7C4989

69,413

SUPREME COURT OF FLORIDA

RAUL GARCIA GRANADOS QUINONES, et al.,

Appellants/Defendants,

vs.

SWISS BANK CORPORATION (OVERSEAS) S.A., et al.,

Appellees/Plaintiffs.

Case Nos. 69,412
69,413
69,478
69,479

FILED
SID J. WHITE
FEB 5 1987
CLERK, SUPREME COURT
By _____ Deputy Clerk

INITIAL BRIEF ON THE MERITS OF PETITIONER RAUL GARCIA GRANADOS QUINONES

KENNY NACHWALTER & SEYMOUR, P.A.
400 Edward Ball Building
100 Chopin Plaza - Miami Center
Miami, Florida 33131
Telephone: (305) 358-8151

Attorneys for Petitioner
Raul Garcia Granados Quinones

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I. SUMMARY OF ARGUMENT

The District Court erred in failing to reverse the trial Court's order which denied Defendants' motion to dismiss. This motion was based on the parties' contractual agreement that any dispute between the parties involving the agreements in question would be litigated either in Guatemala or Panama, to the exclusion of all other jurisdictions. Such clauses are enforceable in Florida absent a showing by the party opposing dismissal that enforcement of the forum selection clause would "virtually deprive the [plaintiff] of his day in court" if the matter were litigated in the chosen forum. Plaintiff has not and cannot make such a showing in this case.

The District Court also erred in failing to reverse the trial Court's order denying Defendants' motion to dismiss based on the doctrine of forum non conveniens. This matter involves an action between parties who are not residents of Florida. It is essentially a contractual dispute between foreign parties involving contracts entered into in Guatemala and to be performed in Guatemala. The cause of action, if any, arose in Guatemala. Florida has no relationship to the contractual dispute. Moreover, to the extent that it is contended that some parties may be residents of Florida, this Court should revisit its decision in *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978) and

rule that the residency of the parties is only one factor, among others, to be considered in determining whether a matter should be dismissed pursuant to the doctrine of forum non conveniens.

II. STATEMENT OF THE FACTS AND OF THE CASE

Petitioner Raul Garcia Granados Quinones[1] ("RGG") seeks review of a decision of the Third District Court of Appeal which expressly and directly conflicts with a decision of this Court on the same question of law, namely: whether a contractual choice of forum clause bargained for in good faith is enforceable in Florida courts. RGG also seeks review of that part of the Third District's decision which affirmed the trial Court's denial of RGG's motion to dismiss based upon the doctrine of forum non conveniens.

A. Factual Background

In 1978 Banque National de Paris ("Bank of Paris") allegedly opened a letter of credit for $20,000,000.00 in favor of Administracion Central Industrial y Apropecuaria, S.A. ("ACIA"),

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[1] Plaintiff misspelled Quinones in the style of the case at the trial court level as Quinonez.

a Guatemala corporation.[2] (R. 9, 17).[3] The documents memorializing this agreement, written in Spanish, were executed in Guatemala. (R. 17). All performance pursuant to the agreement was to take place in Guatemala. (R. 42-86). The documents were registered in Guatemala.[4] (R. 98). With the exception of the Bank of Paris, which is a banking association organized under the laws of the Republic of France, all the parties to the agreement were citizens and residents of Guatemala, or other Latin American countries. (R. 2-17). No Florida or United States citizens or residents were involved in the transaction.

Approximately one year later the credit was allegedly increased by an additional $11,000,000.00. (R. 18). At about

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2 References to the Record on Appeal will be designated (R.) with citation to the appropriate page number(s). References to the Appendix previously filed with this Court will be designated (App.) with citation to the appropriate page number(s).

3 The agreement was allegedly guaranteed by Raul Garcia Granados Quinones, Enriqueta de Garay Asencio de Garcia Granados, Rosa Carlota Dubon Zea de Garcia Granados, Maria Judith Garcia Granados de Garay de Vestrini, Paolo Vestrini Lensi, Barbara Virginia Garcia Granados de Garay de Arzu, Compania de Inversiones Agricolas E Industriales, S.A., Garcia Granados, Garcia Granados Y Compania Limitada, Compania de Inversiones Agricolas E Industriales Garcigra, S.A., Agropecua Ria Pangolita, S.A., Compania de Inversiones Agricolas E Industriales Coyolate, S.A., Agropecuaria Pangola, S.A., Jorge Raul Garcia Granados y Compania Limitada, Compania Agropecuaria Nueva Linda, S.A., Compania de Servicios Agromaquinas, S.A., Insumos Agricolas, S.A., Administracion Central, Industrial Y Agropecuaria, S.A., Agropecuaria La Conquista, S.A., Ensambladora de Maquinaria Agricola, S.A., Compania Guatemalteca de Aeroservicios, S.A., Compania Agropecuaria La Barranquilla, S.A., Agroindustrias Agroinsa, S.A., Agropecuaria Terra, S.A. (R. 17-18).

4 These types of agreements are required by Guatemala law to be registered with the government of Guatemala before they can be negotiated or enforced by the parties to the agreement. (R. 98).

that same time ACIA also allegedly executed five separate promissory notes in the amount of one million dollars each in favor of the Bank of Paris as a further extension of the agreement. (R. 18). The five notes were allegedly guaranteed by various persons who were citizens and residents of Guatemala or other Latin American countries.[5] Again no Florida or United States citizens or residents were involved in the transaction.

