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# Agreements in Advance of Conferring Exclusive Jurisdiction on Foreign Courts

William E. Syke

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theless, this massive and enormously important work calls for continued efforts in this and other respects. The American Law Institute has announced further revision of Section 1-105 for January, 1950. It may be that by the time these remarks are published they will be obsolete. I hope so.

ERNST RABEL\*

### AGREEMENTS IN ADVANCE CONFERRING EXCLUSIVE JURISDICTION ON FOREIGN COURTS

With almost boring unanimity American courts have refused to enforce contractual provisions conferring exclusive jurisdiction in advance on a court or courts of a particular sister state or foreign country. Leading writers in the fields of conflict of laws,<sup>1</sup> admiralty,<sup>2</sup> and contracts<sup>3</sup> take it to be well settled that contractual exclusion of the jurisdiction of the courts of a certain state or country will not be honored by the courts so sought to be excluded. The rule is rigidly applied, and hardly ever are the particular facts involved in a case given consideration.

The rule had its origin in the tendency long displayed by judges to guard jealously the jurisdiction of their own courts. This tendency found expression, among others, in the early emasculation by the English courts of arbitration clauses by holding them to be "revocable" at the option of either party.<sup>4</sup> Consequently, it is somewhat surprising to find that English courts from an early date have enforced contractual clauses conferring exclusive jurisdiction on foreign tribunals.

In the earliest case on record<sup>5</sup> the litigants were foreigners. A ship and cargo were confiscated in an English port on its voyage back to The Netherlands. Dutch seamen sued their Dutch captain for wages due under a contract entered into in Rotterdam. The seamen's contract provided that all disputes should be set-

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\*Research Associate, University of Michigan, Formerly Professor of Law at the University of Berlin, Director of the Kaiser Wilhelm Institute for Foreign and International Private Law, and judge in international courts.

1. Stumberg, *Conflict of Laws* (1937) 244.

2. Benedict, *Admiralty* (Kanuth's 6 ed. 1940) 38.

3. Williston, *Contracts* (1936) § 1725.

4. *Vynior's Case*, 8 Co. Rep. 80a (1609); *Kell v. Hillister*, K.B. 1 Wilson 129 (1746); *Wellington v. Macintosh*, 2 Atk. 569 (Ch. 1743). However, the position taken was legislatively overruled by the enactment of the Arbitration Act of 1889, 52 and 53 Vict. c. 49.

5. *Glenar v. Meyer*, 2 H.Bl. 603 (1796). A second case, *Johnson v. Machielsne*, 3 Camp. 44 (1811), was decided in accord with the *Meyer* case on facts similar thereto.

tled by the courts in Rotterdam and specifically provided that the captain was not to be sued in foreign countries. In refusing to exercise jurisdiction, the court pointed out that since the captain could not pay the wages with his ship and cargo confiscated, he might languish in debtor's prison for life. It was thought more reasonable to "send the parties to their own country there to pursue their remedy."<sup>6</sup>

Thus this first case seemed to be based on the *forum non conveniens* theory rather than the enforcement of the exclusive jurisdiction clause. In fact, the dictum of Lord Chief Justice Eyre definitely stated that the court would not allow English persons to exclude themselves from the jurisdiction of the English courts. As will be seen, this dictum was not followed in subsequent cases.

The first case in which the parties were English residents and subjects was *Law v. Garret*,<sup>7</sup> decided after the passage of the Common Law Procedure Act of 1854.<sup>8</sup> The parties had established a partnership to conduct business in Russia with the main office in St. Petersburg. The partnership agreement provided that disputes were to be referred to a particular commercial court in St. Petersburg and that its decision was to be final. When a dispute arose under the contract, one of the partners filed suit in England asking for dissolution of the partnership and for other relief. The court held that the exclusive jurisdictional clause was an agreement to submit to arbitration under Section 11 of the Common Law Procedure Act, and ordered a stay of proceedings. The appellate court held that in the case of an arbitration clause the Common Law Procedure Act did not oust the jurisdiction of the superior courts, but merely gave them discretion to stay proceedings. Lord Justice Baggly further stated that the court entirely concurred with the decision in the case of *Willesford v. Watson*<sup>9</sup> in the proposition that if "parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to ordinary courts, a prima facie duty is cast upon the courts to act on such arrangements."<sup>10</sup>

