REVIVING THE "HAUNTING SPECTER OF ERIE": THE ENFORCEABILITY OF FORUM-SELECTION CLAUSES UNDER PUERTO RICO'S DISTRIBUTOR'S LAW

DANIEL LIMÉS RODRÍGUEZ*

INTRODUCTION

In 1964, Puerto Rico's Legislature enacted the Dealer's Contracts Act (Act 75)[1] with the express intent of protecting any distributor who, after creating a favorable market for the principal's products or services, would see their distributorship relationship terminated.[2] The Legislature specifically highlighted the important public policy issues behind Act 75. Essentially, the statute provides that principals may not terminate a distributor's contract, or deny renewal, without just cause. Act 75 would later be amended to include an express prohibition of any arbitration clauses, forum-selection clauses, or choice of law clauses that excepted the applicability of Act 75.[3] Almost 40 years after the amendment, this prohibition, and the evolution of state and federal court's interpretation therewith, remains controversial.

The evolution in federal case law concerning the enforceability of arbitration and forum-selection clauses inevitably led to parallel precedential developments in Puerto Rico's Supreme Court's case law. For example, the Supreme Court of Puerto Rico (hereinafter, "PRSC")[4] included an extensive analysis of federal precedent when interpreting the enforceability of forum-

* J.D., 2018, candidate from the University of Puerto Rico School of Law. The author would like to thank his family for their unconditional support and infinite patience.

[1] Dealer's Contracts Act, Act No. 75 of July 24, 1964, 10 L.P.R.A. §§ 278-278e (2016).

[2] Statement of Motives, Dealer's Contracts Act, Act. No. 75 June 24, 1964, 1964 L.P.R. 231. (*quoted in* Walborg Corp. v. Tribunal Superior, 104 D.P.R. 184 (1975)).

[3] 10 L.P.R.A. § 278b-2.

[4] PRSC stands for Puerto Rico Supreme Court.

selection clauses in general,[5] and also recognized the Federal Arbitration Act's (FAA) pre-emption of State law.[6] However, local courts and federal courts differ on the treatment of Act 75's prohibition of forum-selection clauses. The PRSC has not expressly addressed the issue, yet the Court of Appeals of Puerto Rico (hereinafter, "TCA") recently held Act 75's prohibition applicable and invalidated a forum-selection clause.[7] Furthermore, local courts have not decided whether a forum-selection clause, incorporated within a provision mandating arbitration, would be enforceable.[8] Even within the federal court system, the "haunting specter of *Erie*"[9] and common law developments regarding forum-selection clauses further obfuscate the applicability of Act 75's prohibition on forum-selection, choice of law, and, to a much lesser degree, arbitration clauses.

This article will address the current state of the law regarding forum-selection clauses in distributor's contracts in Puerto Rico. First, this article will briefly summarize the enactment of Act 75 and the important public policy concerns employed to justify its creation. Second, the article will provide an overview of the U.S. Supreme Court decisions regarding forum-selection clauses and arbitration agreements in commercial contracts. Accordingly, the article will then turn to highlight the evolution of local judicial decisions interpreting the same contractual clauses. Third, the article will specifically address these developments and their interaction with Act 75, both within the local courts and the federal court system. Thus, a succinct analysis of the relevant issues and factors at play will be provided. Lastly, extrapolating from the available case law, the paper will conclude with insights into the future enforceability of forum-selection clauses in light of Act 75's prohibitions.

I. PUERTO RICO'S DISTRIBUTOR'S LAW

In Act 75's Statement of Motives, the Puerto Rican Legislature acknowledged the "growing number of cases" in which principals, without just cause, eliminate their distributors' contractual relations "as soon as these have created a favorable market and without taking into account their legitimate interests."[10] The Legislature also declared that the "reasonable stability" of the distributor's relationship is "vital to the general economy of the country, to the public interest and to the general welfare."[11] Accordingly, and invoking Puerto