The following year the parties allegedly entered into another agreement where ACIA was granted an extension of an additional $2,000,000.00 line of credit (hereinafter the "December 1980 agreement"). The December 1980 agreement ratified and superseded all prior agreements between the parties. (R. 19-20). No Florida or United States citizens were involved in that final

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[5] Each of these Promissory Notes was allegedly guaranteed by Raul Garcia Granados Quinones, Enriqueta de Garay Asencio de Garcia Granados, Rosa Carlota Dobon Zea de Garcia Granados, Maria Judith Garcia Granados de Garay de Vestrini, Paolo Vestrini Lensi, Barbara Virginia Garcia Granados de Garay de Arzu, Silvia Laura Enriqueta Garcia Granados de Garay de Arzu, Agropecuaria Los Laureles, S.A., Compania de Inversiones Agricolas e Industriales, S.A., Ensambladora de Maquinaria Agricola, S.A., Agroindustrias Agroinsa, S.A., Industria Maderera Inmasa, S.A., Insumos Agricolas, S.A., Jorge Raul Garcia Granados y Compania Limitada, Garcia Granados, Garcia Granados y Compania Limitada, Compania Guatemalteca de Aeroservicios, S.A., Agropecuaria La Conquista, S.A., Agropecuaria Pangola, S.A., Agruapecuaria Pangolita, S.A., Compania de Servicios Agromaquinas, S.A., Compania de Inversiones Agricolas e Industriales Garcigra, S., Compania de Inversiones Agricolas e Industriales Coyolate, S.A., Compania Agropecuaria La Barranquilla, S.A., Agropecuaria Terra, S.A., Sistemas y Controles, S.A., Agropecuaria Mojarras, S.A., Desarrollo Quimco Industrial, S.A., Desarrollo y Tecnologia, S.A., Desmotadoras, S.A., Agropecuaria Irlanda, S.A., Agricola Toliman, S.A., Transportes Blanco y Negro, S.A., Hatos de Engorde, S.A., Empresa Agropecuaria Puyumate, S.A. Carlos Alfonso Castillo, Ramirez, Francisco Font Elias, Carlos Montenegro Panigua, Jose Manuel Gomez Perez and Miguel A. Ponciano; each of whom allegedly guaranteed one of the five one million dollar notes. (R. 18-19).

agreement. In that agreement, the parties negotiated, bargained for and agreed, among other things, to litigate any disputes relating to that and the other agreements in either Guatemala or Panama, to the exclusion of all other jurisdictions. (R. 78).

B. Procedural History - Trial Court

In February 1986, Swiss Bank Corporation (Overseas), S.A. ("Swiss Bank") filed a complaint in the Circuit Court of Eleventh Judicial Circuit in and for Dade County, Florida seeking to collect on the debt allegedly owed by ACIA and the guarantors. Prior to any of the fifty-eight (58) named defendants filing an answer, Swiss Bank filed an amended complaint. The amended complaint consists of eight counts. (R. 5-41). These counts, as denominated by Swiss Bank, are:

I. Quasi-In-Rem Relief (Writs of Attachment and Garnishment)

II. Note Due

III. Note Due

IV. Note Due

V. Note Due

VI. Note Due

VII. Note Due

VIII. Fraudulent Transfer

(R. 5-41). In its amended complaint,[6] Swiss Bank alleges that the various notes are in default. (R. 24-34). Swiss Bank alleges that it was assigned 32% of the rights, benefits and interest in the December 1980 agreement[7] and the five 1979 promissory notes by the Bank of Paris. (R. 21). The non-note counts of Swiss Bank's amended complaint concern alleged fraudulent transfers and writs of attachment and garnishment. (R. 5-41). The non-note counts are entirely dependent upon Swiss Bank prevailing at trial on the "note" counts.[8]

Swiss Bank's motions for emergency attachment and garnishment were filed, heard ex parte and granted by the court before service of any pleadings on any of the Defendants. The court also initially granted Swiss Bank's ex parte motion for emergency

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6 Swiss Bank subsequently filed a second amended complaint which added Bank of Paris as an additional Plaintiff and added an additional cause of action, i.e., an alleged violation of Florida's Racketeer Influenced and Corrupt Organization Act ("RICO"). By stipulation of the parties, the second amended complaint, and the allegations contained therein, were not to affect the substantive basis for RGG's motion to dismiss the amended complaint. (R. 146). Therefore, the second amended complaint should not affect this Court's consideration of the trial court's order denying RGG's motion to dismiss the amended complaint.

7 The December 1980 agreement is also known as Public Deed 130.

8 Obviously, if the alleged guarantors have no liability under Guatemala law on the notes they cannot possibly be guilty of fraudulent transfers to avoid payment of that debt. The same is true of the writs of attachment and garnishment. Absent an enforceable debt owed to Swiss Bank by the alleged guarantors, there is no basis for either attachment or garnishment.

discovery[9] and sealed the court file pending service of the writs of attachment and garnishment.[10]

RGG filed a motion to dismiss Swiss Bank's amended complaint.[11] (R. 86). In support of his motion to dismiss, RGG filed a memorandum urging that the amended complaint be dismissed because the parties had chosen to litigate disputes relating to the December 1980 agreement in either Guatemala or Panama, to the exclusion of all other jurisdictions. (R. 86-124). RGG also asserted the Amended Complaint should be dismissed pursuant to the doctrine of forum non conveniens. (R. 125). In addition to his own affidavit, RGG filed supporting affidavits of Carlos Diaz

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9 The court subsequently, after having the opportunity to hear from Defendants, limited the emergency discovery "to assets in the United States." As the litigation progresses in the trial court, it has become readily apparent that the principal reason for Swiss Bank bringing this action in the United States rather than in Guatemala or Panama is to attempt to conduct prejudgment discovery of Defendants' assets, sources of income, etc. prior to being required to demonstrate its right to a judgment on any of the notes and/or guarantees under Guatemala law.

