

ENFORCEMENT OF FORUM SELECTION AGREEMENTS IN CONTRACTS BETWEEN UNEQUAL PARTIES

I. INTRODUCTION

Parties to a contract may choose a tribunal to which disputes between them will be brought, *i.e.*, they may agree to submit disputes to arbitration or may designate the court or courts of a particular state.¹ Generally, contracting parties provide for judicial settlement of disputes by means of a choice-of-forum clause inserted into the contract.² Two questions arise with regard to the efficacy of these clauses: 1) to what extent they are mandatory, and 2) to what extent they are effective in conferring jurisdiction on a court where jurisdiction does not exist independently of the agreement.³ In recent years, choice-of-forum agreements have been upheld in international contracts, and courts have dismissed actions brought in violation of forum selection clauses, even where the court chosen had little apparent connection with the contract.⁴ In certain circumstances, however, clauses in international contracts limiting jurisdiction over disputes have been held unenforceable. A refusal to enforce typically occurs when the court determines that a substantial inequality in bargaining power existed at the time the contract was formed.⁵ For example, courts have not allowed a choice-of-forum clause to benefit a party with superior bargaining power who could force a weaker party to submit to the jurisdiction of a forum it would not otherwise have chosen.⁶

The effect given to choice-of-forum clauses has special significance with regard to contracts involving developing countries. Transnational corporations based in developed countries generally have enjoyed economically superior bargaining positions in their dealings with developing countries.⁷ This lack of economic

¹ Pryles, *Comparative Aspects of Prorogation and Arbitration Agreements*, 25 INT'L & COMP. L.Q. 543 (1976).

² Choice-of-forum clause is synonymous with choice-of-court clause and prorogation agreement.

³ Pryles, *supra* note 1, at 543.

⁴ Christie, *Techniques for Settlement of Transactional Disputes Involving Transfer of Technology*, 14 TEX. INT'L L.J. 264, 266-67 (1979).

⁵ *Id.* at 267.

⁶ *Id.*

⁷ Greenhill, *UNCTAD: Control of Restrictive Business Practices*, 12 J. WORLD TRADE L. 67, 70 (1978).

power presents a substantial impediment to the expansion and diversification of trade necessary for economic development, and it is increasingly apparent that preferential treatment for developing countries is necessary to improve their economic status.⁸ The need for preferential treatment is manifested in contracts between companies of developed countries and private and public sectors of developing countries. In practice, foreign-based enterprises operating in developing countries often insert both choice-of-law and choice-of-forum clauses in their contracts in an attempt to obtain the law most advantageous to the enterprise. After surveying the motivations for investment in the developing world, this Note analyzes the extent to which the unique problems of developing countries should be taken into consideration when a court decides the effect to be given a choice-of-forum clause in a contract involving a developing country. Treatment of such clauses in the United States and other Western nations is then highlighted.

II. INVESTMENT IN THE DEVELOPING WORLD

One of the areas of dissension among developed and developing nations involves investment and transfer of technology agreements. Clearly, investment by the developed world is essential to supply the technology, capital, and managerial expertise in developing economies.⁹ Investment also serves the interests of investors who seek new markets, lower costs of production, and sources of supply.¹⁰ Equally clear is that continued trade between developed and developing countries depends upon maintaining a balance of benefits between both parties to the trade relationship.¹¹

Foreign investment stimulates development in several ways. First, the transfer of technology incident to investment provides information that would otherwise be unavailable to the host country.¹² The foreign enterprise may aid in the education of the local population in management, marketing, and technological skills.

⁸ *Id.* at 71.

⁹ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *INVESTING IN DEVELOPING COUNTRIES* 6 (4th ed. 1978).

¹⁰ *Id.*

¹¹ Brown, *Changing the Rules: International Law and the Developing Countries: The ABA Workshops of 1977*, 12 INT'L LAW. 265, 272 (1978).

