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Tai Kien Industry Co. Ltd. v. *M/V Hamburg*: Contractual Forum Selection Clears Another Hurdle

Bremen v. Zapata Offshore Oil Co.,[1] decided by the United States Supreme Court in 1973, marked the end of a longstanding antipathy on the part of American courts toward forum selection clauses in contracts.[2] The effect of the decision has been to allow contracting parties, within the limits of reasonableness,[3] the freedom to agree that a specified tribunal will have exclusive jurisdiction over any commercial disputes which may arise between them. *Zapata* was instituted in a United States district court by one party to a contract against the other, in contravention of an agreement to bring suit only in a particular English court. *Tai Kien Industry Co. Ltd. v. M/V Hamburg* presents an analogous, but somewhat more complex, situation. Citing the *Zapata* decision as controlling, the Ninth Circuit Court of Appeals dismissed a claim brought in the United States District Court on Guam in contravention of a forum selection clause, although an action had been brought in the same district court by the United States against the same defendant for damages arising out of the same incident. Thus, it appears that the enforcement of forum selection clauses will be unaffected by a suit brought by a stranger to the contract against one of the parties to the contract in a court other than the one agreed upon contractually.

Tai Kien Industry Co. Ltd., a Taiwanese corporation, contracted with Fairplay-Peterson and Alpers Seatowage, a German corporation, to tow its ship, the *SS Caribia*, from New York to Taiwan for scrapping. The contract of towage provided that any dispute between the parties be referred to the Supreme Court of Justice in England. During a typhoon, the *SS Caribia* broke loose from the German tug and stranded near the mouth of the Apra Harbor in Guam. It subsequently broke up and sank. The United States brought an in rem action against the German tug, the *M/V Hamburg*, in the United States District Court on Guam seeking recovery for damages caused by the obstruction to navigation and by the accompanying oil spill.

The controversial nature of the case arose when Tai Kien Industry Co. Ltd., the owner of the *SS Caribia*, brought suit in the same court

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[1] 407 U.S. 1 (1973).

[2] Such clauses are variously called forum selection clauses, forum clauses, and choice-of-forum clauses. Contracting parties who wish to include such a clause in their contract can thereby agree that only the jurisdiction of a particular court or of a particular country will be utilized to settle any commercial disputes which may arise between the parties as a result of the contract.

[3] *See* text accompanying note 18, *infra*.

[4] 528 F.2d 835 (9th Cir. 1976).

naming both the *M/V Hamburg* and its owner, the German corporation, as defendants. Tai Kien Industry sought damages for loss of the scrap value of its ship as well as indemnity from any action filed by the United States. The German corporation moved to dismiss both actions brought by Tai Kien Industries on the ground that by filing the actions, the latter had violated the forum selection clause of their contract. The district court granted the motion to dismiss.[5] On appeal to the Ninth Circuit Court of Appeals, Tai Kien Industry contended that, because suit had been instituted by a third party against Fairplay-Peterson in a forum other than the one contractually agreed upon, the clause was no longer reasonable and should not be given effect. In affirming the lower court's dismissal, the court rejected Tai Kien's contention while stressing the foreseeable nature of the accident, the resulting damage and the lawsuit by a third party.

As previously noted, efforts by contracting parties to provide that a specified court have exclusive jurisdiction over any dispute which might arise between them were long viewed with disfavor by American courts. Motions to dismiss an action brought in a court other than the one agreed upon were invariably denied on the ground that such agreements were against public policy and therefore void.[6] Scholars have suggested numerous underlying reasons for this judicial hostility. One, which does no more than state a conclusion, is that parties are powerless to oust the jurisdiction of a court once it has been legitimately acquired under the traditional concepts of jurisdiction.[7] Another reason is the fear of adhesion contracts which could have the effect of denying a forum altogether to a party without equal bargaining power.[8] A third reason embodies a judicial unwillingness to relegate a local domicilliary to a foreign forum where his substantive rights to recover on a cause of action might be hampered.[9] A fourth reason is the judiciary's traditional distaste for arbitration provisions which, it is suggested, "may have been carried over more or less without thought to the choice of forum field."[10] Whatever the underlying reasons, it is clear that courts have been unwilling to enforce such

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[5] Tai Kien Industry Co. Ltd. v. *M/V Hamburg*, unreported decision of the United States District Court on Guam.

[6] *See* Annot. 56 A.L.R.2d 300 (1956).

[7] *See, e.g.*, Carbon Black Export v. The *SS Monrosa*, 254 F.2d 297 (5th Cir. 1958) *cert. dismissed*, 359 U.S. 180 (1959).

[8] EHRENZWEIG, JURISDICTION, STATE AND FEDERAL 97 (3d ed. 1973).

