

CONTRACTUAL ARBITRATION AND CHOICE OF FORUM CLAUSES: AN ANSWER TO LIMITS ON TITLE VII'S EXTRATERRITORIAL USE?

by Don Mayer*

In the 1990-91 term, the Supreme Court decided several cases with significant implications for international business law: *Equal Employment Opportunity Commission v. Arabian American Oil Company* and *Boureslan v. Arabian American Oil Company*¹ (relating to the non-application of Title VII of the Civil Rights Act abroad), *Carnival Cruise Line v. Shute*,² (upholding a choice of forum clause), and *Gilmer v. Interstate/Johnson Lane Co.*³ (upholding the arbitrability of an age discrimination claim against an employer). While *Shute* and *Gilmer* do not directly conflict with *Boureslan*, their implications and ancestry suggest that U.S. courts may adjudicate certain claims arising from alleged employment discrimination occurring abroad or may enforce arbitral agreements and awards to employees discriminated against while abroad.

The tension among these cases comes from the Court's elevation of contractual choice as a public policy. The Burger-Rehnquist Court has repeatedly sent broad signals that parties to a business transaction may freely contract to choose the judicial forum for resolution of disputes or may choose arbitration, and that the Courts will seldom disturb such choices. *Shute* and *Gilmer* are only the most recent manifestations of that trend. In the case of *The Bremen v. Zapata Off-Shore Company** which resonates in the majority's

Department of Management and Marketing, Oakland University, Rochester, Michigan 'E.E.O.C v. Arabian American Oil Co., Boureslan v. Arabian American Oil Co., 111 S.Q. 1227 (1991). The two cases were consolidated on appeal to the Supreme Court. The U.S. Solicitor General, Mr. Kenneth Starr, argued before the Court on behalf of both the E.E.O.C and Ali Boureslan.

¹Carnival Cruise Line v. Shute, 111 S.Q. 1522 (1991). ²Gilmer v. Interstate/Johnson Lane, 111 S.Ct. 1647 (1991).

³Bremen v. Zapata, 407 U.S. 1 (1971).

opinion in *Gilmer* and is explicitly relied upon in *Shute*, the Court also implies that even greater contractual freedom is warranted for parties engaged in international business contracts.⁵

Yet the Court holds in *Boureslan* that Title VII of the 1964 Civil Rights Act cannot apply extra-territorially (since Congress made no "clear statement" that it intended such application) even where a U.S. citizen is employed by a U.S. company operating abroad.⁶

Taken together, these cases raise the question whether in an international business transaction (such as an employment contract between a U.S. citizen and a U.S. company operating abroad) the parties may contractually provide for extra-territorial application of Title VII by choosing arbitration and specifying a choice of U.S. law, or by choosing that all employment disputes be resolved in U.S. courts. While such arbitration and choice of forum clauses are presently uncommon, there is no reason why they must remain so.

In this article, the Supreme Court's most recent decisions on choice of forum, arbitration of employment discrimination claims, and extraterritoriality are reviewed. Part I sets forth the *Boureslan v. Aramco* decision in some detail, with emphasis on the Court's discussion of the need to limit extra-territorial applications of U.S. legislation. Part II discusses choice of forum clauses and choice of law clauses as they might relate to employment discrimination claims, while Part III discusses the potential use of arbitration as a means of hearing and enforcing U.S. citizens' claims of discriminatory conduct by U.S. employers operating abroad.

The conclusion summarizes the findings of Parts II and III and suggests that choice of forum clauses in overseas employment contracts could protect U.S. managers working abroad for U.S. companies as well or better than arbitration clauses. In short, *Boureslan* need not be interpreted to mean that Title VII (without further Congressional amendment) cannot be applied to discriminatory conduct by U.S. companies abroad.

LIMITING EXTRA-TERRITORIAL EFFECT OF U.S. EMPLOYMENT DISCRIMINATION LAWS

The Supreme Court has limited the extra-territorial application of Title VII by requiring the Congress to state clearly when it intends a law to have extra-territorial effect. In *Boureslan*, the Court acknowledged in a 6-3 decision that under the nationality principle of jurisdiction, Title VII of the Civil Rights Act of 1964 could be applied to U.S. citizens employed by U.S. companies operating abroad, but found that Congress must always make a

⁵Bremen, 407 U.S. at 12-14. See also the discussion, *infra*, notes 30-31 and accompanying text.

⁶*Boureslan v. Arabian Amer. Oil. Co.*, 111 S.Ct. at 1230, citing *Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

"clear statement" of its extra-territorial intentions within the text of a statute and had not done so in Title VII.⁷

Ali Boureslan was born in Lebanon but became a naturalized U.S. citizen. In 1979 he began working for the Aramco Services Company (ASC) as an engineer. ASC is a U.S. subsidiary of a U.S. company, Aramco (the Arabian American Oil Company), which has its principal place of business in Saudi Arabia. In 1980, Boureslan requested a transfer from ASC to Aramco and relocated to Saudi Arabia where he was allegedly subjected to nearly four years of racial, religious and ethnic slurs that culminated in his discharge in 1984. He subsequently filed suit in the United States against both ASC and Aramco.

