The Equity of the M/S Bremen and its Extraordinary Influence

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Introduction

It is rare that an admiralty case will be widely influential in other fields of law. Such a one was the case of The Bremen. The Supreme Court unanimously renounced the past hostility to forum-selection clauses and held them enforceable in Equity by admiralty.

Forum-selection clauses had been used for a long time as reflected by past efforts to enforce them. They were sometimes passively enforced by the common law courts, as consents to personal jurisdiction, subject to prevailing conflict rules, but not actively to forbid a nonconforming suit, and were variously barred as trespassing on the jurisdiction of the courts or conditioned on degrees of reasonableness. Specific enforcement is a remedy the Common Law does not provide.

Forum-selection clauses abound in commercial contracts that cross jurisdictional boundaries. In the years post World War II, such commerce has increased geometrically. With The Bremen, this is recognized, and Equity enters the scene. But Equity courses have been out of fashion for decades, and, while instances of enforcement have remained familiar, it has come adrift from its doctrinal basis. One indication is confusion as courts and counsel misunderstand its substance and use procedural rules and practices as ill-fitting pigeonholes in which to fit enforcement.

The unexpected influence of this admiralty decision has made it one of the two or three most important in the last 50 years, by: (i) spreading its doctrine far beyond its setting; (ii) extending the embedment of Equity in admiralty itself; (iii) implanting its equitable doctrine in federal common law; (iv) implanting it also in the common law of States, including some hostile to Equity; and (v) in this process, further exposing and advancing the senescence of Equity itself as a source of solutions without solid jurisprudential foundations.

Equity and Admiralty

The system of Equity springs from Roman law and developed in England as an intervention of the King, through the Lord Chancellor, to palliate the rigidity or lapses of the rules administered in the Common Law courts with principles of "natural justice and good conscience." It therefore prevailed in our original English colonies and was carried forward by them in the Constitution as a feature of federal jurisdiction. It was not truly popular, even in the original States, and did not flourish widely, being viewed as an interference with the Common Law.

From the beginning, however, a body of opinion had seen the development of a uniform federal Equity system as tending to bring a desirable uniformity into our State laws. Fully developed, with its own rules and Equity Sides in the courts, it operated so until the practice was merged with Law in a single set of Rules of Civil Procedure in 1938. There it remains present, however, and operates sporadically in its historic concerns.

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The early leading cases therefore arose in the Admiralty and enforcement of forum-selection clauses came to the Supreme Court in cases where the forums selected were arbitrations under recent acts. Equity was the answer first given by the Court as to arbitration under State law in a case in a State court under maritime law. The Court described the exercise explicitly as “specific performance” with citations in Equity to support it.

After the passage of the Federal Arbitration Act in 1925, the power to grant specific performance of arbitration was recognized as constitutional, consistent with historic maritime practice, and attributed to Equity jurisdiction. There the matter has rested; if it is to be done, Equity will do it.

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damages in Admiralty in Tampa in which Unterweser invoked the forum clause and moved to dismiss for lack of jurisdiction or forum non conveniens; a suit by Unterweser, in London, with jurisdiction under the clause upheld by the High Court and Court of Appeal; a protective petition for limitation of liability of the Bremen in Tampa, reserving all its rights in London, with a claim in it filed by Zapata; and a motion by Unterweser to stay all action in Tampa. The judge in Tampa denied the motion to stay and ordered Unterweser to cease litigation in London, taking the position that he now had in the limitation action Equity jurisdiction of all matters involved and that Unterweser should “do equity” by ceasing to prosecute in London. The Court of Appeals affirmed, holding that the circumstances did not support a discretionary enforcement of the forum clause, “especially since it appeared likely that the English courts would enforce the exculpatory clauses,” which would be contrary to American public policy. The case then went to the Supreme Court.