[9] Bremen v. Zapata Offshore Oil Co., 407 U.S. 1,7 (1973).

[10] Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964). The author also reports a conversation he once had with Judge Learned Hand concerning forum selection clauses saying, "It was his guess that this judicial aversion dates from the time when judges were paid by the case and accordingly viewed arbitration and choice of forum provisions as devices that were likely to curtail their income."

agreements and to condone the practice of contractual forum selection.[11]

This traditional American judicial attitude toward choice of forum clauses first suffered erosion with respect to contracts between nonresident aliens.[12] If two aliens sought to confer exclusive jurisdiction on the courts of their own country or those of a neutral country over disputes arising out of a contract to be performed in the United States, American courts saw little justification for preventing them from doing so. Beginning in 1949 and throughout the subsequent decade, the Second Circuit Court of Appeals sought to reverse the rigid attitude taken by American courts opposing contractual forum selection.[13] Other federal and state courts continued in their refusal to enforce such agreements.[14]

Resolution of the growing conflict between courts willing to give effect to forum selection clauses and those which were not so willing did not occur until 1973 when The Supreme Court, in *Zapata Offshore Oil Co,* reversed a Fifth Circuit decision which had declared void a forum selection clause involving a United States national. An American corporation had contracted with an Italian corporation to tow a drilling rig from Louisiana to Italy. Their agreement provided that all disputes arising out of the contract were to be settled in the Supreme Court of Justice in England. After the drilling rig was damaged in a storm, it was towed into port in Florida where the American corporation instituted a suit alleging negligent towage. The Supreme Court's holding that the plaintiff's cause of action should have been dismissed pursuant to the forum selection agreement has resulted in a judicial trend favoring validity of all such agreements.[17] The Court, however, limited their validity, broadly declaring that they must be "reasonable." The burden of proving the unreasonableness of a forum selection clause in a particular case falls upon the party seeking to avoid its application. The Court outlined three instances where forum selection clauses might be declared unreasonable: (1) where the law which will

[11] To be contrasted with this traditional American judicial hostility is the relatively early acceptance of the validity of such agreements in England and the countries of Western Europe. See Collins, *Arbitration Clause and Forum Selection Clauses in the Conflict of Laws, Some Recent Developments in England,* 2 J. MAR. L. & COM. 363 (1972). For background on international efforts to draft a Convention on the jurisdiction of the selected forum *see* Nadlemann, *Choice of Court Clauses in the United States: the Road to Zapata,* 21 AM. J. COMP. L. 123, 125 (1974).

[12] *See, e.g.,* Mittenthal v. Mascagni, 18 Mass. 19, 66 N.E. 425 (1903); *see* A. EHRENZWEIG, CONFLICTS OF LAWS 148 (2d ed. 1962).

[13] *See, e.g.,* William H. Muller and Co. v. Swedish American Lines Ltd., 224 F.2d 806 (2d Cir. 1955); Krenger v. Penn. R.R., 174 F.2d 556 (2d Cir. 1949).

[14] *See, e.g.,* Carbon Black Export v. The *SS Monrosa,* 254 F.2d 297 (5th Cir. 1958) *cert. dismissed,* 359 U.S. 180 (1959).

[15] 428 F.2d 888 (5th Cir. 1970), *aff'd per curiam on rehearing,* 446 F.2d 907 (5th Cir. 1971).

[16] *See* cases cited in latter part of Annot., 56 A.L.R. 2d 300 (1957).

[17] 407 U.S. at 9.

be applied in the contract forum is contrary to a strong public policy of the forum where the suit has been brought; (2) where the agreement is part of an adhesion contract; and (3) where there would be such serious inconvenience to the party objecting to the contractual forum as to result in a denial of his day in court.[18]

Tai Kien Industry Co. Ltd. v. M/V Hamburg[19] presents a factual situation similar to that of *Zapata,* but poses an issue which was neither presented nor resolved in that case. The similarities are that the parties are likely to have had equal bargaining power in drawing up the contract; the forum agreed upon was a neutral one and well known for its expertise in maritime law;[20] and the contract was clearly international in scope.[21] The important, complicating issue presented in *Tai Kien,* which was not a factor in *Zapata,* is the suit brought by a third person against one of the parties in a jurisdiction other than that agreed upon in the contract. The circuit court's resolution of this issue as it affects the enforcement of the forum selection agreement marks the case as significant.