¹² Camerini, *Argentina as a Host Country for North American Investments*, 9 INT'L LAW. 407, 409 (1975).

Second, employment opportunities created within the non-managerial labor class may result in increased domestic wages and consequent improvement in labor relations.¹³ Third, investment may provide a catalyst for increased competition within the domestic market.¹⁴ Fourth, capital inflow into the developing country is aided when enterprises establish contacts with foreign banks, capital markets, markets for production, and sales organizations¹⁵ Finally, tax revenues from foreign enterprises augment the treasuries of developing countries, filling savings and foreign exchange gaps.¹⁶

Developing countries traditionally have offered incentives to investment by foreign enterprises, recognizing the fact that companies based in developed countries usually will invest in developing countries that offer a substantial profit expectation with a concurrent low risk of loss.¹⁷ Incentives to investment include raw materials, low-cost labor, inexpensive sources of power, and proximity to potential markets. State-created inducements include mineral concessions, restrictions on labor organization, and favorable tax treatment.¹⁸ The host country may also provide such inducements as duty-free imports of intermediate goods, free access to foreign currency, depreciation rates, and special depletion allowances providing compensation for future exhaustion of mines and oil fields.¹⁹

Developing countries recognize the vital importance of foreign investment in economic growth. At the same time, they are extremely sensitive to exploitation.²⁰ Multinational enterprises, which constitute the principal source of investment in the developing world, are often distrusted by developing countries, and their leaders resent delegation of decision-making from subsidiaries within host countries to the parent corporation and hence beyond the reach of the sovereign power of the host coun-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 410.

¹⁶ *Id.*

¹⁷ Jova, *Private Investment in Latin America: Renegotiating the Bargain*, 10 *TEX. INT'L L.J.* 455, 458 (1975).

¹⁸ In Latin America, foreign corporations have been allowed "grace years" in which investors are exempted from taxes in order to transmit profits to home countries. E. UTRECHT, *TRANSNATIONAL CORPORATIONS IN THE DEVELOPING WORLD* 38 (1976).

¹⁹ *Id.*

²⁰ I. SZASZY, *CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES* 66 (1974).

try.²¹ Control of subsidiaries by parent companies is especially resented where the enterprise constitutes a significant percentage of the economic life of the host country.

In this context, government control over economic policy is severely diminished. Where important decisions regarding the subsidiary are made outside the host country, no increase in expertise is achieved by local executives. In addition, enterprises operating in developing countries are criticized for borrowing exclusively from parent corporations, thereby frustrating the goal of development of local banking facilities.²² Foreign enterprises are also faulted for exercising restrictive business practices, particularly in countries having few or no statutory prohibitions.²³ In these countries, foreign enterprises may use monopolistic powers to thwart development of local enterprises. Another criticism of multinationals is their failure to sell shares locally, and their resultant failure to contribute to the formation of a national capital market.²⁴ As development progresses and the host country's need for the benefits of investment decreases, problems incident to foreign investment tend to increase. Although this plateau has not been reached, the leaders of many developing countries presently believe that the benefits from foreign investment are outweighed by the disadvantages of involvement with foreign enterprises.²⁵ It is within this larger context that the issue of choice-of-forum clauses is most profitably approached.

III. THE CONTRACTING PROCESS: INEQUALITY IN BARGAINING POWER

In the debate over the role of multinational corporations in developing countries, views such as the following are most insightful:

Amid the current controversy over multinational corporations, uncompensated expropriations, alleged political machinations by foreign companies, discriminatory laws, "dependency," "neo-colonialism," *etc.*, it is easy to fall prey to good-and-evil theories, which depict the present situation in terms of nefarious plotting or exploitative deception on the part of one

²¹ Camerini, *supra* note 12, at 411.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

side or the other. In the process, the historical aspects of the foreign investment phenomenon—and in particular its two-sided, negotiated character—tend to be forgotten.²⁶

