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Choice of Forum and Public Policy:

SOME INDICATIONS OF THE DEVELOPMENT IN UNITED STATES LAW OF A DISTINCT "INTERNATIONAL" PUBLIC POLICY

by Gabriel M. Wilner*

Introduction – What is "international" public policy?

In this decade, the United States Supreme Court decided two cases which revolved around the enforceability of choice of forum clauses contained in transnational commercial contracts. The decisions which the Court rendered reshaped significantly the legal contours of the enforceability of such clauses. In the two cases, the Court signaled that it was prepared to recognize the distinction between what may be termed "internal" public policy and what may be termed "international" public policy. The recognition of this distinction is likely to have a vital bearing on the right of persons to provide for a specific foreign judicial or arbitral forum as part of the transnational agreement into which they have entered.

Before discussing the impact of the two cases on the effectiveness of choice of forum clauses, it is appropriate to define the two varieties of public policy, particularly in terms of how they pertain to issues raised by choice of forum clauses. The relationship between "internal" public policy and "international" public policy has an approximate analogue in the distinction made in French law between *ordre public interne* and *ordre public international*. The distinction is that one set of standards is applied to transactions which are performed in a local context, while another set of standards is applied to transactions which have international elements. An example of the former class of transactions is a contract which is entered into by two nationals and which is to be performed within their country; an example of the latter class of transactions is a contract which is entered into by persons of different nationalities and which is to be performed in a country other than the place where the contract is entered into.

The standards required by *ordre public interne* are parts of the total law of the forum from which there may be no derogation. The standards required by *ordre public international* can differ from standards of the local law of the forum, provided that the transaction contains sufficient transnational elements. Nevertheless, there remain

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certain forum law standards that even transnational transactions must meet. That is, the *ordre public international* of the forum is deemed to include certain of the standards required by the *ordre public interne* of the forum.¹

The problem and the two United States Supreme Court cases

Parties to a transnational commercial contract may decide that they would prefer that their future disputes be decided in a particular judicial or arbitral forum. This preference will be based on a variety of reasons. The articulation of such a preference will avoid forum shopping; and, above all, it will avoid the possibility that suit will be brought in a forum which one of the parties considers hostile, biased or incompetent, or in a forum which will be likely to apply rules of law detrimental to the interests of one or the other of the parties. Propelled by any or all of these reasons, the parties may include in their agreement a clause granting jurisdiction over claims arising out of the contract to one or more judicial fora or to an arbitral forum.

Any judicial forum which is named is unlikely to refuse to take jurisdiction. This is true whether the clause calls for exclusive jurisdiction or not. As we will see, in a case that will be discussed in detail below, the English courts took jurisdiction in the controversy between a United States corporation and a West German corporation a ship of which, the Bremen, had undertaken towage under an agreement which provided: "Any dispute arising must be treated before the London Court of Justice."² Almost without exception, a designated

¹ It must be stressed that, despite the use of the word "international" in describing one of the two types of public policy, both types of public policy should not normally be considered in any context other than that of the national legal system of the forum. See, e.g., H. BATTIFOL & P. LAGARDE, 1 DROIT INTERNATIONAL PRIVÉ (6th ed. 1974) §§365-369. At section 366, the authors are critical of the common use of the words "international" and "internal" to distinguish between the public policy standards. They state, in discussing *ordre public international*, that "the expression is scarcely a happy one since this *ordre public* is essentially national and opposes itself specifically to the normal international order which is the application of the competent laws The surest terminology, when the specification appears useful, consists in addressing *ordre public* in the sense of conflict of laws (*droit international privé*) or *ordre public* in the sense of internal private law (*droit civil interne*)." (This author's translation). Battifol and Lagarde cite the reader to Cour de Cassation cases which have used the terminology which they suggest to be superior. This author, while grasping the point made about the nature of "international" public policy, does not believe that the use of the word "international" poses any danger as long as the national nature of public policy as public policy as applied presently by national courts is understood. Perhaps, in order to avoid confusion, the word "transnational" should be substituted for "international".

² *Unierweser Reederei, GmbH. v. Zapata Off-Shore Company* 2 Lloyd's List L. R. 158 (1968). On the other hand, in *Keaty v. Freeport Indonesia Inc.*, 503 F.2d 955 (1975), the Court of Appeals for the Fifth Circuit did not enforce the following clause because it did not consider it to be "a mandatory forum-selection clause": "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." *Id.* at 956 (emphasis added).

judicial forum will accept and exercise any jurisdiction conferred on it under a contractual agreement. The real problem arises when non-designated courts are asked to *stay* an action in favor of a designated foreign forum.