Both companies moved to dismiss the suit, ASC on the basis that Boureslan had transferred to the parent company, Aramco on the more fundamental issue of Title VII's extraterritorial application. The federal district court held that Title VII had no application to discriminatory acts outside the U.S., and the Circuit Court of Appeals agreed, both in a three-judge panel⁸ and by all circuit judges sitting *en banc*.⁹ Yet the administrative agency charged with enforcing Title VII, the Equal Employment Opportunity Commission (EEOC), had often taken the position that U.S. employers abroad were bound by the law, at least with respect to U.S. employees, and joined with Boureslan in petitioning the Supreme Court to overturn the Court of Appeals' decision.

Title VII provides that employers must not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁰ The so-called "alien exemption clause" provides in Section 702 that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State. . . The Court of Appeals had divided on the meaning of this provision, with several dissenting judges arguing that the alien exemption clause made no sense unless Congress believed that Title VII did apply extra-territorially in some respects.

Yet the majority opinion, written by Chief Justice Rehnquist, emphasized a particular "canon of construction" for interpreting legislative acts, the "presumption" against extra-territorial application of U.S. laws. This presumption had been established in the case of *Foley Bros. Inc. v. Filardo*,¹² which said that "legislation of Congress, unless a contrary intent appears, is

Vd. The language of 'dearly expressed' is from Benz.

⁷857 F.2d 1014 (1988).

⁸892 F.2d 1271 (1990).

⁹42 U.S.G § 2000e-2(a)(1)(1988).

¹⁰42 U.S.C 52000e-1(1988).

¹²Foley Bros. Inc. v. Filardo, 336 U.S. 281 (1949).

meant to apply only within the territorial jurisdiction of the United States." Chief Justice Rehnquist noted in *Boureslan* that the purpose and function of this principle is to protect against "international discord" caused by unintended clashes between U.S. laws and those of other nations.¹³

The majority opinion did not consider whether substantive provisions of Title VII conflict with Saudi Arabian law or international norms and would not have upheld jurisdiction even in the absence of conflict. Compelling to the majority was the lack of a "clear statement" of Congressional intent. The absence of venue provisions speaking directly to possible overseas discrimination and the lack of particular powers given to the E.E.O.C. to undertake discovery abroad were also deemed significant.¹⁴

Justice Marshall, in dissent, argued that the Court in *Foley Bros.*, was willing "to give effect to all available indicia of the legislative will" to resolve statutory ambiguities, and that such an approach has been honored in numerous cases ever since. Justice Marshall relied on the recognition in *Foley Bros.*, that Congress may have "unexpressed intent," since the Court in that case engaged in lengthy analyses of the statute's legislative history and its interpretation by administrative agencies.¹⁵ The petitioners convinced Justice Marshall that legislative history and administrative interpretation favored extra-territorial application of Title VII.

Using legislative history, petitioners had argued that the initial committee report stated that the purpose of the exemption was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."¹⁶ In designing this exemption to remove potential conflicts of law, petitioners argued that the report showed the committee's understanding that Title VII would otherwise apply outside the United States. If Title VII was not intended to apply extraterritorially, Congress would presumably not have been concerned with conflicts of law which "might otherwise exist."

Administrative agency interpretation was also offered by petitioners as evidence of Congressional intent. According to the EEOC, it had consistently maintained that Title VII protected U.S. citizens employed by U.S. companies abroad. As a former assistant attorney general, Antonin Scalia (now Justice Scalia) had testified before Congress that the alien exemption clause implied

¹³*SM Boureslan*, 111 S.Q. at 1230, where Justice Rehnquist noted that "[the canon of construction] serves to protect against unintended dashes between our laws and those of other nations which could result in international discord." (dting *McCulloch v. Sodedad Nadonal de Marineros de Honduras*, 372 U.S. 10 (1963).)

¹⁴*Boureslan*, 111 S.Q. at 1234.

¹⁵*Foley Bro«. v. Filardo*, 336 U.S. 281, at 286-91.

¹⁶H.R. 405, 88th Cong., 1st Sess (1963).

that Title VII applied abroad.¹⁷ In concurrence, Justice Scalia agreed with the majority except as to the deference that ought to be accorded the EEOCs interpretation of the statute.¹⁸

There are certain anomalies in the result; one U.S. civil rights law protects U.S. employees of U.S. companies abroad, while another does not. Title VII forbids employers to discriminate on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act(ADEA)¹⁹ forbids discrimination against employees aged 40-70. In response to a court holding that the ADEA did not apply abroad, Congress legislated that ADEA should apply extra-territorially where appropriate (e.g. where the nationality principle of jurisdiction applied, as with a U.S. citizen employed by a U.S. employer outside the U.S.). The petitioners argued that prior to this amendment, Congress believed that Title VII did apply to U.S. employers and citizens abroad, and that their intent was to bring the ADEA in line with Title VII.