The nature of the negotiating process between developed and developing countries is the subject of considerable dispute. Many would argue that in the contractual situation, developing countries exert little negotiating power and that too often bargaining power is weighted in favor of the foreign enterprise. Because the foreign investor frequently has the option of locating elsewhere if the developing country presses for more favorable terms,²⁷ the position of developing countries has been equated with the status of consumers in adhesion contracts.²⁸ Developing countries argue that although they are forced to deal with foreign companies due to a crucial need for investment and technology, they lack the negotiating skills and power of the corporations and therefore are unable to bargain effectively.²⁹

Inequality in bargaining power between developed and developing countries may affect the choice of a forum for the resolution of disputes between parties to a contract.³⁰ Developing countries, in general, desire national court jurisdiction over disputes arising under contracts with foreign enterprises.³¹ National jurisdiction over foreigners is defended on the grounds of equality of treatment with domestic companies and protection of nationals from increased costs of litigation in foreign courts.³²

In contrast, and not surprisingly, enterprises of developed countries urge maximization of contractual freedom.³³ Companies claim that contractual relations with developing countries are international in character and that the parties should be free to choose the legal system applicable to the contract.³⁴ Enterprises also

²⁶ Jova, *supra* note 17, at 457.

²⁷ *Id.* at 472.

²⁸ Brown, *supra* note 11, at 281.

²⁹ *Id.*

³⁰ In the Latin American countries, the Calvo Clause ensures that disputes arising under an investment agreement will be litigated in the host country. The clause applies to contracts with Latin American governments and has two basic principles: (1) non-interference in the sovereignty of the state; and (2) absolute subjection of foreign enterprises to the laws and jurisdiction of the host country. See Jova, *supra* note 17, at 466.

³¹ Roffe, *Reflections on Current Attempts to Revise International Legal Structures: The North-South Dialogue—Clash of Values and Concepts, Contradictions and Commitments*, 9 GA. J. INT'L & COMP. L. 559, 566 (1979).

³² *Id.*

³³ *Id.* at 567.

³⁴ *Id.* at 566-67.

argue that national courts of host countries may be biased.³⁵ Furthermore, enterprises doing business in developing countries profess a lack of trust in national courts of developing countries with newly-established legal systems.³⁶

Contractual freedom in the area of choice-of-forum would benefit business entities operating within developing countries. Foreign enterprises seeking predictability and certainty of litigation may rely on a choice-of-law clause as a means of decreasing the risk inherent in a contract transcending national boundaries. However, a choice-of-law clause may not be totally effective in controlling the law to be applied to the contract.³⁷ There is always a chance that the foreign court may elect not to apply the chosen law, or that it may be difficult or expensive to prove the law stipulated in the contract.³⁸ Therefore, the company inserts both choice-of-law and choice-of-forum provisions in the contract to protect against the risk of litigation in courts of developing countries.³⁹

IV. CONTRACT DISPUTES—CHOICE-OF-FORUM AGREEMENTS

A. *United States Treatment of Choice-of-Forum Clauses*

Prior to this decade courts in the United States generally refused to enforce choice-of-forum clauses if the case satisfied jurisdictional requirements.⁴⁰ This refusal to dismiss cases brought in violation of forum agreements usually was based on the ouster doctrine, the concept that parties to a contract may not "oust" a court of jurisdiction.⁴¹ Gradually, forum clauses began to be regarded with less hostility. In *Wm. H. Muller & Co. v. Swedish American Line Ltd.*,⁴² the court affirmed the dismissal of a suit where bills of lading used by a Swedish shipowner stipulated that disputes under the contract would be litigated in Swedish courts. The court treated the forum clause as a means of dismissing the case on forum non conveniens grounds.⁴³ In the pro-

³⁵ *Id.* at 567.

³⁶ *Id.*

³⁷ Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49, 50 (1972).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 51.

