CH. 8 CHOOSING LEGAL REGIMES

1) Can & should parties choose the substantive legal rules to govern their relationships?

2) Should the parties be able to choose the forum for the resolution of their disputes?

3) Should the parties be enable to use an alternative system of dispute resolution, i.e., arbitration, and what rules should apply?

Choosing the Applicable Substantive Rules p.634

A "choice of law" clause is an agreement.

This inquiry about the choice of law is ordinarily relevant in contractual matters. Examples include:

- Domestic business transactions (state borders).

- International business transactions.

- Comprehensive contract coverage, e.g., credit cards, franchise operations, consumer telecommunications.

Objectives in Designating the Governing Law

- Predictability as to result when controversy occurs.
- Uniformity of result both in litigation and in internal corporate responses on national/worldwide basis.
- Avoiding strange rules and results.

Contractual Choice of Law Issues p.634

Restatement, §186 – Applicable law – parties to a contract can designate the governing law.

Restatement, §187 – law of the chosen state governs contractual dispute resolution, if within an explicit provision in their agreement.

Exceptions: - chosen state has no substantial relationship to parties or transaction;

- Chosen state law is contrary to a fundamental policy of a state which has a materially greater interest than the designated state.

Nedlloyd v. Superior Ct. p.635 Cal. Supreme court

Contract between parties to finance and operate an international shipping business.

Choice of law clause specifies contract governed by laws of Hong Kong (& service of process).

Seawinds (HK Corp), Cal. place of business and US bankruptcy; Defendants as Dutch companies with Rotterdam place of business.

Various purchasers (foreign & US) of Seawinds stock. Allegation that Dutch companies violating shareholders' agreement obligations. P.636.

Cont.

Nedlloyd v. Superior Ct. p.635, cont.

Does Cal. accept choice of law contract provision? Restatement, §187 (p.637)

1) HK – "chosen state" has a substantial relationship to the parties. Incorporation of some parties in HK.

2) No fundamental policy requiring Cal. law applicability (or materially greater interest).

3) Fiduciary duty claim is not independent of shareholders' agreement (& therefore not outside choice of law clause). P.638 ***Cont.***

Nedlloyd v. Superior Ct. p.635, cont.

No exceptions in contract to applicability of HK law & therefore <u>all</u> disputes arising from this transactions governed by this choice of law (including breach of fiduciary duty).

No fundamental reason to reject HK law – no Cal. policy is served by disregarding HK law for Cal. law. Respect the choice of the parties!

<u>Dissent:</u> A non-contractual cause of action is involved here (breach of fiduciary duty) & the choice of law clause does not apply.

Disputing Choice of Law Clauses p.642

1) Should the choice of law clause be recognized?

2) Is the disputed issue within the scope of the choice of law clause? How far does the "contract" extend? To breach of fiduciary duty? Fraud claims? Misrepresentation?

3) Does the choice of law clause include the chosen state's procedural rules, e.g. statutes of limitations? Is this not a forum law issue (& choice of law clause has no relevance)?

Banek, Inc. v. Yogurt Ventures p.644

Fed. Dist. Ct. rules choice of law provision in a franchise agreement is valid & enforceable.

Suit in state court alleged breach of contract and MI franchise investment law violations.

Removal to Fed. Ct. based on diversity.

Dist. Ct. granted Def. motion that the (Georgia) choice of law provision applied (valid in MI).

1) No MI law as bar to use GA (not MI) franchise law provisions. ***Cont.***

Banek, Inc. v. Yogurt Ventures, cont. p.644

2) Should the choice of law provision in contract be enforced under MI choice of law rules? Substantial relationship exists with GA and no significant differences between two laws which would be adverse to Plaintiff. Also claims for common law fraud are possible. And. No violation of MI public policy (p.648).

3) Scope of choice of law provision is sufficiently broad to cover all these claims made in this litigation (including fraud and misrepresentation).

Possible Invalidation of Contract p.649

What if choice of law clause specifies a governing law which would invalidate the contract? See Restatement, §187 Comment which specifies that the designated law will not be applied.

Parties can be assumed to have entered into a binding contract and the choice of law clause must be assumed to be a mistake.

Cook Sign Co. v. Combs p.651

State court grant of temporary injunction to prohibit violation of noncompete agreement. Minn. as the proper choice of law. Affirmed.