[5] Unisys Puerto Rico, Inc. v. Ramallo Brothers Printing, Inc., 128 D.P.R. 842 (1991).
[6] World Films Inc. v. Paramount Pictures Corp., 125 D.P.R. 352 (1990).
[7] Caribe RX Servs., Inc. v. Grifols, Inc., No. KLCE201400314, 2014 WL 2527399 (T.C.A. Apr. 14, 2014); *See* Maxon Engineering Services Inc. v. M.R. Franceschini Inc, No. KAC98-0728, 2001 WL 1764034 (T.C.A. Nov. 30, 2001) (suggesting a similar holding, arguably dicta).
[8] *Maxon*, 2001 WL 1764034 at *7.
[9] Outek Caribbean Distributors, Inc. v. Echo, Inc., 206 F. Supp. 2d 263, 265 (D. P.R. 2002).
[10] Statement of Motives, Dealer's Contracts Act, Act. No. 75 June 24, 1964, 1964 L.P.R. 231. The official translation refers to "domestic and foreign enterprises" on the one hand, and "dealers, concessionaries, or agents" on the other. For the purposes of this paper, and with the intention of simplifying the sometimes-murky concepts, we will refer to "Principal" and "Distributor" to encompass both categories of actors in distributorship relationships.
[11] *Id.*

Rico's police power, the Legislature deemed it necessary to regulate this particular relationship to "avoid the abuse caused by certain practices."[12]

Interestingly, Act 75 served as "the prototype legislation that inspired the enactment of similar protective laws in thirty-two countries."[13] The growth in world G.D.P. in the early 1960's, for example, highlights the surge in international commerce post-WWII.[14] Thus, the development of new distribution lines garnered significant attention from local governments. In Puerto Rico, the Senate's Industry and Commerce Commission attributed the "problem in Puerto Rico's distribution system" to the manufacturer's behavior highlighted above.[15] The Senate Commission favored the regulatory framework of Act 75 in order to "guarantee that manufacturers act in good faith, equitably, and in a non-arbitrary manner."[16]

Essentially, Act 75 prohibits any principal from terminating — or refusing to renew — their existing relationship with a distributor.[17] In the absence of just cause, "the principal shall indemnify the [distributor] to the extent of the damages caused him" calculated on the basis of several factors.[18] The Legislature has amended the statute several times. For example, in 1971 the statute incorporated an article whereby a court may grant a "Provisional Remedy" of an injunctive nature ordering the parties to continue the established relationship during the time the litigation is pending resolution.[19] Another significant amendment in 1988 listed a set of presumptions to be held against the principal under certain circumstances.[20]

Regarding the subject matter of this article, the original text of Act 75 expressly declared the "public order" of the provisions contained therein and proscribed any waiver of the rights provided by the statute.[21] The statute, however, did not originally include an express prohibition of specific contractual clauses. After the PRSC held an arbitration agreement unenforceable because of the compelling public policy interests underlying Act 75,[22] the Legislature enacted the amendments of 1978 assuring "[i]nterpretation pursuant to laws of the Commonwealth."[23] Furthermore, as will be discussed in greater detail below, the Legislature provided additional amendments after the PRSC held that, if a conflict arises between the FAA and Act 75, the federal statute preempts the local statute.[24]

---

[12] *Id.*

[13] Paul Salamone, *Puerto Rico's Distributor's Law: Law 75: A primer*, 18 REV. JUR. U. INTER 67, 69 (1983) (*citing* numerous international examples of similar regulatory frameworks).

[14] The World Bank, *GDP Growth (anual %)*, https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2016&start=1961&view=chart&year=1961 (last visited May 12, 2018).

[15] Salomone, *supra 13 at 68* (Discussing the Senate Industry and Commerce Commission Report).

[16] *Id.*

[17] Dealer's Contracts Act, Act No. 75 of July 24, 1964, 10 L.P.R.A. § 278a (2016).

[18] 10 L.P.R.A. § 278b-1.

[19] *Id.*

[20] *Id.* § 278a-1.

[21] *Id.* § 278c.

[22] Walborg Corp. v. Tribunal Superior, 104 D.P.R. 184 (1975).

[23] *Id.* § 278a.

[24] World Films Inc. v. Paramount Pictures Corp., 125 D.P.R. 352, 364 (1990).

