NOTES

UNTERWESER: CHOICE NOT CHANCE IN FORUM CLAUSES

Forum clauses regulating venue disputes are frequently included in transnational contracts as a device to avoid the delays and uncertainties inherent in the application of conflict of laws rules.[1] American courts have been inconsistent in their approach to the enforcement of forum selection clauses where one contracting party initiates suit in the United States in breach of his contract.[2] Generally, forum clauses have been enforced where both contracting parties were aliens and the stipulated forum was in a foreign jurisdiction.[3] The problems emerge where one party is an American citizen and the agreement specifies the courts of a foreign nation. In this situation the American contractor typically has been permitted to maintain suit in the United States in breach of his agreement. This result has been encouraged by the application of domestic public policy doctrines with little emphasis placed on sound contract principles and international policy implications.[4]

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1. *See* Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193 (1966); MODEL CHOICE OF FORUM ACT, 17 AM. J. COMP. L. 292, 293 (1969) (prefatory note).

2. *Compare* Home Insurance Co. v. Morse, 87 U.S. (20 Wall) 445 (1874); Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958); Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941 (2d Cir. 1930); Nute v. Hamilton Mutual Ins. Co., 72 Mass. (6 Gray) 174 (1856) *with* Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3d Cir. 1966); Wm. H. Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir. 1955); Cerro de Pasco Copper Corp. v. Knut Knudsen, O.A.S., 187 F.2d 990 (2d Cir. 1951); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965) *and* Boyd v. Grand Trunk W.R. Co., 339 U.S. 263 (1949); Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967).

3. *See, e.g.*, Murillo, Ltda. v. The Bio Bio, 127 F. Supp. 13 (S.D.N.Y. 1955), *aff'd*, 227 F.2d 519 (2d Cir. 1955); Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903).

4. The leading case and outstanding example of this method of analysis is Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. granted*, 358 U.S. 805 (1958), *cert. dismissed as improvidently granted*, 359 U.S. 180 (1959). An American shipper brought an action in rem and in personam against the Monrosa and its owner for water damage to cargo.

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The recent decision of the Supreme Court in *M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Company*[5] rejects the protectionist public policy approach previously cherished by the majority of American courts, holding that a motion to dismiss must be granted, where, under the circumstances, the enforcement of a forum clause would be reasonable.[6] Thus, forum clauses may be properly deemed enforceable manifestations of intent to litigate disputes in the selected forum, and such clauses are prima facie enforceable in the absence of a showing by the resisting party that the enforcement would be unreasonable.[7]

Perhaps the most significant aspect of the Supreme Court's departure from the concept that forum clauses violate public policy per se, is the unequivocal preference expressed for the expansion of international trade and commerce through a policy of freedom of contract.[8] The adoption of this "expansionist" outlook represents a complete, but not unexpected,[9] change in position for

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The forum clause in the bills of lading read: "that no legal proceeding may be brought against the Captain or ship owners or their agents . . . except in Genoa . . . ." *Id.* at 299. On the strength of this clause, the district court declined to retain jurisdiction over the dispute relying on the *Muller* decision. *See* note 2 *supra.* However, on appeal, the court distinguished the wording of the forum clause in *Muller* from that contained in *Carbon Black* to reach its conclusion that the latter did not preclude an action in rem. Discussing forum clauses in general, the appellate court stated the universal rule to be that forum clauses are void per se because they represent an attempt to oust the jurisdiction of a court. The *Carbon Black* court then bolstered this policy position by noting that the foreign shipowner failed to carry its burden of showing that the American forum was inconvenient under the doctrine of forum non conveniens. On certiorari to the Supreme Court, the reasoning as to the in rem action was affirmed but the Court refused to decide the issue of enforceability regarding the in personam action because the issue was too abstractly posed. Hence, the court of appeals decision remained intact.

5. 407 U.S. 1 (1972). This was a 6 to 1 decision with Justice Douglas dissenting.

6. *Id.* at 10.

7. *Id.*

8. *Id.* at 11-12:

> It [the reasonableness test] accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with experience in the subject matter. Plainly, the courts of England meet the standard of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

9. The leading case for the minority view was Wm. H. Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir. 1955), *cert. denied,* 350

American courts. The effect of this new policy is an extension of comity to foreign courts and a grant of autonomy to alien contractors in their dealings with American businessmen. The Supreme Court acknowledged the necessity of expedient and uniform settlement of international disputes in order to facilitate trade and commerce, and accordingly held that a mutual agreement by contracting parties to litigate their disputes in a specific court is an acceptable method to promote convenience and expedite the resolution of contract disputes.[10]

One of the several important by-products of the Supreme Court's analysis in *Unterweser* includes the specific exclusion of the application of the doctrine of forum non conveniens in those contracts which contain forum clauses.[11] Although the language of the Court regarding this doctrine is quite clear, there remains a possibility of continued use of forum non conveniens under the guise of a reasonableness analysis as a result of the various definitions of the reasonableness test found in earlier cases.[12] In

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U.S. 903 (1955). In an action by the consignee of goods shipped from Sweden to the United States, the federal district court granted the shipowner's motion to decline jurisdiction on the ground that the forum clause in the bills of lading should be given effect. On appeal, the United States Court of Appeals affirmed the district court and stated that where the clause is reasonable under the circumstances, a court may properly decline jurisdiction and relegate a party to the court to which he assented in the contract.

10. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1 (1972). "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 13-14. The clear inference is that forum clauses will not only enhance certainty but also extend commercial comity to foreign courts.

11. Discussing the district court opinion in the instant case, the Supreme Court noted that: "the court treated the motion to dismiss under normal *forum non conveniens* doctrine applicable in the *absence* of such a [forum] clause . . . ." *Id.* at 6 (emphasis added).

12. *See, e.g.*, Wm. H. Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir. 1955). In applying the reasonableness test this court considered four factors: (1) the nationality and residence of the shipowners and crew; (2) the location of evidence regarding seaworthiness; (3) the nation in which the vessel was constructed; and (4) the similarity of Swedish and American laws regarding the measure of damages allowable. These factors considered under a reasonableness approach bear close resemblance to those considered by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509-12 (1947), in applying the doctrine of *forum non conveniens.* *See* Barrett, *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380 (1947); Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908 (1947). *See also* Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972) (residency of parties, location of witnesses & parties, place of execution and/or performance of the con-

light of the clear language of the Court regarding the inapplicability of forum non conveniens, one section of this Note will explore the feasibility of avoiding this doctrine by characterizing the reasonableness test as one of unconscionability.

The strong emphasis on the expansion of international commerce and the resultant extension of comity to foreign courts in the *Unterweser* decision serves to promote the increased use of the forum clause in international contracts to such an extent that its impact is readily discernible in two specific situations.

The first is the result of the Supreme Court's discussion of the domestic policy against the enforcement of exculpatory clauses in international business agreements. Consistent with its "expansionist" tenor, the Court considered the laws and policies prevalent in England to reach its determination that such restrictive domestic policies as that embodied in *Bisso v. Inland Waterways Corp.*[13] do not control those international contracts in which performance occurs outside the United States.[14] By limiting the *Bisso* doctrine to domestic contracts, the *Unterweser* Court renewed its commitment to the fundamental principle of freedom of contract.

The second effect of *Unterweser* is to make apparent the need for judicial clarification of the United States Limitation of Vessel Owner's Liability Act.[15] Generally, the Act allows a shipowner to limit his monetary liability as a defendant in an action for damages.[16] The broad language of the Act coupled with the

tract); Geiger v. Keilani, 270 F. Supp. 761 (E.D. Mich. 1967) (location of place of performance and its relation to the selected forum); Amicale Industries, Inc. v. S.S. Rantum, 259 F. Supp. 534 (D.C.S.C. 1966) (nationality of witnesses, comparison of laws, nationality of crew); Sociedade Brasileira De Intercambio Comercial y Industrial, Ltda. v. S.S. Punta Del Este, 135 F. Supp. 394 (D.C.N.J. 1955) (relegation of contract breaching party to non-neutral forum, relying heavily on *Gulf Oil* case); Murillo, Ltda. v. The Bio Bio, 127 F. Supp. 13 (S.D.N.Y. 1955) (location of evidence).

13. 349 U.S. 85 (1955).

14. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 15-16 (1972).

15. 46 U.S.C. § 181 *et seq.* (1970).

16. The right of vessel owners to invoke the Limitation Act is embodied in 46 U.S.C. § 183 (1970) without regard to time limitations. However, in 46 U.S.C. § 185 (1970) the right to *petition* a federal district court for Limitation is subject to a six-month statute of limitations. Since the Supreme Court has not decided whether § 185 applies when Limitation is pleaded by *answer*, the safest procedure for the shipowner to follow is to petition a federal court within the six month period. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 10-15 (1957).

particular circumstances in *Unterweser* may possibly deprive a foreign shipowner of the right to invoke the benefits afforded by the Limitation Act.

This Note will first explore the usefulness of the reasonableness test as it is variously interpreted. Then, the impact of the *Unterweser* rule on the *Bisso* doctrine and the Limitation Act will be examined.

I. THE FACTUAL BACKGROUND

A. The Contract: Agreement and Performance

Zapata, a Delaware corporation based in Houston, Texas, solicited bids for the towage of its ocean-going drilling rig from Venice, Louisiana to Ravenna, Italy. Unterweser, the low bidder, submitted its contract for approval and acceptance by Zapata. Several alterations were made and the modified offer was forwarded to Unterweser, a German corporation, for final acceptance. The contract was executed in Germany in November of 1967, containing the forum selection clause in issue: "Any dispute arising must be treated before the London Court of Justice."[17] The contract also contained two clauses purporting to absolve Unterweser from liability for the negligence of its employees and any damages to its tow.[18]

According to the contract, the *M/S Bremen* departed Louisiana with the drilling rig *Chaparral* in tow on January 5, 1968. Four days later, while in international waters, a sudden storm arose causing severe damage to the *Chaparral.* Pursuant to the instructions of Zapata, the *M/S Bremen* put into the nearest port of refuge, Tampa, Florida. Upon arrival the *M/S Bremen* was immediately seized pursuant to an in rem action and a summons and complaint was served upon the agent of Unterweser.