It may well be questioned whether an agreement to submit all disputes to a foreign court is an *arbitration* agreement. However, today this question is, as far as England is concerned, of academic interest only, since the point was specifically discussed

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6. 2 H.Bl. 603, 607 (1796).

7. L.R. 8 Ch. 26 (C.A. 1878).

8. 17 and 18 Vict. c. 125.

9. L.R. 8 Ch. 473 (1870).

10. L.R. 8 Ch. 26, 37 (C.A. 1878).

in the *Garret* case, which has become the leading English case and has been followed and reaffirmed ever since.<sup>11</sup>

The English view of the matter seems to be a common sense approach to the problem. If parties to a contract include a stipulation conferring exclusive jurisdiction on the courts of a foreign country, the English court will enforce the stipulation, unless some good reason exists in the particular case for not enforcing it. *The Vestris*<sup>12</sup> is an example of a case in which the court found good reason for not enforcing the agreement. In that case, a bill of lading provided that New York courts should have exclusive jurisdiction over any claim of loss under the shipping contract. When an action was brought in England after a shipwreck, the court refused to stay proceedings because it felt that under the particular circumstances, litigation in England would be easier and more convenient for both parties. England was the *forum conveniens*, the residence of the defendant was England, the domicile of the shipowner was England, and proceedings in New York had proved in the past to be very expensive and difficult. In addition, the parties had been negotiating in England for a settlement for almost two years, and the motion to stay was not filed until a few weeks prior to the date on which the case was to be tried. The court apparently was of the opinion that the invocation of the clause at such a late date constituted an unfair maneuver to delay the settlement of the case.

The two leading American cases on the point which represent the practically unanimous view today in every jurisdiction which has passed on the question are *Ephraim Nute v. Hamilton Mutual Insurance Company*<sup>13</sup> and *Insurance Company v. Morse*.<sup>14</sup>

The *Nute* case involved a venue clause in an insurance policy of the defendant company providing that all actions on the policy were to be brought in the county where the company was established. The Supreme Judicial Court of Massachusetts refused to enforce such a clause on the ground that legal *remedies* as distinguished from legal *rights* could not be affected by contractual agreement between parties. Chief Justice Shaw stated that the law had fixed the rules relating to legal remedies upon the basis of general convenience and expediency, and that to "allow them

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11. *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society, Ltd.* [1903] 1 K.B. 249; *Kirchner and Co. v. Gruban* [1909] 1 Ch. 413; *The Media* (1931) 41 Ll. L. Rev. 80.

12. 43 Ll. L. Rev. 86 (1932).

13. 72 Mass. 174 (1856).

14. 87 U.S. 445, 22 L.Ed. 365 (1874).

to be changed by agreement of parties would disturb the symmetry of the law and interfere with such convenience."<sup>15</sup> Although the distinction between legal rights and remedies is very tenuous, it has not been abandoned in subsequent cases.

The *Morse* case is the leading federal case on the problem. A Wisconsin statute<sup>16</sup> required, as a prerequisite for doing business in the state, all foreign corporations to agree that they would not remove any suits to the federal courts. The defendant insurance company, a New York corporation, filed such an agreement in accordance with the provisions of the statute. When sued by Morse in the Wisconsin state court, the company attempted to remove the cause to the federal court but was refused by the lower court, the state supreme court affirming. The United States Supreme Court reversed, and held the "agreement" between the company and the state invalid, citing cases holding that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."<sup>17</sup> With the exception of the *Nute* case, nearly all the cases cited dealt with arbitration agreements. The court then decided that the "agreement" gained no validity from the underlying Wisconsin statute since that statute was repugnant to Article III, Section 2 of the United States Constitution and Section 12 of the Judiciary Act of 1789, providing removal procedure in cases having diversity of citizenship.

