CONTRACTS—JURISDICTION—ABSENT A STRONG SHOWING OF UNREASONABLENESS OR UNDUE INFLUENCE, PARTIES' CONTRACTUAL SELECTION OF FORUM IN INTERNATIONAL TRANSACTIONS WILL BE VALID AND ENFORCEABLE.

In November 1967, respondent Zapata Off-Shore Company (hereinafter Zapata), an American corporation, contracted with petitioner Unterweser Reederei, GmbH, a German corporation, for towage of respondent's ocean-going oil drilling rig *Chaparral* from Louisiana to a point in the Adriatic Sea off Ravenna, Italy. The contract submitted by petitioner and approved by respondent contained a stipulatory clause specifying the London Court of Justice as the forum for settling any dispute arising from the transaction. Two additional clauses purported to exculpate petitioner from any liability for damage incurred in the course of the tow. While being towed in international waters the *Chaparral* sustained considerable structural harm and, pursuant to respondent's instructions, was towed to Tampa, Florida, the nearest port of refuge. Respondent then brought an admiralty suit for damages against petitioner in federal district court. Petitioner entered a motion to dismiss on grounds of lack of jurisdiction under the forum selection clause of the contract and, pending that decision, moved to limit its liability in the district court under 46 U.S.C. § 185 (1971).[1] At the same time, invoking the exculpatory clauses of the agreement petitioner instituted proceedings in the London Court[2] for breach of contract. Subsequently the district court denied petitioner's motion to dismiss, refused to grant a stay of respondent's initial damage action, and enjoined any further action by petitioner in the London Court.[3] The decision was upheld on appeal in the Fifth Circuit, and affirmed on rehearing.[4] On writ of certiorari to the United States Supreme Court, *held* judgment vacated. A forum selection clause in a transnational commercial contract is valid and will be specifically enforced, absent a strong showing either that the forum is unreasonable, or that its selection was the result of overweening influence exerted by one of the parties. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

The approach of American courts to the problem of enforcement of contractual choice of forum clauses has lacked consistency among the various jurisdictions.[5] The courts most strongly opposed to the enforcement of such contrac-

---

[1]46 U.S.C. § 185 (1971) allows the vessel owner, after moving in district court to limit his liability either to deposit with the court a sum in the amount of his interest in the vessel or transfer his interest in the vessel to a court-appointed trustee; on compliance with the terms of this section all claims and proceedings against the owner cease.

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

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

[4]*In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (1971).

[5]Major decisions from the Second Circuit have conceded the validity of forum selection clauses: Wm. H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951);

tual provisions rely on two contentions as the basic foundation of their argument. First, they dispute the essential validity of the forum selection clause itself by urging acceptance of what has in the past been considered a universally accepted rule: that such provisions must be considered invalid per se as attempts to oust by agreement the jurisdiction of the courts already vested by law with the right to hear any action on a specific contract.[6] Thus, historically, when confronted with a prorogation agreement,[7] judicial policy has dictated that the court with the initial power over the action retain that power, rather than give effect to the legal expectations of the parties by surrendering jurisdiction over the contract action to the forum mutually selected by the parties.[8] Second, they attack the choice of forum clause on the grounds that it is against public policy. This outlook has been generated by the fact that the contractually selected forum could, in arriving at a solution to the problem, apply rules of law differing from the rules of the court which initially could have exercised valid jurisdiction over the matter.[9] Thus, these courts take the position that a result which would be distasteful by their own judicial standards must be void as against the public policy of their own jurisdiction. They, therefore, refuse to surrender the action to the foreign forum. One area giving rise to a great deal of policy conflict concerns the effect to be given to exculpatory clauses. Judicial reaction to upholding such clauses has ranged from hesitancy[10] to open

---

Krenger v. Pennsylvania R.R., 174 F.2d 556 (2d Cir. 1949). *Contra,* Indussa Corp. v. The S.S. Ranborg, 377 F.2d 200, 203-04 (2d Cir. 1967) (overruling *Muller* on other grounds). The Fifth Circuit has tended to deny the validity of such clauses: *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc,* 446 F.2d 907 (1971); Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed,* 359 U.S. 180 (1959); *cf.* Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, 466 (5th Cir. 1956). *Contra,* Anastasiadis v. The S.S. Little John, 346 F.2d 281 (5th Cir. 1965).