10 The writs of attachment went far beyond the permissible bounds of such writs under Florida law. For example, the writs authorized the sheriff to break and enter the premises and the writs could be served on Sunday and at night. At least one home was actually broken into while the occupant was away and the contents taken by the sheriff prior to that particular Defendant, who was not even a debtor of Plaintiff, ever being aware of the lawsuit. The writs also authorized the seizure of documents as well as property. As such the writs allowed Swiss Bank to completely circumvent the entire discovery process established by the Florida's Rules of Civil Procedure. The propriety of the issuance of the writs is now under review by the Third District Court of Appeal in separate appeals.

11 RGG's motion was actually a motion to: (1) Dismiss Plaintiff's Amended Complaint and in the Alternative Motion for Partial Summary Judgment; (2) Strike Claim for Attorneys' Fees and Punitive Damages; and (3) Strike References to Prior Law Suits.

Duran, Luis Juerez Aragon and Benjamin Garoz Villatoro[12] (hereinafter the "Experts"). (R. 92). The Experts' affidavits stated, among other things, that the forum selection clause (Clause 17) of the December 1980 Agreement:

> [Is] valid, enforceable and mandatory under the laws of Guatemala. The language used in Clause Seventeen is effective to preclude, by agreement of the parties, the bringing of any action by the Creditor [Bank of Paris] (or any Assignee) in any jurisdiction other than Guatemala or Panama.

(R. 115). RGG's affidavit stated, among other things, that:

(a) Any witnesses to the agreements are residents of a country other than the United States and are not residents of Florida;

(b) Compulsory process for attendance of unwilling witnesses is available in Guatemala;

(c) The cost of obtaining attendance of willing witnesses would be greatly reduced if this action were pursued in either Guatemala or Panama since most of the witnesses reside in Guatemala or other countries in Latin America;

(d) The Guatemala forum would alleviate the problem of having to translate the testimony of most witnesses and all documents from Spanish to English;

(e) Any judgment would be more easily enforceable in Guatemala since the security allegedly given for the agreements is located there and that is where the corporate headquarters of

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[12] All of whom are lawyers licensed to practice in Guatemala.

the principal debtor is located;[13] and

(f) Guatemala has a much greater interest than Florida in interpreting and applying its law to the controversy.

In addition, it is undisputed in the record that:

(a) RGG is a citizen and resident of Guatemala. (R. 135A).

(b) Plaintiff Swiss Bank is a foreign corporation organized and existing under the laws of Panama. (R. 6).

(c) All the agreements which form the basis of Plaintiff's law suit were executed in Guatemala. (R. 135A).

(d) All the agreements which form the basis of Plaintiff's law suit were to be performed in Guatemala. (R. 135A).

(e) All of the documents which form the basis of Plaintiff's law suit are in Spanish. (R. 135A).

(f) RGG is not the maker of any of the alleged notes on which Plaintiff Swiss Bank seeks to collect in this matter. (R. 89).

(g) Swiss Bank's sole basis for asserting a claim against RGG on the notes is that RGG is allegedly a guarantor on the notes. (R. 5-41).

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[13] Under Guatemala law, an action must first be brought against the principal obligor of any debt instrument and the underlying security before proceeding against any alleged guarantors. (R. 116-18). However, Swiss Bank has attempted to circumvent this required procedure and legal principle by filing an action in Florida and proceeding directly against the guarantors. Had this matter been filed in Guatemala, as the parties agreed, RGG could not and would not be a defendant. Since Swiss Bank would be compelled to first proceed against ACIA (the principal debtor) in Guatemala, RGG submits this legal principle, which Swiss Bank has not disputed, is an additional ground for dismissing this action.

In opposition to RGG's motion to dismiss, Swiss Bank filed a memorandum and an affidavit of William Riley, one of its investigators in the litigation. Riley's affidavit attempted to demonstrate that Defendant Jorge Raul Garcia Granados de Garay ("JRG"), RGG's son, is a Florida resident.

The trial court denied RGG's motion to dismiss. (R. 183). RGG filed a motion for rehearing. (R. 185). In support of the motion for rehearing, RGG filed an affidavit of JRG in which JRG declared that he is a resident of Guatemala and not a resident of Florida. (R. 193-194). RGG also filed a copy of the complaint in *Administracion Central, Industrial Y Agropecuaria, S.A. vs. Swiss Bank Corporation Overseas, Sociedad Anonima* ("ACIA v. Swiss Bank"). (R. 197) *ACIA v. Swiss Bank* is an action, filed in Guatemala, similar to a declaratory judgment action asking the Guatemala court to determine the critical liability issues which are also at issue in this case. (R. 197-227). The court denied the motion for rehearing. (R. 4). RGG appealed to the Third District Court of Appeal. (R. 1).

C. Procedural History -- District Court of Appeal

As noted, RGG urged two points on appeal, i.e., (1) that the trial court should have enforced the parties' contractual choice of forum and (2) that the action should have been dismissed by

the trial court based upon the doctrine of forum non conveniens. A ruling in favor of RGG on either of those points on appeal would warrant a dismissal of the action. The Third District affirmed the trial court. The entire opinion reads as follows:

> PER CURIAM.
>
> > Appellants bring these appeals from a non-final order denying their motion to dismiss based on lack of jurisdiction and improper venue. We affirm on authority of *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978) (where venue is established because one of the parties is a resident of Florida, the action may not be dismissed on grounds of forum non conveniens); *Manrique v. Fabbri*, 474 So.2d 844 (Fla. 3d DCA 1985) (contractual language which reflected an agreement by the parties not to contest the jurisdiction of the Netherlands Antilles courts if suit was brought in that jurisdiction cannot be construed to oust Florida of subject matter jurisdiction); and *Hu v. Crockett*, 426 So.2d 1275, 1281 (Fla. 1st DCA 1983) (determination of venue question is generally left to sound discretion of trial judge and will not be disturbed unless there is a clear showing of abuse of that discretion).
>
> Affirmed.