Employment contract stating that disputes to be resolved under N.D. law. But, later non-compete agreement with Minn. as designated choice of law. Employee (Combs) enjoined from working. Decision: ND does not recognize non-competes; Minn. accepts non-competes. Minn. law governs. *Cont.*

Cook Sign Co. v. Combs p.651 cont.

Reasons supporting Minn. Law application:

1) **Clear choice of law provision in noncompete agreement and choice should be accepted.**
2) **Not forum shopping- Def. as Minn. resident.**

(but two separate documents & different rules).

3) **Simplification since Minn. court applies**

Minn. law (i.e., need not research foreign law).

4) **Significant interest of the forum state**
5) **Better rule of law – this consideration is not relevant here.**

Non-competes & litigation strategy p.655

Race to the courthouse concerning seeking a declaratory judgment action with respect to a non-compete clause. Seeking to strike down on a public policy basis - impeding an individual's ability to earn a living.

Hall v. Spring Spectrum p.655

Sprint appeals from state court certification of a 48 state class in class action lawsuit filed in Ill.

Class action status affirmed by Ill. App. Ct.

Sprint had choice of law clause re KS consumer protection law in all contracts.

Court says Kansas law applies to all claims.

Sprint argues KS statute can not be applied beyond KS borders.

Only issue re validity of early termination fee.

Cont.

Hall v. Spring Spectrum p.655 cont.

Ill. Court accepts this choice of law clause:

1) Substantial relationship with KS (as relevant under the Restatement of Conflicts-2nd).

2) KS Consumer Protection Act made to apply to all parties because of an express choice of law provision. This provision in a private contract.

3) No violation of Sprint's due process rights to apply KS consumer protection law to all. No surprise to Sprint!

Consumer Protection Situations p.660

Credit card disputes – whose law included in the choice of law clause?

European Union & choice of law rules – p.661

Choice of law rules permitted in consumer contracts – but not to frustrate mandatory consumer protection rules.

Choice of Court/Forum Clauses P. 663

Bremen v. Zapata Offshore Co., p. 663

Forum selection clause in international towing contract – to get Zapata rig from US to Italy. Transporter is German Co. – agreement that dispute to be in London Court of Justice.

Problem in Gulf of Mexico and then lawsuit in Fed. Dist. Ct. in Tampa, FL. (& in rem).

Holding: Forum selection clause (London) is prima facie valid (reversing 5th Cir.). ***Cont.***

Bremen v. Zapata p. 663, cont.

Reasons for recognizing choice of forum clause:

Prima facie valid & not unreasonable.

Parties can consent to jurisdiction.

Neutral forum with expertise.

Negotiated private international agreement.

Forum clause an integral part of the agreement.

Forum clause important to international trade.

London is not a seriously inconvenient forum; & burden of proof is to show otherwise.

Carnival Cruise Lines v. Shute p.667

Admiralty case: Forum selection clause in tickets issued by cruise line to passengers.

Clause specifies litigation in Florida courts.

Negligence lawsuit filed in W.D. Wash Fed. Ct.

Carnival asserts (1) summary judgment since forum clause requires Florida and (2) no personal jurisdiction over Carnival in Wash.

Ct. App. (reversing) says (1) sufficient contacts in Wash. to have personal jurisdiction there and (2) forum clause not freely bargained for. *Cont*.

Carnival Cruise Lines v. Shute, cont. p.667

Sup. Ct.: Pl. not carrying burden of proof re inconvenience to set aside forum choice clause.

Florida is not a "remote alien forum."

No bad faith on part of cruise lines.

Adequate notice to Plaintiffs re forum clause.

Dissent: (1) Should be "heightened scrutiny" since unequal bargaining power; &

(2) prevailing rule that forum selection clauses are not enforceable if not freely bargained for.

Hague Conv. on Choice of Court Agreements P.673

Convention concluded in 2005, but not yet in force (?).

For worldwide enforcement of choice of forum clauses – except for consumer contracts and employment contracts.

U.S. & E.U. as signatories to Convention – 2009

& Mexico also a signatory.

Knowledge Required of Forum Selection Clause?

