O/A 65-86

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 67,770

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

Appellants,

vs.

GIORGIO FABBRI,

Appellee.

FLORIDA BAR NUMBER 041245

REPLY

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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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

This is the Reply Brief of Appellants, FRANCISCO J. MANRIQUE, INVERSIONES CONTINENTALES, N.V., and ARGOVILLE CORPORATION, N.V. For purposes of this Reply Brief, Appellants/Defendants will be collectively refered to as "Continentales" and the Appellees/Plaintiffs will be referred to as "Fabbri".

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

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

References in this Brief to the letter "A" followed by a page number mean the appendix to the Initial Brief filed by Continentales.

Fabbri contends, in his "Statement of the Case" that the Motion to Dismiss filed by Continentales was based solely upon subject matter jurisdiction. Continentales contends that such contention is not correct. The Motion to Dismiss specifically raised as a basis the provision of the agreement sued upon by Fabbri that the parties agreed that the Netherlands Antilles shall have sole jurisdiction. The Order of the trial court (A-35) which denied the Motion to Dismiss did not make any distinction between impersonam jurisdiction and subject matter jurisdiction.

STATEMENT OF THE FACTS

Fabbri contends that he exercised his option to repurchase. Such statement is obviously contested by Continentales. The trial court granted the Motion for Judgment Upon the Pleadings filed by Continentales. Implicit in such ruling would be a finding by the trial court that the allegations of the Amended Complaint did not establish that Fabbri exercised the option to repurchase.

Fabbri expends considerable time relating contacts of the parties to Florida. The material points are that Fabbri is a citizen of Italy residing in Argentina. He organized Argoville in the Netherlands Antilles. Inversiones is another Netherlands Antilles corporation and is controlled by Manrique, a citizen of Venezuela. Manrique does not reside in Florida.

Fabbri sold to Inversiones one-half (1/2) of the Argoville stock, retaining the right to repurchase under the agreement with its addendum which is the subject matter of this action.

SUMMARY OF ARGUMENT

ISSUE ON APPEAL: Continentales contends that the position of the Third District Court as contained in its opinion below (A-37) is a vestigial legal fiction. The modern view holds that a forum - selection clause does not oust the courts of jurisdiction but rather that the court should examine the provision in question to determine if it is reasonable and if so the provision should be enforced.

Since the submission of the Initial Brief of Continentales, the District Court of Appeal, Second District, has concluded that forum-selection clauses are enforceable. Datamatic Services Corporation v Bescos, 11 FLW 665 (2d DCA, Case No. 85-1039, Opinion filed March 12, 1986) (hereinafter referred to as "Datamatic").

The Supreme Court has also recently accepted jurisdiction in another case involving the enforceability of a forum-selection clause. McRae, Petitioner, v J.D./M.D. Inc., Respondent, Case No. 68370, on appeal from the Fourth District Court of Appeal.

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?

Fabbri contends that the intention of the parties should govern and that the parties only intended that the laws of the Netherlands Antilles should apply in this matter. He contends the provision in question is only a choice of law clause. Fabbri stresses the opening language that appears in the original agreement disregarding the remainder of the clause which states the parties "submit themselves to . . . (the) jurisdiction" (of the Netherlands Antilles). Furthermore, Fabbri chooses to omit any reference to an addendum to the agreement that is attached to the complaint which is the basis of his cause of action.

Article Fourth of the Addendum to the option agreement executed in Spanish, in its English version attached to the Complaint, 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."

Based upon the parties own interpretation of the provision, as evidenced by the addendum, the parties intended that any litigation arising between them with respect to the agreement must be determined by the Courts of the Netherlands Antilles, not just the laws of the Netherlands Antilles.

Fabbri obviously supports the position of the Third District Court of Appeal (A-37). Such Court holds that the forum selection provision is void as an attempt to oust the jurisdiction of all other courts over subsequent disputes arising out of an agreement. The position of the Third District Court of Appeal is consistent with the ancient common law of this State that held such clauses invalid per se reflecting a provincal attitude regarding the fairness of foreign tribunals.