Specifically, the Legislature enacted in the year 2000, amendments precisely addressing arbitration clauses, prescribing as an "indispensable requirement" that "a court with jurisdiction in Puerto Rico", if questioned by any of the parties determine the validity of the clause, or arbitration agreement.[25]

As a whole, Act 75 survived serious constitutional challenges during its early years. In the seminal case *Warner Lambert v. Tribunal Superior*, the PRSC held that the retroactive application of Act 75 to pre-existing contracts contravened the constitutional protections against the impairment of contractual obligations.[26] However, the decision opened the door to Act 75's enforceability through the civil law doctrine of novation.[27] As could easily been expected, this precedent led to an influx of cases regarding novation of distributor's contracts.[28] Moreover, in *Marina Industrial v. Brown Boveri*, the PRSC held that Act 75 does not contravene the due process clause or the equal protections clause of the Federal Constitution.[29] Pointedly, the underlying public policy of Act 75 received differential treatment by the PRSC in *Warner Lambert* vis-à-vis *Marina Industrial*.[30] And in a similar vein, the interpretation of forum-selection clauses and arbitration agreements in Federal Courts also faced a somewhat rocky development.

II. THE ENFORCEABILITY OF PARTICULAR CLAUSES WITHIN COMMERCIAL CONTRACTS

A. Forum-selection

The U.S. Supreme Court (hereinafter, "the Court") established the enforceability of forum-selection clauses in their seminal case M/S Bremen v. Zapata.[31] The Court recognized that "[f]orum-selection clauses have historically not been favored by American courts. Many courts, both federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."[32] The Court reasoned that there are compelling reasons to give full effect to private, freely negotiated, international agreements, "unaffected by fraud, undue influence, or

---

[25] Act No. 448–2000, 10 L.P.R.A. § 278b-3 (2016).
[26] Warner Lambert Co. v. Tribunal Superior, 101 D.P.R. 378, 403 (1973).
[27] *Id.* at 388-394.
[28] Marina Industrial, Inc. v. Brown Boveri Corp, 114 D.P.R. 64, 66–67 (1983).
[29] *Id.* at 86.
[30] In *Warner Lambert*, for example, the PRSC found the Legislature's evidence and, therefore, its reasoning regarding the necessity of Act 75 to be lacking. *Warner Lambert*, 101 D.P.R. at 398. Specifically, the Court stated that it would not take judicial notice of the "effect on the Puerto Rican economy or society of the termination of distributor's contracts." *Id.* (our translation). In *Marina Industrial*, contradicting their stance in *Warner Lambert*, the PRSC found that Act 75, in its text and legislative history, clearly articulates the judgments and conclusions showing a legitimate purpose and reason for enactment. *Marina Industrial*, 114 D.P.R. 83-84. These divergent interpretations regarding the weight attributed to the Legislature's conclusions are mere examples of the conflicting views adopted by local courts and federal courts regarding Act 75.
[31] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).
[32] *Id.* at 9.

overweening bargaining power."[33] However, the Court also noted that a forum-selection clause could be held "unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[34] For example, the opinion explicitly narrows its holding to cases in admiralty,[35] it focuses its discussion on international commercial contracts,[36] and then concludes that the public policy of the forum might play a more significant role if the controversy arose between Americans.[37]

A significant holding in Bremen establishes that the party claiming that the forum-selection should not be enforced has the burden of proving that it would be "unfair, unjust, or unreasonable to hold the party to his bargain."[38] This holding relies on the fact that both parties agreed to the forum-selection clause. For example, the Court noted that "[w]hatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting."[39] Furthermore, the Court also emphasized that "[t]he choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen...."[40] Essentially, Bremen established a series of factors affecting the enforceability of forum-selection clauses.

In *Stewart Organization, Inc. v. Ricoh Corp.*, the Court revisited *Bremen* but, instead of arising under admiralty jurisdiction, the case arose under diversity of citizenship jurisdiction.[41] In fact, the Court noted that "federal common law developed under admiralty jurisdiction [is] not freely transferable to [a] diversity setting."[42] The Court disagreed with the emphasis the Court of Appeals placed on Bremen and held that "federal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute."[43] In Stewart, the action was filed in an Alabama District Court, whilst Alabama's public policy barred the enforcement of forum-selection clauses.[44] The Court held that Congress exercised their valid authority in enacting § 1404(a), a procedural rule, citing *Van Dusen* that a transfer "does not carry with it a change in applicable law."[45] Justice Scalia dissented, stating that federal courts cannot "fashion a judge-made rule to govern this issue of contract validity."[46]

