

CHAPTER 3 RESOLVING INTERNATIONAL COMMERCIAL DISPUTES

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TEACHING SUMMARY

Dispute resolution in international disputes must be cognizant of various cultures, legal systems, and mechanisms for resolution. In terms of procedure, international legal disputes begin with questions of jurisdiction, venue, and conflict of laws. The recent popularity of the Internet (advertising items on Web sites and on-line ordering and contract-negotiation) has added a wrinkle to these issues.

Alongside procedural issues are practical choices of which available mechanism or forum is best suited for the parties. In business disputes, parties may choose suit in their home or foreign court, or mediation arbitration, or inquiry. Traditionally, tribunals such as the International Court of Justice are available to hear disputes involving states, non-governmental, and intergovernmental organizations.

CASE QUESTIONS AND ANSWERS

Scherk v. Alberto-Culver, p.82.

1. What were the Court's reasons for upholding the arbitration provision?

Answer: The clause was consistent with U.S. legislation embodied in the Arbitration Act. Second, the contract was clearly international in its scope and subject matter and thus the parties were free to select a forum other than U.S. courts for the resolution of disputes.

2. What needs of international businesses were served by the Court's holding? How were these needs addressed?

Answer: The most important needs addressed by the Court were orderliness and predictability in international transactions and the prevention of a multiplicity of litigation.

These needs were addressed by enforcing a clear and unambiguous arbitration provision and dismissing the litigation.

3. What factors would Alberto-Culver need to have shown in order to have overturned the arbitration provision?

Answer: Alberto-Culver would have been required to demonstrate that there was credible claim that any international conflict of laws problems would arise in the case.

Asahi Metal Ind. v. Superior Court of California, Solano County, p. 85.

1. Why did the Court refuse to hold that the California courts had personal jurisdiction over Asahi?

Answer: Asahi was located in Japan. It had no offices or agent's property in California. The court also noted that submitting to a foreign court's jurisdiction was burdensome.

2. What activities would Asahi need to have engaged in order for the Court to determine that it had purposefully availed itself of California law? Are some of these activities more important than others? If so, which ones?

Answer: The Court listed several factors. These included the absence of offices, agents, employees or property in California, the lack of advertising or solicitation of business in the state, the absence of a distributor in the forum, and the lack of a product designed for the forum. The Court did not prioritize these activities in its purposeful availment analysis.

3. Did the Court give adequate weight to California's interest in the safety of products distributed in the state? Why or why not?

Answer: Yes. The injured California resident had already been compensated by Cheng Shin. The Court found that California's assertion of jurisdiction over Asahi was slight as the instant claim was one of indemnification rather than tort (e.g., safety of consumers). The claim on which indemnification was based took place in Taiwan, the components were shipped from Japan to Taiwan, not California, Asahi was not a California resident, it was not clear that California law would govern the dispute, and it was not shown that California was a supremely convenient forum for litigation.

Graduate Management Admission Council v. Raju, p. 87.

1. On what basis did the court hold that Raju had sufficient minimum contacts with the United States such as to support the exercise of personal jurisdiction?

Answer: The court used the *Zippo* "sliding scale" case to determine whether the defendant purposefully availed himself of the privilege of conducting business in the U.S. In the *Zippo* case, the court noted, on the one hand, passive websites in which courts typically do not exercise jurisdiction and, on the other hand, active websites in which business is conducted. Given the defendant's "interactive" website that sold GMAC materials over the Web and the ample evidence that the defendant targeted customers in the U.S., the court found personal and specific jurisdiction over Raju.

2. Is the court's distinction between interactive and passive Websites valid? What factors determine whether a Website is interactive or passive?

Answer: This question calls for student opinion. The primary factor in determining whether a website is whether the site not only allows users to exchange information but also whether such exchange is commercial in nature and clearly constitutes doing business.

3. Is the Internet sufficiently different from non-electronically-based businesses to merit different treatment for purposes of jurisdiction? Why or why not?

Answer: This question calls for student opinion. However, it bears to note that the court was reluctant to devise special rules for the Internet but simply applied minimum contact rules previously utilized in non-electronic-based business cases.

Iragorri v. United Technologies Corp. & Otis Elevator Co., p.92.

1. What were the court's reasons for refusing to apply forum non conveniens to the case and requiring refiling of the litigation in Colombia?

