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Harold G. Maier

THE THREE FACES OF *ZAPATA*: MARITIME LAW, FEDERAL COMMON LAW, FEDERAL COURTS LAW

*Harold G. Maier**

In *The Bremen v. Zapata Off-Shore Co.*,[1] the Supreme Court upheld the selection of a London forum in a towage contract between a German firm and an American firm and dismissed a suit brought in a Florida federal district court whose jurisdiction was otherwise valid. In doing so, the Court stated the rule: "[Forum-selection clauses] are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[2] The Court qualified the rule by indicating that to be enforceable such clauses must be actually bargained for and agreed to by the parties and that an unjust or arbitrary designation of forum would not be acceptable.[3] This comment deals with three potential applications of the *Zapata* decision in order to indicate its implications for the enforceability of forum-selection clauses in American courts. The potential scope of *Zapata*'s rule depends on, first, the source and scope of the Supreme Court's power to create and apply its rule for all admiralty and maritime cases; secondly, the extent to which the Court's decision creates supreme federal common law, making forum-selection clauses at least prima facie valid in all cases involving international contracts; and, thirdly, the extent to which the decision has validated forum-selection clauses in all cases, domestic or international, in which such contract provisions are sought to be enforced. In order to clarify the legal considerations involved in dealing with these problems, this comment begins with a brief survey of the authority for, and scope of, the power of the federal courts to fashion rules of federal common law.

Since the landmark decision in *Erie R.R. v. Tompkins*,[4] it has been clear that there is no separate body of federal common law, existing outside the aegis of any particular state, that would control the substantive results of decisions in federal forums. The decision in *Erie*, however, was clearly not intended to deny the existence of power in

* Professor of Law, Vanderbilt University. B.A., 1959, J.D., 1963, University of Cincinnati; LL.M., 1964, University of Michigan.

1. 407 U.S. 1 (1972).
2. 407 U.S. at 10.
3. 407 U.S. at 17-18.
4. 304 U.S. 64 (1938).

the federal courts to create law by common law techniques for use in special types of situations in which an important federal interest indicates the need for the exercise of judicial law-making power. *Erie* did reject the concept of a special "federal courts common law" but it did so only in the sense that it overruled *Swift v. Tyson*,[5] which had created a kind of "common law" applicable only in the federal courts, and especially for diversity cases.[6]

The power to use common law techniques to create national legal rules by judicial decision is clearly part of the federal "judicial power" given to the courts in article III of the United States Constitution.[7] There are at least four different types of cases in which this common law power is regularly exercised by the federal courts.[8] The first type includes those cases in which the courts develop substantive rules to determine disputes between the states, or between the states and the nation. Illustrative of this type of case is *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[9] in which the Supreme Court applied principles derived from public international law and from the assumptions underlying the United States Constitution to determine the rules that would govern the apportionment between two states of waters in an interstate stream. The second class of cases includes those situations in which the court must determine the correct division of powers between the branches of the national government, not from an explicit constitutional command, but from principles derived by drawing the necessary inferences from the structure of a national government of separated powers. Illustrative of this type are most of those cases that include issues designated as "political questions," such as *Banco Nacional de Cuba v. Sabbatino*[10] concerning the act of state doctrine, or *Ex parte Peru*[11] concerning the doctrine of sovereign immunity. A third class of cases includes those in which the court finds limitations on the power of the states based on, but not

5. 41 U.S. 1 (1842).

6. Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 30-33 (1971). *See also* Friendly, *In Praise of Erie–and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1964).

7. *See* Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 58 (1968).

8. For a different and more detailed division of these cases see Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

9. 304 U.S. 92 (1938).

10. 376 U.S. 398 (1964).

11. 318 U.S. 578 (1943). *See* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

explicitly compelled by, the constitutional division of powers between the states and the nation. Illustrative of cases of this type is *Zschernig v. Miller*[12] in which the Supreme Court ruled unconstitutional the application of a state statute preventing foreign heirs from inheriting a decedent's estate unless the heirs could prove that their nation would grant reciprocal treatment to Americans and that they would have the benefit and use of the funds passed. In this case, the majority structured its rule on a finding of an impermissible interference by the state with the national foreign relations power, although the decision is more properly characterized as being based on "the basic allocation of power between the States and the Nation" in matters touching foreign affairs.[13] The *Sabbatino* case drew a similar conclusion when it ruled that the act of state doctrine is one of federal, not state, law.[14]

The fourth class of federal common law cases includes those in which the courts derive by common law techniques a rule of decision applicable to actions involving private individuals because of special federal interest in the content of the substantive rule that is to govern rights of the parties. The clearest illustrations of cases of this type are found in admiralty and maritime law.[15] *The Bremen v. Zapata Off-Shore Co.* is one of these cases.