The role of forum-selection clauses under § 1404(a) fostered some intricate and complicated issues of federal jurisdiction, especially when juxtaposed with the Erie doctrine; whereby federal courts are to apply the state's substantive law in

---

[33] *M/S Bremen*, 407 U.S. at 12.
[34] *Id.* at 15.
[35] *Id.* at 10.
[36] *Id.* at 16.
[37] *Id.* at 17 ("Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum.").
[38] *Id.* at 18.
[39] *Id.* at 17–18.
[40] *Id.* at 12.
[41] Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988).
[42] *Id.* at 28 (*citing* Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641–42 (1981)).
[43] *Id.*
[44] *Id.* at 30.
[45] *Id.* at 32.
[46] *Id.* at 33 (Scalia, J., dissenting).

diversity cases.[47] Furthermore, the Court had previously held in *Klaxon Co. v. Stentor Electric Manufacturing Co.* that federal courts should use the choice of law rules that the state would use in their own state courts.[48] Accordingly, the limits and bounds of § 1404(a) are somewhat unclear.[49] In *Ferens v. John Deere Co.*, for example, the Court extended *Van Dusen* and held that the law of the transferor state where the federal court is located should apply regardless of who makes the change-of-venue motion under § 1404(a).[50] The Court qualified Stewart as an "isolated circumstance," and pointed out that the Court has "seen § 1404(a) as a housekeeping measure that should not alter the state law governing a case under Erie."[51] Recently, in *Atlantic Marine Const. Co. v. U.S. District Court* for the Western District of Texas, the Court re-asserted the supremacy of federal common law regarding the propriety of a specific venue, reaffirming that forum-selection clauses should be controlling in all but the most exceptional and extraordinary of cases.[52]

In Puerto Rico, the PRSC addressed the enforceability of forum-selection clauses in *Unisys Puerto Rico, Inc. v. Ramallo Bros. Printing, Inc.*[53] Building on federal court case law, the PRSC set forth four factors to guide the analysis in determining the enforceability of a forum-selection clause. Those four factors are: "(1) Whether the forum becomes irrational or unjust; (2) [p]roceeding with the case in the selected forum would constitute a patently clear inequity; (3) [t]he existence of an invalid clause due to fraud or falsehood, [and] (4) [t]he enforcement of such clause would defeat the State's public policy."[54] The PRSC has repeatedly upheld the four Unisys factors. In fact, the PRSC very recently elaborated their analysis of the third factor.[55] In *Bobé v. UBS*, the PRSC held that the mere allegations of fraud are insufficient to defeat a freely agreed upon clause.[56]

B. Arbitration Agreements

At first glance, the enforcement of arbitration agreements carries forth the force of the FAA, which was enacted almost a century ago.[57] However, in general, the enforceability of arbitration agreements ran parallel to the enforcement of forum-selection clauses. For example, in *Mitsubishi Motors v. Soler Chrysler* the Court stated that "we are well past the time when judicial suspicion of the desirability of arbitration . . . inhibited the development of arbitration as an alternative means of dispute resolution."[58] The Court thus echoed the disapproval expressed in *Bremen*

---

[47] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
[48] Klaxton Co. v. Stentor Electric MFG. Co., Inc., 313 U.S. 487 (1941).
[49] *See* Caribbean Wholesales & Service Corp. v. U.S. JVC Corp., 855 F. Supp. 627 (S.D.N.Y. 1994).
[50] Ferens v. John Deere Co., 494 U.S. 516 (1990).
[51] *Id.* at 523.
[52] Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas, 134 S.Ct. 568, 581 (2013).
[53] Unysis Puerto Rico, Inc. v. Ramallo Brothers Printing, Inc., 128 D.P.R. 842 (1991).
[54] *Id.* at 857 (translation by the author).
[55] Bobé v. UBS Financial Services Inc. of Puerto Rico, 198 D.P.R. 6 (2017).
[56] *Id.*
[57] Federal Arbitration Act, 9 U.S.C. § 1–213 (2012).
[58] Mitsubishi Motors v. Soler Chrysler, 473 U.S. 614, 626–27 (1985).

at how federal courts repeatedly dismissed forum-selection clauses without giving them proper effect. Furthermore, after directly discussing *Bremen*, the Court underscored the stronger presumption of enforceability afforded by the "emphatic federal policy in favor of arbitral dispute resolution."[59]

