67,770

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO.

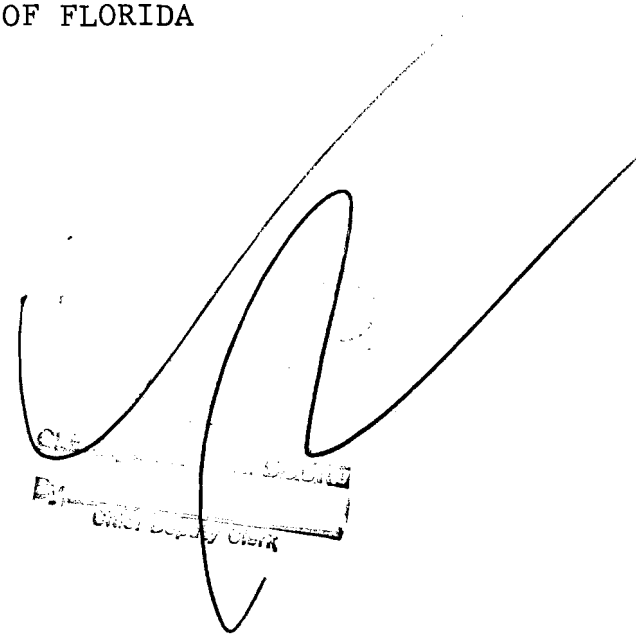
FRANCISCO J. MANRIQUE,
INVERSIONES CONTINENTALES,
N.V., a foreign corporation,
and ARGOVILLE CORPORATION,
N.V., a foreign corporation,

Appellants,

vs.

GIORGIO FABBRI,

Appellee.
_____/



APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

APPELLANTS' BRIEF UPON JURISDICTION

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SUMMARY OF ARGUMENT

STATEMENT OF THE CASE: Appellants filed an appeal to the Third District from a non-final order which denied Appellants' 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 and is a request by Appellants to the Supreme Court to invoke its discretionary jurisdiction.

STATEMENT OF THE FACTS: Appellee, as Plaintiff, and the Appellants, as Defendants, 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."

Appellee instituted an action, in Florida, based upon the agreement. Appellants sought a dismissal of the action for lack of jurisdiction based upon such provision.

ISSUE ON APPEAL: Appellants contend that the opinion of the Third District affirming the order denying the Motion to Dismiss for Lack of Jurisdiction expressly and directly conflicts with an Opinion of the District Court of Appeal, Fourth District.

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.

STATEMENT OF THE CASE

This is the Brief Upon Jurisdiction filed by the Appellants, FRANCISCO J. MANRIQUE, INVERSIONES CONTINENTALES, N.V., and ARGOVILLE CORPORATION, N.V.

For purposes of this Brief, Appellants (Defendants in the trial court) may be individually respectively referred to as "Manrique", "Inversiones" and "Argoville" and will be collectively referred to as "Appellants" and the Appellee (Plaintiff in the trial court) will be referred to as "Fabbri".

Fabbri filed his Complaint seeking declaratory judgment and other relief. The Appellants, constituting all of the Defendants in the trial court, filed a Motion to Dismiss the Complaint for Lack of Jurisdiction. The Motion to Dismiss for Lack of Jurisdiction was denied without prejudice by the trial court by Order dated April 8, 1985.

Appellants then filed an Appeal from the Non-final Order denying Appellants' Motion to Dismiss for Lack of Jurisdiction. The Order of the trial court was affirmed by the Third District Court of Appeal in its Opinion of August 6, 1985 (A-1) (hereinafter referred to in this brief as "the Opinion"). Appellants' Motion for Clarification of the Opinion was denied by Order dated September 17, 1985.

This is an Appeal from the Opinion and is a request by Appellants to the Supreme Court to invoke its discretionary jurisdiction.

STATEMENT OF FACTS

Fabbri filed his Complaint seeking a declaratory judgment, specific performance, injunction and other relief. The action is predicated upon an alleged breach of Stockholders' Settlement Agreement and Option Agreement dated August 31, 1981, hereinafter referred in this Brief Upon Jurisdiction as the "Option Agreement", that replaced a December 15, 1980 Stockholders' Agreement executed by and between Fabbri and Manrique; which Option Agreement was amended on February 21, 1982 as per a certain Addendum to the above Option Agreement, that may be hereinafter referred in the Brief Upon Jurisdiction as the "Addendum to the Option". The Option Agreement and the Addendum to the Option Agreement may be hereinafter collectively referred in this Brief Upon Jurisdiction as the "Option Agreement as Amended".

The record also shows that:

(a) it was Fabbri who selected the Netherlands Antilles for the seat of Agroville, that he incorporated there on October 22, 1980;

(b) Fabbri, a citizen of Italy residing then in Argentina, thereafter invited Inversiones, another Netherlands Antilles corporation, apparently controlled by Francisco J. Manrique, a citizen and resident of Venezuela, to acquire one-half (1/2) of the outstanding stock of Argoville as well as sold thereto the remaining one-half (1/2) of such shares of stock.

