

California Law on Prorogation Clauses in International Contracts:  
*Beirut Universal Bank v. Superior Court*\* &  
*The Bremen v. Zapata Off-Shore Co.*\*\*

J. Sorton Jones†

A prorogation or forum-selection clause in a contract designates the jurisdiction in which any dispute between the parties is to be heard.<sup>1</sup> In the past, California has always refused to enforce such clauses. The last California case to consider a prorogation clause in an international contract, *Beirut Universal Bank v. Superior Court*,<sup>2</sup> indicates that California courts will continue to ignore the forum expressly selected by the parties and determine the proper forum by independent analysis.<sup>3</sup> This Commentary examines the tenability of the California position in light of *The Bremen v. Zapata Off-Shore Co.*,<sup>4</sup> a recent United States Supreme Court decision giving effect to a prorogation clause in an international contract.

Prorogation clauses differ from choice-of-venue clauses and choice-of-law clauses. Statutory venue rules denominate the proper court or courts in which an action may be brought, although discretionary transfer to another court generally is allowed.<sup>5</sup> It is the policy behind the venue rules—avoiding free transferability at the whim of contracting parties—that the courts seek to protect when they resist giving effect to contractual choice-of-venue clauses between parties of the same jurisdiction. The early observation of one court remains valid today:

The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the

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\* 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969).

\*\* 401 U.S. 1 (1972).

† B. Sc. 1964, University of St. Andrews, Scotland; J.D. 1973, University of California, Berkeley. Mr. Jones is a member of the California bar.

1. "Forum selection" and "choice of forum" are apparently used interchangeably by the courts. "Prorogation" is another synonym, not utilized by the courts, but preferred by leading scholars. *E.g.*, A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 41a (1962) [hereinafter cited as EHRENZWEIG].

2. 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969).

3. *Id.* at 843, 74 Cal. Rptr. at 340.

4. 407 U.S. 1 (1972) [hereinafter, *Zapata*].

5. *E.g.*, CALIF. CODE CIV. PROC. § 395 (West 1973); 28 U.S.C. § 1391 (1970).

agreement of parties would disturb the symmetry of the law, and interfere with such convenience.<sup>6</sup>

Prorogation clauses can be justified by considerations inapplicable to choice-of-venue clauses. Between two or more possible jurisdictions there will generally be greater differences in result than in different courts within the same jurisdiction. A prorogation clause aids in ensuring that the outcome is predictable, a concern of particular importance in international negotiations. Prorogation clauses also enable the contracting parties to select a forum having particular expertise or neutrality but where the parties would not be subject to jurisdiction absent the clause.

The differences between prorogation and choice-of-law clauses are as significant as the differences between choice-of-venue and prorogation clauses. A choice-of-law clause is frequently inserted into a contract in conjunction with a prorogation clause. When used alone, however, a choice-of-law clause represents the parties' choice only as to which system of legal rules should be applied in resolving a dispute arising out of the contract, and not as to the forum that will apply such rules. This can lead to uncertainty and confusion. In an international contract, resolution of a dispute usually can be sought in any one of a number of jurisdictions. Most forums, whether domestic or foreign, are willing to defer to the parties' choice of foreign law<sup>7</sup> unless there are strong public policy<sup>8</sup> arguments against doing so or the contract containing the choice is adhesive.<sup>9</sup> As a result, the court with jurisdiction over the parties often will be required to apply foreign law—a difficult procedure in the complex area<sup>10</sup> of contract validation. Choice-of-law clauses in contracts without prorogation clauses may be refused effect if the parties have no substantial connection with the jurisdiction of the chosen law.<sup>11</sup>

Prorogation clauses, especially when bolstered by a stipulation that the law of the chosen forum shall be applied, provide a higher

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6. *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856).

7. EHRENZWEIG, *supra* note 1, at § 176.

8. *Id.*

9. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 145 n.6 (1968) [hereinafter cited as LEFLAR]; *See generally* Ehrenzweig, *Adhesion Contracts in Conflicts of Laws*, 53 COLUM. L. REV. 1072 (1953).