If, as it seems likely, a United States firm will have difficulty in persuading other parties to an international commercial agreement to choose a United States forum, what alternatives are available to the United States firm? In general, they include the courts of the other parties (*e.g.*, the courts located at the other parties' main places of business), the courts of the place where the transaction is to be performed, a neutral forum or a combination of these alternatives.

How will the courts of the United States treat a choice of forum clause calling for the jurisdiction of a foreign court? Before 1971, United States courts were likely to disregard such a clause whenever an American party to the agreement brought a suit in a United States forum. The public policy-based reasons given by the courts were threefold: the superior convenience of the United States forum, possible-prejudice abroad, and the likelihood of non-application of United States law by the foreign court.

In 1971, however, the United States Supreme Court initiated a movement in the opposite direction. In deciding *The Bremen v. Zapata Off-Shore Corporations*,³ the Court stated: "Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our law and in our courts."⁴ The Court acknowledged that the United States courts had been divided on the matter, but pointed to acceptance of this aspect of freedom of contract in other countries. The Court then added: "Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum."⁵ The Court noted that in this case the choice of the forum had been made in arms-length negotiation by businessmen. Moreover, according to the Court, the parties were justified in eliminating uncertainty as to the places where suit might be brought. The elimination of such uncertainty by the agreement in advance on a forum was "an indispensable element in international trade." In the mind of the Court, then, there were "compelling reasons why a freely negotiated private international agreement, unaffected by fraud,

³ 407 U.S. 1 (1971). Among the many treatments of this complex case are Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124 (1973) and Becker & Collins, *The Chapparral/Bremen Litigation: Two Commentaries*, 22 INT'L. & COMP. L.Q. 329 (1973).

⁴ 407 U.S. 1, 8-9.

⁵ *Id.* at 11-12.

undue influence, or overweening bargaining power, such as that involved here, should be given full effect."⁶

On the strength of the above stated rationale, the Supreme Court concluded "that the forum clause should control absent a strong showing that it should be set aside." The correct approach, said the Court, "would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁷ Contravention of a strong public policy of the forum⁸ and serious inconvenience, which was characterized as inconvenience depriving the party of its day in court, were retained by the Court as grounds for non-enforcement of the choice of forum clause. The Supreme Court distinguished between the instant case and an earlier case, *Bisso v. Inland Waterways Corp.*,⁹ which had involved "towage business strictly in American waters." The Court found that the considerations which it had set out for strictly local situations "are not controlling in an international commercial agreement."¹⁰

The Bremen v. Zapata has been followed, of course, in the federal courts.¹¹ Whether this approach would be followed in the state courts remains a question.¹²

In deciding *Scherk v. Alberto-Culver Co.*¹³ in 1974, the Supreme Court confirmed (by a five to four majority) that parties to a transna-

⁶ *Id.* at 12-13.

⁷ *Id.* at 15.

⁸ Fraud and overreaching exemplify such a contravention.

⁹ 349 U.S. 85 (1955).

¹⁰ 407 U.S. at 16.

¹¹ *Republic Int'l Corp. v. Amco Engineers Corp.*, 516 F.2d 161 (9th Cir. 1975). The challenged contract provision in this case provided: "for the purposes of this contract, the contracting parties place themselves under the jurisdiction and competence of the courts of the Republic of Uruguay." *Id.* 168 n. 12; *Tai Kien Industry Co. Ltd. v. M/V Hamburg*, 528 F.2d 835 (9th Cir. 1976); *In Flight Services Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 n.4 (6th Cir. 1972); *Gaskin v. Stumm Handel GmbH.*, 390 F. Supp. 361 (S.D.N.Y. 1975); *Spatz v. Nascone*, 364 F. Supp. 967 (W.D.Pa. 1973); *Roach v. Hapag-Lloyd A.G.*, 358 F. Supp. 481 (N.D.Cal. 1973). Some courts have not subscribed to the modern view. In *Cooperweld Stell Co. v. Demag-Mannesmann-Boehler*, 354 F. Supp. 571 (E.D.Pa. 1973), for example, the court, which was faced with a standard clause selecting the "court of justice having jurisdiction in the area where the supplier has its main office", refused to allow the application of the clause because such application would have given German courts jurisdiction. The rationale of the court was the traditional one. The court argued that "It was the German engineers who had expanded their horizons into the United States . . . Their business will hardly be encouraged if they insist on trying the case in Germany because of a formal clause . . . The court held that it was not bound by *Bremen* because . . . the Supreme Court appears to be telling us to apply *M/S Bremen* in admiralty cases." *Id.* at 573. This is a disappointing interpretation of the Supreme Court's decision.