There is, today, no doubt of the Court's power to create substantive rules that are applicable in all maritime cases.[16] Such power stems directly from the assignment of federal jurisdiction under article III of the Constitution in "all Cases of admiralty and maritime jurisdiction." This clause has long been interpreted to permit the federal courts to create supreme federal common law in cases of this type.[17] Even if the admiralty clause in the Constitution is viewed merely as a grant of jurisdiction,[18] without the necessary implication of judicial law-making power, the determination of when that jurisdiction should not be exercised is surely within

12. 389 U.S. 429 (1968).

13. 389 U.S. at 443 (Stewart, J., concurring).

14. For a discussion of this aspect of these two cases see Maier, *The Bases and Range of Federal Common Law in Private International Matters,* 5 VAND. J. TRANSNAT'L L. 133, 136-41, 159-62 (1971).

15. For an excellent discussion of the entire area of federal control of maritime matters see Note, *The Bases and Range of Federal Maritime Law: Indicia of Maritime Competence,* 6 VAND. J. TRANSNAT'L L. 187 (1972).

16. *See* Hill, *supra* note 8, at 1032-35.

17. *See* Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). For a more recent illustration see Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

18. *See* Hill, *supra* note 8, at 1032-33.

the power of the court to which it is granted. Thus even if the forum selection clause is treated as an attempt to "oust" jurisdiction, rather than as a part of the contract to be interpreted and enforced, the authority for the *Zapata* holding is clear.[19] The Court made explicit its intent that the rule is henceforth to be applied by all federal courts sitting in admiralty, at least when such cases involve a foreign party, and it implies that the rule is intended to govern purely domestic maritime cases as well, as long as the enforcemnt of the clause would not "contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[20]

A second and slightly more difficult question concerns the extent of the power of the federal courts to validate, by a federal common law rule, forum-selection clauses in all international contracts, regardless of the domestic forum in which they are sought to be enforced. Further, if that power exists, has the Supreme Court in *Zapata* exercised it? The answer to each of these questions is in the affirmative.

The existence of a general power in the federal courts to create substantive rules for cases in which there is a special national interest in the rule's content has been to some degree obscured by the tendency of the courts to justify decisions of this type, not in terms of existing federal judicial power to function as common law courts where appropriate, but rather by reference to either statutory or constitutional texts in which the courts allegedly "find" the rule to be applied.[21] Illustrative of this type of reasoning is *D'oench, Duhme & Co. v. FDIC.*[22] In that case, the Supreme Court ruled that the applicability of the doctrine of holder in due course to notes held against the Federal Deposit Insurance Corporation would be deter-

19. In *Zapata,* the Court emphasized that it was not concerned merely with a matter of federal jurisdiction. The Court said that enforcement of the forum selection clause did not "oust" federal jurisdiction, but that its enforcement represented an *exercise* of jurisdiction to give effect to the intentions of the parties "manifested in their freely negotiated agreement . . . ." 407 U.S. at 12.

20. 407 U.S. at 15. One form that this public policy might take is represented by the Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (8) (1970). *See, e.g.,* Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967).

21. This same tendency exists in cases involving certain kinds of constitutional questions in which the courts tend to seek explicit textual justifications for decisions that are more accurately explained by structural analysis of governmental interrelationships. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

22. 315 U.S. 447 (1942).

mined by federal, not state, law. The majority of the Court found, in the Federal Reserve Act, "[a] federal policy to protect respondent [FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans."[23] That this statutory justification was not only spurious but unnecessary was pointed out by Mr. Justice Jackson in his concurring opinion. He argued that the Court's decision was not merely one in which it stretched the Federal Reserve Act to find an applicable federal rule. Rather, the decision was an open exercise of the power to make federal common law.

> I think we should attempt a more explicit answer to the question whether federal or state law governs our decision .... I do not understand Justice Brandeis's statement in *Erie R. Co. v. Tompkins* ... that "[t]here is no federal general common law," to deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions.... Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes.... Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique ... in cases such as the present. ... The law which we apply to this case consists of principles of established credit in jurisprudence, selected by us because they are appropriate to effectuate the policy of the governing Act.[24]