B. The Zapata Action

On January 12, 1968, Zapata, in breach of contract, brought a complaint in admiralty against the *M/S Bremen,* in rem and its

17. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).

18. *Id.* at 3 n.2.

> 1. [Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow.
> 2. . . . .
> b) Damages suffered by the towed object are in any case for account of its Owners.

owner in personam, in the Federal District Court at Tampa.[19] The complaint alleged negligence in towage and breach of contract for which Zapata prayed $3,500,000.00 damages. In its answer Unterweser invoked the forum clause and moved for dismissal on the grounds that (a) the court lacked jurisdiction and (b) the forum was inconvenient, asking in the alternative that (c) the court stay the current action pending the resolution of the dispute in the London Court of Justice. This motion was denied on July 29, 1968.

C. The Unterweser Actions

In compliance with the contract, and while awaiting the ruling of the Tampa District Court, Unterweser brought an action against Zapata in the High Court of Justice in London, England. This complaint alleged breach of contract by Zapata.[20] Over the objection of Zapata, the trial court ruled that the forum clause was sufficient to confer jurisdiction on the English courts.[21] This ruling was appealed by Zapata. During the interim before the English appellate division could render a decision and before the ruling on its motion in the Zapata action, Unterweser faced a difficult choice. The six-month period for filing an action under the United States Limitation Act[22] was nearing expiration. Thus, uncertain as to the outcome of both the Zapata action in the United States and its own action in England, Unterweser elected to invoke the benefits afforded a shipowner under the Limitation Act.[23] On July 2, 1968, Unterweser filed its claim for exoneration from or limitation of its liability in response to the Zapata action.[24]

In this separate action Unterweser reiterated its former claim that the forum clause should be given effect. In its answer Zapata reinstated its original complaint. Upon receipt of the pleadings, the district court judge enjoined all other proceedings in the

19. *In re* Unterweser Reederei, GMBH, No. 68-21 Civil-T (M.D. Fla. 1968).

20. In addition to the breach of the forum clause, Unterweser sought damages for loss of towing gear and payment for towage receivable. Petitioner's Brief for Certiorari at 5, n.3, M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co. 407 U.S. 1 (1972).

21. This opinion was not published.

22. 46 U.S.C. § 185 (1970).

23. Realizing that pleading Limitation by answer is fraught with risk, Unterweser chose the safest course of action to preserve its substantive rights. *See* note 16 *supra.*

24. 296 F. Supp. 733 (M.D. Fla. 1969).

United States regarding this contract pending the outcome of the Limitation proceedings. Thus, the Limitation action became the surviving action in the United States. Subsequently, Zapata moved for an injunction to restrain Unterweser from further prosecuting the English action. To force the issue, Unterweser moved to stay its own Limitation action pending the outcome of the English action. The district court judge denied Unterweser's motion and enjoined it from proceeding in the English action.[25] From this order Unterweser appealed to the United States Court of Appeals for the Fifth Circuit.[26]

In an opinion based largely on the rationale of *Carbon Black Export, Inc. v. The S.S. Monrosa*,[27] the appellate court reiterated its prior position that forum selection clauses are per se invalid as an attempt to oust the jurisdiction of an American court.[28] The court upheld the injunction against Unterweser without placing any weight whatsoever on the forum clause. Rejecting the contract remedy of specific performance, the court went on to conclude that the trial court did not abuse its discretionary power to refuse enforcement of the forum clause on the basis of forum non conveniens.[29] The court reasoned that to remand the case to England would materially affect Zapata's substantive rights since the exculpatory clause in the contract would be enforced in England. The court noted that this would violate the public policy set forth in *Bisso v. Inland Waterways Corp.*[30] This judgment was affirmed on rehearing[31] and Unterweser appealed to the Supreme Court.

In order to resolve the conflicts within federal and state courts regarding the enforcement of forum clauses, the Supreme Court granted certiorari.[32] Thus, a choice of theories, each with

25. *Id.*

26. *In re* Unterweser Reederei, GMBH, 428 F.2d 888 (5th Cir. 1970) (three judge panel).

27. 254 F.2d 297 (5th Cir. 1958).

28. *Id.* *See* note 4 *supra.*

29. *In re* Unterweser Reederei, GMBH, 428 F.2d 888, 894, 895 (5th Cir. 1970).