⁴¹ *Id.*

⁴² 224 F.2d 806 (2d Cir.), *cert denied*, 350 U.S. 906 (1955).

⁴³ *Id.* at 808.

cess, the court employed a reasonableness standard, stating that the clause should control unless unreasonable under the circumstances.⁴⁴ Although *Muller* was subsequently overruled on the ground that the Carriage of Goods by Sea Act (COGSA),⁴⁵ (which prohibited exculpatory clauses) forbade forum-selection clauses,⁴⁶ the case is still cited as authority in opinions upholding choice-of-court agreements.⁴⁷

In *Carbon Black Export v. The S. S. Monrosa*,⁴⁸ the United States Supreme Court granted certiorari to consider a Fifth Circuit decision allowing actions brought by an American exporter in disregard of a forum selection clause in a contract with an Italian shipping company.⁴⁹ The court of appeals had held that with respect to the in personam action the clause could not be enforced, reiterating that agreements to oust the jurisdiction of a court are contrary to public policy.⁵⁰ The Supreme Court dismissed the writ as improvidently granted after the majority agreed that the case was not appropriate for consideration of the enforceability of choice-of-court provisions because the provision did not exclude the maintenance of an in rem action.⁵¹ In dismissing the writ, the Supreme Court avoided the opportunity to determine the validity of choice-of-forum agreements, and the case law remained equivocal.

In 1972, the Supreme Court was called upon to review a judgment of the Court of Appeals for the Fifth Circuit⁵² which refused to enforce a choice-of-forum clause in an international towage contract. In *M/S Bremen v. Zapata Off-Shore Company*,⁵³ the

⁴⁴ *Id.*

⁴⁵ Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-05 (1976).

⁴⁶ *Indussa Corp. v. S.S. Ramborg*, 377 F.2d 200 (2d Cir.1967).

⁴⁷ *See, e.g., Furbee v. Vantage Press*, 464 F.2d 835 (D.C. Cir.1972).

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

⁴⁹ *See generally Nadelmann, Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124, 130 (1973).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888 (1970).

⁵³ 407 U.S. 1 (1972). The contract between respondent Zapata, an American corporation, and petitioner Unterweser, a German corporation, stipulated that disputes would be brought before the London Court of Justice. While Unterweser's tug, the *Bremen*, was in the process of towing Zapata's drilling rig from Louisiana to Italy, a storm arose in the Gulf of Mexico and the rig was severely damaged. The rig was towed to Tampa, Florida where Zapata brought suit in admiralty in the United States District Court in Tampa seeking \$3,500,000 damages against Unterweser in personam and the *Bremen* in rem alleging negligent towage and breach of contract. Unterweser responded by invoking the forum-selection clause of the contract. The district court denied Unterweser's motion to dismiss or

Supreme Court reversed, and adopted the rule that choice-of-forum clauses are prima facie valid unless demonstrated to be unreasonable under the circumstances surrounding the contract.⁵⁴ In arriving at this result, the Court took note of the need for forum selection clauses in an era of rapid expansion in international trade by United States businesses.⁵⁵ The Court also noted that the result brought United States law into congruence with English law and with the *Restatement (Second) of Conflict of Laws*,⁵⁶ both of which allow choice-of-forum agreements.⁵⁷

The Supreme Court rejected the argument in *Zapata* that choice-of-forum clauses amount to an ouster of a court's jurisdiction.⁵⁸ The Court emphasized that the real question raised by a forum-selection clause is not whether the clause "ousts" the court of jurisdiction but whether the court should give effect to the parties' agreement to litigate in another forum.⁵⁹

In a later case, the Supreme Court expanded the holding of *Zapata* by concluding that an agreement in an international commercial contract to submit disputes to arbitration is enforceable. In *Scherk v. Alberto-Culver Co.*,⁶⁰ the Supreme Court recognized

stay the proceedings and the court of appeals affirmed, relying on the language in *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959), that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced." 254 F.2d at 300-01.