Two years prior to *Mitsubishi*, the Court already established the pre-emptive power of the FAA. In *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, the Court held that the FAA stands as a "congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*."[60] However, this apparent bright-line rule lacked any straightforward approach in the courts.[61] Notwithstanding the apparent cacophony, in *Preston v. Ferrer* the Court held that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."[62] Even more recently, in *AT&T Mobility LLC v. Concepcion*, the Court held that a state-created judicial rule of not enforcing arbitration agreements which ban class-wide arbitration procedures was preempted by the FAA.[63]

Puerto Rico's case law lacks an extensive treatment of the FAA.[64] Since the FAA is applicable only in commerce "among the several states or with foreign nations," its applicability to distributorship contracts is straightforward.[65] Almost thirty years ago, in *World Films, Inc. v. Paramount Pictures Corp.*, the PRSC recognized the FAA's preemption of state law. Not surprisingly, Act 75 governed the controversy in *World Films*.[66] The decision expressly overruled *Walborg*, which invalidated an arbitration clause in a distributorship contract.[67]

III. ACT 75 AND FORUM-SELECTION CLAUSES

Very early on, in Act 75's evolution, the District Court for the District of Puerto Rico held the FAA applicable and enforced an arbitration agreement in a distributor's contract.[68] However, in *Walborg* the PRSC later held that the public policy underlying Act 75 outweighed the public policy associated with the enforcement of arbitration agreements.[69] As mentioned above, the PRSC's decision in *Walborg* spawned the amendments of 1978 that incorporated § 278b-2 prohibiting any arbitration, forum-selection or choice-of-law clauses in distributor contracts. Nevertheless, the federal courts affirmed the enforcement of forum-

---

[59] *Id.* at 631.
[60] Moses H. Cone Memorial Hospital v. Mercury Const. Corp, 460 U.S. 1, 24 (1983) (emphasis ours).
[61] *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L. J. 1217 (2013) (discussing the controversies between the FAA and state public policy).
[62] Preston v. Ferrer, 552 U.S. 346, 359 (2008).
[63] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[64] *See* David M. Helfeld, *La jurisprudencia creadora: Factor determinante en el desarrollo del derecho de arbitraje en Puerto Rico*, 70 REV. JUR. U.P.R. 1 (2001).
[65] Federal Arbitration Act, 9 U.S.C. § 1 (2012).
[66] World Films, Inc. v. Paramount Pictures Corp., 125 D.P.R. 352 (1990).
[67] Walborg Corp. v. Tribunal Superior, 104 DPR 184, 190 (1975).
[68] Sumaza v. Cooperative Ass'n, 297 F.Supp. 345 (D.P.R. 1969).
[69] Walborg Corp. v. Tribunal Superior, 104 DPR 184, 191 (1975).

selection clauses despite Act 75's express prohibition.[70] Accordingly, a gap began to emerge between the applicability of Act 75's prohibition in the local state courts and in the federal court system.

The issues underlying the supremacy of federal common law regarding forum-selection and Act 75 are complex. The difficulty of the interplay between forum-selection clauses and conflict of laws was clearly illustrated in *Caribbean Wholesales & Service Corp. v. U.S. JVC Corp.*,[71] where the District Court for the Southern District of New York explored the various precedential developments regarding forum-selection and change of venue under § 1404(a). The District Court for the Southern District of New York discussed in detail which state's conflict of laws should apply. Finding that Puerto Rico choice of law rules apply, the court held that the clause was unenforceable due to Act 75's prohibition. Not being bound by the Court of Appeals for the First Circuit precedent (hereinafter, "First Circuit"), the District Court for the Southern District of New York's holding contradicted a line of cases holding otherwise. The First Circuit previously held that Act 75 does not invalidate a forum selection clause,[72] and that "[f]orum selection clauses are enforced as a matter of federal common law."[73] Moreover, in *Silva*, the First Circuit held that there were no *Erie* doctrine issues because the applicability of forum-selection clauses in PR is the same as in federal courts.[74]

