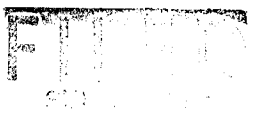
15 ✓

SUPREME COURT OF FLORIDA



NOV [illegible]

CLERK, SUPREME COURT

By _____ Deputy Clerk

RAUL GARCIA GRANADOS QUINONES,
JORGE RAUL GARCIA GRANADOS,
CARMEN RODRIGUEZ CERNA,
ESTUDIOS, PROYECTOS E INVERSIONES
DE CENTRO AMEICA, S..A., (EPICA),
etc., et al.,

Appellants/Defendants,

v.

SWISS BANK CORPORATION (OVERSEAS),
S.A., a Panamanian Banking Institution
and BANQUE NATIONALE DE PARIS, a
French Banking Institution,

Appellees/Plaintiffs.
_____/

CASE NO. 69,412
69,413
69,478
69,479

APPELLEES' REPLY TO JURISDICTIONAL BRIEF OF PETITIONER, RAUL GARCIA GRANADOS QUINONES

Richey & Munroe, P.A.
Attorneys for Plaintiffs/
Appellees
717 Ponce de Leon Boulevard
Suite 331
Coral Gables, Florida 33134
(305) 445-1110

TABLE OF CONTENTS

RICHEY & MUNROE, P.A., ATTORNEYS AND COUNSELLORS, SUITE 331, 717 PONCE DE LEON BLVD., CORAL GABLES, FLA. 33134, (305) 445-1110

I. TABLE OF CITATIONS AND AUTHORITIES

Other Authorities

II. STATEMENT OF THE CASE AND THE FACTS

Appendix references to Appellant's Appendix shall be to (App. _____) with the appropriate page citation. References to Appellees' Appendix shall be to (A.App. ____) with the page citation.

There is no conflict between the decision of the Florida Third District Court of Appeal and that of this Court in Manrique v. Fabbri, 493 So.2d 437 (Fla. 1986). "Conflict" exists when "two decisions are wholly irreconcilable," Williams v. Duggan, 153 So.2d 726, 727 (Fla. 1963). Neither is there an inconsistancy or conflict among the precedents. Kincaid v. World Insurance Company, 157 So.517 (Fla. 1963).

At page three of his brief, Appellant finds it "inexplicable" that the Third District Court of Appeal denied his Motion for Re-hearing after he filed a notice of supplemental authority citing this Court's decision in Manrique v. Fabbri, supra. What is inexplicable is Appellant's failure to inform this Court that Appellee Swiss Bank filed a Response to Defendant's Notice of Supplemental Authority which relied on Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985).

Appellant's failure to inform this Court of an important step in the procedural history of the case, the filing with the Third District of Appellee's Response, is a troubling omission. A copy of Appellee's Response is included in Appellee's Appendix at page one. The Citrovale case distinguishes between mandatory and permissive contractual forum selection clauses.

Since Manrique, it is clear that contractual choice of forum clauses are enforceable in Florida. If the forum selection clause at issue here is viewed as permissive, then there is no conflict with this Court's rule in Manrique. The trial court and Third District Court of Appeal's decisions indicate an agreement with the Appellees' position that the clause is permissive. Adjudication of this action by a Florida Court does not violate a non-exclusive forum selection clause.

The contract clause which is at issue provides as follows:

> CLAUSE SEVENTEEN: LEGAL ACTION
>
> In any of the cases wherein the contract may be terminated or at the end of the term, the Creditor may choose to take legal proceedings to the competent Courts of the City of Guatemala, Department of Guatemala, Republic of Guatemala or to the competent Courts of Panama City, Republic of Panama.

(Emphasis added.) (App. 679).

The accuracy of this translation has never been disputed by Appellant. Appellant filed affidavits as to the legal effect in Guatemala of Clause 17.

In his statement of the facts, at pages six to seven of his brief, Appellant states seven factual matters which he alleges are undisputed. It is disputed that most if not all the witnesses are citizens and residents of Guatemala, Panama or various other Latin American countries. More importantly, the presentation of the nature of the action on pages six to seven of the brief tells only a fraction of the story.