Answer: The plaintiffs believed that Connecticut was the proper forum for their case because defendants' principal place of business was Connecticut and because plaintiffs were permanent, long-time residents of Florida. The appeals court agreed with plaintiffs' contention that Connecticut was the proper forum. The court noted that "heightened deference" must be given to the plaintiffs' choice of forum when there is no evidence that plaintiffs had engaged in forum-shopping and when plaintiffs were concerned for their physical safety in Cali, Columbia. Moreover, because the claims were based on product liability, Connecticut was convenient for the defendants because all design, manufacturing, and operations of the elevators were in Connecticut.

2. Does the court's opinion reward forum shopping to the extent the plaintiffs were likely to receive a larger damages award in the United States than in Colombia? Why or why not?

Answer: No. As previously noted, there were legitimate reasons for Connecticut serving as the forum for the litigation. An increased damages award is a possibility but was not determinative.

3. The court cited concern regarding the unstable political situation in Colombia as a reason for refusing to apply forum non conveniens. Given the changes that have occurred in the country in the past decade, would the court reach the same conclusion today?

Answer: This question calls for student opinion. However, students may be requested to review analyses of the Colombian judicial system prepared by the U.S. government and the World Bank in formulating their opinions.

M/S Bremen v. Zapata Off-Shore Co., p.94.

1. What was the Court's holding with respect to the general enforceability of forum selection clauses?

Answer: The Supreme Court noted that "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." As a practical matter, if U.S. companies were to do business internationally, foreign businesses must know that U.S. courts will make U.S. businesses stick to their bargains, however unwise. Zapata was here characterized as a "sophisticated" company that should have been aware of the risks it was taking.

2. How would you define "public policy reasons" or "serious inconvenience" for purposes of refusing to uphold a forum selection clause? What factors would you take into consideration?

Answer: This question calls for student opinion.

***Finnish Fur Sales Co., Ltd. v. Juliette Shulof Furs, Inc.*, p.97.**

1. What was the court's holding with respect to the enforceability of the choice of law clause?

Answer: The court analyzed the "Conditions of Sale," which expressly states that Shulof "shall stand surety as for his own debt.... If he has made the bid on behalf of another person, he is jointly and severally liable with the person for the purchase." The transaction was governed by Finnish law.

In other words, by participating in the auction, Shulof agreed to the conditions of sale and the application of Finnish law to the transaction. According to the court's analysis, this did not offend New York policy because Finland had substantial contact with the transaction and found Shulof personally (jointly and severally) liable for the debt.

2. What factors did the court utilize in its decision to uphold the choice of law provision?

Answer: The court focused on the considerable contacts between the transaction and Finland. The bids were made in Finnish marks, the subject matter of the contract originated in Finland, the plaintiff was a Finnish resident, the sale, payment and delivery took place in Finland and Shulof was a sophisticated businessperson who voluntarily traveled to Finland to participate in the auction.

3. How would you define a "fundamental" public policy that would cause a court to refuse to enforce a choice of law provision?

Answer: This question calls for student opinion.

QUESTIONS AND CASE PROBLEMS

1. Answer: Jurisdiction refers to the power of a particular court to hear and decide a dispute. In order for a court to hear a case, it must possess both personal and subject matter jurisdiction. Minimum contacts refer to a sufficient connection between the party and the forum before a court may constitutionally exercise jurisdiction. This concept is derived from U.S. Constitutional principles of due process.

2. Answer: The U.S. Court of Appeals for the Second Circuit vacated the district court's judgment and remanded the case for further proceedings. The court determined that the record developed by the district court was insufficient for it to determine whether Viewfinder's publication of the photographs was fair use within the protections of the First Amendment. The record is unclear as to the percentage of Feraud's designs that were posted on firstView. This determination was crucial to determining whether the publication of the designs constituted "fair use" under U.S. copyright law. The court also held that the record was unclear as to the manner of protection afforded Feraud's fashion shows by French law as well as the protections afforded to alleged infringers generally, and photographers specifically, under French law. The determination of whether the protections provided by French law were sufficiently comparable to that required by the public policy of New York was a question best addressed by the district court on a fully-developed record.