There is some doubt whether the E.E.O.C. consistently maintained that Title VII should apply beyond U.S. territory. But the greater weight of the evidence indicates that the E.E.O.C. has generally adhered to the notion that U.S. employers must recognize Title VII's protections for U.S. employees abroad. The Court's decision to uphold dismissal of Boureslan's case does little to clarify the already confusing question of the degree to which U.S. courts will "defer" to administrative agency interpretations of the laws they are required to enforce.²⁰

The purpose of the judicial presumption in *Foley Bros*, against extraterritorial application of any U.S. law was to prevent conflicts between U.S. law and law of other nation-states. In the case of U.S. discrimination laws, there is certainly some chance that extra-territorial application might give U.S. citizens some protections not afforded by host country laws, or even protections that the host country would prohibit. But in the *Boureslan* case, the likelihood of conflict with the Saudi Labor Code appeared minimal. Article 91(a), for example, obliges an employer to "treat his employees with respect and refrain from any word or act that may affect their dignity or

¹⁷*Formgn Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International finance of the Senate Comm, on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess. 165 (1975).*

¹⁸Boureslan, 111 S.Ct. at 1236: *1 join in the judgment of the Court, and its opinion except that portion, *ante*, at 124-1235, asserting that the views of the Equal Employment Opportunity Commission-not only with respect to the particular point at issue here but apparently as a general matter-are not entitled to the deference ordinarily accorded administrative agencies under *Chevron U.S. A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837."

¹⁹81 Stat. 602, as amended, 29 U.S.C §621 *et. seq.*

²⁰See the concurring opinion of Justice Scalia in Boureslan, 111 S.Ct. at 1236-37.

religion."²¹ Moreover, Saudi legislation does not specifically state that it applies to employment between a foreign company and its foreign citizen employees. Without application of Title VII to U.S. employees working abroad for U.S. companies, there may at present be neither U.S. nor Saudi remedies for employment discrimination.

Potential conflict between Title VII and host country employment law is further reduced by the "bona fide occupational qualification" or BFOQ exception to Title VII. Employers who might otherwise be held to have discriminated on any of the statutorily impermissible bases may demonstrate that their discriminatory requirements are either essential to the operation of their business or mandated by the laws under which they operate. For example, in *Kern v. Dynallectron*,²² the employer required Moslem helicopter pilots to fly helicopters into Mecca, since Saudi law imposed the death penalty on non-Moslems entering Mecca. The trial and appellate courts upheld the employers' religion-based discrimination as a BFOQ.

Potential conflict is further reduced by the relatively strong degree of international consensus on discrimination matters. As Sir Hersch Lauterpacht once observed, the claim to equality is "the starting point of all other liberties."²³ The Universal Declaration of Human Rights²⁴ and the International Covenant on Economic, Social, and Cultural Rights²⁵ also demonstrate the desire among many for progress toward more universal actualization of employment rights, and the International Labour Organization Convention (No. III) Concerning Discrimination in Respect of Employment and Occupation²⁶ has been ratified by at least 108 nations, including the United States and Saudi Arabia.

At present, however, U.S. employees will not be protected by Title VII from employment discrimination abroad unless Congress acts to reverse

²¹ Saudi Arabian Labour and Workmen Regulations of 1969, Royal Decree No. M/21: Labour Code (15 November 1969), Art. 91(a).

²² 577 F.Supp. 1196 (N.D. Tex. 1983), *affirms* at 746 F.2d 810 (5th Cir. 1984).

²³ H. Lauterpacht, *International Bill of Rights of Man*, quoted in Ramcaran, "Equality and Justice," in L. HENKIN, ed., *THE INTERNATIONAL BILL OF RIGHTS*, (1945), at 247.

²⁴ "The Universal Declaration of Human Rights, GA Res. 217, 3 U.N. GAOR (No. 1) U.N. DOC A/811 (1949).

²⁵ International Covenant on Economic, Social, and Cultural Rights, GA. Res. 220,21 GAOR Supp. (No. 16) U.N. DOC A/6316 (1976).

²⁶ 362 U.N.T.S. 31 (1958).

Boureslan. While some legislative measures are pending,²⁷ the entire civil rights package is prone to presidential veto, without Congressional override, and the prospects for any quick reversal of *Boureslan* are uncertain. In the meantime, however, other decisions and doctrines of the Court may assist U.S. employees who seek protection against discriminatory conduct by U.S. companies abroad.

CONTRACTUAL CHOICE OF FORUM AND CHOICE OF LAW CLAUSES

Let us suppose, in response to *Boureslan* or just as an exercise of market power, that the very ablest of U.S. managerial talent were to begin negotiating "equal overseas opportunity clauses" in their employment contracts with U.S. companies operating abroad. These clauses could specify that U.S. courts would hear all employment-related claims brought by the employee, and that Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and other U.S. federal employment law²⁸ would be applied as the substantive choice of law by the court hearing the case. In the alternative, the contracts could specify that courts of some other country (the United Kingdom, France, Germany, Switzerland) would hear such claims, specifying a similar choice of law.

These hypothetical may seem somewhat fanciful at present because of the realities of corporate culture, weakened demand for U.S. executive talent, or the physical distance between the foreign site of potential discrimination and the forum chosen. But the Supreme Court seems to assume that considerable freedom of contractual choice exists, and so, for the moment, shall we. Moreover, long distances are no insuperable barrier to the Court's view of contractual freedoms. In *Carnival Cruise Lines v. Shute*,²⁹ decided during the 1990-91 term, the Court enforced a choice of forum clause specifying Florida courts as the forum for dispute resolution even though the ticket was sold in the state of Washington, the cruise originated on the West coast, and the plaintiff (a resident of Washington) allegedly slipped and fell while the cruise ship was somewhere in international waters west of Mexico.