10. LEFLAR, *supra* note 12, at § 108. Complications frequently arise in determining the validity of the contract, especially if the law chosen by the parties requires that the validity of a multijurisdictional contract be determined by the law of the place having "the most significant relationship." *Id.* at § 96. The forum court must then attempt to apply the unfamiliar "most-significant-relationship" test, a task difficult even for those courts where it results in the application of the forum law. *Id.*

11. Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553, 575 (1957).

degree of certainty for the contracting parties than choice-of-law clauses alone. Despite a lack of connection between the parties and the chosen forum, they generally are enforced in jurisdictions outside the United States.<sup>12</sup> Prorogation clauses thus have characteristics which peculiarly ease the vexing problems of validation of multijurisdictional contracts. Nevertheless, California courts have generally refused to give effect to these clauses. A particularly egregious example of this practice, the decision in *Beirut Universal Bank v. Superior Court*,<sup>13</sup> will be examined in the next section.

## I

### CALIFORNIA: PROROGATION CLAUSES IN INTERNATIONAL CONTRACTS

#### A. *Beirut Universal Bank v. Superior Court*

Beirut Universal Bank (Bank), a Lebanese banking association, completed a loan agreement with a Swiss borrower and a California guarantor; the loan was negotiated and signed in California. The representative of the Bank spent approximately five days in Los Angeles during the negotiations, but the Bank did no other business in California and had no previous connections with California. Inserted into the agreement was the following prorogation clause:

. . . the borrower declares

B) . . . to accept the jurisdiction of the Courts of Beirut, having sole jurisdiction for settling all conflicts arising out of this contract and to refrain from raising any exception for default of jurisdiction for whatever reason.<sup>14</sup>

The Swiss borrower and the guarantor later brought an action against the Bank alleging misrepresentation and fraud with respect to statements made by the bank and a co-defendant individual who was the seller of a Beirut theater business, an interest in which had been purchased by the Swiss borrower using the borrowed funds. The suit was filed in the Superior Court of the County of Los Angeles. The defendant Bank appeared specially and filed a motion to quash the service of process, claiming that the court lacked jurisdiction over the Bank. The court denied the motion and defendant appealed on two grounds: lack of personal jurisdiction, and the prorogation clause in the contract. The court of appeal upheld personal jurisdiction over the Bank.<sup>15</sup> The

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12. See, e.g., Cowen and Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, 13 AM. J. COMP. L. 179, 180 (1964).

13. 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969).

14. *Id.* at 843, 74 Cal. Rptr. at 340.

15. The appellate court first discussed the claim by the Bank that it was not subject to personal jurisdiction because it:

had never maintained any office in California and had never owned any prop-

Court failed completely to analyze the defendant's second ground for disputing jurisdiction, the prorogation clause, and simply stated: "That agreement, made in advance of the controversy, did not divest the courts of California of jurisdiction in the present case."<sup>16</sup>

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erty in this state. An officer or representative of the bank had never been present in this state and the bank had not engaged in any business transaction in California by means of correspondence, cable or otherwise [except for the loan agreement subject to the dispute].

*Id.* at 836, 74 Cal. Rptr. at 335. The court devoted its opinion almost exclusively to this issue and held that service of process had been proper in the light of modern interpretations of "subdivision 2 of section 411 of the [California] Code of Civil Procedure in accordance with the expanded concept of the due process clause of the United States Constitution." *Id.* at 842, 74 Cal. Rptr. 339.

16. *Id.* at 843, 74 Cal. Rptr. at 340.

In support of the quoted conclusion, the court cited no cases but relied on 12 CAL. JUR. 2d *Contracts* § 95 (1952); 13 CAL. JUR. 2d *Courts* § 91 (1952); Annot., 56 A.L.R.2d 300, 306 (1957). In addition, the court quoted Corbin's statement of the general rule:

It is a generally accepted rule in the United States that an express provision in a contract that no suit shall be maintained thereon, except in a particular court or in the courts of a particular county, state, or nation, is not effective to deprive any court of jurisdiction that it otherwise could have over litigation based on that contract.

6A CORBIN ON CONTRACTS § 1445 (1962).