30. *Id.* at 895 n.38, *citing* Bisso. In addition the court stated that because the plaintiff was an American and the selected forum was in a foreign nation, the discretion to remand the case to this forum was very limited.

31. *In re* Unterweser Reederei, GMBH, 446 F.2d 907 (5th Cir. 1970) (en banc).

32. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

its own policy considerations, was presented to the Court. In response, the Supreme Court stated:

> 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. . . .
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> . . . .
>
> This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.[33]

The Court also repudiated the theory that choice of forum clauses oust the jurisdiction of American courts.

> The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. . . . 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.[34]

II. THE UNTERWESER RULE: REASONABLENESS OR UNCONSCIONABILITY?

A. Prior Case Law

The decisional law preceding the *Unterweser* case dealt with forum clauses in various fashions. Early cases, as an example, commonly held that such clauses were void as an attempt to remove the jurisdiction of a court.[35] Others found a violation of public policy because the effect of a forum clause was to bar an American citizen from litigating a dispute in American courts.[36] An

33. *Id.* at 8, 10 (footnotes omitted).

34. *Id.* at 12.

35. Home Ins. Co. v. Morse, 87 U.S. (20 Wall) 445 (1874); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916).

36. Sliosberg v. New York Life Ins. Co., 217 App. Div. 685, 217 N.Y.S. 226 (1926).

early New York court found that a forum clause denied an insured the rights guaranteed under the state constitution and statutes.[37] Still other courts have applied a forum non conveniens rationale to test the enforceability of a choice of forum clause.[38] The Carriage of Goods by Sea Act[39] has been held to be a limitation on the enforcement of such clauses in admiralty cases.[40] The most recent line of cases adopt a reasonableness test but appear to rely on forum non conveniens elements.[41]

In those cases which deny enforcement of forum clauses, discussion of freedom of contract is conspicuous by its absence, and usually no weight is given to the forum clause.[42] Often these decisions assume the forum clause to violate some policy and then support this assumption by the application of the doctrine of forum non conveniens.[43] The problem with this approach is that the mutual agreement of the parties is completely overlooked. Moreover, the burden of proving that the domestic forum is inconvenient is usually placed on the defendant rather than on the contract-breaching American.[44] The net result of this misallocation of the

37. Darling v. Protective Assurance Soc., 71 Misc. 118, 127 N.Y.S. 486 (1911).

38. *See, e.g.*, Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958).

39. 46 U.S.C. § 1300 *et seq.* (1970).

40. Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967). This case overruled *Muller* in part by holding that where the provisions of COGSA apply, a forum selection clause serves to lessen the liability of the carrier in contravention of § 1303(8).

41. *See* note 12 *supra.*

42. *See, e.g.*, Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958); Wood & Selick, Inc. v. Compagnie Transatlantique, 43 F.2d 941 (2d Cir. 1930); Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1956).

43. *See* note 4 *supra.*

44. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his own remedy. *But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.*

Id. at 508 (emphasis added and footnotes omitted).

This particular language was cited in *Carbon Black* and in the federal district court's opinion in the instant case in support of placing the burden of proving inconvenience on the shipowner. In *Carbon Black*, the shipowner was a defendant whereas in *Unterweser* the vessel owner was a plaintiff in the Limitation action but in the position of a defendant when responding to Zapata's counterclaim. The forum non conveniens analysis does not take into account the mutual agreement of parties, thus, arbitrarily placing the burden of proof on a defendant who seeks specific enforcement of a forum clause stipulating a for-

burden of proof is a denial of justice to the foreign contractor.

B. The Reasonableness Test

The fundamental question facing the Supreme Court in *Unterweser* rested ultimately on a choice between divergent policies. One line of cases represented a protectionist viewpoint and accordingly found forum clauses void per se,[45] whereas the minority view sought to enforce the mutual agreement of the parties where the forum clause was reasonable.[46] The Supreme Court found that the absolute doctrines contained in those cases which deem forum clauses unenforceable per se were entirely inconsistent with international business realities. The Court traced the expansion of international trade and commerce and stressed the necessity of enforcing the bargains reached by mutual agreement in support of its conclusion. In holding that forum clauses should be enforced in all but unreasonable circumstances, the Court fell into line with domestic authorities[47] and most European courts.[48]

The *Unterweser* Court phrases its definition of the reasonableness test in traditional contract language. Given the policy

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eign forum, is unduly harsh. In effect, a court employing a forum non conveniens analysis is remaking the contract on the basis of inconvenience to the American party, completely ignoring the fact that the alien foregoes his remedy for breach of contract. This inequity was redressed when the *Unterweser* Court placed the burden of overcoming the forum clause on the resisting party rather than on the alien defendant.

45. *See* note 42 *supra*. *See also* Clarke v. Lowden, 48 F. Supp. 261 (D.C. Minn. 1942); The Edam, 27 F. Supp. 8 (D.C.N.Y. 1938); Kuhnhold v. Compagnie Generale Transatlantique, 253 F. Supp. 387 (D.C. N.Y. 1918).

46. Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); Wm. H. Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir. 1955); Cerro de Pasco Copper Corp. v. Knut Knudsen, O.A.S., 187 F.2d 990 (2d Cir. 1951); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965). *See generally* 56 A.L.R.2d 300 (1957) *and* LATER CASE SERVICE (1967).

47. A. CORBIN, CONTRACTS § 1445 (1962); A. EHRENZWEIG, CONFLICT OF LAWS § 41 (1962); RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1970); Lenhoff, *The Parties Choice of a Forum*, 15 RUTG. L. REV. 414 (1961); Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964); Comment, *Application of the Forum Clause to Commercial Contracts*, 8 HOUS. L. REV. 739 (1970); Comment, 8 CALIF. WEST. L. REV. 324 (1972).

48. G. CHESHIRE & P. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW, 205-06 (8th ed. 1970) (English cases); *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Assn.*, 13 AM. J. COMP. L. 157 (1964) (cases cited therein with regard to Western Europe, Latin America, and Scandinavia); Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COMM. 17 (1971) (recent English cases); Lenhoff, *supra* note 47; MODEL CHOICE OF FORUM ACT, *supra* note 1.

favoring the facilitation of international commerce, the Court emphasized the necessity for upholding the parties' mutual selection of a forum. The only positive requirements dictated by the Supreme Court are that the selected court possess expertise in the subject of the litigation and that the agreement itself be the result of arm's-length negotiations.[49] In other words, the contract clause must simply conform to normal principles of contract law to be enforced by the courts.

The majority opinion, expressly recognized that a forum clause is an acceptable and desirable means of providing certainty in international business transactions by specifying what law will govern the transaction, and which court will apply that law should a dispute arise.[50] The attributes of certainty are outweighed, however, where the procurement of the forum clause can be shown to be the result of fraud or overreaching, in which case the forum clause will not be enforced for two reasons. First, there is no mutual assent or freedom of choice actually exercised; and second, the presence of fraud or overweening bargaining power necessarily implies the presence of a motive of unfair advantage or surprise rather than the desire for certainty on the part of the dominating party.

In its opinion, the *Unterweser* Court requires the party resisting enforcement of the forum clause to carry the burden of proof on the issue of unreasonableness[51] eliminates the confusion created by the early decisions applying the reasonableness approach[52] and clarifies the allocation of proof for those jurisdictions which have applied the doctrine of forum non conveniens.[53] Although the language of the Supreme Court appears to preclude a forum non conveniens analysis where the contract contains a forum clause, many of the cases decided prior to *Unterweser* have incorporated this doctrine as a part of the reasonableness test.[54] The possibility of continued inclusion of the elements of forum non conveniens exists because the Supreme Court cites these cases with approval.[55] Substitution of the un-

49. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

50. *Id.* at 13, 17 & 18.

51. *Id.* at 10, 15.

52. *See* cases cited, note 12 *supra.*

53. *See* notes 42 & 45 *supra.*

54. *See* note 12 *supra.*

55. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 10 n.11 (1972).

conscionability test for the reasonableness approach might well preclude this result.

C. *The Unconscionability Test*

The unconscionability approach, as set forth in the Uniform Commercial Code,[56] has been applied in a variety of business contract disputes.[57] The common law complement of this test looks to such factors as fraud, undue influence, and duress,[58] whereas the Official Comment to the Uniform Commercial Code is aimed at the prevention of oppression and unfair surprise.[59] The authors of the Official Comment imply that something more that unequal bargaining power is required to render a contract clause unconscionable.[60] But the fact remains that unconscionable clauses are most frequently found where unequal bargaining power is brought to bear: the adhesion or standard form contract.[61]

Neither the Uniform Commercial Code nor the annotated cases attempt to define the unconscionability test with any precision.[62] The courts look to the particular circumstances surrounding the formation of the contract and then balance the interests of the parties to prevent unconscionable oppression or unfair advantage.[63] In effect, the analysis is equitable in nature, requiring the courts to reason on a case by case basis in deciding whether or not the agreement was extracted in an oppressive setting.

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56. Section 2-302(1):

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

57. *See, e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948) (sale contract); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (financing contract); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (implied warranty); Paragon Homes, Inc. v. Carter, 56 Misc. 463, 288 N.Y.S. 817 (1968) (memorandum) (forum clause).

58. *See* Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

59. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

60. *Id.*

61. *Id.* and cases cited note 57 *supra*. *See generally* Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

62. UNIFORM COMMERCIAL CODE § 2-302, Comments 1-3, *and* cases cited note 57 *supra*.

63. *See* note 57 *supra*.