¹² See generally Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 387 (1973).

¹³ 417 U.S. 506 (1974). See the dissent of Stevens, C. J., to the decision of the case rendered by the Court of Appeals. *Alberto-Culver Co. v. Scherk*, 484 F.2d 611 (7th Cir. 1973). Justice Douglas' dissent focused on the fear that an essentially local question

tional contract are free to select an exclusive forum. The Court enforced a clause specifying a foreign arbitral forum,¹⁴ even though the Court knew that enforcement could result in the non-application of the 1934 Securities Exchange Act, a piece of legislation containing the highest ("internal") public policy content.¹⁵ The Court admitted that in a purely domestic situation it would have been reluctant to enforce the arbitration clause.¹⁶

would escape the public policy rules of domestic regulation just because the question involved some small international element. In a manner entirely consistent with his philosophy, Justice Douglas was more anxious to protect the public than to encourage international commerce. For a critique of the dissent, see Kling, *Greater Certainty in International Transactions Through Choices of Forum*, 69 AM. J. INT'L L. 366, 372-73 (1975).

¹⁴ The contract provided for arbitration under the auspices of the International Chamber of Commerce. The arbitration was to be held in Paris unless the parties agreed otherwise. The contract also stated that the law of the State of Illinois was to apply to and govern the agreement, "its interpretation and performance."

Commercial arbitration in the context of interstate and international transactions has been favored through the U.S. Arbitration Act. 9 U.S.C. § 1 *et seq.* (1970). Moreover, the U.S. is now a party to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 330 U.N.T.S. 38 (1959) Dec. 29, 1970, 21 U.S.T. 2518, T.I.A.S. No. 6997. The U.S. has even passed enabling legislation with respect to this Convention. 9 U.S.C. § 201 *et seq.* (1970).

Article 2 of the Convention calls for the enforcement of arbitration clauses; Articles 3 through 7 deal with enforcement of awards. In *Parsons & Whittlemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (1974), the Court of Appeals for the Second Circuit enforced a foreign arbitral award pursuant to the Convention. An argument on public policy grounds was turned down by the court: "We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice." *Id.* at 974. Query: is this a standard of "international" public policy?

¹⁵ For a discussion of reasons why, even in the context of international transactions, an arbitration clause calling for arbitration of antitrust issues should not be given effect, see Nissen, *Antitrust and Arbitration in International Commerce*, 17 HARV. INT'L L. J. 110 (1976).

¹⁶ In a prior case, *Wilco v. Swan*, 346 U.S. 427 (1953), the Supreme Court held that an arbitration clause in a contract to which the 1934 Securities Exchange Act was exclusively applicable was invalid. The contract was in a purely United States context. This general proposition was restated in dictum in *Bear v. Hayden Stone, Inc.*, 526 F.2d 734 (9th Cir. 1975). The circuit court stated: "Arbitration is regarded with favor by the courts; *Prima Paint v. Flood & Conklin*, 388 U.S. 395... except in situations involving protective legislation,³ an exception not germane to this case." The footnote referred to *Wilco v. Swan* for support but then added "*but see Sherk v. Alberto-Culver Co.*"

As indicated by the caveat in the footnote, the choice of an arbitral forum would appear to pose a peculiar problem to the courts. Whether the place chosen for arbitration is within the country or state where the court called upon to enforce the arbitration clause sits or whether the arbitral forum clause calls for another place, a finding that the arbitration agreement is valid results in the use of a tribunal other than the regular judicial institutions of the forum. If the arbitration clause calls for arbitration in another country, the criteria for determining whether the transaction is international can be utilized in deciding the enforceability of the clause. Suppose, however, that the arbitration clause calls for arbitration in the United States and that at least some, if not all, of the criteria for considering the transaction international are present. Under these circumstances, will the arbitration clause be enforced? Will it be enforced even if the subject of dispute has substantial public policy content in U.S.

The Court characterized the arbitration clause as one type of choice of forum clause; it relied on *The Bremen v. Zapata* for support. The Court insisted that the choice of forum clause is an essential part of the international contract. According to the Court, the parties involved in *Scherk v. Alberto-Culver Co.* might not even have entered into the contract if the forum had not been designated therein.