There are several other cases in which the courts purport to find justification for judicially created substantive law in federal statutes but in which the statutory connection is so tenuous that the decisions can be explained only by treating them as the results of law making by common law techniques. A recent case of this kind is *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[25] In that case, a New York company had purchased a business from a New Jersey company. The contract of sale required continuing assistance in marketing and quality control by the seller for a designated period as part of the consideration for the purchase price. The agreement contained a clause in which the parties agreed to submit all disputes under the contract to arbiters from the American Arbitration Association. After the purchase had been completed, the New York plaintiff discovered that the New Jersey seller was unable financially to carry out its

23. 315 U.S. at 457.
24. 315 U.S. at 465-72. (Jackson, J., concurring).
25. 388 U.S. 395 (1967).
26. 9 U.S.C. §§ 1-14 (1970).

responsibilities under the contract. In addition, there was evidence that this weak financial condition had been known to the seller before the contract was signed. The New York company refused to pay further installments of the purchase price under the contract and the New Jersey seller sought arbitration in New York. The New York company refused to arbitrate and brought a diversity suit in a federal court sitting in New York to have the contract declared void for fraud. The seller argued that the court should decline to exercise jurisdiction because there was no allegation of fraud concerning the arbitration clause and because the clause was separable from the remainder of the contract. After the plaintiff's suit was dismissed below, the Supreme Court granted certiorari. The Court purportedly applied section 2 of the United States Arbitration Act,[26] which provides that a written arbitration agreement "in any . . . contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Court ruled that the arbitration clause was separable from the remainder of the contract and that, therefore, the issue of fraud in the inducement was not raised. Since the clause was therefore independently valid, enforcement was required by the provision of the Arbitration Act. The Court expressly rejected New York law as a source for determining the separability of the arbitration clause from the remainder of the contract. The Court purported to find in the legislative history of the section of the Act in question an indication that an arbitration clause was to be enforced unless there was an allegation of fraud in the inducement relating to the arbitration clause itself.[27] In fact, the Court created its own federal rule to determine the separability of the arbitration clause, even though it assumed that the clause was not separable under the New York Arbitration Act.[28] Mr. Justice Black, dissenting, made it clear that the majority was in fact exercising power to create a "national rule" governing separability in contracts to arbitrate. The only supportable basis for this decision is not the language of the statute itself, or even congressional intent attached to any specific language. Rather, the Court appears to have used as the fundamental source of its rule the principle that there is a federal interest in the enforcement of contracts to arbitrate and that the implementation of this federal interest should not be left to state law.

Despite apparent preoccupation with statutory sources, even for what are clearly common law implementations of general policy

27. 388 U.S. at 403-04.

28. N.Y. CIV. PRAC. LAWS AND RULES § 7503 (McKinney 1963).

considerations, the Supreme Court has made it clear that it has no doubt of its own power to create federal common law in cases in which a federal interest must be reflected in the substantive rule. In *Clearfield Trust Co. v. United States*,[29] the United States sued on a guarantee by defendant bank to recover the amount of a check on which the payee's name had been forged. The check had been drawn against the United States Treasury in payment for work done under the Works Progress Administration. The District Court held that a fifteen-month delay in giving notice of the forgery to defendant was an unreasonable delay under Pennsylvania law, where the case was being tried. The Supreme Court ruled that federal law, not state law, governed the rights and obligations of the United States on its own commercial paper. Justice Douglas wrote:

> The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.[30]

The Court went on to note that a principal reason for creating the federal common law rule that it applied was the need for nationally uniform results not subject to "the vagaries of the laws of the several states."[31]

The opinion in *Zapata* makes it clear that the operative legal policies supporting the rule applied were federal in origin[32] and that this justifies the creation of federal common law applicable not only to maritime matters, but to international contracts generally. The rationale stated by the Court goes far beyond that required to justify its decision regarding maritime matters alone. The Court wrote:

> 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. . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce

29. 318 U.S. 363 (1943).
30. 318 U.S. at 366.
31. 318 U.S. at 367.
32. *See* Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1213 (1959).

> in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.[33]

Later in the opinion, the Court pointed out other adverse effects that refusal to enforce the selection clause would have in international dealings and relations.

> [F]oreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then a neutral forum with expertise in the subject matter. . . . The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.[34]

This last statement echoes a continuing theme in American case law concerning the national importance of maintaining an effective climate in which to conduct international commercial activity. In *Lauritzen v. Larsen*,[35] Justice Jackson warned against the dangers of forgetting that American foreign commerce is in fact *inter*national and that undue judicial emphasis on domestic values could have seriously harmful effects.