3. Answer: The district court granted Beton's motion to dismiss for lack of personal jurisdiction. The court held that Beton's contacts with Massachusetts are neither extensive nor regular enough to subject the corporation to general jurisdiction within the state. Beton was based in Innsbruck, Austria, and did not have an office, mailing address, telephone number, or bank account in Massachusetts. Beton did not ultimately bid on the first project referenced in the pleadings, and its involvement in the second project did not rise to the level of "doing business" within Massachusetts so as to subject it to general jurisdiction within the state. Beton's activities in Massachusetts did not comprise a "systematic pattern of in-state activity approximating the regular conduct of a domestic corporation" but rather was an "isolated and discrete foray into Massachusetts commerce" insufficient to serve as a basis for general jurisdiction.

4. Answer: The court of appeals affirmed the district court's decision. The absence of a right to a jury trial or class action lawsuit in Gibraltar did not render the forum selection clause unenforceable. The selected location was not so inconvenient such that enforcement of the clause would be unjust or unreasonable. Wong failed to produce any evidence of exploitation or unfair treatment such as to overcome the "heavy burden" placed upon those challenging such clauses. Public factors favored Gibraltar as the forum because PartyGaming was a Gibraltar company, Gibraltar law would govern the suit, and Gibraltar had an interest in hearing "a case involving a substantial player in its comparatively small economy." These interests were sufficient to overcome Ohio's interest in having its consumer protection laws enforced. Private factors also weighed in favor of Gibraltar as the required forum. Specifically, relevant evidence and witnesses were located there.

5. Answer: Often, consenting to arbitration divests parties of the ability to appeal the decision, even if that decision is inconsistent with well-established legal principles. Conversely, arbitration carries the risk that a "losing" party will refuse to accept or ignore an arbitral decision. In instances where arbitration has not previously been chosen pursuant to a contractual arbitration clause, a party may even go through arbitration only later to bring the dispute to court, thus bringing uncertainty to the process.

Nevertheless, arbitration also possesses several benefits. Parties will know in advance how and where their differences will be settled. It is also considered to be speedier, less costly for the parties involved, more private, and more flexible with regard to potential remedies than litigation. Some literature even suggests that arbitration awards are lower than those after trial, thus favoring defendants. Consequently, a plaintiff with a strong case seeking traditional remedies, such as monetary damages might prefer litigation, whereas a defendant

business seeking to stave off future copy-cat litigation or to reduce a likely award might prefer arbitration.

6. Answer: The favorability of a suit in U.S. courts depends on the interests of the litigants. Often times, litigants may favor the use of juries, the possibilities of jury awards, punitive damages, and procedural rules, which are part of the U.S. system. Other times, it represents a single forum to which business partners can agree. European consumers, however, would not likely favor suit in U.S. courts (although U.S. businesses would) due to decreased consumer protections.

7. Answer: There is no correct answer to this question. The reciprocity requirement has been subject to much criticism. These criticisms include the absence of similar requirements in English common law and U.S. statutes and common law, the holding of the interests of private litigants hostage to the government's interest in promoting reciprocity and gridlock as foreign states refuse to recognize one another's judgments due to the absence of reciprocity. For further discussion of reciprocity, students may review law review articles including William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161 (2002) and Vishali Singal, Note, *Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments, Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 59 Hastings L.J. 943 (2008).

8. Answer: The court of appeals affirmed the district court's dismissal of the case on the ground of forum non conveniens. Applying the doctrine of comity, the court concluded that "Mexico, as a sovereign nation, has made a deliberate choice in providing a specific remedy for this tort cause of action." The Mexican government balanced competing objectives involving costs, and the interests of victims, of consumers, of manufacturers, and of various other economic and cultural values. The court held that it would be inappropriate for a U.S. court to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims. Having concluded that Mexico was an adequate forum, the court then agreed with the district court that almost all of the private and public interest factors weighed in favor of Mexico as the appropriate forum. This conclusion was based on the facts that the plaintiff, the driver and the victim were Mexican citizens, the accident occurred in Mexico, the car was purchased in Mexico and neither the car nor the air bag was designed or manufactured in Texas.

9. Answer: The district court dismissed Hy Cite's complaint for lack of personal jurisdiction. The court held that badbusinessbureau did not have "continuous and systematic general business contracts" with Wisconsin due to the absence of an office, agents and employees, and a substantial amount of business in the forum. The court found the lack of targeting of Wisconsin Internet users to be indicative of a lack of general personal jurisdiction. The court also rejected the exercise of specific personal jurisdiction. It held that badbusinessbureau did not purposefully avail itself of the benefits and protections of Wisconsin's laws because it received no donations or advertisements from Wisconsin residents and did not advertise in Wisconsin or target its residents. Furthermore, badbusinessbureau did not engage in intentionally harmful behavior expressly directed at Wisconsin residents. Rather, the harmful conduct, if any, was the complaints written by consumers and posted by them on the Web site.