However, the modern view and more favored trend in the law is to apply a reasonableness test in determining whether to enforce such a clause. As noted by the United States Supreme Court in M/S Bremen v Zapata, 407 US 1, 92 Supreme Court 1907 (1972) (hereinafter "Zapata"), such ancient law as followed by the Third District is hardly more than a vestigial legal fiction.

The modern view holds that forum-selecting clauses do not oust the court's jurisdiction but rather that the court should examine the provision in question to determine whether it is reasonable and, if so, the provision should be enforced. The question is really whether the court should choose to exercise its jurisdiction to do more than enforce the clause in a contract agreed upon by the parties. Once a court concludes that the clause truly specifies a mandatory, exclusive forum for the litigation of the dispute in question, the party seeking to escape enforcement of the clause has a burden of showing that the trial in the contractual forum

will be so gravely difficult and inconvenient that he will, all practical purposes, be deprived of his day in court (Zapata).

The record in this case does not establish that Fabbri would be deprived of his day in court by utilizing the courts of the Netherlands Antilles.

The "reasonable" test announced in Zapata has been increasingly reiterated in other jurisdiction, including but not limited to the following:

California	Smith, Valentine & Smith v The Superior Court of Los Angeles County, 551 P. 2d. 1206 (1976);
Delaware	Elia Corporation v Paul N. Howard Company, 391 A 2d 214 (1978);
South Dakota	James C. Green v Clinic Masters, Inc., 272 N.W. 2d 813 (1978);
Texas	Hi Fashion Wigs Profit Sharing Trust v. Hamilton Investment Trust 579 S.W. 2d 300 (1979);
Arizona	Societe Jean Nicolas et Fils v. Jean Claude Mousseux 597 P. 2d 287 (1981);
Alaska	Jean-Mark Abadou v Dimitri N. Trad. 624 P. 2d 287 (1981);
U.S. Supreme Court	Insurance Corporation of Ireland v. Societe de Bauxites de Guinee 456 U.S. 694 (1982);
Georgia 11th Cir.	National Service Industries, Inc. v Vafla Corporation 694 F. 2d 246 (1982); and
Florida 11th Cir.	Shawmut Boston International Banking Corporation v Luis Duque-Pena 767 F.2d. 1504 (1985).

The modern view is followed in Florida by the Fourth District of Appeal in Maritime Limited Partnership v Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984) (hereinafter "Maritime") and by the Second District Court of Appeal, in Datamatic.

In Datamatic, Datamatic, a Florida corporation, sold medical equipment to Bescos, a California resident. The contract of sale provided:

> ". . .this agreement shall be deemed to have been made and shall be construed and enforced in accordance with the laws of the State of Florida. The parties hereto consent and by the execution hereof submit themselves to the jurisdiction of the Courts of Florida for any litigation arising from this Agreement."

The Second District Court of Appeal held the provision enforceable. The Fourth District expressly followed the rationale of Maritime and Zapata to the effect that if the court finds the provision reasonable, it should be enforced.

Adopting the rationale of Zapata, the Second District in Datamatic held that Bescos had the burden of establishing that the trial in Florida "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." Bescos did not do so nor did Fabbri in this case. The record is devoid of any evidence that Fabbri would be deprived of his day in court should he be required to litigage in the Netherlands Antilles.

As previously stated, the modern view holds that jurisdiction-selecting provisions do not oust a court of jurisdiction but rather that the court should examine the

provision in question to determine whether it is reasonable and if so the provision should be enforced. The record is devoid of any evidence that the provision is unreasonable.

Fabbri expends considerable time describing the contacts of the parties with Florida. The issue involved in this appeal is the enforceability of a forum selection clause. The Supreme Court in Zapata concluded that no contacts whatsoever with the contractually agreed upon forum are necessarily required in order to justify the enforcement of such an agreement.

The Third District Court of Appeals (A-37) contends that a forum selection clause is violative of public policy in that it ousts the court from the jurisdiction. Continentales respectfully suggests that the claimed public policy is illusory. The courts of this State have for many years enforced a binding arbitration provision which may be contained in a contract, which provision, in effect, ousts a court of jurisdiction. Nor is the announced policy supported by statute. .

CONCLUSION

The choice of forum provision, freely and voluntarily entered into between the parties, should be upheld. The intention of the parties should govern where reasonable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28 day of April, 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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