> [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[36]

The importance to a nation of certainty and predictability in international commercial contracts is recognized in all countries engaged in international economic intercourse. In this connection, two cases decided during the 1960's by the French *Cour de Cassation* have considerable relevance.[37] In the first case, *Office National Interprofessionnel des Cereales c. Capitaine du San Carlo*, the court ruled that an arbitration clause in a contract between a French government-

33. 407 U.S. at 8-9.
34. 407 U.S. at 12.
35. 345 U.S. 571 (1953).
36. 345 U.S. at 582.
37. The two cases, decided in 1964 and 1966 respectively, together with citations to the French reports, are described in detail in Batiffol, *Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties*, 7 COLUM. J. TRANSNAT'L L. 32 (1968).

owned enterprise and a private party for transport of grain from Ethiopia to Marseilles prevented a French court from entertaining a suit by the government entity for damages resulting from loss of the cargo. The contract designated Genoa as the situs for any arbitration. In this case, the court reasoned that since the contract was made in England, enforceability of the clause was to be determined according to English law under which it was valid and binding. In the second case, *Tresor Public c. Galakis*, the *Cour de Cassation* ruled that a government-owned enterprise could not refuse to participate in binding arbitration to which it had agreed concerning violation of the provisions of a charter party and that the award of the London arbitral tribunal, before which the French enterprise had refused to appear, was binding and enforceable in French courts. In upholding the decision of the lower court giving effect to the arbitral award, the *Cour de Cassation* ruled that those sections of the French Civil Code that invalidated arbitration agreements entered into by French government agencies were inapplicable to defeat an agreement to arbitrate in an international contract. The court wrote:

> [T]he primary duty of the Court of Appeal was to decide whether the rule, enacted for internal contracts, should be applied as well to international contracts made to suit the needs of, and under the conditions conforming to the usages of, maritime commerce; that the judgment under attack decides justly that the rule denying validity does not apply to such a contract.[38]

In commenting on these cases, Professor Battifol pointed out that these decisions represented extensions of an existing policy in some French cases to treat international contracts specially and to create exceptions from those general rules that were designed primarily to cover purely internal business agreements.[39] What was most important was the recognition by the court that fairness in international dealings made it essential to treat the rule invalidating arbitration agreements for government-owned enterprises as purely an internal rule in order to meet the needs of international commercial dealings. In reaching this decision, the court stepped outside the explicit rules in the French Code to create a judicial exception for international commercial contracts, based on the needs of international commerce.[40] In *Zapata*, the language used by the Court to express its rationale leaves no doubt that it intended its holding to apply equally to all international transactions. No part of the Court's rationale is applicable by force of reason, or by judicial limitation, solely to maritime contracts. The reasons given in support of validating the

38. Quoted in Battifol, *supra* note 35, at 34.
39. Battifol, *supra* note 35, at 38.
40. *Id.*

forum-selection clause apply equally to all international transactions. To read the Court's opinion as applying only to admiralty or maritime cases is to deny the force of the reasoning that supports it.

The rule that *Zapata* imposes is one that should be binding in federal and state courts alike, at least for international contracts. There is no indication in the *Erie* case, nor in any of the decisions clarifying it, that it was intended to make state law authoritative on matters that affect the interests and powers of the federal government when those matters require the application of uniform national value judgments rather than the localized value perceptions of state decision-makers.[41] It is clear from the opinion in *Zapata* that the validity of forum-selection clauses in international contracts is viewed by the Supreme Court as a matter affecting important national interests. The federal interest in the effective conduct of foreign commerce is self-evident, and the perceptions of the importance of foreign commerce and the relationship of the forum-selection clause to the effectiveness of its conduct is a principal emphasis of the *Zapata* opinion. In view of the endorsement of this evaluation by the Supreme Court, it is clearly inappropriate to subject a forum-selection clause in any international contract to diverse state practice and assessment of its enforceability. The limited political context in which the state decision-maker operates is an inappropriate one in which to make a policy judgment concerning the importance of effective forum selection by the parties to international commercial dealings. Also, the pertinent information that must be weighed to determine the wisdom of giving effect to the clause is unavailable to the state decision-maker, or, if actually available, will not necessarily be perceived as sufficiently important to override the competence of state courts unless the court is forced to view that information from a national perspective by means of a rule of federal common law. Lastly, any adverse effects that may be experienced in international commercial dealings because of lack of predictability created by a diversity of rules on the validity of forum-selection clauses will impinge on the nation as a whole, not solely on those states that might decide to refuse enforcement.[42] It is true that the above analysis is based on what is, in the strict sense, dicta in the *Zapata* opinion. Nonetheless, this writer believes that the impact of that case clearly was intended to go beyond the framework of admiralty and maritime law to create a federal common law rule, binding on federal and state courts alike in all international cases in

41. *See* United States v. Standard Oil Co. of California, 332 U.S. 301, 307 (1947).