Thus, it is seen that the *Morse* case was concerned with the constitutional problem of concurrent jurisdiction between federal and state courts; that is, as a prerequisite for doing business in a state, does that state have the power to compel a foreign corporation to waive its constitutional right to remove a case to a federal court? The case was not concerned with and should never have properly been used as a precedent, for a determination of the problem of whether parties to a contract could, by their own agreement, confer exclusive jurisdiction in advance on the courts of a particular state or foreign country.

However weak the rationale of the *Morse* and the *Nute* cases, they have remained the foundation for the almost unanimous American rule that such agreements are unenforceable. The rule, with few exceptions, has been mechanically applied, with seldom even a consideration given to the facts involved in the particular case. Most of the decisions have repeated the words

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15. 72 Mass. 174, 184 (1856).

16. 1 Taylor's Statutes (Wis. 1870) 958, § 22.

17. 87 U.S. 445, 451, 22 L.Ed. 365, 368 (1874).

of the *Nute* and *Morse* cases without a real analysis of the reasons for the rule.

Only a few cases in the United States have enforced an exclusive jurisdiction clause where the issue was squarely presented. Furthermore, none of these have been followed in recent times and they stand alone, separate and apart, branded with the malodorous antipathy of a bastard child at a family reunion of bluebloods. Each has either been disavowed or severely restricted.

*Daley v. People's Building, Loan and Savings Association*<sup>18</sup> involved an action brought by a Massachusetts citizen in a Massachusetts court against a New York association. The plaintiff's certificate of membership in the association contained a clause stating that any action brought by a shareholder was to be brought in Ontario County, New York. Chief Justice Holmes, speaking for the court in holding that the action would not lie in Massachusetts, pointed out that most of the members of the corporation lived in New York, that the defendant was a New York corporation and that the greater part of the dealings and contracts would naturally take place in New York. It was also specifically emphasized that ". . . we are speaking of parties standing in an equal position where neither has any oppressive advantage or power, and that our decision as to the validity of the condition as a defense does not go beyond the particular circumstances of this case."<sup>19</sup>

In *Mittenthal v. Mascagni*,<sup>20</sup> both parties were non-residents of the forum. The contract, entered into in Italy, called for a concert tour by Mascagni in the United States to be arranged by Mittenthal. It was stipulated in the contract that the courts of Florence, Italy, should have exclusive jurisdiction of any suit between the parties to the contract. The Massachusetts court held that under the circumstances of hurried travel through many different jurisdictions, the stipulation was reasonable and thus refused jurisdiction of an action brought during the trip by the concert agent against Mascagni.

Both of these cases were cited in urging enforcement of an exclusive jurisdictional agreement in *Nashua River Paper Company v. Hammermill Paper Company*,<sup>21</sup> but the Massachusetts

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18. 178 Mass. 13, 59 N.E. 452 (1901).

19. 178 Mass. 13, 20, 59 N.E. 452, 453 (1901).

20. 183 Mass. 19, 66 N.E. 425 (1903).

