

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 67-770

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FRANCISCO J. MANRIQUE,
INVERSIONES CONTINENTALES,
N.V., a foreign corporation,
and ARGOVILLE CORPORATION,
N.V., a foreign corporation,

Appellants,

vs.

FLORIDA BAR NUMBER 041245

GIORGIO FABBRI,

Appellee.

INITIAL BRIEF OF APPELLANTS
Francisco J. Manrique,
Inversiones Continentales, N.V.,
a foreign corporation, and
Argoville Corporation, N.V.,
a foreign corporation

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STATEMENT OF THE CASE

This is the initial brief of Appellants, Francisco J. Manrique, Inversiones Continentales, N.V. and Argoville Corporation, N.V.

For purposes of this Brief, Appellants/Defendants will be collectively referred to as "Continentales" and the Appellee/Plaintiff will be referred to as "Fabbri".

Fabbri filed his Complaint (A-1) seeking declaratory judgment and other relief. Continentales filed a Motion to Dismiss the Complaint for Lack of Jurisdiction (A-32). The Motion to Dismiss for Lack of Jurisdiction was denied by Order of Court rendered April 8, 1985 (A-35).

Continentales then sought an appeal from the Non-Final Order Denying Continentales' Motion to Dismiss for Lack of Jurisdiction. The District Court of Appeal, Third District, affirmed the position of the trial court by opinion filed August 6, 1985 (A-37).

This is a discretionary appeal from the opinion of the Third District Court of Appeal which affirmed the Non-Final Order Denying Continentales' Motion to Dismiss for Lack of Jurisdiction. The Supreme Court granted jurisdiction pursuant to Order dated February 26, 1986.

During the pendency of the appeal to the Third District Court of Appeal and the pendency of this discretionary appeal, the trial court proceedings continued without

abatement. In the trial court proceedings, Continentales filed a Motion for Judgment Upon the Pleadings. The Trial Court granted the Motion by Order dated January 13, 1986. A Motion for Rehearing is pending with respect to the Order Granting the Judgment Upon the Pleadings.

The trial court proceedings also continue with respect to the resolution of a counterclaim filed by the Appellant/Defendant, Francisco J. Manrique.

References in this Brief to "Argoville" mean the Appellant/Defendant Argoville Corporation, a Netherlands Antilles corporation.

References in this Brief to "Inversiones" mean the Appellant/Defendant Inversiones Continentales, a Netherlands Antilles corporation.

This Brief is accompanied by an Appendix and reference to this Appendix will be indicated by the letter "A" followed by the appropriate page number.

STATEMENT OF FACTS

Fabbri filed his complaint (A-1) seeking a declaratory judgment, specific performance, injunction and other relief. The action is predicated upon an alleged breach of Stockholders' Settlement Agreement and Stock Option between Inversiones and Fabbri, (designated in the agreement as a citizen of Italy and a resident of Buenos Aires, Argentina.) The agreement was amended by an addendum subsequently executed. A copy of the option agreement and the Addendum were attached as exhibits to the complaint (A-1). All references contained in this Brief to the "option agreement" mean the Stockholders' Settlement Agreement, Stock Option and Addendum just described.

Fabbri generally alleges in his complaint that he had an option to purchase stock in Argoville held by Inversiones and that he exercised the option to purchase. Fabbri also alleges that Inversiones failed and refused to transfer to him the required shares of stock in Argoville upon his alleged exercise of the Option.

The option agreement (A-14) provides in Article Fourth thereof, the following:

". . . The laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction . . ."

The parties executed an Addendum to the Option Agreement executed in Spanish, Exhibit B to the Complaint (A-20) Article Sixth (6) thereof, in its English version (not

executed) attached to the Complaint (Exhibit C thereto)
(A-25) reads as follows:

". . . The laws of the Netherlands Antilles shall govern and control in case of any conflict among the parties who expressly submits themselves to the venue and jurisdiction of the Courts of the Netherlands Antilles."

Continentales filed a Motion to Dismiss the Complaint for Lack of Jurisdiction (A-32). The Motion was based upon the foregoing language contained in the option agreement.

The Motion to Dismiss was denied by Order rendered April 8, 1985. (A-35).

SUMMARY OF ARGUMENT

STATEMENT OF THE CASE: Continentales filed an appeal to the Third District from a non-final order which denied Continentales' Motion to Dismiss a Complaint for Lack of Jurisdiction. The order of denial was affirmed by the Third District. This is an appeal from the opinion of the Third District affirming the denial. The Supreme Court invoked its discretionary jurisdiction.

STATEMENT OF THE FACTS: Fabbri and Continentales, all non-residents of Florida, entered into an agreement, which agreement provided:

". . . the laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this Agreement, who submit themselves to that jurisdiction."