It is commonly asserted that "parties cannot by their agreement divest courts of their proper jurisdiction." 12 CAL. JUR. 2d *Contracts* § 91 (1952). This assertion is supported by *Muldrow v. Norris*, 2 Cal. 74 (1852). There the California Supreme Court held that the lower court had erred in refusing to consider an allegedly fraudulently obtained arbitration award on the ground that the parties had agreed to accept as final the award of the arbitrators and not to contest the award in court. The California Supreme Court held that the lower court should have considered the arbitration award, not only because of the alleged fraud, but also because of the "mistake of law apparent on the face of the award." *Id.* at 78. The mistake of law, according to the unsupported view of the appellate court was that the award contained a written stipulation not to appeal to the courts to contest the award. This apparently violated the rule that "[t]he agreements of parties cannot divest courts of law or equity of their proper jurisdiction." *Id.* Common law arbitration [see generally *Jones, The Nature of the Court's "Jurisdiction" in Statutory Arbitration Post-Award Motions*, 46 CALIF. L. REV. 411 (1958); Comment, *Commercial Arbitration: A Need for Reform*, 36 MO. L. REV. 343 (1971)], however, has given way to statutory arbitration [e.g., CAL. CODE CIV. PROC. §§ 1280-89 (West 1972)] which is generally invoked by an express written agreement to arbitrate. *Id.* § 1281. Court opinions prohibiting ouster of jurisdiction of the courts have persisted from the common law principle that an arbitration award was not enforceable as a judgment but was only a basis for a judicial action seeking enforcement. Comment, *Commercial Arbitration*, *supra* at 25.

Another approach to agreements depriving courts of jurisdiction is that they are void as contrary to sound public policy. 12 CAL. JUR. 2d *Contracts* § 95 (1952). Two cases can be cited to support this assertion: *California Annual Conference of the Methodist Episcopal Church v. Seitz*, 74 Cal. 287, 14 P. 839 (1887) and *Duque v. Duque*, 155 Cal. App. 2d 142, 317 P.2d 63 (1957). *Seitz* was a suit based on a contract providing for an independent appraisal of value. The California Supreme Court upheld the lower court's validation of the appraisal clause as distinguishable from an arbitration clause but observed, in accordance with common law of the time, that arbitration clauses were unenforceable. The case speaks only of arbitration clauses as being void as attempts by the parties to deprive themselves of the right to

### B. *The Missed Policy Questions*

In its peremptory rejection of the prorogation clause in *Beirut*, the California court avoided an opportunity to tackle substantial policy questions. The California court was faced with a conflict between two opposing policy considerations. On the one hand, the reach of long-arm statutes gradually has been extended to increase the protection of forum-jurisdiction residents until, for example, the standard today in California is that "[a] court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."<sup>17</sup> As a result, California courts' power over out-of-state parties has increased as the due process requirements for assertion of jurisdiction have proceeded through the "minimum contacts" and "fair play and substantial justice" doctrines of *International*

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resort to the courts, and should not be used as authority in a prorogation case. *Duque* involved the continuing jurisdiction of the courts under section 139 of the California Civil Code following a final divorce decree. It was a statutory interpretation problem—the precise question being the effect of a post-decree property-division agreement upon the statutorily prescribed continuing jurisdiction. It did not deal with a prorogation clause.

See also 13 CAL. JUR. 2d Courts § 91 (1952):

The jurisdiction of a court cannot be ousted by a private agreement of individuals made in advance of the controversy, but such contracts are void as against public policy.

*Id.*, citing *Holmes v. Richet*, 56 Cal. 307 (1880) (validating an appraisal clause as distinguishable from an invalid arbitration clause).

The CAL. JUR. citations should not have been used by the court in *Beirut*. The textual statements are much too broad to provide meaningful authority for the invalidation of a prorogation clause. Additionally, further examination of the cases relied upon indicates fundamental distinctions between them and the situation in *Beirut*.