[6]Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 301 n.9 (5th Cir. 1958); Meacham v. Jamestown F. & C.R.R., 211 N.Y. 346, 105 N.E. 653 (1914); RESTATEMENT OF CONTRACTS § 558 (1932). *But see* Krenger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir. 1949) (Judge Learned Hand construes RESTATEMENT OF CONTRACTS § 558 as support for forum selection clauses, stating that under § 558 they would be invalid only when unreasonable.).

[7]The term "prorogation agreement" has not been in general use in the United States, but is gaining acceptance. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 727 (1968); Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements,"* 15 RUTG. L. REV. 414 (1961).

[8]Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916); Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856) (The Massachusetts courts held forum selection clauses to be invalid because parties by agreement cannot oust a court of jurisdiction when it would normally have had such jurisdiction.). *But see* Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 66 N.E. 627 (1903). *See also* Annot., 69 A.L.R.2d 1324 (1960) (Clauses authorizing a laying of venue in a specified place have not been denied validity in a majority of states.).

[9]Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963).

[10]Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963) (Harlan, J., concurring). Justice Harlan expressed reservations as to the correctness of the Court's decision to deny effect to the forum selection clause; he concurred with the majority simply because of the need for a consistent standard of conduct.

hostility,[11] but the prevailing policy within the United States has been one of refusal to grant such clauses any enforceable legal effect.[12]

Despite the historical opposition to forum selection clauses, judicial disfavor has been by no means universal. In recent years a steadily growing minority of courts has conceded their validity.[13] The basis of this developing policy is belief in the integrity of the contract itself, and the feeling that parties in an arms-length transaction should be able to rely on their agreements.[14] In 1949, Judge Learned Hand contended that there was no legal bar to such contracts, and that their enforceability was a function of their reasonableness in relation to the facts of each individual case, as well as the relative parity of bargaining power between the parties.[15] This view was adopted, and Judge Hand's opinion specifically cited, in a later case from the Second Circuit (*Wm. H. Muller & Co. v. Swedish Am. Line, Ltd.*)[16] involving a forum selection clause. The

[11]Bisso v. Inland Waterways Corp., 349 U.S. 85, 95 (1955) (Douglas, J., concurring). Justice Douglas wrote a special concurring opinion in the case, and wrote the only dissent in the principal case, expressing strong disapproval of the majority's policy of allowing the choice of forum clause to take effect. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 20 (1972) (Douglas, J., dissenting).

[12]Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955); Bisso v. Inland Waterways Corp., 349 U.S. 85, 91 (1955).

[13]Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341, 345 (3d Cir. 1966) (The court respects the provision as the responsible expression of the parties so long as there is no proof that the provision will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.); Anastasiadis v. The S.S. Little John, 346 F.2d 281 (5th Cir. 1965); Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951); Euzzino v. London & Edinburgh Ins. Co., 228 F. Supp. 431 (N.D. Ill. 1964); Takemura & Co. v. The S.S. Tsuneshima Maru, 197 F. Supp. 909 (S.D.N.Y. 1961); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965); Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903); Daley v. People's Bldg., Loan & Sav. Ass'n, 178 Mass. 13, 59 N.E. 452 (1901); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). *See also* MODEL CHOICE OF FORUM ACT (1968).

[14]Gilbert v. Burnstine, 255 N.Y. 348, 354-55, 174 N.E. 706, 707 (1931) ("Contracts made by mature men who are not wards of the court, should, in the absence of potent objection, be enforced. . . . Unless individuals run foul of constitutions, statutes, decisions, or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them.").

[15]Krenger v. Pennsylvania R.R., 174 F.2d 556, 560-61 (2d Cir. 1949) (Hand, J., concurring).