In the case of forum clause agreements, one writer advocates the consideration of whether or not the drafting party had any legitimate interest in selecting the particular forum.[64] This consideration compares with the language of the Supreme Court regarding the facilitation of international commercial transactions through the use of forum clause agreements. Determining legitimacy of interest would involve a balancing of such factors as oppression and overreaching in the procurement of the contract with the need for jurisdictional certainty. In other words, if the implementation of the forum clause would produce unconscionable results,[65] the clause should not be enforced since the unfair method of procurement of the agreement would nullify any presumption of legitimate motives by the drafting or dominant party. The advantage of an unconscionability approach over the unreasonableness test, in this situation, is that a court could weigh the international interests of certainty and freedom of contract unhampered by such collateral and inapposite issues as the doctrine of forum non conveniens.

That the unconscionability approach is consistent with the analysis of the Supreme Court in *Unterweser* is borne out by the specific factors considered by the Court. For example, the Court equates reasonableness and freedom of contract with the presence of "arm's length negotiations"[66] and the absence of "fraud"[67] or "overreaching"[68] throughout its opinion. At one point the Court states:

> The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement, yet even there the party claiming should bear a heavy burden of proof.[69]

It may be inferred from this statement that forum clauses free from the characteristic elements of adhesion contracts[70] (fraud or

64. Spanogle, *supra* note 61, at 960.

65. *Id.*

66. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

67. *Id.* at 12.

68. *Id.* at 12.

69. *Id.* at 17.

70. *See generally* Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Lenhoff, *A Comparative Study in Light of American and Foreign Law*, 36 TUL. L. REV. 492 (1962).

overreaching) are reasonable. By the same token, it is equally consistent to state that the unconscionability standard would be met by a consideration of the same elements.[71]

The difference between unconscionability and unreasonableness is more than one of semantics. While the *Unterweser* decision does point out that the doctrine of forum non conveniens is inapplicable to a contract containing a forum clause and that the burden of proving unreasonableness is on the resisting party,[72] the distinction between reasonableness and forum non conveniens is unclear because the Court cites several cases which have considered elements of the latter under the guise of a reasonableness test.[73] Perhaps such desirable goals as the extension of comity to foreign courts and the grant of autonomy to contracting parties can be attained with greater certainty under an unconscionability rationale.

III. THE BISSO DOCTRINE

Bisso v. Inland Waterways Corp.[74] involved a towage contract, to be performed within the United States, containing an exculpatory clause which was invoked as a defense to a negligence action brought against the bargeowner. The Supreme Court rejected this defense on the basis of public policy and strict construction of the contract against the drafting party. The policy position of the Court was that the use of exculpatory clauses does not tend to discourage negligence, thus, there was no reason to enforce the clause.

A similar exculpatory clause was included in the contract drafted by Unterweser.[75] The court of appeals decision in the instant case relied on the policy prohibition contained in the *Bisso* opinion, but the Supreme Court found that this policy did not reach those contracts which are substantially performed outside the United States.[76] Further, the *Unterweser* Court observed that the *Bisso* contract was between two Americans, whereas the

71. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485 (1967); Spanogle, *supra* note 61.

72. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

73. *Id.* at 10 n.11.

74. 349 U.S. 85 (1955).

75. *See* note 18 *supra.*

76. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 15-16 (1972).

contract in the instant case was between an American and an alien. Based on these two distinctions: party nationality and place of substantial performance, the Supreme Court differentiated the scope of the *Bisso* doctrine; indicating its preference for consideration of international rather than domestic policy limitations in deciding the validity of a forum clause.[77]

In its discussion of the *Bisso* policy, the Court considered the case law of the selected forum, finding that English courts favor the use of forum selection clauses[78] and that they usually enforce exculpatory clauses.[79] In addition, it was noted that where a forum clause does no more than select an English forum, a choice of English law is customarily implied.[80] The importance of this comparison becomes apparent when an exculpatory clause is used in conjunction with a forum clause as in *Unterweser.* Prior to that case some forum clauses were enforced but few exculpatory clauses were ever honored, consistent with the strong position of the Court in *Bisso.* With the adoption of the "expansionist" viewpoint in the *Unterweser* opinion both exculpatory and forum clauses will now be enforced in contracts performed outside the United States. Hence, it becomes important for the practitioner to evaluate the case law and policies of the selected forum in calculating the legal effect of the forum clause in relation to the other portions of an international contract.

Parties may now limit their liability for negligence by agreement and also select a particular court to decide any disputes arising out of an international contract.[81] Thus, the *Bisso* doctrine

77. This is not to say that some domestic policies would not affect international transactions. The particular transaction in *Unterweser* was not regulated, directly or indirectly, by any federal statute. Thus, the instant case is readily distinguishable from the decisions in Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) (Carriage of Goods by Sea Act) and Boyd v. Grand Trunk W.R. Co., 339 U.S. 263 (1949) (Federal Employer's Liability Act), both of which denied enforceability of forum clauses on the ground that the federal statute superseded the agreement of the parties. To the extent that the federal statute regulates a particular type transaction, one must acknowledge a limitation on both the unconscionability and unreasonableness approaches. This limitation on the autonomy of the parties is entirely consistent with the promotion of certainty and uniformity desired by the Supreme Court since a clear statement prohibiting forum clauses is more apt to be uniformly applied and it will afford the foreign contractor adequate notice of United States policy.