Fabbri generally alleges in his Complaint that subsequently he was given an option by Inversiones (one of the Appellants) to purchase one-half (1/2) of the outstanding stock of Argoville (another Appellant) but that Inversiones failed and refused to issue to him the required shares of stock of Argoville upon the happening of the events more particularly referred to in the Complaint, that the Appellants have negated.

The Option Agreement 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."

With further specificity, the Addendum to the Option Agreement, in its English version attached to the Complaint by Appellee, at the end of its paragraph 6, reads as follows:

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

The Appellants, as Defendants in the trial court, filed a Motion to Dismiss the Complaint for Lack of Jurisdiction, such Motion being based upon the foregoing language contained in the Option Agreement.

The Motion to Dismiss was denied. Defendants then filed an Appeal from the Non-Final Order which denied the Motion. By Opinion filed August 6, 1985, (A-1), District Court of Appeal, Third District, affirmed the Order of the trial court.

ARGUMENT

ISSUE ON APPEAL

DOES THE OPINION FILED AUGUST 6, 1985 (A-1) EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW?

Appellants request the Supreme Court to invoke its discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Rules of Appellate Procedure. Appellants contend that the Opinion of August 6, 1985 expressly and directly conflicts with Maritime Ltd. Partnership v Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984).

In Maritime, Florida firms were to supply consulting and advertising services for a project in South Carolina. The contracts provided: "Jurisdiction for any litigation arising out of this agreement shall lie within the appropriate court in Broward County, Florida". The District Court of Appeal, Fourth District, held the provision to be valid and that jurisdiction can be conferred by consent even though no cause of action exists when the contract is entered into, provided:

(a) A forum was not chosen because of overwhelming bargaining power on the part of one party which would constitute overreaching at the other's expense.

(b) 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 in the forum from which the suit has been excluded.

(c) 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 District Court of Appeal, Fourth District, recognized that its opinion was in conflict of an opinion of the Third District Court of Appeal. The Fourth District could not perceive of any public policy against the contracting parties designating the home state of one of two contracting parties as the forum for ensuing litigation.

The Third District, in Zurich Insurance Co. v. Allen, 436 So.2d 1094 (Fla. 3rd DCA, 1983) with a contrary position reaffirmed its position, as announced in earlier decisions to that court, to the effect that it will continue to 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 . . ."

Appellants respectfully advise this Court that the District Court of Appeal, Fourth District in Maritime certified the following question to the Supreme Court of Florida:

> 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 over-reaching, no contravention of stated public policy and a forum is neither remote nor alien?

It is apparent from Maritime that the Fourth District will enforce a forum selection clause provided that the standards as announced by it are satisfied. It is also apparent that the Third District will not, in any event, enforce a forum selection clause as it announced in Zurich and followed in the Opinion of August 6, 1985.

The Opinion sought to be reviewed by this appeal refers to both decisions and acknowledges that Appellants invited the Third District to recede from its prior position and adopt the rationale of the Fourth District.

The Third District in the Opinion concluded, in our opinion erroneously, that the provision in question was only a choice of law provision and not a forum selection clause. Such conclusion was not reached by the trial court below that simply denied the motion to dismiss without prejudice, should this Court rule upon the question certified in Maritime, in a manner favorable to Appellants.

For the sake of judicial certainty in the State of Florida as a whole, to avoid discriminant "forum shopping" that unjustifiably burdens our State courts with litigation that parties with similar bargaining power have submitted to another forum freely chosen, that does not contravene a strong policy enunciated by statute or judicial fiat, which purpose is not to transfer an essentially local dispute to a remote and alien forum, but precisely to the forum selected by the parties as expressed in the Option Agreement and,

also, with pristine clarity in the Addendum to the Option Agreement, we respectfully request the Supreme Court to invoke its discretionary jurisdiction.

Weight should be given then to the advisability of conforming Florida law to that prevailing in Federal courts since 1972, for freely negotiated international agreements like that before the instant Court, where following M/S Bremen and Unterweser Reederei, GMBH, v Zapata Off-Shore Co., 407 US 1, 1972, the Supreme Court 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."

CONCLUSION

The Opinion of August 6, 1985, expressly and directly conflicts with the decision of the District Court of Appeal, Fourth District in Maritime and the decision of the Supreme Court of the United States in M/S Bremen. The Supreme Court should invoke and exercise its discretionary jurisdiction pursuant to the applicable Rules of Appellate Procedure.

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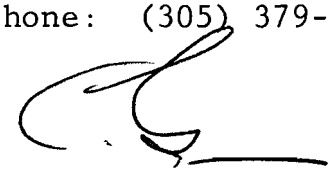

By: _____
Agustin de Goytisolo, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this 18TH day of October, 1985, to Manuel A. Reboso, Esq., Sams, Ward, Newman, Elser & Lovell, P.A., 700 Concord Building, 66 West Flagler Street, Miami, Florida, 33131.

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