[16]224 F.2d 806, 808 (2d Cir. 1955). The majority of the Fifth Circuit Court of Appeals in *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970) concluded that Indussa Corp. v. The S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) overruled the *Muller* holding that courts should enforce a forum selection clause in an international contract unless it were unreasonable or prohibited by statute. Judge Wisdom, dissenting, stated that the *Indussa* decision not to enforce a forum selection clause was a result of the view that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1958), prohibited such clauses under certain circumstances. Thus, where COGSA does not apply, as in the *Unterweser* case, Judge Wisdom contended that *Muller's* general principles of contract law are still valid, and the *Muller* holding is still sound law. *See* Geiger v. Keilani, 270 F. Supp. 761, 764 n.3 (E.D. Mich. 1967) (Where the Federal District Court agreed with Judge Wisdom's analysis, stating that the rationale of *Muller* is still good and highly persuasive, despite *Indussa*.).

Muller opinion disposed of the "ouster" argument by stating that no court's jurisdiction would, or indeed could, be ousted by agreement, but if in a preliminary holding the court found the agreement to be reasonable within the setting of the particular case it could exercise its power of discretionary dismissal and decline jurisdiction in favor of the contractually selected forum.[17]

The "reasonableness" test propounded in *Muller* has been confused with the doctrine of forum non conveniens, and there has been some resultant misapplication of the doctrine.[18] The difference in the two tests lies in the fact that forum non conveniens considers the forum from a point in time after the litigation has begun, whereas the *Muller* "reasonableness" test looks to the actual time of contracting to determine whether or not the agreement shall be upheld. This distinction is procedurally significant in *The Bremen v. Zapata Off-Shore Co.*[19] (hereinafter *Bremen*). The Supreme Court held that the district court and the court of appeals had incorrectly placed the burden on petitioner to show that the London Court would be a more convenient forum than the federal district court that respondent had chosen.[20] The Court stated that the correct procedural approach would have been specific enforcement of the forum selection clause, unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for reasons such as fraud or undue influence.[21] Thus, following the "reasonableness" rationale of *Muller*, respondent should have had the burden of clearly showing that the forum selection clause was unreasonable due to fraud, undue influence, or the exercise of overweening bargaining power. The Court vacated and remanded the case for reconsideration on these grounds.

The opinions of Judge Wisdom, dissenting in both decisions of the court of appeals,[22] provided the basic reasoning for the Supreme Court's opinion upholding the forum selection clause.[23] The Court's and Judge Wisdom's criteria, for determining "reasonableness" under *Muller* accord careful attention to

---

[17]Muller v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d Cir. 1955).

[18]"[F]actors determinative of unreasonableness are similar to those involved in deciding an issue of forum non conveniens." Takemura & Co. v. The S.S. Tsuneshima Maru, 197 F. Supp. 909, 912 (S.D.N.Y. 1961).

[19]407 U.S. 1 (1972).

[20]In denying petitioner's motion to dismiss, the district court relied on a prior Fifth Circuit case, Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959), which held forum selection clauses unenforceable for the traditional reason that they "oust" the jurisdiction of a particular court and thus are contrary to public policy. On this rationale, the district court gave the forum selection clause little, if any, weight and dismissed petitioner's motion to dismiss under normal forum non conveniens doctrine, applicable in the absence of such a clause, citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

[21]The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

[22]*In re* Unterweser Reederei, GmbH, 428 F.2d 888, 896 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907, 908 (1971) (Wisdom, J., dissenting).

[23]The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8 (1972) ("We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy.").

the overriding public policy considerations involved. Courts should approach the consideration of choice of forum provisions with a primary view toward enforcement, as long as there is no evidence of a contract of adhesion[24] or compelling and serious public policy considerations such as fraud or the exercise of overweening bargaining power. Finding none of these factors, Judge Wisdom concluded that the London Court would provide an adequate remedy which would contravene no American public policy. This finding was made even in light of the Supreme Court's holding in *Bisso v. Inland Waterways Corp.*,[25] and in spite of the fact that it appears likely that the London Court would enforce the exculpatory clauses. Quoting Judge Wisdom, Chief Justice Burger stated that the public policy against exculpatory clauses expressed in *Bisso* rested on considerations regarding towage contracts in American waters only and that such considerations are not controlling in an international commercial agreement.[26]