The annotation [Annot., 56 A.L.R.2d 300, 306 (1957)] relied on by the court in *Beirut* also contributes only confusion. The California cases cited therein [see, e.g., *General Acceptance Corp. v. Robinson*, 207 Cal. 285, 277 P. 1039 (1929); *General Motors Acceptance Corp. v. Codiga*, 62 Cal. App. 117, 216 P. 383 (1923)] do not provide authority for the *Beirut* result because they involve choice-of-venue clauses, not prorogation clauses.

The court's quotation of, and apparent reliance upon, Corbin is also questionable. The quotation used was written in 1962 and cites in support of its "general rule," *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1941), a case in which a prorogation clause nominating a French forum was held to be subject to the "well settled" rule of invalidity. *Id.* at 942. Also cited by Corbin is *Slocum v. Western Assurance Co.*, 42 F. 235 (C.C. S.D.N.Y. 1890), a case arising out of a fire insurance contract designating "her majesty's court in the city of Toronto" as the forum. The court in this case recognized the difference between venue selection and prorogation but held that the latter should not be given "any greater effect." *Id.* The results were used by Corbin without analysis.

Generally, then, the authorities relied on by the court in *Beirut* were out-of-date, inapt, or at the least, a poor substitute for an analysis of the policy questions raised by the case.

17. CAL. CODE CIV. PROC. § 410.10 (West 1973).

*Shoe Co. v. Washington*<sup>18</sup> to the "substantial connection" requirement of *McGee v. International Life Insurance Co.*<sup>19</sup> and, in California, to the balancing-of-convenience approach of *Buckeye Boiler Co. v. Superior Court*.<sup>20</sup> On the other hand, judicial recognition of prorogation clauses allows parties to express their own choice of forum and to have that choice enforced by the courts. In international contracts, the policy underlying the enforcement of prorogation clauses is the fostering of trade relations<sup>21</sup> and world-wide uniformity of judicial treatment of prorogation clauses in disputed contracts. Such a policy would, of course, reduce the protection that California courts afford to California parties.

In its detailed examination of the jurisdictional question in *Beirut*, the court did not face up to the conflict between these policies, although it did note "[i]t is true that defendant bank will be put to expense in having to litigate the matter in California . . . ."<sup>22</sup> Apparently the court never considered the possibility that the Bank may have given some added consideration for plaintiff's promise to appear in Beirut. Its dismissal without analysis of the prorogation clause further avoided consideration of these competing policies. When the United States Supreme Court finally faced a prorogation clause in *The Bremen v. Zapata Off-Shore Co.*<sup>23</sup>, however, no problem existed with respect to the exercise of federal admiralty jurisdiction over both parties.<sup>24</sup> Thus the policy questions associated with prorogation clauses were exposed for discussion. The next section will discuss how *Zapata* resolved them.

## II

### FEDERAL TREATMENT OF PROROGATION CLAUSES IN INTERNATIONAL CONTRACTS

The recent decision of the United States Supreme Court in *The Bremen v. Zapata Off-Shore Co.*<sup>25</sup> provides a basis for re-examining the *Beirut* decision and assessing the future course California courts should pursue in analyzing international contracts with prorogation clauses.

#### A. *The ZAPATA Decision*

A dispute arose when a drilling rig belonging to Zapata Offshore

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18. 326 U.S. 310 (1945).

19. 355 U.S. 220 (1957).

20. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969), noted in *The Supreme Court of California 1968-1969*, 58 CALIF. L. REV. 80, 142-54 (1970).

21. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

22. 268 Cal. App. 2d 832, 840, 74 Cal. Rptr. 333, 338 (1969).

23. 407 U.S. 1 (1972).

24. *Id.* at 12.