21. 223 Mass. 8, 111 N.E. 678 (1916).

court refused to depart from the doctrine of the *Nute* and *Morse* cases, the rule allegedly prevailing in "all states where the question has arisen."<sup>22</sup> The *Daley* case was explained as being based on a New York Supreme Court case<sup>23</sup> which "did not correctly state the law of New York."<sup>24</sup> The *Mascagni* case was distinguished on the grounds that both parties were non-residents and had no standing in the Massachusetts courts "as a matter of strict right, but only as a matter of comity."<sup>25</sup> The court "well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens."<sup>26</sup>

Stumberg<sup>27</sup> cites *Kelvin Engineering Company, Incorporated v. Blanco*<sup>28</sup> as indicating a trend away from the doctrine of the *Nute* and *Morse* cases. The court adopted the English view and treated an agreement to submit all future disputes to the courts of Santiago, Cuba, as an agreement to arbitrate. The court stayed the action under Section 5 of the New York Arbitration Act.<sup>29</sup> This decision, however, has never been followed and was questioned in a later case.<sup>30</sup> In addition, different divisions of the New York Supreme Court reached contrary results in two other cases decided within two months of the *Kelvin* case. In *Sudbury v. Ambi Verwaltung Kommanditgesellschaft auf Aktien*<sup>31</sup> the reason given for not enforcing an agreement to submit all disputes exclusively to a named German court was that it was an attempt to oust the New York courts of jurisdiction and so was contrary to public policy and void. *Sliosberg v. New York Life Insurance Company*<sup>32</sup> involved an agreement to submit all claims or suits under an insurance policy to the courts of St. Petersburg only. The court said that the question was whether the facts shown required the court, in the interest of justice, to remit the parties to the foreign tribunal. It then decided this in the negative, as the Russian Revolution had occurred since the making of the contract and the defendant had been expelled from that country, and assumed jurisdiction. Thus each of the above three cases proceeded on mutually exclusive theories.

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22. 223 Mass. 8, 19, 111 N. E. 678, 681 (1916).

23. *Greve v. Aetna Life Stock Ins. Co.*, 81 Hun 28, 30 N.Y. Supp. 668 (1894).

24. 223 Mass. 8, 17, 111 N.E. 678, 680 (1916).

25. 223 Mass. 8, 18, 111 N.E. 678, 681.

26. *Ibid.*

27. Stumberg, *Conflict of Laws* (1937) 251.

28. 210 N.Y. Supp. 10 (Sup. Ct. 1925).

29. N.Y. Laws (1920) c. 275, 1 Thompson's Laws of New York 101.

30. *The Ciano*, 58 F. Supp. 65 (E.D. Pa. 1944).

31. 210 N.Y. Supp. 164 (Sup. Ct. 1925).

32. 211 N.Y. Supp. 270 (Sup. Ct. 1925).

Therefore it can be seen that the few cases holding contrary to the *Nute* and *Morse* cases are standing alone. The old rule still is definitely entrenched in the jurisprudence of all courts which have expressly ruled on the problem.

Although never given as reasons or justification for the rule, two factors have probably influenced the courts in their decisions. One is the old tendency of courts carefully to guard their own jurisdiction, wishing to extend rather than confine its scope. The second factor is the fear that the bargaining power of the contracting parties may be unequal and may thus result in inequities to the weaker party if enforcement of the stipulation were to be ordered.

The crowded condition of nearly all dockets of United States courts today has probably abrogated the first factor to a considerable extent. The second factor, however, still carries considerable weight, and deserves more serious consideration.

If an inflexible and mechanical application of the rule in every case were necessary to protect parties with inferior bargaining power, there might be some justification for the manner in which the courts have treated such agreements. But is such a rigid and rigorous treatment necessary to accomplish this end?

Normally the factors motivating the inclusion of such an agreement in a contract are the legitimate and reasonable desires of both parties for certainty and convenience of a forum in which to settle any possible future disputes arising out of the contract, the desire to eliminate the hazards of the conflict of laws and to settle in advance the law applicable. Very often business men want to know that they do not run the risk of being forced to litigate thousands of miles away from their normal place of business, thereby subjecting themselves to a great deal of unnecessary expense and inconvenience. They desire to avoid the unhappy consequences suffered by the interstate railroad companies in the rash of suits<sup>33</sup> brought against them in Minnesota courts by plaintiffs with causes of action which originated thousands of miles away from Minnesota. Why should not parties to a contract be permitted to guard against just such contingencies