The Bremen: In the Supreme Court

The Supreme Court reversed in a plain exercise of specific performance, upholding the jurisdiction of the English courts under the forum clause and formulating its rule to be “to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching,” or “enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.” These were the standard defenses to specific performance. The Court explained, with respect to inconvenience as unreasonableness, that “the inconvenience of being forced to litigate in the contractual forum... was clearly foreseeable at the time of contracting... 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 he for all practical purposes be deprived of his day in court.”

Two passages in the Supreme Court’s reversal opinion are widely familiar through repetition:

For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so.... In an era of expanding world trade and commerce, the absolute aspects of the [former] doctrine... have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.... [I]n an era of expanding world trade and commerce, the absolute aspects of the [former] doctrine... have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.

The forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

In a final exercise (estoppel), the Court here newly recognized a defensive feature of the Limitation Act by rejecting Zapata’s contention that Unterweser’s limitation petition was necessarily a consent to jurisdiction in Tampa, treating it instead as a “purely necessary defensive action.” This defensive feature proves valuable when a limitation petition is filed in a court where a claimant’s right to sue will be contested.

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19 407 U.S. at 3-7, 1972 AMC at 1409-12.
20 407 U.S. at 15, 1972 AMC at 1418.
22 407 U.S. at 17-18, 1972 AMC at 1420.
23 407 U.S. at 8-9, 1972 AMC at 1413 (footnote omitted).
24 407 U.S. at 14, 1972 AMC at 1417 (footnote omitted).
This was from beginning to end an Equity case. The district judge invoked his equitable power in the limitation action and ordered an equitable remedy, which the court of appeals had before it and affirmed, and which the Supreme Court reversed with the equitable remedy of specific performance. Altogether, The Bremen is the Court’s most impressive sitting as a court of Equity in Admiralty.

**The Bremen: The Court’s Extensions and Reaffirmations**

The Court has re-visited The Bremen several times, each time extending or reinforcing its rubric on the forum clause. The first case was far from admiralty and a surprise to many; it applied the rule to a contract for the sale of German enterprises to an American company under Illinois law, with arbitration in Paris, as against a suit for damages in Illinois for violation of a federal securities act. The highly controversial Southland decision in 1984 reversed the Supreme Court of California and held the FAA to apply in State courts and require enforcement of the arbitration clauses in franchise contracts, overriding the restriction to the State courts by State franchise law. The decision held arbitration clauses not procedural but matters of substance and explicitly to be enforced in Equity. In 1985, The Court held antitrust counterclaims of a Puerto Rican corporation against a Japanese automobile maker arbitrable in Japan under a clause in their distribution agreement, overriding a Puerto Rican statute and relying on Scherk, Southland and The Bremen. The Supreme Court next upheld the terms of a cruise ticket of a Seattle resident requiring all suits to be brought in Florida, which might have been distinguished from the commercial precedents. The Court made no distinction, however, and also overruled the court of appeals’ conclusion of inconvenience according to The Bremen.

Thus, in The Bremen and its subsequent treatment of forum-selection clauses and arbitration clauses, which it has called a “subset,” the Court has clearly established the clauses as matters of contract substance rather than procedure.

**The Extraordinary Spread of the Bremen Rule**

The 1960s began an era of active promotion of free trade with emphasis on the increase of international commerce and the Bremen opinion expressed the Court’s response to the policy and the increase. The quotations from the case, both in the federal and State courts, show recognition that it had importance far beyond the concerns of admiralty practice and testify that it has been widely influential.

**Arbitration**

The discussion in The Bremen, arising in the context of a dispute regarding the choice of a foreign court, was used directly to support enforcement of an arbitration clause as against restriction by State law in the Southland decision, holding the FAA binding in State courts and cases under State law by specific performance in Equity. The effect was to subject a far greater number of cases in the federal and State courts to the FAA or one of the Conventions and therefore to the doctrine of The Bremen.