The case has other curious aspects. The plaintiffs did not negotiate the

²⁷The language was incorporated in the Sec. to Title VII that was passed November 1991. P.L. 102-166, Now. 21, 1991, 105 Stat. 1071. See S. 1407, the proposed "Civil Rights Restoration Act of 1991," Sec 11, "Protection of Extraterritorial Employment," which would amend Section 701(f) of the Civil Rights Act of 1964 by adding to the definition "employee" an individual who is a citizen of the United States. The amendment would operate prospectively (Sec. 11(d)) and would not apply to foreign operations not controlled by "an American employer." (Sec. 11(c)(2)) Interrelation of operations, common management, centralized control of labor operations, and common ownership or financial control would be used as bases for determining whether an American company controls the foreign subsidiary. (Sec. 11(c)(3))

²⁹*Carnival Cruise Lines v. Shute*, 111 S.Ct. 1522 (1991).

forum selection clause, since it could only have come to their notice after they received the ticket, which was non-refundable. In other words, if they didn't like the forum (Florida) as chosen by Carnival Cruise Lines, they could cancel their vacation plans but not receive a refund.

Notably, the Court relied on its 1972 decision in the case of *The Bremen v. Zapata Off-Shore Co.*²⁹ In *Bremen*, the Supreme Court upheld a choice of forum clause between a U.S. oil company (Zapata) and a German company (Unterweser) who contracted to tow a drilling rig from Louisiana to Italy. The "London High Court of Justice" was the chosen forum, but the rig was damaged during a storm in the Gulf of Mexico. The damaged rig was towed by Unterweser's vessel, the *Bremen*, to Tampa. Zapata believed Unterweser had been negligent, and despite the choice of forum clause, sued in the U.S. district court in Tampa, Florida.

Unterweser interposed the choice of forum clause in the towing contract, but the court held that the clause was an attempt to "oust" its traditional jurisdictional prerogatives, and was thus against public policy and unenforceable. The court of appeals affirmed. But the Supreme Court enforced the clause despite the proximity of the federal court to the site of defendant's alleged negligence, despite the historic appropriateness of repairing to a nearby federal court to invoke admiralty jurisdiction, and despite the presence of an exculpatory clause in the contract which would severely limit the liability of Unterweser.³⁰

The Court reasoned that in an international business transaction, in the absence of fraud or the overwhelming bargaining power of one of the parties, negotiated clauses must be honored as the intent of the parties.

The choice of (the London Court of Justice) was made in an arm's-length negotiation by experienced and sophisticated business, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts. . . . There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect The elimination of . . . uncertainties by agreeing in advance to a forum acceptable to both parties is an indispensable element in international trade.³¹

²⁹*Bremen v. Zapata*, 407 U.S. 1 (1972).

³⁰It appeared likely that the English courts would enforce the exculpatory clauses in the contract, but that U.S. courts, for public policy reasons, would not. *Bremen*, 407 U.S. at 8, n. 8. *See also* *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

³¹*Bremen*, 407 U.S. at 12

The benefits of eliminating such uncertainties accrue not only to the parties, but to the courts. In any multi-state or international agreement, in which personal jurisdiction and proper venue exists in many places, it may be impossible to predict where a plaintiff will file suit. Such clauses have the advantage of reducing uncertainty as to where litigation may be brought, thus controlling the parties' litigation costs. To the extent that choice of forum clauses are generally upheld, parties will eventually pay more attention to their presence in proposed contracts, negotiate them more carefully, and conserve judicial resources by not contesting agreed-upon choices in judicial fora.

Forum selection clauses also advance many important public policies. Freedom of contract is respected: the expectations of the contracting parties are preserved, the equities of the agreement are preserved. Judicial resources are conserved by confining pretrial struggles over venue, and trade is encouraged. Yet despite *Bremen* there are problems concerning the enforceability of such clauses.

The basic problem is that parties cannot, solely by a choice of forum clause, confer jurisdiction on a U.S. federal court. Subject matter jurisdiction, personal jurisdiction, venue, and forum non conveniens are all important procedural limitations that courts must consider, even *ex mero motu*.

Consider, then, whether the presumption against extra-territoriality from *Foley Bros*, as applied in *Boureslan* should give us pause: the decision holds as a matter of law that Title VII does not apply to acts abroad. Could a future U.S. employer-defendant alleged to have discriminated against a U.S. employee abroad *wave* this holding by not raising the extra-territoriality defense (as in *Boureslan*) in a motion to dismiss?

This question, as a practical matter, is unlikely ever to arise, but related question eventually might: if the defendant-employer has (1) agreed to litigate in the U.S. or (2) agreed that a foreign tribunal should apply U.S. law, could this be construed as a waiver of the defense used in *Boureslan*? Or must the court, *ex mero motu*, (1) dismiss the employer-plaintiffs complaint for asking the court to go beyond its subject matter jurisdiction or (2) determine that U.S. non-discrimination law can never apply to discriminatory acts taking place outside the U.S.?

Subject matter jurisdiction is "at the top of the hierarchy" in "the limitations on the courts' ability to resolve a lawsuit."³² The court's "power" or "competency" to hear and adjudicate a given type of lawsuit cannot be

³²Stein, *Forum Non Conveniens and the Redundancy of Court-Accea Doctrine*, 133 U. PA. L. REV. 781. at 786-87 (1985).

created by agreement.³³ By contrast, a party can waive a personal jurisdiction objection.³⁴

But in *Foley* and *Boureslan*, the Court's analysis of extra-territoriality is not couched in terms of subject matter jurisdiction, nor is subject matter jurisdiction a concept central to the *Restatement (Third) of Foreign Relations Law* of the United States,³³ which instead discusses jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.³⁴ Thus, to consider the survivability of choice of forum and choice of law clauses hypothesized above, the approach here will be to focus first on Constitutional barriers to subject matter jurisdiction, then to consider whether the policies animating the presumption against extra-territorial application of U.S. laws would dictate dismissal for lack of subject matter jurisdiction.