The agreement was amended by an addendum subsequently executed in Spanish. The English version of the addendum provides:

". . . The laws of the Netherlands Antilles shall govern and control in case of any conflict among parties who expressly submit themselves to the venue and jurisdiction of the Netherlands Antilles."

Fabbri instituted an action, in Florida, based upon the agreement. Continentales sought a dismissal of the action for lack of jurisdiction based upon such provisions.

ISSUE ON APPEAL: Continentales contend that the parties to a contract may agree to submit to the jurisdiction of a chosen forum in the event of subsequent litigation arising out of the contract where there is no overreaching, no

contravention of stated public policy and the forum is neither remote or alien.

In Maritime Ltd. Partnership v Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984), the Fourth District held that parties to a contract may agree in the contract to submit to the jurisdiction of a chosen forum in the event of subsequent litigation arising out of such contract.

The Third District, in Zurich Insurance Company v Allen, 436 So.2d 1094 (Fla. 3rd DCA, 1983), with a contrary position, reaffirmed its position to the effect that it will adhere to the rule: "that an agreement to limit future causes of action . . . to the courts of a specific place is void as an attempt to oust the jurisdiction of all other courts over subsequent disputes arising out of the agreement"

The record in this case establishes that there was no overreaching by Continentales and that the parties had equal bargaining power. The record further establishes that enforcement of the provision would not contravene any strong public policy. The record further establishes that the purpose of the provision was not to transfer an essentially local dispute to a remote and alien forum.

Any public policy which would prohibit the enforcement of the choice of forum provision, in this case, would be archaic, encourages "forum shopping" and should be revoked.

ARGUMENT

ISSUE ON APPEAL

CAN PARTIES TO A CONTRACT AGREE THEREIN TO SUBMIT TO THE JURISDICTION OF A CHOSEN FORUM IN THE EVENT OF SUBSEQUENT LITIGATION ARISING OUT OF SUCH CONTRACT WHEN THERE IS NO OVERREACHING, NO CONTRAVENTION OF STATED PUBLIC POLICY AND THE FORUM IS NEITHER REMOTE OR ALIEN?

Parties to a contract can properly agree to submit to the jurisdiction of a chosen forum in the event of subsequent litigation arising out of a contract when there is no overreaching, no contravention of stated public policy and the forum is neither remote or alien.

The option agreement, Article Fourth thereof, provides:

" . . . The laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction . . ."

Article Fourth of the Addendum to the option agreement executed in Spanish, in its English version attached to the Complaint (A-25), reads as follows:

". . . The laws of the Netherlands Antilles shall govern and control in case of any conflict among the parties who expressly submit themselves to the venue and jurisdiction of the Courts of the Netherlands Antilles."

Continentales concedes that there is a conflict of authority in Florida. Continentales urges that the better law in Florida is Maritime Limited Partnership v Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984), (hereinafter referred to as "Maritime"), and followed by the same District Court in McRae v. J.D./M.D., Inc., 11 FLW 117, case 85-642, (Fla 4th DCA, December 31, 1985) (hereinafter referred to as "McRae"). In Maritime, Florida

firms were to supply consulting and advertising services for a project in South Carolina. The contracts provided: ". . . client and agency further agree that proper venue and jurisdiction for any litigation arising under this agreement shall lie within the appropriate Court in Broward County, Florida". The Fourth District expressly did not address questions of doing business or performing acts in Florida and addressed itself solely to the question of the validity of the provision with respect to the consent to jurisdiction.

The District Court of Appeal, Fourth District, held the provision valid and that in personam jurisdiction can be conferred by consent even though no cause of action exists when the contract is entered into, providing that:

1. The forum was not chosen because of overwhelming bargaining power on the part of one party which would constitute overreaching at the other's expense.
2. Enforcement would not contravene a strong public policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, or the forum from which the suit has been excluded.
3. The purpose was not to transfer an essentially local dispute to a remote and alien forum in order to seriously inconvenience one or both of the parties.

The option agreement involved in this appeal does not evidence any overreaching by Inversiones at the expense of Fabbri. Fabbri originally organized Argoville and selected the Antillean forum for its formation. Inversiones later purchased from Fabbri the stock that it subsequently optioned to Fabbri. Both Inversiones and Fabbri appear to have equal bargaining power. There is nothing in the record

to indicate that Inversiones had in its favor overwhelming bargaining power, or that the choice of forum was made at the expense or detriment of Fabbri.

There is nothing in the record to indicate that enforcement in the agreed forum contravenes any strong public policy enunciated by statute or judicial fiat in the Netherlands Antilles or in the forum (Florida) where Fabbri has elected for convenience unilaterally to bring suit. The Netherlands Antilles is part of the Kingdom of the Netherlands, a commonwealth well known for its judicious and competent legal system and Courts.