78. M/S Bremen and Unterweser Reederei, GMBH v. Zapata Off-Shore Co., 407 U.S. 1, 11 n.12 (1972).

79. *Id.* at 13-14 n.15.

80. *Id.*

81. *Id.*

is now applicable only to those contracts which are performed within the United States.

IV. THE UNITED STATES LIMITATION OF LIABILITY ACT

In general, the Limitation of Liability Act[82] is advanced by shipowners as a defense to an action for money damages.[83] By invoking the protection afforded by this Act, a shipowner may limit the amount recoverable in damages to the value of his ship[84] in an action in rem, in personam, or both.[85] The basic substantive right to Limitation is set forth in section 183 of the Act.[86] This section does not set forth any specific procedural form of action nor any statute of limitation period. Section 185 specifies the procedure to be followed in the event the shipowner elects to *affirmatively petition* a federal district court. The basic procedural requirement is that a shipowner must file his complaint within six months from the date a claimant has given him written notice of a claim.[87] It is clear from the mandatory language in the statute that a court may not waive this six month statute of limitations.[88] However, some courts have by-passed section 185 by allowing the benefits of the Limitation Act to be pleaded as an affirmative defense under section 183 without regard to any time limitation.[89]

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82. 46 U.S.C. § 181 *et seq.* (1970).

83. 3 BENEDICT, ADMIRALTY § 508 (6th ed. 1940); G. GILMORE & C. BLACK, *supra* note 16, at § 10-15.

84. 46 U.S.C. § 183(a) (1970):

> The liability of the owner of any vessel, whether American or foreign, . . . shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

85. *See* note 83 *supra.*

86. *See* note 84 *supra.*

87. 46 U.S.C. § 185 (1970):

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter . . . . Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

88. This assumes that compliance with the statute of limitations goes to the court's subject matter jurisdiction. In addition, this statement only involves those situations where the shipowner affirmatively petitions a district court. *See* G. GILMORE & C. BLACK, *supra* note 16, § 10-15 at 684.

89. *See, e.g.*, Murray v. New York Central Railroad Co., 287 F.2d 152 (2d Cir. 1961); Deep Sea Tankers v. The Long Branch, 258 F.2d 757 (2d Cir. 1958); The Chickie, 141 F.2d 80 (3d Cir. 1944); Blunk v. Wilson Line of Washington, Inc., 341 F. Supp. 1345 (N.D. Ohio 1972). These cases usually substitute the doctrine of laches for the six-month statute of limitations and ac-

The factual circumstances of *Unterweser* present a situation which could result in discriminatory treatment for a foreign shipowner under the Limitation Act. For example, if an American initiates an action in a foreign court pursuant to a reasonable forum clause and this action is dismissed on procedural grounds more than six months after the American claimant has given the shipowner notice of a claim, a problem of construction of the Limitation Act will arise if the American subsequently brings suit in the United States.[90] The language of section 185 precludes the invocation of affirmative action by the shipowner, so if the shipowner is to receive the protection of the Limitation Act, he must rely upon the broad language contained in section 183. That is, the shipowner must plead Limitation as a defense in his answer to the American's claim, a procedure which is fraught with risk.[91]

The problem, therefore, involves the determination of the scope of the procedure enunciated in section 185 of the Limitation Act. If the six month statute of limitations contained in this section is found to be a substantive prerequisite to the *right* of Limitation,[92] then the shipowner in the hypothetical will not be able to limit his liability for damages. On the other hand, several cases have held that section 185 is limited in scope and does not affect the shipowner who pleads Limitation in his answer, accordingly, the statute of limitations contained in section 185 is inapplicable.[93] This is to say that section 183 is construed broadly so

cordingly allow the vessel owner to invoke the defense of limitation beyond the six month period.

90. G. GILMORE & C. BLACK, *supra* note 16. In their discussion of § 185 the authors found three possible constructions of the statute of limitations portion of this section. These are: (1) the time limit is procedural and thus relates only to affirmative petitions, allowing a shipowner to raise the defense of limitation in his answer beyond this period; or, (2) the time limit applies equally to petitions and limitation by answer thus requiring compliance with the statute of limitations for *any* limitation action; or, (3) that limitation may now be raised only by petition thus eliminating defense by answer completely. They sum up the problem facing the shipowner by stating: "but, until the Supreme Court has read the riddle, the prudent practitioner should of course assume the worst (or third solution) and always proceed by filing his petition within the six months period." *Id.* at 685 (footnotes omitted).

91. *See* The West Point, 83 F. Supp. 680 (E.D. Va. 1949). This case noted that the *defense* of Limitation does not serve to aggregate liability against all claims arising out of the same transaction. According to the court, concourse of claimants is allowed only where the shipowner files a petition with a federal district court under § 185.