For federal courts, the Constitution (in Article III) specifically provides for jurisdiction over cases "arising under" the Laws of the United States, and Title VII actions are clearly such cases. Moreover, where the foreign subsidiary is not incorporated in the United States, diversity jurisdiction may exist under section 2 of Article III. It is difficult to see other constitutional issues for a federal court's exercising jurisdiction over a dispute referred to it by the parties with a Title VII question as its central cause of action. Certainly, the *Boureslan* and *Foley* decisions did not present the "canon of construction" against extra-territoriality in terms of constitutional thought or doctrine, or even imply that constitutional separation of powers doctrine required judicial abstention wherever a potential conflict between U.S. and foreign law was raised by the pleadings.

For state courts, the Supreme Court's unanimous 1990 decision in *Yellow Freight v. Donnelly*³⁷ allows state courts concurrent jurisdiction (along with federal courts) over Title VII actions. The Supreme Court could not find anything in the language of Title VII indicating that Congress meant to vest exclusive jurisdiction in federal courts, so concurrent jurisdiction is "presumed." State courts are certainly bound by *Boureslan* in interpreting the provisions of Title VII, but since *Boureslan* does not specifically address the issue of subject matter jurisdiction, what should the state courts conclude if a defendant/employer, having agreed to refer disputes to a certain state's courts, makes no objection to its jurisdiction?

³³See *Hoffman v. Blaski*, 363 U.S. 335, 342-43 (1960).

³⁴*M. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979): "Neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties."

³⁵AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). [hereinafter, *Restatement (Third)*]

³⁶*Id.*, § 401-403.

³⁷*Yellow Freight Co. v. Donnelly*, 110 S.Ct. 1566 (1990).

The Court is clear enough in *Boureslan* that the policy animating the *Foley* presumption is to prevent unintended conflicts between U.S. law and the law of other nation-states that might provoke "international discord." Where the law of the other "interested" state (Saudi Arabia, for example, or Japan) is implicated there is a potential conflict of law, but the courts have dealt with conflicts of law for many years, and fairly well-developed rules for resolving conflicts of law. Moreover, Title VII, through its BFOQ exception, specifically provides for conflict resolution where the laws of host countries require discriminating decisions that would otherwise be unlawful.

In fact, another, less dramatic kind of conflict is far more likely—that Title VII will require personnel policies which are counter to a given host country's cultural and social traditions. This kind of conflict is unlikely to generate "international discord" or trench upon sovereign relations. Any conflicts are further minimized in choice of forum clauses where the employer freely contracts to have certain of its employment disputes heard in U.S. courts. Conflicts are minimized because the litigation takes place in the United States, not the host country; thus, any appearance that the company is imposing its "ethnocentric" views on the host country is somewhat softened.

In *Foley Bros.*, prior to considering legislative history and administrative interpretations of the Eight Hour Law,³⁴ the Court expressed a basic concern that some violation of sovereignty might be implied by exercising jurisdiction over acts occurring in Iraq or Iran, where the plaintiff had worked overtime for *Foley Bros.*³⁹

But the notion of violating another nation's sovereignty by applying U.S. law when chosen by U.S. parties seems to show excessive deference to the concept of sovereignty, especially when the exercise of "nationality" jurisdiction (based on right of sovereigns to make and enforce rules for their subjects) is well-established in customary international law. And to borrow the jurisdictional nomenclature of the Restatement (Third), where parties to an international contract freely adopt a set of public laws as their reference point for dispute resolution it is clear that the United States is not prescribing rules of right action for application abroad, but that private parties are. Finally, sovereign compulsion of the employer by the host country⁴⁰ or BFOQ

*See *Foley Bros. v. Filar do*, 336 U.S. 281, at 286-91 (1948) for the Court's discussion of the Eight Hour Law's legislative history and administrative interpretation.

³⁴*Id.* at 285: There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq. We were on their territory by their leave, but without the transfer of any property rights to us."

³⁹See RESTATEMENT (THIRD), §441. The proponent of the foreign compulsion defense bears the burden of establishing that it was compelled to violate United States laws. *Id.*, comment c (which indicates that the foreign sovereign compulsion defense applies where "the requirement or prohibition by the first state is backed by criminal or civil liability or both.") See also *id.*, comment d ("For the foreign compulsion defense to succeed, however, it is not enough that the

defenses are recognized by U.S. law; the host country sovereign can still prescribe rules that pre-empt the effect of U.S. law. Thus, the policies behind the *Foley* presumption are satisfied, even though the result is to apply U.S. law to conduct abroad.

ARBITRATION, DOMESTIC AND FOREIGN, OF TITLE VII DISPUTES

U.S. employees of U.S. companies operating abroad might also retain Title VII's protections by agreeing to arbitrate employment disputes. Several issues arise, depending on whether the arbitration provision calls for arbitration within the United States or abroad; i.e., if the arbitral award must be judicially enforced, is it a domestic or foreign award? Generally, the Federal Arbitration Act (FAA)⁴¹ would apply to domestic enforcement or awards, while the Convention on Recognition and Enforcement of Arbitral Awards⁴² would apply to the enforcement of foreign arbitral awards.