⁵⁴ 407 U.S. at 10 (1972).

⁵⁵ The Court stated:

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 laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.

Id. at 9.

⁵⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §80. 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.

⁵⁷ 407 U.S. at 11 n.12 (1972).

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* The Court recognized that:

No one seriously contends in this case that the forum-selection clause 'ousted' the District Court of jurisdiction over *Zapata's* action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties' manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

Id.

⁶⁰ 417 U.S. 506 (1974). *Alberto-Culver*, an American manufacturer, had contracted to purchase the enterprises and trademark rights of *Scherk*, a German citizen. The contract contained warranties that the trademarks were unencumbered and included a clause providing that disputes arising between the parties would be referred to arbitration in France. The

the uncertainty concerning the law applicable to possible disputes arising from a contract between entities of two or more countries and noted that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."⁶¹ The Court found the principle of *Zapata* controlling in the context of arbitration agreements where enforcement of the agreement would not be unreasonable under the *Zapata* criteria.⁶²

Cases subsequent to *Zapata* have embellished the law concerning choice-of-forum clauses in international contracts. In *Gaskin v. Stumm Handel GmbH*,⁶³ the court considered the effect of a forum-selection clause in an employment contract that designated West Germany as the site for litigating disputes. The court analyzed the facts of the case under the two-pronged test established in *Zapata*. First, the court considered, under an "invalidity test," whether the forum clause was voidable for reasons of fraud, overreaching, mistake, coercion, lack of consideration, or unconscionability.⁶⁴ Second, the court considered whether deference to the forum clause would be unreasonable or unjust, essentially applying a "reasonableness test."⁶⁵ The court listed seven factors to be considered in determining whether enforcement of the terms of the contract would be unreasonable: (1) inequality of bargaining power; (2) public policy; (3) injustice; (4) availability of remedies in the chosen forum; (5) the governing law; (6) inconvenience; and (7) conduct of the parties.⁶⁶ The choice-of-court clause in *Gaskin* was enforced because the court found that the party resisting the enforcement of the clause failed to prove either its invalidity or its unreasonableness under the criteria established.⁶⁷ The court stated that there was no evidence dem-

trademarks were discovered to be subject to encumbrances and when Scherk refused to rescind the contract, Alberto-Culver instituted suit in the United States. The court of appeals affirmed the district court's dismissal of Scherk's motion to stay the action pending arbitration in Paris. *Id.* at 508-10.

⁶¹ *Id.* at 516.

⁶² *Id.* at 519.

⁶³ 390 F. Supp. 361 (S.D.N.Y. 1975).

⁶⁴ *Id.* at 365.

⁶⁵ *Id.* at 368.

⁶⁶ *Id.* at 305, quoting Collins, *Choice-of-Forum and the Exercise of Judicial Discretion—The Resolution of an Anglo-American Conflict*, 22 INTL & COMP. L.Q. 332, 338-43 (1973).

⁶⁷ 390 F. Supp. at 370.

onstrating overwhelming bargaining power or an adhesion contract, and that there was no evidence contradicting the conclusion that "[the] choice of . . . forum was made in an arm's length negotiation by experienced and sophisticated businessmen."⁶⁸

Similarly, in *Republic International Corp. v. Amco Engineers, Inc.*,⁶⁹ the court held that an action on a construction contract should be dismissed when a forum-selection clause provided for litigation in Uruguay.⁷⁰ The court found the *Zapata* decision, which was directed to federal courts sitting in admiralty, applicable to other kinds of international contracts because of the *Zapata* Court's emphasis upon "an appreciation of the expanding horizons of American contractors, who seek business in all parts of the world."⁷¹

The new approach to choice-of-forum agreements in the United States has been universally praised by scholars in the field as promoting international commercial relations.⁷² The trend established by *Zapata* and later cases is to enforce choice-of-forum clauses in contract disputes brought in federal courts.⁷³ Under the trend upholding forum clauses, a party resisting enforcement will be under a heavy burden to show why the court should disregard the clause.⁷⁴

B. Choice-of-Forum Agreements Outside the United States

Legislation governing choice-of-forum agreements is relatively uncommon in the common law countries.⁷⁵ Instead, reliance is placed upon the power of the courts to refrain from ousting the suit from their jurisdiction when the clause is found to be unrea-

⁶⁸ 390 F. Supp. at 369, quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 12 (1972).