The Federal Rules of Civil Procedure embody a strong policy favoring consolidation of all claims arising out of the same transaction or occurrence, especially if any questions of law or fact common to all claimants will arise in the action.[22] This strong policy conflicts in this case with the newly developed policy favoring enforcement of contractual forum selection clauses. The paucity of the record leaves few clues as to the arguments of Tai Kien Industry for rejection of the forum selection agreement. However, the inference from the summary dismissal is that Tai Kien Industry contended that where multiple claims arise out of the same occurrence, it is wise public policy, as reflected in the Federal Rules of Civil Procedure, to have the claims consolidated and settled in one forum rather than duplicate preparation and presentation of a case against a defendant. By presenting these arguments Tai Kien Industry sought to establish the factual situation as a fourth instance where a court could declare a forum selection clause unreasonable.

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[18] 528 F.2d 835 (9th Cir. 1976).

[19] 14 HARVARD INT'L L. J. 150 (1973).

[20] *Tai Kien* was unlike *Zapata* in that the agreement was between two foreign nationals in *Tai Kien* and, as noted above, such agreements have been more readily held valid than forum selection agreements between an American and an alien. *See* text accompanying note 12, *supra.*

[21] FED. R. CIV. P. 19, 20. The two rules cited provide for compulsory and permissive joinder respectively. Compulsory joinder would clearly not apply in this situation because the cause of action asserted by the United States is different than that asserted by Tai Kien Industry. The injuries suffered by the parties are completely different. The philosophy of permissive joinder embodied in Rule 20, however, would seem to be particularly pertinent. Indeed, Rule 20 was drafted to cover exactly this situation. *See also* FED. R. CIV. P. 12, 13, & 14 for similar provisions encouraging consolidation of all claims in one forum.

[22] 358 F. Supp. 481 (N.D. Calif. 1973).

It is worth noting that another federal district court in *Roach v. Hopag-Lloyd*[23] upheld the forum selection agreement of two contracting parties when faced with a situation similar to *Tai Kien* in that the claims all arose out of the same occurrence, and suit was filed by a third party in a jurisdiction other than the one contractually agreed upon. The *Roach* court emphasized the importance of the issue when it concluded:

> The reasonableness of enforcing the forum selection clause in this case is an exceptionally close question. Nevertheless, the test set forth in *Zapata* requires that the party challenging the forum clause "clearly show" that enforcement would be unreasonable and unjust.[24]

The court in *Tai Kien* ultimately based its dismissal of Tai Kien Industry's action on the plaintiff's failure to show that enforcement would be unreasonable and unjust.[25] The forseeability of the occurrence which actually developed gave support to the defendant's contention that the agreement remained reasonable. The possibility that during its long voyage the vessel might break loose and cause injury to third persons who would subsequently bring suit was exactly the type of occurrence the parties had in mind when they contracted in regard to forum selection. In certainty lies the value of a forum selection agreement; because one of the parties is satisfied with the forum in which a fortuitous accident has occurred and where suit has been brought by a third person is no reason to release him from his bargain.

Holding parties to their bargains in cases such as *Tai Kien* will result in duplicitous suits.[26] Viewed from the standpoint of efficiency in judicial administration, the decision appears to represent a regression. The philosophy which underlies the theory of consolidation of all claims arising out of the same transaction or occurrence is cogent and should not be eroded by undue exceptions.[27] The certainty, however, which parties contracting on an international basis derive from the assurance that courts will uphold their forum selection agreements is an opposing and compelling policy consideration. Dictum in the Supreme Court's *Zapata* decision states the case forcefully:

> There are compelling reasons why a freely negotiated agreement, unaffected by fraud, undue influence, or overweening bargaining power such as that involved here should be enforced.... In this case, for example, we are concerned with a far from routine transaction between companies of different nations contemplating the tow of an extremely costly piece of equipment.... In the course

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[23] *Id.* at 483.

[24] This same factor was heavily stressed in the *Zapata* decision.

[25] Considerable research was undertaken to determine whether Tai Kien Industry proceeded to pursue its claim in the Hamburg courts. Although such a determination could not be made, it is assumed that Tai Kien Industries would desire to recover for the loss of its vessel by bringing suit in the contractual forum.

[26] *See* note 22, *supra.*

[27] 407 U.S. at 10.

> of its voyage it was to traverse the waters of many jurisdictions . . . . Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur . . . . The elimination of all such uncertainties by agreeing in advance on a forum is an indispensable element in international trade, commerce, and contracting.[28]

Bearing these "compelling reasons" in mind, the decision in *Tai Kien* appears to be the desirable approach. The possibility of future decisions to the contrary seems likely given the strong countervailing policy considerations inherent in such a situation. The conflict between these two policies may, at some future date, be presented for a definite resolution by the Supreme Court. Given the philosophy so broadly espoused above, the outlook for the continued validity of forum selection agreements in the *Tai Kien* situation is favorable.

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