Arbitration provisions in a contract usually set forth the place of the arbitration and what law will be applied. By reference, procedural rules are often incorporated as well. For example, a provision might read "Arbitration shall take place in New York City pursuant to the rules and procedures of the International Chamber of Commerce. Title VII of the Civil Rights Act of 1964 will apply to any dispute relating to employment discrimination; all other disputes will be decided in accordance with the laws of New York."⁴³ Such a decision, or award, would ordinarily be considered a "domestic" award; if the arbitration clause provided for arbitration in London (or Geneva, Paris, or Amsterdam), however, the arbitral award would be "foreign," even though U.S. law was applied in resolving the dispute.

The discussion of two questions follows. First, will U.S. courts compel arbitration of statutory civil rights claims based on a pre-existing agreement in an employment contract, or enforce an arbitral award based on such a contractual agreement? Second, does it matter whether the employment

government of a foreign state tolerated or licensed the activity at issue. ...").

⁴¹Federal Arbitration Act, 9 U.S.C §§1-14 (1988).

⁴²Convention on Recognition and Enforcement of Arbitral Awards, implemented by Congress in 9 U.S.C §{201 *et. seq.* [hereinafter, the New York Convention], The FAA, 9 U.S.C. §{1-14, applies to awards rendered outside the United States only if the parties had agreed that judgement on the award could be entered in a specified United States court. *See* 9 U.S.C. {9.

⁴³The reader is entitled to have doubts about whether many (or even any) employees in a multinational company would in fact negotiate in advance to protect against the company's discrimination abroad. But the Supreme Court, at least, seems to think that such autonomous and calculating behavior is normal or should be considered so. And it is interesting to ponder whether the refusal of a U.S. company to include Title VII language (or something similar) in an arbitration provision is itself an act of discrimination: what if one well-qualified prospective employee insists on the non-discrimination provision while another does not, and the second prospect is hired without the non-discrimination provision in the contract?

contract provides for arbitration in the U.S. rather than abroad, and whether the arbitral award is considered "domestic" or "foreign"? The answer seems to be that if the Supreme Court eventually determines that arbitration provisions in employment contracts are enforceable despite §1 of the FAA, there is little practical difference. But the Court may not, and until then, a foreign arbitral award for a Title VII claim may actually stand a better chance of enforcement in U.S. courts than a domestic award.

Domestic Arbitral Resolution of Statutory Civil Rights Claims in the Employment Relationship

Despite an historic tendency to favor judicial resolution of statutory claims, the Court in recent years has upheld agreements to arbitrate statutory claims under the Sherman Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act (RICO).⁴⁴ Most recently, in *Gilmer v. Interstate/Johnson Lane Corp.*,⁴⁵ the Supreme Court has upheld the arbitrability of an employee's claim of age discrimination under the Age Discrimination in Employment Act of 1967.⁴⁶

Interstate/Johnson Lane Corporation hired Gilmer in 1981 as "Manager of Financial Services" in Charlotte, North Carolina. He was required by his employment to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). The NYSE required Gilmer's signature on a registration application which provided that Gilmer "agree to arbitrate any dispute, claim, or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations" with which he registered. NYSE Rule 347 provides for arbitration of "[a]ny controversy between a registered representative and any member of member organization arising out of the employment or termination of employment of such registered representative."⁴⁷

Some six years later, when Gilmer was 62, Interstate "terminated Gilmer's employment."⁴⁸ He filed a discrimination charge with the EEOC, then brought suit in federal district court. Interstate filed a motion to compel arbitration under §4 of the FAA, the district court denied the motion, and the Fourth Circuit Court of Appeals reversed, finding that "nothing in the text,

⁴⁴See, e.g. *Miubithi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985), *She arson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. She arson/American Express, Inc.*, 409 U.S. 477 (1989).

⁴⁵*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

⁴⁶81 Stat. 602, as amended, 29 U.S.C }621 *et seq.*

⁴⁷*Gilmer*, 111 S.Ct. at 1650-51.

⁴⁸111 S.Ct. at 1651.

legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.^{*49} But *Gilmer* could have argued, among other things, that §1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."³⁰ The language and legislative history of the statute suggests that if the Court had considered this issue, the FAA could not have been used by Interstate to compel arbitration. The majority notes, however, that "it would be inappropriate to address the scope of the §1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. . . Rather, the arbitration clause at issue here is in *Gilmer's* securities registration application, which is a contract with the securities exchanges, not with Interstate."^{*51}

The dissent in *Gilmer* questioned the majority's decision not to address the §1 issue,³² and would have used that section to uphold federal court jurisdiction. But the dissent does not offer convincing precedent that §1 requires refusal to enforce arbitration agreements in employment contracts. The cases go differing ways. For example, some cases have held that the §1 limitation was meant to apply to employment contracts for individuals in the transportation industry.³³ Other cases hold that employment agreements are contracts, and if the contract involves interstate commerce, the FAA applies.³⁴ Some cases look at the last clause of §1 and consider any arbitration agreement within a contract of employment to be outside the purview of the FAA.³³ Still others have concluded that arbitration provisions in collective-bargaining agreements are only enforceable through the Labor

⁴⁹895 F.2d 195, at 197 (4th Cir., 1990).