Thus, in *Scherk v. Alberto-Culver Co.* as in *The Bremen v. Zapata*, one finds a recognition that a distinction exists between domestic transactions and transnational transactions. The two cases embrace the view that transnational transactions must be encouraged and that such transactions should therefore be subject to less restrictive standards than purely domestic transactions. In essence, *Scherk* and *The Bremen* reflect a recognition by the Supreme Court of "international" public policy. That the Supreme Court has begun to formulate a set of public policy standards peculiar to international transactions has already made an imprint on the decision-making processes of lower federal courts. For example, in deciding a case rooted exclusively in a United States context, the United States District Court for the Western District of Texas commented that *Scherk v. Alberto-Culver Co.* was inapplicable because *Scherk* applied "only to international transactions."¹⁷

Conclusions

What do the two Supreme Court cases and other recent judicial pronouncements tell the draftsmen for a United States national who is party to a transnational commercial agreement? It appears that if a choice of forum clause calling for the exclusive jurisdiction of one or more foreign judicial or arbitral fora is inserted and if the agreement is transnational in nature, the United States courts will enforce the clause. Even though Delaume points out, in his important article in the *Journal de Droit International*,¹⁸ that neither the United States courts nor the courts in France have been able to state a satisfactory definition of a transnational contract, the United States Supreme Court did set forth in *The Bremen v. Zapata* and in *Scherk v. Alberto-Culver Co.* a number of definitional criteria. Comprising these criteria were the nationality of the parties, the transnational character of the negotiations, the extent of contractual performance outside the United States, and the choice of law. Moreover, in addition to these criteria, the Court considered the international *impact* of the transactions in dispute.

One further element that may well be considered is whether the agreement was subject to actual negotiations or whether it was any one

law? Will "international" public policy standards be developed to deal with this specific area?

¹⁷ *Newman v. Shearson Hamill*, 383 F. Supp. 265 (W.D. Tex. 1974). See *Starkman v. Seroussi*, 377 F. Supp. 518 (S.D.N.Y. 1974); see also *Comment, Exculpatory Clauses in Towage Contracts*, 49 TUL. L. REV. 392 (1975).

¹⁸ Delaume, *Clauses d'élection de for et clauses compromissaires: évolution et gestation d'un nouveau droit américain*, 102 J. DU DROIT INT'L [Clunet] 486, 501-502 (1975).

of a variety of adhesion contracts. In this context, a number of cases before the United States federal courts have raised the issue of whether choice of judicial forum clauses in bills of lading covered by the Carriage of Goods by Sea Act should be upheld. In *Indussa Corp. v. S.S. Ranborg*¹⁹ and in *Carbon Black Export Inc. v. The S.S. Monrosa*,²⁰ the Second and Fifth Circuit Courts of Appeals invalidated such choice of judicial forum clauses. The issue of the type of public policy standard to be applied to this variety of transnational contract of carriage has not yet reached the Supreme Court. It is not clear whether the "international" public policy standards for determining whether a choice of forum clause is to be given effect will include a requirement that the transnational agreement be the product of actual negotiations.

The conclusion to be drawn from the cases discussed is that the United States party is unlikely to be able to sue in a United States forum which, in order to take jurisdiction, would be compelled to disregard the choice of forum clause on grounds such as forum nonconveniens or public policy, based, among other things, on the fact that the foreign forum is unlikely to apply United States law or United States law concepts. Precisely this type of public policy argument was rejected in *The Bremen v. Zapata*. The contract which was the subject of litigation in that case contained certain exculpatory clauses which were invalid under United States law, but which would be valid if the English court were to apply its own law.

Of course, in *The Bremen v. Zapata*, the forum chosen was neutral. What if the forum chosen is that of the country of the other party to the international agreement? In a case decided by a United States District Court in New York subsequent to *The Bremen v. Zapata* and *Scherk v. Alberto-Culver Co.*, the court was not sympathetic to the United States party to such an agreement. In *Gaskin v. Stumm Handel*,²¹ a contractual requirement that the parties litigate in West Germany a dispute arising under an employment contract was upheld even though the employee was a United States citizen.

The enforcement by a United States court of a choice of forum clause calling for the exclusive jurisdiction of a foreign court or arbitration tribunal will have its most immediate impact on the jurisdiction of the United States courts to hear disputes arising under the international agreement. The enforcement of such a "derogation" clause gives the foreign forum exclusive jurisdiction. Moreover, the decision by United States courts to enforce such a clause has important

¹⁹ 337 F.2d 200 (2d Cir. 1967). However, in that case, the Court of Appeals mentioned in a footnote that an arbitration clause would not be invalidated in the same context. See Mendelsohn, *Liberalism, Choice of Forum Clauses and the Hague Rules*, 2 J. MAR. L. & COMM. 661 (1971); see also Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COMM. 25 (1971).