Though the enforceability of forum-selection clauses in distributor's contracts in federal courts was somewhat unclear, the FAA's preemption of Act 75 was clearly established in *World Films*. Accordingly, the Legislature enacted further amendments in the year 2000 to counteract the effects of said decision. Specifically, the Legislature granted jurisdiction to a court in Puerto Rico to determine the validity of the arbitration agreement, and also created a controvertible presumption that a distributor's contract be treated as an adhesion contract.[75] The Legislature expressly stated in their Statement of Motives that "situations have arisen whereby the protection provided by said Act [75] has been weakened or diminished by the application of mechanisms or procedures that limit the remedies or options available to the parties, including the distributors, to act as claimants of their rights."[76] Furthermore, the Statement of Motives includes a specific reference to *World Films*.[77]

Evidently, Act 75 incorporates compelling public policy concerns recognized by the Legislature and the PRSC. Additionally, on at least two occasions,[78] the Legislature responded to court decisions to further safeguard those

---

[70] Royal Bed and Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda., 906 F. 2d 45 (1st Cir. 1990).
[71] Caribbean Wholesales & Service Corp. v. U.S. JVC Corp., 855 F.Supp. 627 (S.D.N.Y. 1994).
[72] Royal Bed and Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda., 906 F. 2d 45, 52 (1st Cir. 1990).
[73] Díaz Rosado v. Auto Wax Co. Inc., 2005 WL 2138794 at *2 (D. P.R. 2005) (*citing* Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993)).
[74] Silva v. Encyclopedia Britannica Inc., 239 F.3d 385 (1st Cir. 2001).
[75] Dealer's Contracts Act, Act No. 75 of June 24, 1964, 10 LPRA § 278b-3 (2018).
[76] Statement of Motives, Dealer's Contracts Act, Act. No. 75 June 24, 1964, 1964 L.P.R. 231.
[77] *Id.* at 2387.
[78] Amendmend in the years 1978 and 2000.

interests. Interpreting the 2000 amendments, two decisions from the TCA held arbitration clauses unenforceable by finding that there was no consent between the parties.[79] On the other hand, the enforceability of forum-selection clauses, and arbitration clauses under the FAA, also embody public policy concerns, but mainly in relation to interstate and international commerce. We will now turn to recent case law interpreting these contractual clauses in distributor contracts governed by Act 75.

IV. CURRENT DEBATES

A. Recent Act 75 Case Law

In *Maxon Engineering Services, Inc. v. M.R. Franceschini, Inc.*, the TCA held that a forum-selection clause and a choice-of-law clause within an arbitration provision required the parties to enforce all three mandates.[80] Specifically, the TCA stated that, under general circumstances, the forum-selection and choice-of-law clauses would be unenforceable under Act 75.[81] However, in *Maxon* the parties included the forum-selection and choice-of-law clauses within the arbitration agreement, thus bearing the enforcement power of the FAA.

In *D.I.P.R. MFG., Inc. v. Perry Ellis International Inc.*, the District Court for the District of Puerto Rico simply stated that the holding in *Maxon* was dicta.[82] Plaintiffs argued that *Maxon* was a "change in Puerto Rico's substantive treatment of forum selection clauses.'"[83] Citing *Silva* and various other cases within the First Circuit, the District Court for the District of Puerto Rico found ample authority upholding forum selection clauses in the federal courts under the PRSC's *Unisys* analysis, which brought the local jurisprudence in line with the federal court's decisions.[84] Furthermore, it did not read *Maxon* as "a demise of the rule established in *Unisys*."[85] The District Court for the District of Puerto Rico proceeded to characterize the TA's statement as dicta because the controversy in *Maxon* concerned an arbitration clause, thereby invoking the FAA, and not a forum-selection clause by itself.[86] The distinction is a subtle one, but corresponds to the significance garnered by the FAA across the decades.

Recently, the TCA again issued an opinion that could heighten the controversy. In *Caribe RX Services, Inc. v. Grifols, Inc.*, the TCA held a forum-selection

---

[79] L.M. Quality Motors, Inc. v. Motorambar, Inc., No. K PE 20113259, 2011 WL 6434213 (T.C.A. Oct. 21, 2011); Appliance Parts Corp. v. Whirlpool Corp., Empresas-Berrios, No. GPE2003-0077, 2004 WL 1592834 (T.C.A. Mar. 16, 2004).