While much of the supporting case law for the Court's ultimate holding was interstate in its nature and subject matter rather than international,[27] the majority opinion places particular emphasis on the foreign policy implications of the decision. The basis for the holding and the key to the entire opinion lies in the Court's discussion of the vitally important consideration of unrestrained freedom of trade.[28] With the present multiplicity of available judicial forums, each applying its own legal doctrines to the solution of transnational commercial disputes, current commercial realities would seem to demand the mutual appointment by the parties to a contract of a neutral forum applying agreed-upon law for the resolution of any dispute which might arise. Such a clause in a contract, enforceable in other forums, affords a measure of certainty and secu-

---

[24]*E.g.*, Muoio v. Italian Line, 228 F. Supp. 290 (E.D. Pa. 1964) (The court refused to enforce a forum selection clause on grounds that as an agreement in a passenger ticket, it was adhesory in nature.); *see* Note, *Validity of Contractual Stipulation Giving Exclusive Jurisdiction To The Courts of One State*, 45 YALE L. J. 1150 (1936).

[25]349 U.S. 85 (1955). In *Bisso*, the Supreme Court accepted as a controlling rule, based on public policy, that a towboat owner could not validly exculpate himself from all liability for his own negligent towage. *See* Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963) (per curiam decision following *Bisso* and refusing to subject its rule governing towage contracts in American waters to "indeterminate exceptions" [Harlan, J., concurring] based on the delicate analysis of the facts of each case).

[26]The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15-16 (1972). *But see* Justice Douglas, dissenting at page 20 (Justice Douglas states that *Bisso* is applicable to this case even given the international aspects of the agreement. He further argues that the exculpatory clauses in question cannot be upheld without overruling *Bisso*.).

[27]*E.g.*, Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965).

[28]The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("[B]ut in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved by our courts.").

rity to the agreement[29] and allows parties to have greater confidence in the efficacy of their agreement. Insistence on the application of American legal doctrines to the settlement of international commercial problems is considered "parochial"[30] by the *Bremen* court in light of present transnational business realities. This emphasis on the integrity of the contract and the insistence that forum selection clauses be specifically enforced, absent a strong showing of mitigating factors, is directed toward recognizing commercial reality. It must be assumed that parties to an arms-length transaction are capable of considering all aspects of a proposed trial forum and of negotiating an agreement which will be satisfactory to all parties concerned.

The international implications of *Bremen* are clear; no longer will American commercial entities be able to consider themselves automatically entitled to the benefits of contract litigation in their own courts. Instead, American corporations must conform to the standards of the forum selected in their agreement, and accept the pronouncements of legal systems which may not work to their advantage. This judicial support for more thorough American participation in the international community, through its endorsement of more complete party autonomy, must henceforth be an important consideration in American transnational dealings.

Shelley Himel

---

[29]It is argued by Chief Justice Burger that the forum selection clause was an effort by both parties involved to eliminate all uncertainty as to the jurisdiction and the law which would be applicable in case of a dispute. While the contract did not specifically provide that the substantive law of England should be applied, Chief Justice Burger asserts that the general rule in English courts is that the parties are assumed, absent contrary indication, to have designated the forum with the view that the forum should apply its own law. Chief Justice Burger cites Tzortzis v. Monark Lines A/B, [1968] 1 W.L.R. 406 (C.A.) as authority for this general rule in England. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 n.15 (1972). Although the *Tzortzis* case has not been formally overruled, the reasoning of the *Tzortzis* case has been "decisively rejected" by the English Court of Appeals in Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A., [1970] 3 W.L.R. 389, 397 (C.A.), a case involving an arbitration clause. Therefore, even in view of the fact that an arbitration clause is somewhat distinguishable from a forum selection clause, the Court's citation of *Tzortzis* as full authority for such a general rule is not entirely sound. The *Cie. Tunisienne* case holds that an agreement to refer disputes to arbitration in a particular country does not necessarily indicate a clear intention that the law governing the matters in dispute be the law of that country, in this case, England.

[30]The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).