**Federal Law and Jurisdiction**

The decision had fairly obvious application in non-maritime cases governed by federal law, and its equity and eloquent good sense have been cited and applied far beyond admiralty. To take some measure of its influence and the survival of false procedural doctrines in non-maritime cases, I have looked at examples from all the federal circuits. These cases all show a pattern of emphatic validation and enforcement of forum-selection clauses according to the equitable standards of specific performance without mentioning Equity itself, and doing so in many cases as for lack of jurisdiction, improper venue or forum non conveniens, while

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33 See 9 U.S.C. §§201-08, 301-04.
34 See, e.g., supra notes 27 & 29.
Some Erroneous Evasions

An article I published in 1999 argued, as here, that the Supreme Court had settled the point that the Equity doctrine of specific performance governed the forum-selection clause and deplored that numerous lower courts, while accepting enforcement, had searched their books for standing rules of procedure under which to do it. Those cases had found and variously invoked: (i) lack of jurisdiction; (ii) improper venue (both under Rule 12(b) Fed. R. Civ. P.); and (iii) the doctrine of forum non conveniens. None of these procedures works without great distortion, the first two because, without jurisdiction and venue, the court lacks power to construe and enforce the contract; the third because the circumstances of conveniens are not involved; and, finally, all of them because they do not lead to the decree of injunction or specific performance required to prevent breach. That futile search is still occasionally made and possibly reflects continued unawareness of the substance of the clause and of Equity.

State Laws

A well-documented appellate decision in 1986 sums up the wide application of the Bremen rule to State-law cases at that date:

35 Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993); Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007); General Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 358 (3d Cir. 1986); Alamarin Corp. v. Astrazeneca UK Ltd., 628 F.3d 643, 649 (2d Cir. 2010); Ginter v. Belcher, 536 F.3d 439, 441 (5th Cir. 2008); Wong v. Partygaming Ltd., 589 F.3d 821, 833 (6th Cir. 2009); Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372; 375 (7th Cir. 1990); M.B. Rests., Inc. v. CKE Rests., Inc., 183 F.3d 750, 752 (8th Cir. 1999); Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998) (en banc); Yanuz v. 61 MM Ltd., 465 F.3d 418, 428-29 (10th Cir. 2009); Lipcon v. Underwriters at Lloyd's, 148 F.3d 1285, 1291 (11th Cir. 1998) (dismissal vehicle discussed and venue, but not jurisdiction, considered proper).


37 See, e.g., Phillips v. Audio Active Limited, 494 F.3d 378 (2d Cir. 2007) (dismissed on venue); Alamarin Corp. v. Astrazeneca UK Ltd., 628 F.3d 643 (4th Cir. 2010) (dismissed on venue); Fireman's Fund Ins. Co. v. Cho Yang Shipping Co., 131 F.3d 1336 (9th Cir. 1997) (dismissed on jurisdiction); Lipcon v. Underwriters at Lloyd's, 148 F.3d 1285, 1291 (11th Cir. 1998) (dismissal vehicle discussed and venue, but not jurisdiction, considered proper).

We agree with Professor Reese that The Bremen "should be persuasive in situations where state law controls." Reese, The Supreme Court Supports Enforcement of Choice of Forum Clauses, 7 Int'l Law 530 (1973). Because The Bremen - relies heavily upon the Restatement rule, ... and the common law trend toward enforcing such clauses, ... it is not surprising to note that the Supreme Court's discussion has strongly influenced the state courts....

The Bremen is cited and followed in so many State appellate courts that it would be otiose to collect and cite them all as this is not intended to be a guide to practice. Therefore note here the virtual unanimity on the Bremen rule of the State laws prevailing in representative major ports and commercial centers of the country, those of: Massachusetts, New York, Illinois, Pennsylvania, Maryland, Georgia, Florida, Alabama, Louisiana, Texas, California, and Oregon. The Bremen is the acknowledged source in all but one which predates it.