As both Inversiones and Argoville are Antillean corporations and the option agreement recites that Fabbri is an Italian citizen residing in Argentina, the provision contained in the option agreement clearly was not intended to transfer a local dispute to a remote and alien forum. The provision is precisely intended to settle controversies, like the present, that centers on the appropriate exercise of an option to acquire stock in a Netherlands Antilles corporation, in the forum where the corporation was organized and selected for such purposes by Fabbri. The other Appellant/Defendant, Francisco J. Manrique is acknowledged in the complaint to be a citizen and resident of Venezuela. Citizens of Florida are not involved in this controversy.

The District Court of Appeal, Fourth District, further held in Maritime with reference to the public policy requirement that:

". . . Absent a statute to the contrary, and if such contracts are entered into at arms length with equal bargaining power and partial performance is called for in both states, we can perceive no public policy against the contracting parties designating the home state of one of two corporations as a forum for insuing litigation. Indeed, a conclusion to the contrary does not appear to serve any purpose other than to provide residual loopholes through which one of the contracting parties can use dilatory tactics to escape clearly entered into obligations. Furthermore, it is well recognized that contracting parties can agree on what state law is to apply without doing violence to public policy . . ."

". . . That being so, if one can choose the law of the forum, we fail to understand how arms length choice of the forum itself is anything other than a distinction without much of a difference. . ."

The District Court of Appeal, Fourth District, in Maritime, recognized its position conflicts with an opinion of the District Court of Appeal, Third District, Zurich Insurance Company v Allen, 436 So.2d 1094 (Fla 3rd DCA, 1983) (hereinafter "Zurich"). The Fourth District deemed the matter to be of great public importance and certified to our Supreme Court the question which is also the issue on this discretionary appeal.

The question certified to our Supreme Court by the Fourth District is as follows:

Can parties to a contract agree therein to submit to the jurisdiction of a chosen forum in the event of subsequent litigation arising out of said contract when there is no overreaching, no controvention of stated public policy and a forum is neither remote nor alien?

A similar question was certified to the Supreme Court by the Fourth District in McRae.

The Fourth District expressly adopted the reasoning of

the Supreme Court of the United States in M/S Bremen v. Zapata, 407 US 1, 92 S CT 1907 (1972), (hereinafter "Zapata".) In Zapata, a German corporation (Unterweser) contracted with Zapata, an American corporation, to tow an oil-rig across the Atlantic Ocean to Italy. The contract provided:

"Any dispute arising must be treated before the London Court of Justice."

The rig was damaged in transit and towed to Tampa. Zapata, notwithstanding such provision, instituted proceedings for damages against Unterweser in the U.S. District Court, Middle District of Florida. The District Court denied Unterweser's motion to dismiss based upon the contract provision. Upon certiorari, the United States Supreme Court determined that the choice of forum provision should be enforced.

The Supreme Court in Zapata declared:

"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.

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power... should be given full effect.

Thus, in the light of present day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside...

Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be 'unreasonable' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action. Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties

to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable."

The opinion of the Third District (A-37) in this case below, refused to recede from its rationale in Zurich and other cases cited in the opinion and in Zurich. The Third District also refused to follow the reasoning in Zapata.

Continentales urges this Court to adopt the rationale of Zapata, and Maritime and reject the position of the Third District Court of Appeal as announced in Zurich and followed by it in its opinion of August 6, 1985, in this matter.

Alternatively, Continentales urges that in this particular instance, where all parties are nonresidents of Florida and where the designated jurisdiction desired by the parties as expressed in the option agreement, as clarified in its addendum, is the home jurisdiction of the corporations involved, even the public policy as determined by the Third District would not be violated should this Court determine that such policy exists.

The Third District in its Opinion (A-37) concluded, in our opinion erroneously, that the provision contained in the option agreement is only a choice of law provision and not a forum selection clause. Such conclusion was not reached by the trial court below. It simply denied the motion to dismiss for lack of jurisdiction without prejudice, should this Court rule upon the question certified in Maritime, in a manner favorable to Continentales.

The rationale in Zapata should be the law of Florida

for the sake of judicial certainty and to discourage "forum shopping" that unjustifiably burdens our State courts with litigation that parties with similar bargaining power have freely chosen to submit to another forum. The trial courts of this State can properly protect a party by not enforcing the provision in those instances which involve unequal bargaining power or which transfer an essentially local dispute to a remote and alien forum. The legitimate expectations of parties to a contract should be recognized by our law, especially in view of our efforts to be recognized as an international finance and commercial center.

CONCLUSION

The choice of forum provision, freely and voluntarily entered into between the parties, should be upheld. The public policy announced by the District Court of Appeal, Third District, is archaic, encourages "forum shopping" should be reconsidered, and in any event, is not applicable to the facts in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13TH day of MARCH, 1986 to Manuel A. Reboso, Esq., Sams, Ward, Newman, Elser & Lovell, P.A., 700 Concord Building, 66 West Flagler Street, Miami, Florida 33130.

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