RGG timely filed a motion for rehearing and rehearing en banc seeking review of the Third District panel opinion. (App.

280). While that motion was pending, this Court decided *Manrique v. Fabbri,* 493 So.2d 437, 440 (Fla. 1986), holding that contractual choice of forum clauses should be enforced by Florida courts unless the party opposing the choice demonstrates that upholding the choice would "for all practical purposes [deprive him] of his day in court". RGG promptly filed a notice of supplemental authority with the Third District directing that Court's attention to this Court's decision in *Manrique*. (R. 4). Inexplicably however, the Third District ignored RGG's notice of supplemental authority, denied RGG's motion for rehearing, and let stand its decision which relied on its own earlier decision in *Manrique* as controlling authority for rejecting RGG's point on appeal that the parties' choice of forum clause in the relevant agreements should be enforced in this case. (R. 236).

D. Procedural History -- This Court

RGG sought review of the Third District's decision in this Court. The basis of jurisdiction was: (1) the citing by the Third District of a case which had been overruled by this Court, i.e., *Manrique*; (2) express and direct conflict with decisions of other district courts of appeal, i.e., *Hawes & Garrett General Contractors, Inc. v. Panhandle Custom Decorators & Supply, Inc.*, 11 F.L.W. 1971 (Fla. 1st DCA Sept. 16, 1986); *Datamedic Services*

Corp. v. Bescosm, 484 So.2d 1351 (Fla. 2d DCA 1986); and *Maritime Limited Partnership v. Greenman Advertising Associates, Inc.*, 455 So.2d 1121 (Fla. 4th DCA 1981); and 3) the pendency of a case in this court, i.e., *McRae v. J.D./M.D., Inc.*, 481 So.2d 945 (Fla. 4th DCA 1986), *review granted*, August 21, 1986, Case No. 68,370, which presented the same question of law.

In an order dated January 5, 1987, this Court accepted jurisdiction.

IV. ARGUMENT

The District Court erred in failing to reverse the trial Court's order which denied RGG's motion to dismiss. The matter should have been dismissed because: (1) the parties voluntarily and contractually chose to litigate any matter relating to the December 1980 agreement and related documents in either Guatemala or Panama to the exclusion of all other forums; and (2) the doctrine of forum non conveniens compels that the action be litigated in Guatemala.

A. The Parties Voluntary, Contractual Choice To Litigate Exclusively in Either Guatemala or Panama is Enforceable in the Courts of Florida

1. The Basis of Enforceability

The parties have specifically in good faith bargained for and agreed that any action involving the alleged agreements which are

at issue in this matter shall be brought in either Guatemala or Panama. (R. 78). This Court need go no further than its own recent decision in *Manrique v. Fabbri*, 493 So.2d 437 (Fla. 1986) to determine that the District Court of Appeal erred in failing to reverse the trial Court's decision which refused to honor that agreement. In *Manrique* this Court held: "Florida Courts should recognize the legitimate expectations of contracting parties." *Id.* at 440. [W]e hold that forum selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust." Id. at 440. Moreover, this Court noted in a footnote to that statement that: "[w]e emphasize that the test of reasonableness is not mere inconvenience or additional expense." Id. at 440 n.4. In doing so this Court adopted the standard of proof established by the United States Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Id. at 440 n.4. In Zapata the United States Supreme Court held:

> It should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that for all practical purposes he will be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

(Emphasis added). 407 U.S. at 18, 92 S.Ct. at 1917.

The December 1980 agreement between the parties contained a clause (Clause 17) which provided that any disputes arising between the parties must be litigated in either Guatemala or Panama, to the exclusion of all other jurisdictions.[14] (R. 115). All the agreements were written in Spanish. Rather than create an issue concerning the accuracy of any translation from one language to another, RGG submitted to the trial Court affidavits of experts on Guatemala law concerning the interpretation, meaning and legal effect of the choice of forum clause. The Experts stated that Clause 17:

> [Is] valid, enforceable and mandatory under the laws of Guatemala. The language used in Clause Seventeen is effective to preclude, by agreement of the parties, the bringing of any action by the Creditor [Bank of Paris] (or any Assignee) in any jurisdiction other than Guatemala or Panama.

(R. 115). Swiss Bank did not file anything to rebut the sworn statements of the Experts and apparently decided not to contest the meaning and legal effect given to Clause 17 by the Experts.[15] Nevertheless, the trial court denied the motion to

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[14] The clause also provided for the choice of law: If the suit were brought in Guatemala, Guatemala law would apply; if suit were brought in Panama, the law of Panama would apply.

[15] Swiss Bank did file, as an exhibit to the Complaint, an English translation of the December 1980 agreement, done by a French translator. The key sentence, according to the translation, reads: "the creditor [Bank of Paris] may choose to bring the legal proceedings to the courts in the . . . . Republic of Guatemala or to the . . . . Republic of Panama." (R. 78). Swiss

(continued next page)

dismiss. (R. 183).

A contractual choice of forum by the parties to a contract is valid and enforceable in Florida. In *Manrique* this Court adopted what is clearly becoming the majority rule in the United States and held such a choice is enforceable in Florida. In doing so this Court specifically adopted the view enunciated by the United States Supreme Court in *M/S Bremen v. Zapata off-Shore Co.* and the Fourth District Court of Appeals in *Maritime*. *Id.* at 440. In *Bremen* the court held that such a choice is valid if:

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

407 U.S. at 16-17, 92 S.Ct. at 1916-1917.

There is nothing in this record to indicate overreaching by RGG or the other alleged parties to the agreement. The very

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Bank argued that the choice of forum was thus permissive and not mandatory. Swiss Bank submitted nothing, in the way of expert opinion as to the meaning and legal effect of the clause.

language used by the parties in the forum selection clause conclusively demonstrates the clause was freely bargained for and negotiated. Indeed, if anyone overreached it would be the Bank of Paris. It is impossible to believe the Defendants had more bargaining power than the Bank of Paris who acted as the alleged lender in the transactions.