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33. *Borgith v. Chicago, R.I. and P.R. Co.*, 180 Minn. 52, 230 N.W. 457 (1930); *Erving v. Chicago and N.W. R. Co.*, 171 Minn. 87, 214 N.W. 12 (1927); *Gegere v. Chicago and N.W. R. Co.*, 175 Minn. 96, 220 N.W. 429 (1928); *Winders v. Illinois Cent. R. Co.*, 177 Minn. 1, 223 N.W. 291 (1929); *Witort v. Chicago and N.W. R.R.*, 178 Minn. 261, 226 N.W. 934 (1929).



for their mutual protection? France<sup>34</sup> and Germany,<sup>35</sup> as well as England, afford their citizens such a privilege.

A workable and equitable solution of the problem could be accomplished by an adoption of a part of the English method of treating the situation—enforce all justifiable exclusive jurisdictional agreements, made in good faith between persons of equal bargaining power, unless under the peculiar facts of the case, equity would better be served by the assumption of jurisdiction by the court. This approach places the burden on the person attacking the stipulation to show good cause why he should not be bound by his promise. At the same time it enables the court to afford protection to persons coerced into so stipulating to the advantage of the party possessing the superior bargaining power.

As to the manner of enforcing the agreement, there seems to be no valid reason for resorting to the subterfuge used by the English judges in calling such clauses arbitration agreements. Why not face the issue squarely and simply say that the court will observe and enforce an exclusive jurisdictional agreement just as it will enforce any other earnest stipulation of parties to a contract? They have agreed and so should they be bound.

Some states do not have arbitration statutes and most of those that do have patterned their acts after the New York statute, making mandatory an order to stay proceedings when parties have entered a valid arbitration agreement.<sup>36</sup> Therefore, should a state interpret an exclusive jurisdictional agreement as arbitration, it would be required to enforce it regardless of the inequities resulting therefrom. The English act permits the use of discretion in the judgment of the court.

With such a frank recognition of the jurisdictional agreements, coupled with a differentiating rather than a hackneyed treatment of the cases, the main factor preventing the courts from enforcing such contractual undertakings would be obviated.

Today only two exceptions exist to the basic rule that courts cannot be ousted of a jurisdiction which the law has provided. These two exceptions only help focus the spotlight on the inconsistent and illogical application of the rule.

The first is the manner in which courts treat agreements

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34. *Comp. Gen. Transatlantique v. Armeilla*, Cas. (Civ.) July 16, 1912, 28 Rev. int. de droit maritime 332.

35. OLG Dresden, May 30, 1904, 9 OLG 51.

36. The Louisiana Arbitration Act contains such a provision. La. Act 377 of 1948, § 2 [La. R.S. (1950) § 9:4202].

to submit to foreign arbitration. It is now well settled that such agreements are valid and enforceable in those jurisdictions which have arbitration statutes.<sup>37</sup> The inconsistency in this holding need hardly be mentioned. In *Meacham v. Jamestown, F. and C. R. Company*,<sup>38</sup> decided prior to the passage of the New York Arbitration Act, Chief Justice Cardozo, in a dictum, pointed out that a court would be more prone to enforce an agreement to submit to courts of a foreign state than to enforce an agreement to arbitrate in a foreign state. This would certainly appear to be the more logical view. Justice Lydon, dissenting in *Parker v. Kraus*,<sup>39</sup> also pointed out the inconsistency in the two views.