[80] Maxon Engineering Services Inc. v. M.R. Franceschini Inc, No. KAC98-0728, 2001 WL 1764034 at *7 (T.C.A. 30 de noviembre de 2001)

[81] *Id.*

[82] D.I.P.R. Manufacturing, Inc. v. Perry Ellis International, Inc., 472 F. Supp. 2d 151, 156 (D. P.R. 2007).

[83] *Id.* at 154.

[84] *Id.* at 155.

[85] *Id.* at 156.

[86] *D.I.P.R. Manufacturing, Inc.*, 472 F. Supp. 2d at 156.

clause was unenforceable.[87] The TCA discussed *Unisys* emphasizing the fourth factor which prescribes an analysis of the clause's effect on the public policy of the State.[88] Furthermore, the TCA also distinguished *Caribe RX* from *World Films* by clarifying that the latter merely held that the FAA displaced the local prohibition of Act 75.[89] Significantly, the PRSC in *World Films* did not declare Act 75 unconstitutional.

The TCA in *Caribe RX* does not suppose the demise of *Unisys*, or anything along those lines. Under *stare decisis*, the TA cannot overrule any precedent set by the PRSC. On the contrary, *Caribe RX* specifically relies on *Unisys* to render the forum-selection clause unenforceable. Accordingly, a similar argument to those presented in *Maxon* can now be more clearly asserted. However, we again enter the murky seas of conflict of laws and forum-selection evinced in the federal court system.

B. The Haunting Specter of Erie

A suit by a distributor against a manufacturer under Act 75, filed in Puerto Rico's courts would, most likely, satisfy the requirements for removal to federal court[90] under diversity of citizenship.[91] Once in federal court, the question turns to what is the applicable law to the case. The *Erie* inquiry, when state and federal law are inconsistent, can be summarized as consisting of a three-step inquiry.[92] First, the court must determine whether there is a federal statute or rule of procedure on point. If there is, then federal law should be applied even if there is conflicting law. Second, when there is no federal statute or rule on point, the court must determine whether the state law is outcome determinative. If it is not outcome determinative, then federal law should be applied. Third, if the State law is outcome determinative, the court must answer whether there is an overriding federal interest that would justify employing the federal law. Additionally, the *Erie* inquiry also requires the court to properly identify what is the applicable state law. In *Commissioner of Internal Revenue v. Bosch*, the Court held that a "State's highest court is the best authority on its own law," but when there are no decisions available, federal courts should consider lower state courts decisions and should apply them if they believe the highest court would affirm the lower court.[93]

Under Act 75, the TCA recently held in *Caribe RX* that forum-selection clauses in distributor's contracts are unenforceable. However, the PRSC has yet to explicitly address the issue. Therefore, the federal courts must decide what the current state law is regarding forum-selection clauses under Act 75. Considering

---

[87] Caribe RX Servs., Inc. v. Grifols, Inc., No. KLCE201400314, 2014 WL 2527399 (T.C.A. 14 de abril de 2014).
[88] *Id.* at 4.
[89] *Id.*
[90] 28 U.S.C. § 1441.
[91] *Id.* § 1332.
[92] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 351-65 (2016).
[93] Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 465 (1967) (*quoted in* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 364 (2016)).

Caribe RX, *Maxon*, and the long history of amendments to Act 75, it would be difficult for a federal court to hold that forum-selection clauses are enforceable in distributor's contracts under state law. Even if, *arguendo*, the district courts were to follow *Unisys*, an argument can be made that the PRSC did not adopt federal jurisprudence regarding general enforceability of forum-selection clauses as the First Circuit has stated,[94] and the district courts have followed.[95] In particular, the PRSC in *Unisys* stated that "because there is no applicable jurisprudence in our jurisdiction [though they refer to *Walborg*], we will look to North American federal jurisprudence, where the subject has been addressed extensively, *for orientation and for its persuasive value*."[96] Though not entirely clear whether this constitutes a *Long* statement indicating separate, independent and adequate state grounds,[97] the First Circuit and district courts have routinely ignored the fourth factor of *Unisys*, i.e. enforcing a forum-selection clause defeats State public policy embodied in Act 75. Therefore, a stronger argument can be made that the analysis under *Unisys* should lead federal courts to hold forum-selection clauses unenforceable under Act 75.