The forums chosen, Guatemala or Panama, are obviously neither remote nor seriously inconvenient because the parties are located in those forums. The property which secures the loans is in Guatemala. The agreements were entered into and were to be performed in Guatemala.

All of these considerations obviously caused the contracting parties to provide in the agreement for the appropriate forum and law to be applied in the event of any dispute under such agreement.

Forum selection clauses are vital provisions in multinational agreements. These clauses are bargained for in good faith so that any subsequent dispute which arises under the agreement will be decided in a forum the parties agree has the expertise to resolve the issue presented. International business persons want to litigate their disputes only in a jurisdiction having some relationship to the particular transaction and a jurisdiction familiar with the law relied upon by the parties in negotiating

the transaction. As this Court noted in *Manrique*:

> [A]t the very least such clauses represent efforts to eliminate uncertainty as to the nature, location and outlook of the forum in which parties of differing nationalities might find themselves. Moreover, such clauses might be vital parts of agreements . . . with the consequences figuring prominently in the parties calculations.

Id. at 439. "Such clauses enable freely contracting parties to conduct their interstate and international business affairs more efficiently." *Id.* at 439. Numerous courts have recognized the multitude of problems created where there is uncertainty over the place of litigation and endorsed the rule as a "realistic assessment of modern commercial culture." *Id.* at 439 n.3. As this Court noted in *Manrique* "forum selection clauses provide a degree of certainty to business contracts by obviating jurisdictional struggles and by allowing the parties to tailor the dispute resolution mechanism to their particular situation." *Id.* at 439, *citing, Hauenstein v. Bermeister, Inc.*, 320 N.W. 2d 886, 889 (Minn. 1982).

Finally, the public policy of Florida is not violated by such a choice.[16] *Manrique*, 493 So.2d at 439-40.

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[16] As noted in the Experts' affidavits, forum selection clauses are enforceable in Guatemala.

2. Swiss Bank's Argument Against Enforceability

Swiss Bank has asserted a number of arguments against enforcement of the clause. None of these arguments has validity. Swiss Bank's primary argument was that such clauses are not enforceable because they oust Florida courts of jurisdiction, relying on the decisions of the Third District Court of Appeal in *Zurich Insurance Co. v. Allen*, 436 So.2d 1094 (Fla. 3d DCA 1983); *Sausman Diversified Investments Inc. v. Cobbs*, 208 So.2d 873 (Fla. 3d DCA 1968) and *Huntley v. Alejandra*, 139 So.2d 911 (Fla. 3d DCA 1962). This Court squarely rejected this argument and those cases in *Manrique*. 493 So.2d at 439-40.

Swiss Bank also argued that interpretation of the choice of forum clause should be governed by Florida law. As such, Swiss Bank claims the Court should look to the English translation of the language. Swiss Bank asserts that the English translation reads:

> the creditor [Bank of Paris] may choose to bring the legal proceedings to the courts . . . of Guatemala . . . or . . . Panama.

(emphasis added). (R. 78). Swiss Bank's argument is that the word "may" is permissive and not mandatory and therefore Swiss Bank was not required to bring the lawsuit in one of the two chosen jurisdictions. This Court, of course, drew no distinction in *Manrique* between permissive and mandatory choices. Moreover,

the argument completely ignores the meaning and legal effect of the language in the country where the contracts were executed and to be performed. As noted, the Experts stated the forum selection clause at issue in this appeal:

> [Is] valid, enforceable and mandatory under the laws of Guatemala. The language used in Clause Seventeen is effective to preclude, by agreement of the parties, the bringing of any action by the Creditor [Bank of Paris] (or any Assignee) in any jurisdiction other than Guatemala or Panama.

(R. 115). Swiss Bank asserts that it is proper to overlook the unrebutted expert opinion because the forum selection clause is one of remedy not substance and remedy is determined by the law of the forum state. Swiss Bank's argument is disingenuous. If you look to Florida law to determine whether forum selection clauses are enforceable, the answer is clearly yes. *Manrique*, 493 So.2d at 440.

Moreover, the better analysis is that courts should look to the law of the forum chosen to determine whether the language used is effective to invoke the clause. *See, Pfaudler Co. v. Sylvachem*, 400 So.2d 503 (Fla. 3d DCA 1981); *Jemco, Inc. v. United Parcel Service, Inc.*, 400 So.2d 499 (Fla. 3d DCA 1981). Accord, *C.A. May Marine Supply Co. v. Brunswick, Corp.*, 557 F.2d 1163 (5th Cir. 1973). No other rule would make sense. Parties attempting to draft an effective choice of forum clause could

never know what language to use, because a contracting party could never anticipate where a litigant might attempt to bring an action. The only logical rule is that the clause should be examined and analyzed according to the law of the forum which is chosen by the parties in the forum selection clause. *See, Pfaudler; Jemco; C.A. May Marine.*

Finally, Swiss Bank has argued that the clause should not be honored because the defendants are allegedly committing torts in the State of Florida. The alleged tort is the hiding of assets in Florida. The only tort count asserted in the amended complaint involves alleged fraudulent transfers of property. First, that count is premature, only being proper after Swiss Bank has obtained a judgment. *Bayview Estates Corporation v. Southerland*, 114 Fla. 635, 154 So. 894 (1934); *George C. Sebring Co. v. O'Rourke*, 101 Fla. 885, 134 So. 556 (1931). Second, the fraudulent transfer action is totally dependent upon Swiss Bank prevailing on the contract counts. Obviously, if the alleged guarantors have no liability under Guatemala law on the notes they cannot possibly be guilty of fraudulent transfers of property to avoid payment of a non-existing debt. The same is true of the writs of attachment and garnishment. Absent an enforceable debt owed to Swiss Bank by the alleged guarantors, there is no basis for either attachment or garnishment.