⁶⁹ 516 F.2d 161 (9th Cir. 1975).

⁷⁰ *Id.* at 168.

⁷¹ *Id.*

⁷² See, e.g., Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L LAW. 530 (1973).

⁷³ Although *Zapata* and subsequent federal decisions are not controlling in state courts, it is apparent that state courts are following the trend established by the federal cases. Decisions to dismiss actions based on contracts containing choice-of-court clauses have been rendered where the court has discovered no evidence of unequal bargaining power or fraud, and where enforcement of the clause was found not to violate some state policy. See, e.g., *Volkswagenwerk, A.G. v. Klippan, GmbH.*, 611 P.2d 498 (1980); and *Société Jean Nicolas et Fils, J.B., v. Mousseux*, 123 Ariz. 59, 597 P.2d 541 (1979). State courts have declined to enforce choice-of-forum clauses where the forum chosen by the parties was unreasonable due to serious inconvenience. See, e.g., *Exum v. Vantage Press, Inc.*, 17 Wash. App. 477, 563 P.2d 1314 (1977).

⁷⁴ See Juenger, *supra* note 37, at 58.

⁷⁵ See Nadelmann, *supra* note 49, at 131.

sonable.⁷⁶ In civil law countries, legislation regulates the use of choice-of-court clauses in areas such as installment buying and insurance.⁷⁷ Generally, courts will not intervene without a showing of fraud or duress.⁷⁸

In England, the judge is given the discretion to decide whether to enforce a choice-of-forum agreement.⁷⁹ The English system distinguishes between clauses that bind the parties to the exclusive jurisdiction of a court and clauses that designate the non-exclusive jurisdiction of a foreign court.⁸⁰ Generally, the clause is binding only when it provides for the exclusive jurisdiction of the courts of a particular country.⁸¹ English courts will enforce an agreement by granting leave to commence proceedings outside the jurisdiction, if the defendant is outside the jurisdiction.⁸² Where the clause designates a foreign court and the plaintiff sues in the English court, the defendant may apply to the court for a stay of those proceedings.⁸³ In Great Britain, Australia, and the common law provinces of Canada, it is established that a choice-of-court clause cannot oust the local courts of jurisdiction, although the court may use its discretion to grant a stay in the proceedings.⁸⁴ To prevent the court from granting a stay "the plaintiff must show 'some good cause' why the English proceedings should continue, or 'a strong case' why the proceedings should not be stayed."⁸⁵

In Germany, parties may select a court for the resolution of disputes either by express or implied agreement.⁸⁶ The choice is valid except in certain situations falling within the rules of the Code of Civil Procedure limiting party autonomy.⁸⁷ The most im-

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Kahn-Freund, *Jurisdiction Agreements: Some Reflections*, 26 INT'L & COMP. L.Q. 825, 849 (1977). "The fundamental characteristic of the English system is that the judge has the power to stay the action, but that the law does not compel him to do so. He has a discretion. This gives to English law in this matter a great deal of desirable flexibility." *Id.*

⁸⁰ Collins, *Choice-of-Forum and the Exercise of Judicial Discretion—The Resolution of an Anglo-American Conflict*, 22 INT'L & COMP. L.Q. 332, 333 (1973).

⁸¹ *Id.* at 334.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Pryles, *supra* note 1, at 556.

⁸⁵ Collins, *supra* note 80, at 335.