42. For a discussion of the three tests that underlie this analysis see Maier, *supra* note 14, at 168-73.

which a reasonable forum selection clause is sought to be enforced.[43]

The last remaining question with which this comment will deal concerns the extent to which the *Zapata* decision announces a federal common law rule, binding not only in cases involving international transactions, but in all cases arising in interstate or international commerce. Unlike the question of the applicability of the holding of the case to international contracts, the Supreme Court's opinion contains only a slight hint that it considered the rule it announced one that might be applicable to all forum-selection clauses in contracts falling under federal jurisdiction. In justifying its decision as applied to federal courts sitting in admiralty, the Court said that the rule it adopted in *Zapata* was "merely the other side of the proposition recognized ... in *National Equipment Rental, Ltd. v. Szukhent* ...."[44] The Court quoted a portion of the *Szukhent* opinion:

> [I]t is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.[45]

Szukhent involved a New York federal district court suit in which the Michigan defendants had agreed, in a form contract, to accept service of process through a designated agent in New York State. The Supreme Court held that, as long as actual notice of the pending suit was given, the designation by private contract of an agent to receive service was permitted under Rule 4(d)(1), Federal Rules of Civil Procedure.[46] Justice Black, dissenting, pointed out that this amounted to the creation of a rule applicable only in federal courts since there was no other rule that would require a person who could not constitutionally be compelled to submit to a state court's jurisdiction to appear in compliance with such an agreement. To the extent that the reference to *Szukhent* in *Zapata* can be taken as more than obiter dicta, it could at least imply that the validation of forum-selection

43. If this analysis is correct, the case would have one important side effect. Among the reasons given by the United States delegation to the Tenth Session of the Hague Conference on Private International Law in 1964 for the United States absention in the vote on the *Hague Convention on the Choice of Court* was that "the effect to be given choice of forum provisions is a matter that traditionally lies within the control of the States and there is no compelling reason why the national government should enter the area." 52 DEP'T STATE BULL. 265, 271 (1965). The report, however, mentions several other reasons that justified the United States abstention.

44. 407 U.S. at 10.

45. 407 U.S. at 11 (quoting from National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964)).

46. Rule 4(d)(1) states that service may be made "[u]pon an individual other than an infant or an incompetent person, by delivering a copy of the summons

clauses will be treated as a rule of federal courts law, applicable only in federal forums. Such a result could clearly be reached by the same kind of judicial interpretation applied in *Szukhent.* The *Zapata* rule could be treated as a federal standard, promulgated as a logical extension of the existing case law under Federal Rule 4(d)(1). To read such an extension into the holding in *Zapata* as a statement of existing law appears to be going a bit too far. On the other hand, since most suits involving interstate contracts would qualify for diversity jurisdiction, such a holding in a later case might be one way for the court to create a de facto national rule validating reasonable forum-selection clauses in all commercial contracts, without wrestling with the more difficult problem of justifying a sufficient federal interest to support the creation of a rule of federal common law applicable in all domestic cases in both federal and state forums.

When *Zapata* is read together with *Prima Paint,*[47] it becomes clear that the Supreme Court, in a future case, could find effective reasoning to support on the basis of overriding federal policy the validation of forum-selection clauses in all contracts "arising in commerce." As indicated above, the *Prima Paint* decision amounts to the announcement of a strong federal policy in support of the federal enforcement of agreements to arbitrate that fall within the scope of the United States Arbitration Act. That Act clearly relates to both interstate and foreign commerce.[48] When that decision is read together with *Zapata* one conclusion that can reasonably be drawn is that all agreements to arbitrate as well as all reasonable selections of forums in international commercial contracts will be enforced in the federal courts. One commentator suggests that regardless of the scope given to the *Zapata* opinion itself, its effect will be to eliminate refusal to enforce choice-of-forum clauses through a combination of the power of the Supreme Court's reasoning and the fact that most cases of this nature are brought in the federal courts.[49] If this in fact becomes the result, it will represent no mean accomplishment for the common law powers of the federal courts.

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and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." FED. R. CIV. P. 4(d)(1).

47. *See* note 25 *supra* and accompanying text.

48. Some sponsors of the bill to enact the Arbitration Act indicated that they had three goals in urging its passage: to get a state statute, to get a federal law to cover interstate and foreign commerce and admiralty, and to get a treaty with foreign countries covering arbitration agreements. *See* 388 U.S. at 405 n.13.

49. *See* Juenger, *Supreme Court Validation of Forum-Selection Clauses,* 19 WAYNE L. REV. 49, 59-60 (1972).