This is a case of international fraud. The record below establishes that Appellant has undertaken a complex scheme to fraudulently transfer his assets into Florida in order to defeat any attempt by the Banks to collect on the personal guarantees which were given to the Banks. The factual background is developed in Appellees' Appendix at pages six through nine. The supporting affidavit of William Riley is at pages 16 through 23. The factual background is essential to an understanding of the case.

III. SUMMARY OF ARGUMENT

Manrique does not conflict with the decision of the Third District Court of Appeal in the instant case. On the facts the situations are distinguishable. Manrique dealt with a mandatory forum clause, using the word "shall." The forum selection clause in this case is permissive. It is uncontested by the parties that the English translation of Clause 17 reads: "may choose." This contract does not exclusively grant venue to Guatemala or Panama. It simply states that the creditor "may choose" to sue in Guatemala or Panama. Had the parties intended that the clause be exclusive, it would have been a simple matter for the words shall, only or exclusive to be part of the clause.

IV. ARGUMENT

BASED ON THE AUTHORITY FILED BY SWISS BANK CORPORATION (OVERSEAS), S.A., CITRO FLORIDA, INC. V. CITROVALE, S.A., THE DECISION OF THE THIRD DISTRICT IS COMPATIBLE WITH THAT OF THIS COURT IN MANRIQUE

In Citrovale, the 11th United States Circuit Court of Appeals distinguishes a mandatory from a permissive forum selection clause. The court construed the contract clause

in that case to be ambiguous, thereby requiring it to be construed against the drafter, a construction which thereby made the clause permissive. The court discusses the holding of M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 2d 513 (1972), which stated the general rule that a forum selection clause should be enforced unless it is clearly shown that enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or over-reaching. But, as the court pointed out, the M/S Bremen case dealt with a mandatory, exclusive clause providing that any dispute "must be treated before the London Court of Justice." Id. 407 U.S. at 3, 92 S.Ct. at 1909. (Emphasis added). The clause in Citrovale read "place of jurisdiction is Sao Paulo/Brazil." Citrovale at 1232.

The clause in the case at bar uses the word "may." The word "may" has been held by Florida courts to denote a permissive term when given its ordinary meaning. E.g., Leghorn v. Wieland, 289 So.2d 745 (Fla. 2d DCA 1974), reh'g denied (1974). The words of a contract should be given their usual and ordinary meaning. E.g., Sheldon v. Tiernan, 147 So.2d 167 (Fla. 2d DCA 1962). The circuit court analyzed the forum selection clause properly. The circuit

judge specifically addressed the "may" or "shall" issue and found the clause to be permissive. (A. App. 78).

This Court in its ruling in Manrique adopted the view enunciated in M/S Bremen v. Zapata Off-Shore Co., supra, and Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984). The Third District's ruling is not inconsistent with either of those cases.

In both M/S Bremen and Maritime the language of the forum-selection clauses clearly provided for a mandatory and exclusive place for future litigation. "'Any dispute arising must be treated before the London Court of Justice'." M/S Bremen at 1909.

Appellant correctly notes in his brief at page nine that in Hawes & Garrett General Contractors, Inc. v. Panhandle Custom Decorators & Supply, Inc., McRae v. J.D./M.D., Inc., Maritime Limited Partnership v. Greenman Advertising Associates, Inc. and Datamatic Services Corp. v. Bescos, the First, Second and Fourth District Courts of Appeal held that contractual choice of forum clauses should be enforced by Florida courts. What Appellant fails to men-

tion is that the language in all of those choice of forum clauses, except for Datamatic, was unequivocally mandatory and exclusive. (Hawes, shall, McRae, shall, Maritime, shall).

Datamatic Services Corporation v. Bescos, 448 So.2d 1351 (Fla. 2d DCA 1986), involved a permissive choice of forum clause. The Second District found that by agreeing to a forum selection clause providing for submission to Florida's jurisdiction, the contestant waived objections that he lacked sufficient minimum contacts with Florida. While finding the forum selection clause enforceable, the court did not consider it to be exclusive. The clause did not foreclose the possibility of suit in another state where personal jurisdiction over the parties existed.