⁸⁶ A. DROBNIG, *AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW* 323 (1972). A choice-of-forum agreement is implied where the defendant pleads to the merits of the case without objecting that the court lacks competence.

⁸⁷ Pryles, *supra* note 1, at 569.

portant limitation on party autonomy in choice-of-forum is section 40 of the Code, which provides that "no contractual change of competence is allowed as to non-pecuniary claims and those pecuniary claims which fall under an exclusive competence."⁸⁸ Under this provision, choice-of-forum agreements are not effective in non-pecuniary family law, in certain personal rights disputes, or in matters over which the German court has been given exclusive jurisdiction.⁸⁹

Under French law, contractual freedom of the parties to choose a forum for the settlement of disputes between them is fundamental.⁹⁰ Accordingly, the privileges extended to French nationals under articles 14 and 15 of the Civil Code (*i.e.*, to be subject to the jurisdiction of French courts) may be waived by an express agreement conferring jurisdiction on a foreign court.⁹¹ However, French judges are critical of implied agreements to waive jurisdiction, and in the absence of an express agreement to litigate in a foreign court, there is no presumption of waiver.⁹² There is no limit to the scope of a choice-of-forum clause in France. Such agreements are enforced whether the cause of action arises in contract or some other area, whether the action is in personam or in rem, and whether the object is real or personal property.⁹³

Contractual agreements excluding local jurisdiction are effective in a number of other European countries.⁹⁴ For example, in Austria, Switzerland, Belgium, Denmark, Norway, Sweden, Finland, and the Netherlands, forum agreements generally are effective to exclude local jurisdiction.⁹⁵ Conversely, in Spain, Portugal, and Hungary, no effect is given to choice-of-forum clauses confer-

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements"*, 15 *RUTGERS L. REV.* 414, 440 (1960-1961).

⁹¹ *Id.* at 442.

⁹² *Id.* As Lenhoff states:

[T]he promise made by an employee in the employment contract to the effect that he would move his domicile to the main place of the employer's business situated in a foreign country was not held to be a choice of a court, there, as the exclusive forum for disputes arising out of the employment relationship. Likewise, in an unbroken line of decisions, it has been held that the choice of a legal system of a foreign country, which the parties had chosen as the law controlling their contract, could not be considered as an implied submission to the jurisdiction of the courts of the foreign country.

Id. at 442-43.

⁹³ *Id.* at 448.

⁹⁴ Pryles, *supra* note 1, at 570.

⁹⁵ *Id.*

ring exclusive jurisdiction on foreign courts.⁹⁶ In Italy, choice-of-forum clauses are only effective to exclude Italian jurisdiction if the agreement is in writing and relates to an in personam action involving at least one foreigner.⁹⁷ Outside of Europe, choice-of-forum agreements have been given effect, except in certain circumstances, in Japan, Turkey, Brazil, and Argentina.⁹⁸

V. CONCLUSION

In the settlement of contractual disputes with developing countries, developed countries advocate maximization of party autonomy in the choice of a forum. On the other hand, developing countries, principally in investment and transfer of technology agreements, insist on the exclusive jurisdiction of the host country.⁹⁹ Hence, a compromise is necessary for the settlement of contractual disputes between developed and developing states.

Preferential treatment for developing countries is urged primarily because of the alleged inferior bargaining position of many developing countries in contract negotiations.¹⁰⁰ This disparity in bargaining power is particularly apparent in the context of multinational corporations dealing with developing countries. "As far as bargaining is concerned, it is generally considered that TNCs (transnational corporations), with their command over resources, markets and technology, their ability to manipulate prices and their possession of bargaining skills, are able to extract more concessions from host governments than small or local firms can do."¹⁰¹ Developing countries insist that without special treat-

⁹⁶ *Id.*

⁹⁷ *Id.* at 570-71.

⁹⁸ *Id.* at 571.

⁹⁹ Christie, *supra* note 4, at 266.