Swiss Bank's argument is a classic example of the cart before the horse. In essence, Swiss Bank seeks to keep the case in Florida because if Swiss Bank is successful on the merits there allegedly are assets against which Swiss Bank can execute. If this Court were to adopt Swiss Bank's argument, persons who are parties to contracts with forum selection clauses could never do business or have assets in another jurisdiction. The mere existence of such assets in a jurisdiction, would, under Swiss Bank's reasoning, be justification for not honoring the forum selection clause. Such reasoning is specious.

B. This Matter Should Be Dismissed Pursuant To The Doctrine Of Forum Non Conveniens.

As the Third District Court of Appeal recently held in *Armadora Naval Dominicana S.A. v. Garcia*, 478 So.2d 873, 876 (Fla. 3d DCA 1985), a matter filed in the courts of Florida involving non-Florida residents (where the cause of action arose in a jurisdiction outside the State of Florida) is subject to dismissal under the doctrine of forum non conveniens. The Third District's decision in *Armadora* followed a long line of Florida and federal cases upholding the application of the forum non conveniens doctrine. E.g., *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978); *Gulf Oil Corp. v. Gilbert*, 330 U.S 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

As the Court noted in *Armadora*, there are nine factors which a court should consider in determining whether the doctrine of forum non conveniens is applicable in cases such as this. Those factors are divided into the categories of private and public interest. The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) cost of obtaining attendance of willing witnesses; (4) possibility of viewing the premises; (5) enforceability of a judgment; and (6) all other practical problems that make a trial easy, expeditious and inexpensive. *Id.* at 876.

The public interest factors, which constitute the second category, relate mainly to judicial efficiency. The public interest factors include: (1) administrative difficulties resulting from litigation being piled up in congested forums instead of being handled at its origin; (2) local interest in having localized controversies decided at home; and (3) judicial interest in adjudicating the case "in a forum that is at home with the . . . law that must govern the case rather than having a court of some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 876, *citing, Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947).

The following comparison of the criteria set forth in the Third District's decision in *Armadora*, and the facts of this case make it clear this matter should have been dismissed:

Criteria	Armadora	This Case
1) relative ease of access to proof	1) Plaintiff resident of foreign country,	1) Plaintiff foreign corporation; most witnesses from foreign countries
2) availability of compulsory process	2) available in the Dominican Republic	2) available in Guatemala
3) cost of obtaining attendance of witnesses	3) crew and other witnesses in the Dominican Republic	3) most witnesses in Guatemala
4) possibility of viewing the premises	4) In the Dominican Republic	4) Not applicable
5) enforceability of judgment	5) easier in the Dominican Republic	5) easier in Guatemala
6) all other problems	6) translation from Spanish to English	6) translation from Spanish to English
7) administrative difficulties	7) not discussed	7) Not applicable
8) local interest	8) Dominican Republic had more contact with the action	8) case involves Guatemala contracts and citizens
9) Application of foreign law	9) Florida court unfamiliar in Dominican Republic law	9) Florida court unfamiliar in Guatemala law

The interests of the litigants in this case would best be served by having this case adjudicated in Guatemala for the fol-

lowing reasons:

1. Swiss Bank, an alleged Panamanian banking institution, is suing on contracts which were entered into and to be performed in Guatemala. To the extent the Plaintiff is entitled to deference in its choice of forum, that deference is minimal if the Plaintiff is foreign, as it is in this case. *Armadora*, 478 So.2d at 877, *citing*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56, 1025 S.Ct. 252, 266, 70 L.Ed. 2d 419, 435-36 (1981).

2. Defendant RGG is a citizen and a resident of Guatemala. In the amended complaint filed by Plaintiff there are 58 named defendants. In the complaint, not one of the defendants who were parties to the agreements is alleged to be a resident of Florida.[17] The vast majority of Defendants are residents of Guatemala. The other Defendants are residents of various other countries in Latin America.

3. Any witnesses to the original agreements and subsequent amendments thereto are residents of a country other than the United States and are not residents of Florida.

4. Compulsory process for attendance of unwilling witnesses is available in Guatemala.

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[17] Defendant Rosa Carlota Dubon Zea de Garcia Granados ("Rosa") who is alleged to be a guarantor is alleged to reside in Florida and Mexico. Swiss Bank submitted no proof at all that Rosa is a resident of Florida.

5. The cost of obtaining attendance of willing witnesses would be greatly reduced if this action were pursued in Guatemala since most of the witnesses reside there or in other countries in Latin America.

6. The Guatemala forum would alleviate the problem of having to translate the testimony of most witnesses and all documents from Spanish to English.

7. Any judgment would be more easily enforceable in Guatemala since the alleged security given for the alleged loans is located there and that is where the corporate headquarters of the principal Defendant, ACIA, is located.

8. Plaintiff's choice of a Florida court is outweighed by the following public interest factors:

(a) the parties to the agreements are primarily from Guatemala and all the documents are registered in Guatemala, and thus, Guatemala has a much greater interest in the controversy than the United States;

(b) this matter, without doubt, involves agreements entered into in Guatemala. Guatemala has a much greater interest in interpreting and applying its law in a dispute involving any such agreements;

(c) As the Third District and other courts have noted, since foreign law will be applied to the dispute it is therefore appro-

priate that the case be heard in the foreign court which is most familiar with the law being applied. *See Pain v. United Technologies Corp.*, 637 F.2d 775, 793 n. 101 (D.C. Cir. 1980), cert. denied, 445 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981)(citing *Gilbert*, supra, (where "a strong possibility exists that foreign law will be applied . . . the trial court has discretion to weigh into the forum non convenience determination consideration that problems will inherently arise when the court is forced to apply law with which it is unfamiliar")).