³⁰9 U.S.C. 51 (1988).

³¹*Gilmer*, 111 S.Ct. at 1651, n. 2.

³²The dissenting opinion by Justice Stevens, joined by Justice Marshall, believed that the resolution of this issue was 'clearly antecedent' to the disposition of the case, and should be decided notwithstanding the petitioner's not raising the issue at district court, circuit court of appeals level, or in the petition for writ of certiorari. The Court has considered such issues in

other cases, and twice had done so in the 1990-91 term. *Id.* at _____, citing *Medeskey v. Zant*, 499 U.S. _____ (1991) and *Arcadia v. Ohio Power Co.*, 498 U.S. _____ (1991).

³³*Sae, e.g. Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159, *cert. denied* 469 U.S. 1160 (1984), and *Tenney Engineering, Inc. v. United Elec. Radio & Mach. Workers of America, (U.E.) Local 437,207* F.2d 450 (CA.N.J., 1953)('Intent of Congress in enacting this section providing that nothing in this title relative to arbitration shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce, as to exclude from this title... only those classes of workers who were actually engaged in movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect a part of it.*)

³⁴*See Butcher & Singer, Inc. v. Frisch*, 433 So.2d 1360 (1983).

³⁵*See, eg. Wilderv. Whitaker Corporation*, 215 Cal. Rptr. 536, 169 Cal.App.3d 969 (1985) and *United Food and Commercial Workers v. Safeway Stores*, 889 F.2d 940 (10th Cir. 1989).

Management Relations Act of 1947 and not the FAA.⁵⁶ The Supreme Court must ultimately resolve this issue.

Remarkably, the Court in *Gilmer* enforced an agreement to arbitrate an employment discrimination claim that Gilmer had against Interstate, even though the agreement to arbitrate was not negotiated between Gilmer and Interstate! *Gilmer* thus illustrates the liberal interpretation given to the FAA by the Court, even though it does not broadly hold that arbitration clauses in employment contracts will generally be enforced under the FAA.

A basic similarity between *Gilmer* and *Carnival Cruise Lines* is food for further thought. In neither case did the non-corporate individuals have much in the way of freely negotiated choice. Gilmer urged the court not to enforce arbitration of ADEA claims since there would often be unequal bargaining power between employers and employees. The majority countered that "[m]ere inequality of bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."⁵⁷ The majority then mentioned the need for courts to "remain attuned to *well-supported* claims that the arbitration agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"^{58*}

At this point, the majority also noted that Gilmer was "an experienced businessman." In *Bremen v. Zapata*, the Court made much of the fact that the forum selection clause was agreed to "at arm's length" between "experienced and sophisticated" businessmen.⁵⁹

Several different notions need emphasis here. The Court did not equate choice of arbitration with choice of forum, but the similarities are evident. Experienced parties in an international business transaction will tend to be given freedom to choose particular arbitral or judicial forums. Second, the Court will presume freedom of contract unless fraud or overwhelming economic power are amply evidenced (Veil-supported"). The presumption is not irrebuttable, but *Carnival Cruise Line* and *Gilmer* seem to make that presumption almost irrebuttable. Third, the FAA will be quite liberally construed to enforce agreements to arbitrate and arbitral awards.⁶⁰

Given these clear tendencies, it would be incongruous for the Supreme

**Gilmer v. Interstate/Johnson Lane*, 111 S.Ct. 1647, at 1660 (Justice Stevens, dissenting), citing *Teitik Worker* Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

***Gilmer*, 111 S.Ct. at 1655.

****Bremen v. Zapata*, 407 U.S. at 11, citing *Mitsubishi Motors v. Soler Chrysler Plymouth*, 473 U.S. 614, at 627 (1985).

*****Bremen*, 407 U.S. at 12. ("The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.")

******See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), construing FAA sections 1-3 as manifesting a "liberal federal policy favoring arbitration agreements."

Court to find that a freely negotiated arbitration clause is not enforceable because it was contained in an employment contract, while Gilmer must arbitrate because his non-employment contract arbitration provision (which was not freely chosen) can be enforced as outside of the §1 limitation. But stranger things have happened.

Foreign Arbitral Resolution of Statutory Civil Rights Claims in the Employment Relationship

Our alternative arbitral provision calls for arbitration not in New York, but in London or some other international city favored by arbitrators and parties. Again, Title VII is hypothetically specified by the parties as the law to be applied by the arbitrator or panel of arbitrators. If the site of the arbitration is a country which accepts the reciprocity provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (and approximately two thirds of the many states which have ratified the Convention do), then the U.S. courts would ordinarily be required under the Convention to recognize and enforce the award.

Some preliminary points need emphasis. The Convention, often referred to as the New York Convention because of its negotiation in New York in 1958, provides for enforcement both of agreements to arbitrate and of arbitral awards. Moreover, the award may even have been made without the concurrence and participation of one of the parties, since the predominant procedural rules adopted by reference in most arbitrations⁶¹ allow the arbitrator or panel to an award even if one of the parties refuses to arbitrate. Finally, enforcement of foreign arbitral awards is a question arising under the laws and treaties of the United States. The federal courts, therefore, have jurisdiction to enforce arbitral awards falling under the Convention, regardless of the citizenship of the parties or the amount in controversy.