²⁰ 254 F.2d 297 (5th Cir. 1958).

²¹ 390 F. Supp. 361 (S.D.N.Y. 1975).

ramifications with respect to the law which is applied and with respect to the enforcement by United States courts of the judgment rendered abroad.

With respect to the law applied by the foreign forum, if there is a choice of law clause in the agreement, the forum's law, including appropriate public policy standards, will determine the validity of the choice of law clause. In the absence of such a clause, the forum's choice of law rules will determine the applicable law. Of course, this does not necessarily mean that the law of the forum will be applied, but such a possibility is strong. And, indeed, until the United States Supreme Court decided *The Bremen v. Zapata*, this possibility motivated most United States courts to reject the choice of forum clause.²² A special aspect of the question of what law is to govern is whether any particular law need be applied by the arbitrator in a proceeding pursuant to an arbitration clause. Even if the normally applicable law is applied, since United States courts do not review arbitration awards on the merits,²³ the incorrect application of substantive rules will go undetected.²⁴

A prerequisite to the recognition or enforcement by United States courts of a judgment made abroad is the presence of jurisdiction in the foreign court. If, in accordance with United States "international" public policy standards, United States courts give effect to choice of forum clauses in transnational agreements, such clauses providing for exclusive foreign fora, then the acquisition by foreign courts of exclusive jurisdiction by means of these clauses becomes a generally accepted basis of jurisdiction under United States law. In such circumstances, in an action in a United States court to enforce a judgment or award rendered by a foreign tribunal, the defense of lack of jurisdiction must fail. In light of the recent decisions of the United States Supreme Court, it would be impossible to reconcile the recogni-

²²E.g., *Indussa Corp. v. S.S. Ranborg*, 337 F.2d 200. In *Indussa* the Second Circuit Court of Appeals considered that, although the foreign forum would apply a statute the content of which was the same as that of the United States statute (both Norway and the United States were parties to the 1924 Brussels Convention on the Unification of Certain Rules relating to Bills of Lading), the fact that the foreign court might interpret differently the statute was inimical to U.S. public policy. See also, *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974). In this case, the court commented that "Although the Supreme Court has acknowledged the *Indussa* decision and [has] not formally rejected [it], see *The Bremen v. Zapata* . . . several passages in *The Bremen* opinion cast some doubt on the underlying rationale of *Indussa*. See e.g., 407 U.S. at 9 . . ." *Id.* at 1296 142. See also *Roach v. Hapag-Lloyd A.G. v. Crescent Wharf & Warehouse Co.*, 358 F. Supp. 481 (N.D.Cal. 1973), in which the court rejected the *Indussa* approach in a bill of lading context.

²³ See M. DOMKE, COMMERCIAL ARBITRATION, 254-262 (1968).

²⁴ For a discussion of choice of law in the context of commercial arbitration, see Wilner, *Determining the Law Governing Performance in International Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646 (1965).

tion of the exclusive jurisdiction of a foreign forum with a subsequent refusal to enforce a judgment rendered by that forum.

In *The Bremen v. Zapata* and in *Scherk v. Alberto-Culver Co.*, the United States Supreme Court set forth broad standards of "international" public policy. With the exception of the limits which the two cases established, it is still too early to state the restrictions likely to be imposed upon these standards. Indubitably, the courts will make some inroads on the sweeping pronouncements in *Scherk*. It should be borne in mind that *The Bremen* was an admiralty case and that *Scherk* arose under both the United States Arbitration Act and the 1934 Securities Exchange Act. Whether, in diversity cases, the state courts and the federal courts must follow the Supreme Court's pronouncements is an unanswered question. Nevertheless, it appears that, in drafting a choice of forum clause which provides for foreign courts or foreign arbitral tribunals, close attention must be paid to the likelihood that the clause will be enforced by United States courts and that, as a result, a United States party will be unable to avoid becoming a party to litigation abroad.

In conclusion, a choice of forum clause might be desirable if one can negotiate for a neutral and convenient judicial or arbitral forum and if the law to be applied to the issues that might arise is satisfactory. The "international" public policy standards which seem to be developing will not stand in the way of a decision by the contracting parties to choose their forum.