The second exception to the rule is in the treatment of exclusive jurisdiction agreements entered into after the accrual of a cause of action. These agreements have been enforced,<sup>40</sup> although no logical grounds of distinction have ever been advanced. Such a distinction has been criticized by Judge Learned Hand in *Krenger v. Pennsylvania Railroad Company*.<sup>41</sup> In addition, the recent United States Supreme Court case of *Boyd v. Grand Trunk Western Railroad Company*<sup>42</sup> refused to apply the exception to suits brought under the Federal Employers' Liability Act.<sup>43</sup> It ruled invalid a contract, entered into after a cause of action arose, which restricted the petitioner's right to bring suit in any eligible forum given by Section 6<sup>44</sup> of the act. However, the decision was based on an interpretation of Section 5<sup>45</sup> of the act rather than a violation of public policy as an attempt to oust the jurisdiction given by law.

37. *Shanferoke Coal Co. v. Westchester Corp.*, 293 U.S. 449, 55 S.Ct. 313, 79 L.Ed. 583 (1934); *The Edam*, 27 F. Supp. 8 (S.D. N.Y. 1938); *Gilbert v. Bernstine*, 255 N.Y. 348, 174 N.E. 706 (1931); *Nippon Ko-ito Kaisha v. Ewing-Thomas Corp.*, 313 Pa. 442, 170 Atl. 286 (1934).

38. 211 N.Y. 346, 105 N.E. 653 (1914).

39. 284 N.Y. Supp. 478, 484 (Sup. Ct. 1935).

40. *Roland v. Atchison, T. and S.F. Ry.*, 65 F. Supp. 630 (N.D. Ill. 1946); *Gitler v. Russian Co.*, 108 N.Y. Supp. 793 (Sup. Ct. 1908); *Detwiler v. Lowden*, 198 Minn. 185, 269 N.W. 367 (1936).

41. 174 F.(2d) 556 (C.C.A. 2d, 1949).

42. 70 S.Ct. 25 (U. S. 1949).

43. 45 U.S.C.A. § 51 et seq.

44. 45 U.S.C.A. § 56. "Under this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

45. 45 U.S.C.A. § 55. "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . ."

An expansion of these two exceptions to the general rule may eventually accomplish the desired result, that is, an enforcement of all such exclusive jurisdictional agreements where inequities would not result. In those jurisdictions which have ruled on the question, it may eventually have to be accomplished by a frank overruling of previous jurisprudence.

Louisiana is one of those jurisdictions in which the question would be *res nova*. When the occasion arises to rule on such an agreement, it is hoped that the court will not follow the example of the other states and merely continue to mouth the doctrine of the *Nute* and *Morse* cases and strike down the agreement as an "attempt to oust the court of its jurisdiction." With the modern tendency to give enforcement to the intention of the parties to agreements validly entered into by mature individuals of equal bargaining power, there is no reason why Louisiana should not lead the way in fitting such agreements into the pattern of logical juridical sequence.

WILLIAM E. SYKE\*

### INJUNCTIONS AGAINST SUITS IN FOREIGN JURISDICTIONS

American rules of jurisdiction give a plaintiff a wide choice of possible fora. Under the rules sanctioned by the Supreme Court of the United States, jurisdiction in a suit in personam may be exercised against an individual defendant not only by the state of which he is a domiciliary<sup>1</sup> but also by any state in which he may be personally served with process.<sup>2</sup> If the controversy arises out of an automobile accident, suit may also be brought in the state where the accident occurred.<sup>3</sup> If the defendant is a corporation, suit may be brought not only in the state in which it is incorporated<sup>4</sup> but in any state in which it is "doing business."<sup>5</sup> The recent decision of *International Shoe Company v. State of Washington*<sup>6</sup> implied that the plaintiff's electives may be extended

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\* Graduate of February 1950; presently Member, Alexandria Bar.

1. *Blackmer v. United States*, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932); Restatement, Conflict of Laws (1934) § 79.

2. *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714 (1895); Restatement, Conflict of Laws (1934) § 78.

3. *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L. Ed. 1091 (1927).

4. All states have statutes providing for personal service on domestic corporations; Restatement, Conflict of Laws (1934) § 87.

5. Restatement, Conflict of Laws (1934) § 92.

6. 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945).