Assuming that the arbitration goes forward in a foreign country, and results in an award, whether by default or otherwise, what possible defenses could an employer raise in a judicial enforcement proceeding in the United States?

Article V of the Convention specifies several grounds for resisting the enforcement of a foreign arbitral award. Absence of fundamental fairness, including lack of notice, lack of an impartial tribunal, or inability of a party to present its case, are grounds for nonrecognition of both judgments and awards.⁶²

These would not seem to apply, but Article V.1.(a) allows a U.S. court to refuse enforcement of the arbitral award if the agreement to arbitrate "is

⁶¹5m, t.g. the arbitration procedures for the American Arbitration Association or the International Chamber of Commerce.

⁶²New York Convention, Article V (9 U.S.C §201).

not valid under the law to which the parties have subjected it." Article V.2.(a) allows refusal of enforcement where the "subject matter of the difference is not capable of settlement by arbitration under the law of that country."

Thus, the considerations raised above regarding the FAA's §1 exclusion are germane to whether a foreign arbitral award based on an arbitration clause in an employment contract could be enforced in the United States. And although the plain language of §1 of the FAA seems to exclude enforcement of arbitration based on employment contract provisions, the likelihood after *Gilmer* is that §1 will not be interpreted by the Supreme Court to refuse enforcement arbitration clauses in employment contracts.

Section 2(b) of Article V also allows refusal of an award's enforcement where such would be contrary to the public policy of the enforcing court's country. But given the repeated emphasis by the Supreme Court of a strong public policy favoring arbitration, even in cases where plaintiffs have sought judicial resolution of statutory remedies and have resisted arbitration, it would be anomalous for the Court to refuse enforcement on public policy grounds where an employee actually seeks arbitration and achieves a foreign arbitral award.

Moreover, cases interpreting section 2(b) of Article V have construed the public policy limitation narrowly, applying it only where enforcement would violate the forum state's most basic notions of morality and justice.⁶³ It is difficult, to say the least, to see how an award against an employer arising out of discriminatory treatment in the workplace violates the United States' most basic notions of morality and justice.

Yet at least one more obstacle to enforcement remains: the United States made a declaration, as authorized by Article 1(3), that the Convention would be applicable "only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State making such declaration."⁶⁴ Some decisions view employment services as sufficiently commercial. In *Faberge International, Inc. v. Di Pino*,⁶⁵ an employment agreement whereby a U.S. citizen worked in Italy for a multinational corporation was held "commercial" within the meaning of the Convention. And in *Dworkin-Cosell Interair Courier Serv. v. Avraham*,⁶⁶ the court upheld an arbitral award to an Israeli citizen where the arbitration agreement was contained in an employment agreement and a stock purchase and shareholders agreement. Still, the federal circuit courts of appeal have not considered the issue, nor has the Supreme Court.

⁶³*See, e.g.* *Fotocrotne, Inc. v. Copal Co., Ltd.*, 517 F.2d 512 (1975). *See also* *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie Du Papier (RAKTA)*, 508 F.2d 969 (1974).

⁶⁴9 U.S.C. 8201 (1989).

⁶⁵491 N.Y.S.2d 345 (1985).

⁶⁶728 F.Supp. 156 (S.D.N.Y. 1989).

At worst, however, if a foreign arbitral award based on an arbitration clause in an employment contract will not be enforced under the Convention, such award would nevertheless be enforceable in the United States in the same manner as foreign judgments.⁶⁷ Such actions proceed under state law,⁶⁸ and access to federal courts for enforcement would be limited to diversity cases.⁶⁹

CONCLUSION

Both choice of forum and arbitration clauses may succeed in applying Title VII to discriminatory acts abroad, despite the broad language of *Boureslan* that limits Title VII's extra-territorial application. Both *Shute* and *Gilmer* further policies that the Burger and Rehnquist majorities have been emphasizing: freedom of contract and the arbitrability of statutory-based causes of action. Nor do the policies underlying *Boureslan's* presumption against extra-territorial application of U.S. law have the same force when U.S. citizens choose U.S. law for resolution of employment disputes.

The greatest uncertainties in using choice of forum or arbitral provisions in an employment contract to apply Title VII to overseas incidents of discrimination relates to enforcement of domestic arbitration under the FAA. The cases interpreting §1's exclusion for employment contracts are divided,⁷⁰ but the Supreme Court could conceivably hold that arbitration agreements in employment contracts are excluded from the enforcement provisions of the FAA, but this seems unlikely. Such a holding would entail: that the domestic arbitral agreement would not be enforceable, yet a foreign arbitral award would be, either under the Convention or as a foreign judgment. The Court's preference for freedom of contract and arbitrability would also be frustrated by such a holding. The *Gilmer* majority's unwillingness to reach the §1 exclusion issue may be some indication that the Court is unwilling to limit the expansion of arbitrable controversies or is unwilling to have contractual freedom, judicial economy and docket control yield to a legislative exception from 1925 in the FAA.

For U.S. citizens contracting to work overseas, who wish to retain the benefits of U.S. non-discrimination laws, a choice of forum clause specifying U.S. courts and federal choice of law may avoid these uncertainties. A foreign

or "non-domestic" arbitral award also avoid any uncertainties arising from the U.S. reservation about "commercial" relationships in ratifying the New York Convention.