- What if the forum selection clause had not been reviewed?
- What if no opportunity to review the forum selection clause prior to acceptance of the contract?
- What if really small print in a consumer contract? & not adequate to provide real notice?
- Alternative remedy: Call the local consumer rights advocate?

What if Designated Forum is Quite Inconvenient?

E.g., a long distance to travel, with most of supporting witnesses, etc., at the same location, i.e., the location as the disadvantaged party?

Or, what if very expensive for one party (particularly the economically disadvantaged party) to proceed with litigation in the designated forum state? & particularly if this necessitates being in a foreign country where language translation required and other impediments?

Offsetting Considerations Supporting the Clause

The forum selection clause enables a reduction of transaction costs. Relevant to enforceability of this clause?

Plus (p.676) Americans do not like to bargain (except in a large corporate setting, e.g., Zapata).

See (p.677) the Smith,Valentino "shot-gun" approach to forum selection, i.e., party must litigate in the other's forum.

Caspi v. Microsoft Network (NJ Court) P.677

N.J. class action by members of Network against Network (an Internet service provider) and against Microsoft.

Complaint re overbilling, breach of contract and common law fraud.

Assertion of forum selection clause for King Count, Washington for all disputes.

Choice of forum clause on the computer screen.

Trial Ct.: consent to forum clause not result of fraud or excessive bargaining power. *Cont.*

Caspi v. Microsoft Network, cont. P.677

N.J. Appeals Ct. analysis affirming validity of choice of forum clause:

Enforcement not inconveniencing a trial.

No indication of consumer fraud protections in Wash. State are materially different.

Receipt of adequate notice of choice of forum clause? Yes, although received electronically.

No really small typeface.

Issue of "reasonable notice" of forum selection clause is a question of law (not a fact issue).

America Online v. Superior Ct. (Cal.) P.680

AOL class action suit about AOL continuing to debit plaintiffs' credit cards on subscription termination. Violation of Cal. Unfair Business Practices Act & conversion & fraud?

Forum selection clause states Va. as the location (and Va. law as the governing law).

Enforcement here of the forum selection clause? Determination here that forum selection clause violates strong California public policy.

Cont.

America Online v. Superior Ct. (Cal.) P.680

Va. substantive law re consumer rights provides significantly less protection than Cal. law.

Va. law is hostile to class actions, but this is important to consumers in California.

No punitive damages recoverable in Va.

Other limitations apply under Va. law (p. 682).

Therefore, AOL's Motion to Dismiss was appropriately denied.

Costs & convenience are not relevant considerations here re reasonableness.

Wong v. PartyGaming Fed.6th Cir. p.685

Ohio residents sue Gibraltar Co. over online poker games: breach of contract & misrep. & violation of Ohio consumer laws.

Forum selection clause when registering says Gibraltar as site for dispute resolution.

Def. moves to dismiss & dismissed & aff'd.

Ct.App. reviews forum selection clause de novo.

Fed. law governs evaluation of forum selection clause in a diversity case in certain contexts, but not in absence of a controlling federal statute.

Cont.

Wong v. PartyGaming Fed.6th Cir. *Cont.* p.685

Does enforceability of forum selection clause implicate federal procedure and is therefore governed by fed. law? Yes.

Ruling re forum selection clause (p.687): upheld unless strong contrary showing, e.g., (1) fraud or duress; (2) designated forum ineffective; (3) designated forum as seriously inconvenient. Forum selection clause enforced here after factual analysis (e.g., class actions allowed, p.688). ***Cont.***

Wong v. PartyGaming Fed.6th Cir. *Cont.* p.685

Ruling re forum non conveniens: ruling upheld that not convenient in Ohio.

Issue raised by court – but not an abuse of discretion by court.

Determination that Gibraltar was an appropriate alternative forum, e.g. no obstacles for plaintiffs litigating there.

Deference to plaintiff not dispositive (p.691).

Concurring: Gambling contract sought to be enforced in Ohio is illegal in Ohio!

Arbitration Clauses p.695

An alternate format for dispute resolution:

can be binding or nonbinding

Timing for choice of arbitration: (1) when entering into transaction, with an arbitration clause, or (2) after dispute arises, and arbitration chosen as alternate format for dispute resolution.

Relevance in the "conflict of laws" context: can be used in cross border disputes (whether state or national borders).