25. *Id.*

Co. (Zapata), a United States corporation, was damaged in a storm in international waters off Florida, while being towed from Louisiana to the Mediterranean by defendant, a German corporation.<sup>26</sup> Defendants ordered their tug, M/S Bremen, to put into Florida for refuge and repairs. Zapata immediately sued in a Florida federal district court sitting in admiralty, alleging breach of contract and negligence. Plaintiffs asserted in rem jurisdiction against the M/S Bremen and in personam jurisdiction over the defendant corporation. The defendants sought dismissal, invoking a prorogation clause in the contract that designated the High Court of Justice in England as the exclusive forum for the resolution of any contract disputes.<sup>27</sup> At the same time, the defendants filed suit in England. The district court denied defendants' motion to dismiss; and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court granted certiorari because of the conflicting views of the law concerning prorogation clauses among the courts of appeal.<sup>28</sup> The Court vacated the judgment below, holding that the prorogation clause should have been considered by the district court and "should control absent a strong showing [by the party resisting its application] that it should be set aside."<sup>29</sup>

The Court asserted that the correct doctrine to be followed by federal district courts sitting in admiralty is that "[prorogation] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."<sup>30</sup> The scope of this holding is not entirely clear. Most of the discussion by the Court of the factors that should be considered in evaluating a prorogation clause concerned policy matters and was not confined to admiralty or even federal courts. For example, the Court expressed fear over the adverse effect upon American business and industry in the international arena if American courts insist "on a parochial concept that all disputes must be resolved under our laws and in our courts."<sup>31</sup> The reference to "business and industry" implies a concern much broader than federal courts sitting in admiralty. The Court went on to note: "There are compelling reasons why a freely negotiated private international agreement . . . should be given full effect."<sup>32</sup> In elucidating these "compelling reasons," the Court

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26. *Id.* at 3.

27. *Id.* at 12 n.14.

28. *Id.* at 2. Compare *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959) with *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955).

29. 407 U.S. at 15.

30. *Id.* at 10.

31. *Id.* at 9.

32. *Id.* at 12-13.

first emphasized that the prorogation clause eliminated uncertainty that would have been present had no agreement on a neutral forum been included in the towing contract. The voyage was expected to pass through several jurisdictions; to leave the selection of jurisdiction to the chance location of a possible accident would involve a large and unknown range of possible remedies. The Court then concluded:

The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.<sup>33</sup>

This reasoning applies equally to prorogation clauses in situations other than admiralty.

If the Court did intend the scope of the *Zapata* decision to encompass more than federal courts sitting in admiralty, what are the limits of its impact? It seems clear that the Court only intended to encourage prorogation clauses in international contracts:

[S]election of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum.<sup>34</sup>

The Court in no way indicates that it would uphold selection in a contract between American parties of a particular court within American federal jurisdiction, *i.e.*, a federal venue-selection clause. It seems likely that such a clause would not fall within the scope of *Zapata*. Although the Court placed some importance on the neutrality of the selected forum,<sup>35</sup> it seemingly would approve the selection of a forum native to one of the parties to an international contract, provided that the agreement on choice of forum "was made in an arm's-length negotiation by experienced and sophisticated businessmen."<sup>36</sup>

The Court pointed out that any agreement containing a prorogation clause should be carefully inspected for signs of "fraud, undue influence, or overweening bargaining power."<sup>37</sup> In so inspecting the contract in the *Zapata* case, the Court noted that the tow was an unusual transaction between two experienced companies and that the corporation's draft of the contract had been carefully reviewed and modified by *Zapata* prior to signing. The contract in this case was clearly not adhesive<sup>38</sup> although the Court did not find it necessary to define what might constitute overweening bargaining power.

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33. *Id.* at 13-14.

34. *Id.* at 17.

35. *Id.* at 12. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in local courts, but if that choice is not available, then their second choice would be a neutral forum with expertise in the subject matter.

36. *Id.*

37. *Id.*

38. See Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).



## B. *The Effect of the Zapata Decision*

### 1. *Federal and State Law*

The applicability of the *Zapata* decision to state law is now an open question. Although not authoritative in other than a federal admiralty case, the arguments contained in the opinion are equally applicable to freely negotiated international contracts under review in state courts. The influence of *Zapata*, however, probably will not extend beyond the enforcement of prorogation clauses in international contracts. The Supreme Court seems to have established rather loose requirements, that the selected forum be in the jurisdiction of one of the parties, or be a neutral forum, and the contract must have been freely negotiated and nonadhesive. The forum, having ascertained the above, may then proceed to consider the prorogation clause itself and to apply the substantive law of *Zapata*.