¹⁰⁰ Consider, for example, the following statement of a Mexican official:

Legal transactions, either domestic or international, are based on the principle of equal standing of both parties involved. However, in the real world the party selling, licensing, leasing, lending, *etc.*, is generally the one with more bargaining power. When this difference in bargaining power is too great, then instead of reducing the gap between the powerful and weak, dependence and inferiority is increased. When these unjust transactions become commonplace, it is time for the legal system to revive its norms and issue new legal standards to reduce or if possible to eliminate this disparity.

Maria de Lourdes Jimenez de Padierna, Counsel, Office of the Director General of the National Registry for the Transfer of Technology (Secretariat of Industry and Commerce, Mexico), *cited in* Brown, *supra* note 11, at 275.

¹⁰¹ S. LALL & P. STREETEN, FOREIGN INVESTMENT, TRANSNATIONALS AND DEVELOPING COUNTRIES 77 (1977).

ment in the area of commercial relations, development will continue to be encumbered by the activities of foreign enterprises.

Developed countries support contractual freedom in the selection of dispute settlement mechanisms outside the boundaries of the host country. Representatives of companies operating in and dealing with developing countries assert their willingness to accept any system of law to govern their contracts as long as the law is equitable and reasonably certain.¹⁰² However, companies operating in developing countries claim that in the majority of developing countries the law is too uncertain and unpredictable to be relied upon, and therefore desire the protection of a forum outside the developing country.¹⁰³

Choice-of-forum clauses have been discussed in the negotiations of the United Nations Conference on Trade and Development (UNCTAD) on a Code of Conduct for the Transfer of Technology.¹⁰⁴ Compromise positions have been advanced that the Code designate jurisdictions in which actions may be brought, so that the party has the option of bringing the action in one of several jurisdictions, or that the Code allow jurisdiction based on the existence of basic contacts between the parties, the transaction, and the state.¹⁰⁵ Choice-of-forum clauses would be valid to the extent that they complied with these jurisdictional rules.

One approach to choice-of-forum agreements, the approach adopted in England and the United States, is to allow courts the discretion to decide the effect to be given the clause when included in a contract with a developing country. When faced with a dispute in which a developing country is involved, the court should be alert to the possibility of an unequal bargaining relationship, and should scrutinize the contract to determine to what extent the choice-of-forum provision is the product of lop-sided negotiations. In this way, contractual freedom would be promoted, but only to the extent that the interests of the developing country

¹⁰² Brown, *supra* note 11, at 287.

¹⁰³ Brown states that:

In North Africa and the Middle East, the law as written has nothing to do with the solution of the problems. Each developing country has a right to develop its own internal system of law, but there has to be certainty that the law in existence at the time a company goes into a country will not be changed arbitrarily to alter completely the rules of the game on the basis of which the company made its original decision to invest or transfer technology.

Id.

¹⁰⁴ Christie, *supra* note 4, at 266-67.

¹⁰⁵ *Id.* at 267.

are protected. Under this approach, there should be no presumption of equal bargaining power,¹⁰⁶ and the presumption of validity of a forum selection clause, as established by *Zapata*,¹⁰⁷ should be inapplicable to a contract with a developing country. Instead, the court should require that the party seeking enforcement of the clause demonstrate the reasonableness of the clause in light of the circumstances surrounding the contract. Reasonableness could be established by applying the standards enunciated in *Zapata* and in subsequent United States cases.¹⁰⁸ Where the party advocating enforcement of the clause fails to establish the reasonableness of the clause, the court should refuse to enforce the choice-of-forum agreement.

Cindy Noles

¹⁰⁶ "Even outside the contract of adhesion field, abuse of such clauses is widespread. In today's economy, equal bargaining power cannot be 'presumed'." Nadelmann, *supra* note 49, at 134.

¹⁰⁷ See notes 53-59 and accompanying text *supra*.

¹⁰⁸ See notes 60-74 and accompanying text *supra*.