Relevance of Arbitration to "Conflicts" Issues

1) Choice of law clauses are ordinarily enforced in arbitration proceedings

1) Class actions can be subverted by arbitration proceedings (see cases below)

3) States are often limited in preventing the subversion of arbitration because of the Federal Arbitration Act (FAA).

Benefits from arbitration alternative

1) Choice of arbitrator, location and rules of procedure.
2) Arbitrator(s) may have special expertise.
3) More cost effective and less time-consuming.
4) Permits privacy for the proceedings and information concerning results.
5) Parties can choose the governing law (if specified in the governing contract).
6) Opt-out of court litigation.

Recognition of a Binding Arbitration Clause

1) Should they be recognized? Is the court system obliged to comply?

2) See Federal Arbitration Act (p.696) – to recognize binding arbitration agreements as enforceable. §2

- Court to stay trial until resolution of the arbitration. §3

- One party can petition the court for refusal to arbitrate according to agreement. §4

- Enforcement of arbitral awards. §9

Review of the Arbitrator's Award p.697

Further federal statute requirements:

Court judgment can confirm the arbitrator's award (which is then entitled to full faith & credit). §13

Court can vacate award for (1) corruption & fraud, (2) evident partiality of arbitrator, (3) arbitrator guilty of misconduct, (4) arbitrator exceeded his/her powers or mandate, and (5) arbitrator disregarded clearly applicable law.

Arbitrability? Federal Securities Laws p.698

Question: Was the issue within the jurisdiction of the arbitration proceeding?

Scherk v. Alberto-Culver Co., p. 698

Alberto-Culver acquired businesses including trademarks that were encumbered and AC sought damages in Fed. Dist. Ct. under Fed. Securities laws. Controversies were to be subject to ICC arbitration, but Fed. Dist. Ct. enjoined arbitration based on unenforceability of the arbitration clause. Ct. App. affd. ***Cont.***

Scherk v. Alberto-Culver, cont. P.698

AC says agreement to arbitrate is not enforceable since Scherk's conduct violated Fed. Securities laws (and court enforceability could not be waived).

But, Sup.Ct. states agreement to arbitrate is to be enforced. Factors supporting this result: this is a cross-border international matter.

Dissent: AC (a public company) was defrauded by issuance of bad securities and compliance with 34Act could not be waived. See Wilko case.

Rodriquez de Quijas v. Shearson/Amex p.707

Pre-dispute agreement to arbitrate claims under the 1933 Securities Act.

Customers signed the standard brokerage agreement providing for dispute resolution through binding arbitration.

Customers then sued Shearson for Securities Act claims. Fed. Dist. Ct. says most must be submitted to arbitration, except §12(2) claims.

Ct. App. says <u>all</u> claims subject to arbitration.

<u>Cont.</u>

Rodriquz de Quijas v. Shearson, cont. p.707

Sup. Ct.: Wilko (statute prohibits arbitration) was wrong; various recent decisions have upheld agreements to arbitrate claims under the 34Act (under RICO and antitrust laws).

Mitsubishi (p.708): a party in arbitration does not forgo substantive rights; only submits to resolution in an alternative forum.

Reject presumption of disfavoring arbitration.

Arbitration agreements are a "specialized kind of forum-selection clause." p.709.

Rodriquz de Quijas v. Shearson, cont. p.707

Dissent: Congress has not amended statutory provision in 3½ decades since the Wilko case.

Does that history reinforce Congressional perception of correctness of the original Wilko decision?

This matter settled for many years and wide latitude should be given to U.S. Congress (except in U.S. Constitutional law matters).

Scope of Claims Enabling Arbitration p.711

Many statutory claims are referred to arbitration, including state law claims.

Federal law claims: Federal securities act violations, RICO, Sherman Act, ADEA. Is this appropriate?

But, separate agency analysis (in addition to private law claims)?

Enforceability of Arbitration Clause p.712

Strategic enhancement of a party's opportunities to utilize arbitration: locate assets offshore (including corporate headquarters, i.e., expatriated corporations).

Objective: Create situation involving "international" arbitration where probable acceptance of arbitration proceedings is higher.

U.N. Convention on Recognition p.712

Recognition and enforcement of foreign arbitral awards (New York Convention).

Shows acceptance of arbitration as a legitimate dispute resolution forum.

Member states can determine what claims are arbitrable.