Several commentators<sup>39</sup> have welcomed the *Zapata* decision as long overdue.<sup>40</sup> Now, not only has the Court declared prorogation clauses *prima facie* valid,<sup>41</sup> it has expressly required that the party seeking jurisdiction different from that nominated in the prorogation clause must clearly show that enforcement would be unreasonable and unjust. In *Zapata*, this could be done only by plaintiffs showing that "the balance of convenience is strongly in favor of trial in Tampa" and that "a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court."<sup>42</sup> By imposing such a heavy burden on the party seeking to invalidate the prorogation clause, the Court made its position in favor of the clause very clear.

### 2. *International Law*

As the Court noted in the *Zapata* opinion,<sup>43</sup> the High Court of Justice in England denied a motion by Zapata to set aside service of process. According to the English court "the contractual choice of forum provision conferred jurisdiction and would be enforced absent

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39. E.g., Delaume, *Choice of Forum Clauses and the American Forum Patriae: Something Happened on the Way to the Forum: Zapata and Silver*, 4 J. MARITIME L. 295 (1973); Tuttle, *International Prorogation (Choice of Forum) Agreements after the Unterweser v. Zapata Decision: Some Guidelines for Drafting and Application*, 14 S. TEXAS L.J. 24 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 52 (1972).

40. The United States Supreme Court had an opportunity to settle this question many years ago in *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959).

41. 407 U.S. 1, 10 (1972).

42. *Id.* at 19.

43. *Id.* at 4, n.4.

a factual showing it would not be 'fair and right' to do so."<sup>44</sup> This holding was affirmed on appeal, Lord Justice Willmer noting that the court's discretion, "in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain."<sup>45</sup> English law has favored agreements designating the forum of the parties' choice since 1796.<sup>46</sup> Similarly, the courts of the British Commonwealth have tended to favor prorogation.<sup>47</sup> In civil law countries, the courts look with increasing favor upon contractual provisions designating foreign forums even though such provisions may be contrary to previously controlling law.<sup>48</sup>

*Zapata* brings United States law into line with principles generally accepted in other jurisdictions. The length of time it has taken to reach the final stage is regrettable given that a start was made as early as 1955.<sup>49</sup> The different jurisdictions within the United States must now move rapidly to present a consistent face to participants in world commerce.

### III

#### *Zapata* IN CALIFORNIA: *Beirut* RECONSIDERED

Assuming that *Beirut* came before the California Supreme Court today, would the court apply the rationale of *Zapata*; and, if so, with what result? Certainly, California is not required to validate and enforce prorogation agreements in international contracts. It is, however, to be hoped that a closer look would be taken in light of the *Zapata* decision. The underlying contract in *Beirut* was international—the lender was Lebanese, the borrower was Swiss, and the guarantor was American. The meaning of the prorogation clause was clear—"all conflicts arising out of this contract" were to be settled in the courts of Beirut.<sup>50</sup> The evidence showed that the contract resulted from extended negotiations, the indicia of an arm's length transaction.

*Zapata* does not explicitly require that the prorogation clause itself be shown to have been individually negotiated. But the Court did note that individual clauses were likely to have been carefully weighed

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44. *Id.*

45. *Id.* at 5 n.4, quoting Lord Justice Willmer at [1968] 2 Lloyd's Rep. 158, 162-163.

46. Cowen & Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, 13 AM. J. COMP. L. 179, 180 (1964).

47. *Id.*

48. A. Ehrenzweig, *Private International Law* § 181-1 (1973) (unpublished manuscript on file with the author).

49. See, e.g., *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955).

50. 268 Cal. App. 2d 832, 843, 74 Cal. Rptr. 333, 340 (1969).

in the adjustments of consideration for the contract. Although the court did not examine this issue in *Beirut*, there does not appear to have been any problem of overweening bargaining power.