45 Manrique v. Giorgio Fabbri, 493 So. 2d 437, 439 (Fla. 1986) (Bremen).
50 Reeves v. Chem Indus. Corp., 262 Ore. 95, 98, 495 P.2d 729, 731 (Ore. 1972) (pre-Bremen; Restatement (Second) Conflict of Laws § 80).
Implications in the Evanescence of Equity

I have mentioned above the lack of enthusiasm for Equity in most of the States and its merger with law in the federal courts in 1938. That undoubtedly marked a decline of importance and identification in the federal courts. In that same year, the Supreme Court, in Erie Railroad Co. v. Tompkins, 51 reversed Swift v. Tyson and required federal courts to adhere to State substantive law in diversity cases. Following Erie, the Court held, in Guaranty Trust Co. v. York, 52 in 1945, that the federal courts could not apply, in a State-law case, any result-determinative rule; however, it might be called procedural, contrary to the result the case been in State court. This abolished any reason for shopping the federal court based on choice of law. As Professor Collins puts it: “Guaranty Trust finally eviscerated the federal uniform Equity doctrine, largely ending Equity’s reign as a distinctive site of non-state, judge-made law in federal diversity jurisdiction cases.” 53

These developments did not abolish federal Equity but left it accessible only in federal Law and Admiralty cases. In addition, these developments have led to the abandonment of Equity as a standard course in law schools, saving some vestiges of it as “remedies” in other courses and leaving present generations with little sense of its details. States that no longer had Equity courts or rules and lawyers who no longer had Equity learning must have felt uneasy in it and seemed embarrassed to mention what it was while they did it. A result is that courts and counsel are likely to overlook its availability and relevance in some cases or, in others, to use one of its remedies, saying, and perhaps knowing, as little about it as possible. Natural justice and good conscience are more difficult to manage than rules of law. The system remaining wants to retain virtues and shed vices, neither of which it clearly defines. We therefore retain the gift for occasional use while reluctant to describe it and, without description, to mention it much.

The history of The Bremen rule in its prominence in federal courts and widespread adoption in the State courts illustrates this well. The federal courts of appeals applied the rule generally and not only in Admiralty as they were bound to do. But with what doctrinal reservations and evasions have they done so? Of the circuit cases cited above, two, slighting the substance of the clause, have applied it as “federal common law”; 54 with more or less recognition of the substance, six have approved dismissals for improper venue; 55 and one on the ground of forum non conveniens. 56 In none of those cases is the rule attributed to Equity or Equity even mentioned. It appears that only Delaware (where Equity might be described as a State industry), Mississippi and Tennessee have State Equity courts while Illinois and New Jersey, and perhaps others, have separate divisions in single courts. The leading cases in the 12 States cited above as representative of foreign and interstate commerce all follow the Bremen rule, but none acknowledges Equity as its source. In only two of the State cases does the word itself appear and, then, only in irrelevant contexts. 58

Conclusions

The Bremen rule of forum-selection clauses has passed from its origin in Admiralty/Equity through all federal law and into the Common Law of the United States, illuminating on its way much about the state and locations of Equity itself. From being an occasional contributor, Equity is now firmly embedded in Admiralty, which, from its emphasis on equitable principles, Civil Law foundations flexibility and outreach of powers, may come to be regarded as its “home port.” Equity’s force in Admiralty will be more pervasive than in any other field because of its presence in maritime cases in State courts untrammeled by restriction to State laws. Equity will probably receive little scholarly attention, however, and the declining acquaintance with its principles may lead to the risk that its name, without its

51 304 U.S. 64 (1938).
52 326 U.S. 99 (1945).
53 Collins, supra note 8, at 337.
54 The First and the Fourth Circuits, supra note 35.
55 The Second, Fourth, Eighth, Ninth, Tenth and Eleventh Circuits, supra note 35.
56 The Sixth Circuit, supra note 35.
57 See supra notes 39-50.
principles, will be used to reach autocratic or sentimen-
tal conclusions.

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