Enforcement of arbitral award can be rejected if a determination made that award is contrary to public policy of that country.

Spann v. American Express p.713

Tennessee residents file class action against AmEx for charges on billings for magazines not ordered. AmEx seeks separate arbitrations for each dispute. Class arbitration waiver clause in cardholder agreements.

Trial Court grants motion to compel arbitration.

AmEx Optima card obtained from AmEx Centurion (Utah industrial loan company).

Card unilaterally amended to include arbitration provision. P.714 *cont.*

Spann v. American Express, cont. p.713-4

Utah law designated as governing substantive law. Card then transferred to AmEx Centurion which amended to include arbitration agreement with class arbitration waiver in "A Summary of Changes to Agreements and Benefits." Acknowledgement that agreement arises from transaction in interstate commerce and is governed by Federal Arbitration Act."

Claim for violation of Tenn. Consumer Protection Act and intentional misrepresentation, ctc. ***Cont.***

Spann v. American Express, cont. p.717

AmEx seeks to compel separate arbitrations.

Plaintiffs assert class arbitration waiver clause is unconscionable and unenforceable.

Holding re Federal Arbitration Act: Favoring agreements to arbitrate commercial disputes.

FAA preempts conflicting state law; but state law still protects from fraud, duress & unconscionability. Trial Court declared arbitration waiver was unconscionable. Was it?

Cont.

Spann v. American Express, cont. p.713

Utah contract law applicable re unconscionability – p.719.

Issue whether contract terms are unreasonably favorable to one party.

Issues re: (1) Substantive unconscionability (fairness of the contract's terms – here the "class arbitration waiver"), Held: No, and,

(2) Procedural unconscionability (relative bargaining power), Held: No.

Coady v. Cross Country Bank P.723

Class action lawsuit against Bank and Card Systems alleging illegal debt collection practices.

Agreement included arbitration clause that <u>if arbitration</u> no rights to pursue in court <u>or</u> class action/representative basis.

Plaintiff claims debt collection practices violate Wis. Consumer Act and Bank seeks to compel arbitration. Did arbitration clause (1) violate Consumer Act, (2) was unconscionable and (3) was illusory? <u>*Cont.*</u>

Coady v. Cross Country Bank, cont. P.723

Does Wis. or Del. law apply? Credit card agreement choice of law clause required Del. law to determine whether the arbitration clause is unconscionable.

Holding: (1) Wis. Consumer Act invalidates choice of law clauses – including in this situation – to protect consumers (p.726).

(2) Del. law would not apply even without the choice of law clause in credit card agreement (Wis. as the most significant relationship). *Cont*.

Coady v. Cross Country Bank, cont. P.723

(3) Wisconsin public policy is violated because plaintiffs could not assert Wisconsin Consumer Act claims in arbitration.

(4) Under Wis. (not Del.) law is the arbitration clause unconscionable? Holding the arbitration clause is both: (a) procedurally unconscionable (p.729), i.e., no "meaningful choice," and,

(b) substantively unconscionable (p. 731) (i.e., overreaching & oppressive in seeking relief from debt collection). Class action is essential.

Coady v. Cross Country Bank, cont. P.723

Is there Federal (i.e., FAA) preemption of the Wis. Consumer Act (which precludes plaintiffs' ability to waive class action rights in an arbitration agreement)?

1) The Cross Country arbitration clause is unconscionable based on common law of contracts.

2) Further, Wisconsin Consumer Act would not be preempted if U.S. Sup. Ct. were to consider this issue.

Response of Arbitration Associations p.734

Efforts being made on standard form agreements to assure individuals are not deprived of fundamental rights. E.g., fair notice of arbitration provision, and limited fees to consumers.

& arbitrator can grant remedies available through a court proceeding.

Alteration of Business Practices p.735

Responses by large corporations to avoid one-sided (overreaching) provisions to deprive consumers of an effective remedy.

Class Arbitration Issues p.735

1) AT&T Mobility case (p.735) –U.S. Sup. Ct.- Cal. principles refusing to enforce arbitration clauses containing bans on class proceedings were preempted by the FAA. Majority opinion identified problems with class arbitration.

2) Stolt-Nielson (p.736) – U.S. Sup. Ct. – not permitted under FAA for arbitration panel to impose class arbitration.