MANAGERIAL IMPLICATIONS

1. Answer: Yes, I would include mandatory, binding arbitration provisions in the contract with United States law and venue governing the transaction. My plans would not change. If I am a U.S.-based corporation, I want to negotiate for the choice of law and forum. However, I would also negotiate to have a foreign court automatically recognize and enforce the arbitration verdict under the various international treaties, such as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

2. Answer: The existence of a Web site, alone, will not confer foreign jurisdiction in Alaska. The question, however, makes it appear that the consumer has now purchased the product from the company. Depending upon the essence of the consumer's claim (and the facts related to the purchase), there may be other reasons that subject the business to jurisdiction in Alaska.

Students should note that, if clearly stated, a B2B forum selection clause is enforceable, but B2C clauses are sometimes enforceable in the U.S., but not abroad. They should also note that while permitting on-line ordering may increase sales, it will also increase the likelihood of being subjected to the jurisdiction of a foreign court. The more interactive a Web site becomes, the more it will subject its owner to jurisdiction in the fora of foreign customers.

Additionally, recognizing that New York has become an international hub, the New York State Rules of Civil Procedure provide that parties, regardless of any connection to New York, may choose New York as their forum. Generally, however, a forum chosen must have some reasonable connection to the dispute. Therefore, unless Tibet has some reasonable connection to the claims (i.e., the customers targeted and sold to are Tibetan), this selection of forum will not be enforced.

ETHICAL CONSIDERATIONS

The answer to this scenario depends on the ethical theory one applies to the question. For example, applying the theory of ethical egoism, it is clear that Union Carbide acted in its own self-interest in forcing the litigation to India. Applying the teleological framework of moral relativism, it may be contended that the terms of the settlement were proper given the location of the catastrophe and financial circumstances of the largely poor and undereducated victims of the gas leak. Applying utilitarianism, the financial well-being of the victims may have been enhanced had the litigation been permitted to proceed in the United States, although it is equally possible that this well-being would have been diminished by procedural delays and appeals. On the other hand, if one determines that the greater good resides with those interested in the continued financial well-being of Union Carbide, then the outcome was ethically defensible. Applying deontological frameworks, in particular, the categorical imperative, it may be seriously questioned whether anyone would want Union Carbide's conduct to serve as an example for confronted with similar catastrophes in the future. Furthermore, the settlement may be viewed as a means to the end of preserving the company's assets and shareholder value at the expense of the victims. Finally, applying contractarianism, it may be asked whether Union Carbide abided by its duties and responsibilities to the community, especially given the lethal nature of its product and the information gap between itself and the surrounding inhabitants.

TEACHING SUGGESTIONS / COOPERATIVE LEARNING ACTIVITIES

1. Internet Jurisdiction
An interesting issue of late is whether a company that maintains an Internet presence is,

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by virtue of that presence, subject to the jurisdiction of various fora. While the law is still evolving, courts have begun to follow a “spectrum analysis.” The spectrum analysis considers the extent of interactivity and affirmative commercial aspects of sites

Provide students with the names of two-four Web sites, or make up your own, that fall on this spectrum of activity (i.e., an informational site that does not allow on-line orders, a site that provides an e-mail address and answers questions, an on-line store, such as www.amazon.com).

a) Ask students to assess whether a customer in Germany could sue the respective businesses in Germany.

b) Do any of the sites include forum selection or choice of law clauses?

Internet Exercises

1. Arbitration continues to enjoy popularity as a method of international dispute resolution. Nonetheless, the arbitration process will be only as good as the arbitration clause drafted agreeing to it. Dividing students into groups (perhaps as part of a larger contract negotiation exercise), ask paired groups to negotiate and draft an arbitration clause. One helpful link to various international ADR sites is: <http://www.cpradr.org/>

2. Once a party obtains a foreign arbitral award, it still must be able to enforce that award. As apparent from jurisdictional cases concerning due process and minimum contacts, countries may enforce awards to differing extents and under differing circumstances. To provide some clarity, several countries adhere to the UN Conventions on Arbitral Recognition and Enforcement. Using www.google.com, find the text of U.N.C.A.R.E. and apply it to one of the cases discussed in Chapter 3 or one of your own. Ask students to research and consider whether the arbitration award would be enforced under this convention.