the place where an association has its center of management and control. There are several indications that future interpretations will tend to adopt the above definitions as common denominators leading as

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67. 15 J.D. COMM. EUR. (No. L 299) 32 (1972). The references are to the French text as there is yet no official English translation. See for a note on the Convention, Zaphiriou, *The EEC Convention on Jurisdiction and Enforcement of Judgments*, 1969 J. BUS. L. 74.

68. Treaty Establishing the European Economic Community, March 25, 1957, art. 220, 298 U.N.T.S. 11; The United Kingdom, Denmark, Norway and Ireland joined the European Economic Community by the Treaty Concerning the Accession to the European Economic Community and to the European Atomic Energy Community as well as the Act Concerning the Conditions of Accession and the Adjustments to the Treaties, art. 3(2), January 22, 1972, Office for Official Publications of the European Communities: Luxembourg, 1973.

69. European Convention, art. 52.

70. *Id.* art. 52(2).

71. *Id.* art. 53.

far as possible to uniform solutions. It may be assumed that the suggested definitions will be accepted by a court in which an action is filed pursuant to a choice of forum clause or by a court which is asked to dismiss the suit for lack of jurisdiction on the ground that the dispute was submitted by the parties to the exclusive jurisdiction of another court.

In addition to domicile by one of the parties in a Contracting State, Article 17 provides for two further requirements: (1) the agreement must be in writing or if oral it must be confirmed in writing; and (2) the submission can apply to present or future disputes which relate to a particular legal relationship (*e.g.*, arising under or in connection with a particular contract.)

In light of the above analysis, the Common Market subsidiary or even possibly the Common Market branch of an American corporation which submits disputes to the exclusive jurisdiction of a court in one of the Contracting States can invoke Article 17 of the European Convention and insist that the chosen court has exclusive jurisdiction. The domicile of the other party is immaterial. The European Convention, however, provides only minimum jurisdictional standards to be followed by all Contracting States. Beyond those standards each Contracting State applies its own rules, which, in addition to the requirements of Article 17, must be satisfied in order for the court to acquire jurisdiction. Choice of court clauses between non-residents are generally enforceable in every member state<sup>72</sup> with the sole exception of Italy.<sup>73</sup> There, choice of forum clauses are subject to more stringent limitations relating to the nationality, domicile and residence of the parties or depending upon whether the obligation is foreign.

The European Convention provides for two exceptions to the enforcement of a choice of court clause which are to apply to all persons irrespective of domicile. The first exception concerns the ouster of the jurisdiction of a court of a Contracting State which has exclusive jurisdiction because of the subject matter of the dispute, and the second concerns contracts of adhesion.

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72. G. DELAUME, *supra* vol. 1, at §8.11.

73. Art. 2 of the Italian Code of Civil Procedure provides that an agreement to submit to a foreign jurisdiction in derogation of the jurisdiction of an Italian court is only enforceable if it relates to a foreign obligation or to a dispute between two aliens or one alien and a non-resident Italian. The above provision is not applicable to natural or legal persons having a place of residence, place of business, or a center of management and control within the European Community. See also art. 3(2) of the European Convention.

Article 16 of the European Convention provides that the following courts have exclusive jurisdiction as to certain matters:

(1) The courts of the Contracting State in which immovable property is situated as to rights in, or tenancies of, the immovable property;

(2) The courts of the Contracting State in which a legal person or association has its center of management and control as to matters relating to the existence or dissolution of a legal person or association and as to the powers of its officers and directors;

(3) The courts of the Contracting State in which a public register is kept as to matters relating to the validity of entries in the register; and

(4) The courts of the Contracting State in the territory of which the filing or registration for a patent, trademark, design, utility model or other similar right requiring filing or registration was applied for, or effected, or deemed to have been effected according to the terms of an international convention, as to matters of registration or validity of the said rights.

All of the above matters cannot be submitted by agreement to the jurisdiction of another court.

As to contracts of adhesion, only present disputes arising under an insurance policy, a conditional sale or a lease-purchasing agreement can be submitted to the jurisdiction of a particular court. Future disputes can only be submitted to the jurisdiction of a particular court at the option of the assured or of the purchaser or may be submitted to the jurisdiction of a court which is within the territory in which both parties are domiciled.<sup>74</sup>

All member states of the European Community with the exception of Ireland have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>75</sup> France has adopted the United Nations Convention with the reservation that the Convention will apply to differences arising under a relationship, whether contractual or not, which is considered to be commercial under French law. Belgium, Denmark, the Federal Republic of Germany, France and the Netherlands recognize and enforce only awards made in the

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74. European Convention, arts. 7-12, 14, 15.

75. See updated list in C. SCHMITTHOFF, *supra* vol. 1, at 9.

territory of another Contracting State. It is, therefore, probable that in any of these countries a court when seized of a matter in respect of which the parties have made a valid agreement to arbitrate, will only refer it to arbitration pursuant to Article II of the United Nations Convention if the arbitration is to take place in a state which has ratified the United Nations Convention.<sup>76</sup>

### III. CONCLUSIONS

Choice of law clauses are generally upheld unless they are contrary to public policy or attempt to evade mandatory provisions of the law with which the contract is most substantially connected.

Clauses submitting differences to the exclusive jurisdiction of a particular court or of the courts of a particular state are generally upheld in the United States and in the United Kingdom subject to three qualifications: (1) New York has tended to lag in joining the trend; (2) American or Scottish courts may decline jurisdiction on the ground that it is a *forum non conveniens*; and (3) a choice of forum clause in the United Kingdom and the United States will be given no effect if the defendant can prove that trial by the chosen court would under the circumstances be unfair or unjust.

The picture in the European Community is less clear and will affect the United Kingdom when the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters becomes effective in the United Kingdom. Clauses submitting differences to the exclusive jurisdiction of a particular court or of the courts of a particular State are generally upheld subject to two exceptions: (1) they cannot oust the jurisdiction of a court of a Contracting State (*i.e.*, the six original member states of the European Community and eventually all member states) which has exclusive jurisdiction because of the subject matter of the dispute; and (2) in the case of contracts of insurance, conditional sales and lease-purchasing agreements, choice of court clauses are subject to important limitations.

The United Kingdom, the United States and the member states of the European Community, with the exception of Ireland, are bound by Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards to

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76. Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is discussed *supra*, p. xx.



dismiss or stay proceedings which are in violation of a valid agreement submitting the difference to the jurisdiction of an arbitral tribunal. The dismissal or stay must be requested by a party to the proceedings right at the outset and before any other step is taken. The United Kingdom requires the agreement to be non-domestic in the sense that it submits the difference to arbitration outside the United Kingdom and that one of the parties is an individual habitually resident in a foreign State or a corporation incorporated or having its center of management and control in a foreign State. The United States requires the difference to arise under a relationship which whether contractual or not is considered to be commercial. It also requires that the difference exist not solely between citizens of the United States or corporations incorporated or having their principal place of business in the United States unless it involves property located abroad, or has some other reasonable relation with one or more foreign states.

In the European Community, France has also limited the application of the United Nations Convention to differences that relate to a commercial relationship. Belgium, Denmark, the Federal Republic of Germany, France and the Netherlands have adopted the Convention on a basis of reciprocity and it is therefore probable that an agreement providing for arbitration in a foreign country which has not adopted the United Nations Convention would not fall under Article II of the Convention.