While in *Armadora* there was "a strong possibility foreign law would be applied in this case", it is a certainty that Guatemala law controls the interpretation of any agreements between the parties in this matter. It is undisputed that all of the alleged agreements upon which Swiss Bank is suing on this matter were executed in and were to be performed in Guatemala. Florida law, as to contracts, absent a valid choice of law clause, provides that the forum where the last act necessary to complete the formation of the contract occurs is the forum whose law will control the interpretation of the agreement. *Pfaudler Co. v. Sylvachem*, 400 So.2d 503 (Fla. 3d DCA 1981); *Jemco, Inc. v. United Parcel Service, Inc.*, 400 So.2d 499 (Fla. 3d DCA 1981).

As the court noted in *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1970) the foreign law problem always "necessitates

the introduction of inevitably conflicting expert evidence on numerous questions of [foreign] law, and it creates the uncertain and time consuming task of resolving such questions by an American judge unversed in civil law tradition". Judge Friendly perhaps put it best:

> [T]ry as we may to apply the foreign law as it comes through the lips of the experts, there is an inevitable hazard that, in those areas, perhaps interstitial but far from inconsequential, where we have no clear guides, one labors molded by our own habits of mind . . . may produce a result whose conformity with foreign court may be greater in theory than in fact.

Conte v. Flota Mercante Del Estado, 277 F.2d 664 (2d Cir. 1960).

(d) There is presently pending in Guatemala the case of *Administracion Central, Industrial Y Agropecuaria, S.A. v. Swiss Bank Corporation (Overseas), Sociedad Anonima.* (R. 119). That action, brought by the principal debtor, ACIA, and others, is the equivalent of a declaratory judgment action. ACIA is asking the Guatemala court for a ruling on the issues most critical in this case: (i) whether the choice of forum clause (discussed infra) is valid and enforceable (ii) whether, even absent the choice of forum clause, the action must first be brought in Guatemala since the security is located there and under Guatemala law an action may not be brought against guarantors until an action is commenced against the principal debtor and the security is

deemed, by judicial action, to be insufficient to satisfy the debt; and (iii) whether the guarantors have any liability at all since certain of the guarantors gave collateral as security for the debts of all guarantors and under Guatemala law if a guarantor gives collateral he has no further personal liability.[18]

In opposition to this overwhelming authority that this case should have been dismissed on forum non conveniens grounds, Plaintiff filed a memorandum and an affidavit of William Riley. Plaintiff attempted to demonstrate, through Mr. Riley's affidavit, that Defendant Jorge Raul Garcia Granados de Garay ("JRG") is a Florida resident. The statements in Mr. Riley's affidavit simply do not establish that JRG is a Florida resident. In pertinent part, Mr. Riley's statement simply states that JRG told Mr. Riley that he intends to permanently reside in the United States.[19] There is nothing in the affidavit which states that JRG has a present intention to become a permanent

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[18] It would be, indeed, ironic if this matter were not dismissed and the Guatemala and Florida courts reached inconsistent results concerning the interpretation and application of Guatemala law.

[19] The affidavit also states that JRG intends to expand some business interests in the United States. That does not make him a resident of Florida.

resident of Florida.[20] JRG's affidavit, however, establishes that he is not a Florida resident. In his affidavit, JRG states that he is a citizen and resident of Guatemala[21] (R. 185). JRG states:

> He is in this country as a spouse of an L-1 visa holder.
>
> An L-1 visa holder is a "temporary" inter-company transferee with the manifest intention to return to the visa-holder's permanent residence, or in my family's case, Guatemala.
>
> I have not, nor has my spouse made any application to the Immigration and Naturalization Service for any change in my

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[20] The affidavit states in pertinent part:

> During the course of the investigation and litigation of this case, I have had occasion to have conversations with Jorge Raul Garcia Granados, one of the Defendants in this case. During the depositions taken in the bankruptcy proceedings of J. R. Investment Corp., N.V. in Fort Lauderdale, Florida, Jorge Raul Garcia Granados stated to me that he intends to, plans to and has begun the necessary steps to organize and engage in a large-scale business development in the United States. He stated that this large-scale business development had been temporarily postponed by the initiation of the present litigation. He stated that this business would be known as REMCO. REMCO would include multiple retail outlets, including Ultima Imports. Jorge Raul Garcia Granados stated to me that it was his intention to reside permanently in the United States of America. He stated that it is his intention and has been his intention since he and his family moved to their Fort Lauderdale, Florida residence in 1982 to build his life in the United States and that his business future and personal future were in this country.

[21] JRG's affidavit was submitted in support of RGG's motion for reconsideration of the denial of the motion to dismiss. RGG also appealed the order denying reconsideration.

present status.

(R. 193). JRG is not a resident of Florida; he remains a legal resident and citizen of Guatemala. (R. 193).

Mere residence in the state is not enough. *Bloomfield v. City of St. Petersburg Beach*, 82 So.2d 364, 368 (Fla. 1955). One must be a "bona fide resident" of this state and possess a present intent "to remain permanently a citizen of [Florida]." *Id.* at 369. JRG is not a citizen of the United States moving from one state to another. JRG is a citizen and resident of Guatemala. JRG is subject to the immigration laws of the United States. It is not a simple matter of JRG's desiring, at some time in the future, to become a Florida resident (even if that is what JRG had said, which he did not). The choice unlike the person in *Bloomfield*, is not solely JRG's. The statements allegedly made to Mr. Riley do not make JRG a Florida resident. Moreover, Swiss Bank does not allege JRG to be a party to the agreements. Swiss Bank should not be able to gain the benefit of the holding in *Houston* because of someone not even a party to the agreements.