In its decision, the Second District Court of Appeal engages in a detailed analysis of the distinction between mandatory and permissive venue clauses. The court characterizes the conflict between the Third and Fourth District Courts of Appeal as involving only mandatory venue clauses. Datamatic at 1353.

Both the Federal courts and the State courts make a distinction between exclusive and permissive forum selection

clauses. Some of the many cases in which the specific language of the clause did not confer exclusive venue are listed and analyzed in Appellee's Appendix at page 89.

UNDER FLORIDA CONFLICT OF LAWS JURISPRUDENCE, PROCEDURAL ISSUES SUCH AS VENUE ARE CONTROLLED BY THE LAW OF THE FORUM

In his brief Appellant states that Swiss Bank did not file anything to rebut the sworn statements of Raul Garcia Granados' legal experts as to the meaning of Clause 17 under Guatemalan law. The Bank did not file such an affidavit because it would be irrelevant.

As a general rule, the nature, validity and interpretation of the substantive terms of contracts are to be governed by the law of the country where the contracts are made. Matters of procedure and remedy, however, are governed by the law of the forum.

Under Federal and Florida conflict of laws jurisprudence, procedural issues and clauses in the enforcement of contracts are controlled by the law of the forum where the lawsuit is brought. Scudder v. Union National Bank, 91 U.S. 406, 23 L.Ed. 2d 245 (1876); Wingold v.

Horowitz, 292 So.2d 585 (Fla. 1974); Strauss v. Sillin, 393 So.2d 1205 (Fla. 2d DCA 1981), Fincher Motors, Inc. v. Northwestern Bank and Trust Co., 166 So.2d 717 (Fla. 3d DCA 1964); Castorri v. Milbrand, 118 So.2d 563 (Fla. 2d DCA 1960). Among those rules of procedure and questions of remedy which will be interpreted by the law of the forum is the question of the venue of the Court to handle the lawsuit.

As previously stated, Appellee's English translation was accepted without rebuttal by Appellant. At no time did Appellant say the translation was inaccurate or offer to the trial court of the Third District Court of Appeal an alternate translation. In fact, the only translation of the clause included in the Appendix to Appellant's brief to this Court is that of the Appellee.

On its face, through the use of the word may, Clause 17 is permissive. Leghorn v. Wieland, 289 So.2d 745 (Fla. 2d DCA 1974), reh'g denied (1974). The clause simply means that, if suit were brought in either Guatemala or Panama, the parties have agreed in advance that the courts of those countries would have personal jurisdiction.

CONCLUSION

This Court should refuse to review this case. The action of the Third District Court of Appeal in denying Appellant's Motion for Re-hearing and allowing its original ruling to stand is not inconsistent with nor does it conflict with this Court's decision in Manrique v. Fabbri, 493 So.2d 437 (Fla. 1986).

Respectfully submitted,

Richey & Munroe, P.A.
Attorneys for Plaintiffs/
Appellees
717 Ponce de Leon Boulevard
Suite 331
Coral Gables, FL 33134
(305) 445-1110

By _____
William L. Richey

By _____
Beth F. Jacobi

Certificate of Service

I hereby certify that I have this day mailed a copy of the foregoing to

Thomas H. Seymour, Esq.
Attorney for Raul Garcia Granados
Kenny, Nachwalter & Seymour
100 Chopin Plaza
Room 400
Miami, FL 33131

L. Van Stillman, Esq.
Attorney for Jorge Raul Garcia Granados
2200 W. Commercial Boulevard
Suite 307
Fort Lauderdale, FL 33309

Michael F. Kelley, Esq.
Attorney for Carmen Rodriguez-Cerna
1481 N.W. North River Drive
Miami, FL 33125

George Volsky, Esq.
Attorney for EPICA
444 Brickell Avenue, Suite 420
Miami, Florida 33131

Michael J. Fingar, Esq.
Attorney for J.R. Investments, Inc.
19501 N.E. Tenth Avenue
Suite 205
North Miami Beach, Florida 33179

William L. Richey

Dated: November 3, 1986

11