92. That is, a prerequisite to the substantive right of limitation set forth in § 183 (solution number 2 or 3, note 90 *supra*).

93. *See* note 89 *supra*.

that the shipowner may take advantage of the benefits afforded by the Limitation Act by way of an affirmative defense. The proper interpretation to be given to sections 183 and 185 has not yet been decided by the Supreme Court.

Until this question is decided by the Court, it is clear that the shipowner's right to limit his liability is severely hampered. After a dismissal in the selected forum, there is nothing preventing the American plaintiff from forum shopping in the United States to avoid those jurisdictions which allow Limitation to be pleaded as a defense without regard to the statute of limitations contained in section 185.[94] This is an anomalous predicament for the shipowner, especially since the Limitation Act is primarily for his benefit.[95]

If as in the hypothetical, the foreign shipowner does lose the right to petition a federal court for Limitation through no fault of his own actions, justice and equity would seem to dictate that he be allowed to plead Limitation by answer as a matter of right. If not, the shipowner would be forced to file a concurrent action in the United States whenever he feared a dismissal abroad, in order to protect his right to Limitation in the United States.[96] A vessel owner should not have to incur the expenses incident to this "extra" litigation. In addition, the foreign shipowner would suffer grave injustice at the hands of American courts if the American plaintiff, following the *Unterweser* decision, were to bring suit abroad and then, due to a fortuitous turn of events, be allowed to profit by a potential excess recovery from a shipowner who is unable to limit his liability.[97] The grant of commercial comity and the expansion of international commerce fostered by

94. The American plaintiff's selection of forum is limited to those jurisdictions which do not allow limitation as a defense and in which the American can get jurisdiction over the *res*.

95. *See* Standard Wholesale Phosphate v. Travelers Ins. Co., 107 F.2d 373 (4th Cir. 1939); In re Moore, 278 F. Supp. 260 (E.D. Mich. 1968).

96. Similarly Unterweser was forced to initiate a concurrent action in the United States under § 185 upon penalty of waiving its right to limitation. The additional effect of this filing was to submit to the exclusive jurisdiction of U.S. courts by virtue of its action as a plaintiff and counterclaimant, *In re* Unterweser Reederei, GMBH, 428 F.2d 888, 891-92 (5th Cir. 1970) in that this court affirmed an injunction against Unterweser from proceeding in the stipulated English forum. Although the district court did have jurisdiction, the Supreme Court concluded that the retention of this jurisdiction was inconsistent with a reasonable forum clause.

97. This potential excess recovery consists of that amount actually recovered which exceeds the liability fund required in § 183 & § 185.

the Chief Justice's language in *Unterweser* might prove to be illusory without the concomitant right of Limitation in the field of maritime law.

V. CONCLUSION

The *Unterweser* decision establishes the rule that forum selection clauses may be utilized and must be enforced, if reasonable, in international contracts. This definitive position gives recognition to the contractual freedom as well as the sophistication of the parties to an international contractual agreement. The policy has resulted in the Supreme Court extending comity to foreign courts with regard to admiralty and international business litigation.

Unterweser has eliminated much of the confusion surrounding the application of the reasonableness test by holding the doctrine of forum non conveniens inapplicable where the litigation involves a contract which contains a forum clause, and allocating the burden of showing unreasonableness to the party resisting the enforcement of the forum clause. The possibility of confusion remains as do the cases which created this situation, so there is substantial justification for the use of the unconscionability, rather than the unreasonableness, approach. This procedure would introduce a different, but equally consistent, body of precedent which would substitute such standards as prevention of oppression and unfair advantage for unreasonableness. The principal virtue of the unconscionability approach is that it would accomplish the promotion of certainty and uniformity desired by the *Unterweser* Court without the need to rely upon cases which confuse unreasonableness with the doctrine of forum non conveniens.

Given either interpretation, the *Unterweser* decision alters the legal relations of international contracting parties who utilize forum clauses both within and outside the field of admiralty, but particularly in two areas of admiralty law. The first alternation is that the parties to an international contract may use and enforce exculpatory clauses. It now appears to be settled that the *Bisso* doctrine, which prohibited the use of such clauses, is now limited to those situations where the contract is to be performed within the United States. The second effect on admiralty law involves the right to plead Limitation of Liability as a defense beyond the six month statute of limitations. Assuming circumstances similar to those in *Unterweser*, a foreign vessel owner

may be denied the vital defense of Limitation. This result is inconsistent with both the basic philosophy of the *Unterweser* decision in regard to the preservation of a foreign party's contractual rights as well as fundamental notions of fairness. To redress this injustice the Supreme Court should unify the circuits by allowing Limitation of Liability to be pleaded as an affirmative defense (notwithstanding the language of section 185) where the vessel owner was not the cause of the delay.

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