*Zapata* also permits a court to refuse to give effect to a prorogation clause where there is evidence of fraud. This raises a more difficult problem. One of the causes of action alleged against the defendant lender in *Beirut* was fraud,<sup>51</sup> and so the question arises: Does the court have to go to the merits of the case to determine the presence or absence of fraud and then decide upon the prorogation issue? It would seem more logical to evaluate only the prorogation clause for fraud. Since *Zapata* remarked that the clause appeared in the contract just above the signature,<sup>52</sup> it can be inferred that the Court was concerned only with fraudulent insertion of a prorogation clause and not fraud generally. The alleged fraud in *Beirut* concerned the amount of indebtedness on the business to be purchased by the borrower using the borrowed funds,<sup>53</sup> and thus would be irrelevant. Only secretive insertion of a prorogation clause by one party would constitute fraud in the selection of a forum, and there is no indication that this occurred.

The next question is whether the party opposing the prorogation clause—the plaintiff guarantor—can establish, as required by *Zapata*, that enforcement of the prorogation clause would so “manifestly and gravely” inconvenience him that he would be “effectively deprived of a meaningful day in court.”<sup>54</sup> This burden probably could not be met in *Beirut* because much of the evidence would be available only in Lebanon. It is understandable that the guarantor might not want to travel so far to participate in the litigation, but this would not seem to satisfy the burden.

The foregoing speculation indicates that the prorogation clause in *Beirut* would be technically enforceable under the *Zapata* rationale. There remains the question of policy. The essential issue is whether the California courts should continue to protect California residents from their own promises to appear in foreign tribunals. If the federal system is heading in the direction indicated by *Zapata*, can California afford to be restrictive?

The liberalization of state long-arm statutes increases the protection of forum residents against adversaries from other states and countries. If, however, an American business enterprise enters into a freely-bargained contract with a foreign party and within the terms

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51. 268 Cal. App. 2d 832, 833, 74 Cal. Rptr. 333, 334 (1969).

52. 407 U.S. 1, 13, n.14 (1972).

53. 268 Cal. App. 2d at 835, 74 Cal. Rptr. at 335.

54. 407 U.S. 1, 19 (1972).

of that contract agrees expressly to appear in a foreign forum it is not conducive to harmonious international trade relations to allow the American party to avoid his promise to appear in the chosen forum and then use the considerable latitude allowed by modern long-arm statutes to bring the foreign party before United States courts. Not only does international trade suffer but international respect, through comity,<sup>55</sup> for United States judgments must be diminished. The United States courts respect only those foreign judgments gained pursuant to procedures which approximate American notions of due process of law.<sup>56</sup> Foreign courts, which enforce prorogation clauses, might find unpalatable the prospect of enforcing default judgments gained in United States courts against their citizens who had in good faith promised to appear in a particular forum and then had been held, by a United States court, subject to United States jurisdiction and determination of the issues. The policy favoring liberal long-arm statutes should not be allowed to extend so far.

#### CONCLUSION

The decision in *Beirut Universal Bank v. Superior Court* handed down in 1969 by a California court was an unfortunate one. By affirming a lower court decision denying enforcement of a prorogation clause, the court of appeal forced a Beirut bank to accept an American forum despite an express contractual provision that all disputes be heard in Lebanon. In *Zapata*, the United States Supreme Court held that such clauses were prima facie valid in federal courts sitting in admiralty, but the Court's reasoning is generally applicable to all international contracts. Hopefully, the *Zapata* decision has ended a long and inuddled treatment of prorogation clauses by the federal courts.<sup>57</sup> Now the United States, in conformity with the majority of other nations, has begun to accord increased regard to party autonomy in the area of forum selection.

If the *Beirut* case were to be decided today, the prorogation clause would merit far greater attention than it received in 1969. Although the state courts are under no compulsion to do so, the reasoning of the Supreme Court and the policy considerations underlying its decision in *Zapata* should encourage a more favorable view of the much maligned prorogation clause. The next "*Beirut*" in California should at least evince an awareness of the competing policies involved in asserting jurisdiction and hopefully resolve the issue in favor of the parties' express agreement with respect to choice of forum.

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55. See generally EHRENZWEIG, *supra* note 1, at 161-66; LEFLAR, *supra* note 12, at 171-74.

56. *Id.*

57. See cases cited at note 80 *supra*.