RGG could find only one Florida case dealing with the test for residency in a forum non conveniens context. In *Cruickshank v. Cruickshank*, 420 So.2d 914, 915 (Fla. 1st DCA 1982) the court applied the rule of *Bloomfield*. *Cruickshank* involved a

dissolution action in which the husband was a member of the United States Air Force and the parties had resided in a number of different states during the marriage. Five years after the marriage commenced the husband was assigned to Eglin Air Force Base in Florida. The parties purchased a home in Florida and resided there for six years. The husband registered to vote in Florida, obtained a Florida driver's license and registered the car in Florida. When the husband was reassigned he kept the home in Florida, voted in Florida by absentee ballot, kept his Florida driver's license and maintained his account with a credit union in Florida. Upon separation, the wife resided in Illinois and ultimately filed for divorce in Illinois. The husband filed for divorce in Florida. It was undisputed that at the time the husband filed for divorce he was not actually residing in Florida. The husband contended that Florida was the only forum available to him. The court in ruling for the husband noted "the wife has not shown otherwise." *Id.* at 915. It thus is not clear whether the court actually decided the residency issue or decided the case on the basis of the wife's failure to rebut the contentions of the husband that he could not sue in any other forum.

Both *Bloomfield* and *Cruickshank* are inapposite to the situation present in this case. Both cases involved a party

trying to establish residence in Florida. In this case JRG is still a citizen and resident of Guatemala. Any intent which might be derived from JRG's statements to Mr. Riley is at best that in the future JRG would like to be a United States permanent resident if the United States Immigration and Naturalization Service will allow him to be. JRG cannot become a Florida citizen of his own choice. Swiss Bank has done nothing more than demonstrate a future hope which as the Florida Supreme Court noted in *Bloomfield*, in distinguishing the case of *Campbell v. Campbell*, 57 So.2d 34 (Fla. 1952), does not establish Florida residency.

Swiss Bank's attempt to show JRG is a Florida resident is inadequate and misses the mark.

However, even if JRG is a Florida resident, this case represents a classic example of why the rationale of the *Houston* decision, has been repeatedly criticized. See, e.g., *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361, 278 N.Y.2d 619, 622, 328 N.Y.2d 398 402-03 (1972)(the doctrine of forum non conveniens is severely - if not completely - undercut if not applied where only one party is a forum resident or corporation). Here, there is at best some conflicting evidence that two out of approximately 60 litigants may be residents of Florida. Surely, even if the *Houston v. Caldwell* decision was intended to extend to such

facts, the rule is inequitable. The basis of the forum non conveniens doctrine is inconvenience to the Court and the litigants. Even if two of the sixty litigants are residents of Florida, Florida is an extremely inconvenient forum. This case is the perfect opportunity for this Court to revisit its decision in *Houston*. At a minimum this Court should hold that the so-called one resident rule of *Houston* is not applicable where the principal litigants are not residents of Florida, or in the alternative, hold that Florida residency by some of the litigants is only one of the many factors to be considered in determining whether the forum is inconvenient to the litigating parties.

Florida is apparently the only jurisdiction in the United States to follow the one resident rule based on common law considerations. *Alcoa Steamship Co. v. M/V Nordie Regent*, 654 F.2d 147, 155 n. 10 (2d Cir. 1980).[22] Some courts do impose the single resident rationale based upon a state's particular constitutional provisions. *E.g., McDonell-Douglas Corp. v. John*, 557 F.2d 373 (Colo. 1976); *Chapman v. Southern Ry.*, 230 S.C. 210, 95 S.E. 2d 170 (1956). The *Houston* decision is not based upon such a consideration. *Houston*, 359 So.2d at 861 n. 4. Florida's access to the courts section of the Florida Constitution, art. I,

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[22] "Apparently the only state where the court of last resort has rejected the doctrine of forum non conveniens as a matter of common law is Florida." Id. at 155 n.10 (emphasis added).

section 21, Fla. Cont. (1968) which grants Florida citizens access to the courts, is not implicated in this case as no Florida citizens are involved. To the extent any defendants are residents, they do not wish to enforce whatever rights article I, section 21 may grant them.

It is respectfully submitted that the decision in *Houston* is contrary to the realities of litigation by multinational parties in the modern world of international business transactions and should be revisited by this Court.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Court enter an order (1) quashing the decision of the Third District Court of Appeal; (2) remanding the case to that Court with directions to vacate the trial court's order denying RGG's motion to dismiss; and (3) remanding the case to that Court with instructions to the trial court to dismiss this case for the reasons stated herein.

Respectfully submitted,

KENNY NACHWALTER & SEYMOUR, P.A.
400 Edward Ball Building
100 Chopin Plaza - Miami Center
Miami, Florida 33131
Telephone: (305) 358-8151

By: _____
Thomas H. Seymour
Thomas D. Hall

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel of record on the attached list by first class mail this 30th day of January, 1987.

KENNY NACHWALTER & SEYMOUR, P.A.
400 Edward Ball Building
100 Chopin Plaza - Miami Center
Miami, Florida 33131
Telephone: (305) 358-8151

By: Thomas D. Hall
Thomas H. Seymour
Thomas D. Hall

CERTIFICATE OF SERVICE

William L. Richey, Esq.
Richards H. Ford, Esq.
Richey & Monroe, P.A.
717 Ponce de Leon Boulevard
Suite 331
Coral Gables, Florida 33134

Michael Kelly, Esquire
1481 North River Drive
Miami, Florida 33125

L. Van Stillman, Esquire
2200 West Commercial Boulevard
Suite 307
Fort Lauderdale, Florida 33309

Castro & Castro
2600 Southwest Third Avenue
Miami, Florida 33129

George Volsky, Esquire
Rivergate Plaza, Suite 420
444 Brickell Avenue
Miami, Florida 33131