If state law conflicts with federal common law regarding the general applicability of forum-selection clauses, as discussed above, a court would move on to the first step of the *Erie* doctrine. To determine what federal statute, if any, is on point, the motion used to enforce a forum-selection is significant. If the motion is to dismiss, then the criteria in *Bremen* should apply, and if the motion is to transfer under § 1404(a), then *Stewart* would control.[98] Accordingly, if the hypothetical distributor's contract includes a forum-selection clause that refers to a forum outside of the United States, then the party opposing the dismissal has the burden of proving the unreasonableness or unjust nature of the clause under *Bremen*.[99]

Under *Stewart*, federal common law regarding forum-selection clauses and change-of-venue motions of § 1404(a) would pre-empt Act 75. However, *Ferens* casts a serious doubt on the pre-emption of federal common law *vis-à-vis* the applicability of state law under *Erie*. Accordingly, determining whether there exists a conflict between federal and state law, and whether that federal law is applicable, is an uncertain issue. Additionally, state law regarding the applicability of forum-selection clauses under Act 75 has not been resolved by Puerto Rico's

---

[94] Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 386 n.1 (1st Cir. 2001).

[95] *See D.I.P.R. Manufacturing, Inc.*, 472 F. Supp. 2d 151, 154 (D. P.R. 2007) (relying heavily on *Silva* and *Lambert* for the proposition that *Erie* is evaded because of the similarity between federal and state law).

[96] Unysis Puerto Rico, Inc. v. Ramallo Brothers Printing, Inc., 128 D.P.R. at 855 (translation by the author).

[97] Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

[98] Outek Caribbean Distributors, Inc. v. Echo, Inc., 206 F. Supp. 2d 263, 266 (D. P.R. 2002). *See* Silva v. Encyclopedia Britannica Inc., 239 F.3d 385 (1st Cir. 2001) (applying *Bremen* for a motion to dismiss); Royal Bed and Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 51 (D. P.R. 1990) (recognizing that § 1404 was inapplicable, held that *Stewart* factors very similar to *forum non conveniens* factors of *Bremen*).

[99] *See* Royal Bed and Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 52–53 (1st Cir. 1990) (discussing the public and private interests considered, and the heavy weight of consent through "arms-length negotiations").

highest court. Therefore, the federal courts, as a cautionary measure, may certify the question to the PRSC before ruling on the constitutional supremacy of federal law, or before disentangling the conflicts between "haunting specter of *Erie*" and § 1404(a).[100]

Regarding the remaining two steps of the *Erie* inquiry, it is fairly certain what the analysis would look like. In the second step, the state law is clearly outcome determinative, especially because the cause of action arises out of Act 75. In the third and final step, the federal interests of promoting international commerce and party consent highlighted by the case law could be construed to have garnered greater attention in a globalized world, while the same would apply to Act 75's public policy interests. However, those federal interests are somewhat vague when compared to other *Erie* doctrine case law.[101]

CONCLUSION

Act 75 emerged out of strong public policy concerns fostered by an increase in international and interstate commerce. The enforceability of forum-selection clauses, and other contractual clauses, also responded to a similar set of pressures. However, neither jurisprudential development interpreting these issues evidences a clear and straightforward approach. Accordingly, and in light of recent developments in Puerto Rico's Court of Appeals, the "haunting specter of *Erie*" might be on the rise. The issue will remain uncertain as long as the Supreme Court of Puerto Rico does not establish the correct interpretation of Act 75's prohibition under state law and the federal court's do not clarify the applicability of the *Erie* doctrine in § 1404(a) motions. Moreover, the complex list of relevant factors adduced by the case law, including public policy concerns, cast a shadow of doubt over any uniformity in future decisions. This murkiness, in turn, might open new avenues for small distributors to fall under the protection of Act 75.

---

[100] The PRSC provides for "Interjurisdictional certification." *See* Watchtower Bible v. Mun. Dorado I, 192 DPR 73 (2014) (answering an interjurisdictional certification); Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974) (concluding that resort to certification of a state law question is "particularly appropriate in view of the novelty of the question and the great unsettlement of [state] law.").

[101] *See* Byrd v. Blue Ridge Rural Electric Cooperative Inc., 356 U.S. 525 (1958) (overriding federal interest in providing jury trial).