

Defending Your Client's Choice of Forum

By *Russell F. Conn and William P. Corbett, Jr.*

Conn Kavanaugh Rosenthal Peisch & Ford, LLP, Boston

Forum selection clauses – contract language in which the parties specify in advance the jurisdiction in which future disputes are to be litigated – have become a prominent feature on the modern commercial landscape. Eliminating uncertainty and ensuring a convenient locus for the adjudication of disputes, such clauses are increasingly used in all varieties of contracts.

Because such language is no longer attackable on its face, plaintiffs' attorneys have attempted a wide variety of pleading tactics to avoid enforcement of clauses that specify unfavorable fora. Though not universally successful, defense attorneys have often succeeded in resisting such efforts.

The Bremen

Revolutionary when it was decided two and a half decades ago, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), set forth what has become widely accepted across the United States as the standard governing the enforcement of forum selection clauses. Such clauses historically had been looked upon with disfavor, with many courts declining to enforce them because they were "contrary to public policy" or operated to "oust the jurisdiction" of the court in which suit was brought. *Id.* at 9. However, it is now axiomatic in most jurisdictions that forum selection clauses are "prima facie valid." *Id.* at 15.

Forum selection agreements embody the parties' consent to the personal jurisdiction of the specified tribunal. *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *Inso Corp. v. Dekotec Handelsges, mbH*, 999 F. Supp. 165, 166 (D. Mass. 1998). Modern courts are therefore reluctant to disturb them. Courts have instead imposed "a heavy burden of proof" on parties challenging such clauses. *The Bremen*, 407 U.S. at 17; *Carnival Cruise Lines, Inc v. Shute*, 499 U.S. 585, 592-95 (1991).

A forum selection clause will generally be enforced unless the resisting party shows that enforcement would be "unreasonable or unjust, that the clause [is] invalid for such reasons as fraud or overreaching," or that "enforcement would contravene a strong public policy of the forum in which suit is brought." *The Bremen*, 407 U.S. at 15. At least one court has held that [no] satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arms' length." *Smith, Valentino & Smith, Inc. v. Superior Court*, 131 Cal. Rptr. 374 (1976).

Contracts of adhesion

Accordingly, even forum selection language contained in a contract of adhesion is not ordinarily avoidable in the absence of specific evidence that the clause is fundamentally unfair. *Carnival Cruise Lines*, 499 U.S. at 592. That the contract containing such language was entered into on a "take-it-or-leave-it" basis, and was not the subject of bargaining, however, is generally a relevant consideration in determining whether to enforce a forum selection clause. Restatement (Second) of Conflict of Laws, Section 80, Comment c (1971 and rev. 1989).

Generally, mere inclusion of the clause in a contract of adhesion will not defeat its enforcement unless the resisting party can show that the clause resulted from the "unfair use of superior power to impose the contract upon the other party" or it was not within the reasonable expectations of that party. *Cal-State Business Products v. Ricoh*, 16 Cal. Rptr. 2d 417, 425 (Cal. App 3 Dist. 1993) (emphasis added). An "unfair" imposition of such a term would likely involve the imposition of a forum selection clause as a means of discouraging legitimate claims. *Carnival Cruise Lines*, 499 U.S. at 595.

What's the effective scope?

Forum selection clauses are now an established component of modern commerce. What has remained unsettled is the effective scope of such clauses.

Unsatisfied with specified fora, some plaintiffs' attorneys have attempted to limit the types of claims subject to such clauses. Others have attempted to cloak contract claims with the trappings of tort in their efforts to avoid the agreed-upon forum. Still others have attempted to join unnecessary parties as defendants in order to defeat forum selection clauses. All of these tactics can be resisted successfully.

Drafting Can Be Dispositive

A plaintiff's success in avoiding the agreed-upon forum generally depends upon the precision with which the clause was drafted. The effective scope of forum selection language depends in large part on the clause that is negotiated. For example, it is well settled that a choice of law clause does not operate as a forum selection clause in the absence of language expressly specifying the jurisdiction in which disputes are to be resolved. *Telco Communications, Inc. v. New Jersey State Firemen's Mut. Benev. Ass'n*, 41 Mass. App. Ct. 225, 227-28 (1996). If a party wants to specify a forum in which disputes are to be resolved, it should directly and unequivocally specify that forum, as well as the types of disputes to be adjudicated there.

Obviously, defense counsel are not often in a position to dictate the forum selection clause they will ultimately litigate. Even looking retrospectively, however, the defense attorney should pay close attention to such language.

Hugel v. Corporation of Lloyd's, 999 F.2d 206 (7th Cir. 1993), illustrates the effect of an expansively drafted forum selection clause. In that case, the parties executed a forum selection clause providing that "the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's." The Seventh Circuit held that the plaintiffs' claims – alleging unlawful disclosure of confidential information – were governed by that clause. *Id.* at 209. The Court reasoned that a party to such a clause may not avoid its effect by arguing that it should apply only to disputes concerning membership duties relating to insurance underwriting. The expansive forum selection language inserted into the contract was dispositive.

By way of contrast, *Jacobson v. Mailboxes, Etc. U.S.A., Inc.*, 419 Mass. 572 (1995), demonstrates how draftsmanship can minimize the effect of a forum selection clause. That case involved a franchise agreement which provided that "Venue and Jurisdiction for all actions enforcing this agreement are agreed to be in the City of San Diego, County of San Diego, California." *Id.* at 573. Explicitly accepting for the first time "the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so," *id.* at 574-75, the Massachusetts Supreme Judicial Court nonetheless declined to apply that clause to wrongs allegedly committed before the parties entered into the franchise agreement. *Id.* at 579.

The Court reasoned that the clause "by its terms relates only to actions to *enforce* the agreement and not to actions based on unlawful conduct that induced a franchisee to sign the agreement." *Id.* at 578 (emphasis in original). The party seeking to enforce the clause was limited by the language it drafted. Unlike the defendants in *Hugel*, who obtained the benefit of the expansive language they drafted, the Jacobson defendant was constrained by the narrow language it inserted into its standard franchise agreement.²

Artful Pleading Will Not Defeat Careful Drafting

An inexorable corollary to *The Bremen* rule is its limitation to clauses not procured by "fraud, duress, the abuse of economic power or other unconscionable means." Restatement (Second) section 80. This limitation has tempted many plaintiffs' lawyers to use artful pleading as a means for litigating their claims in fora that are more favorable than the ones their clients contractually agreed upon. By alleging fraud, these attorneys have attempted to circumvent the application of the otherwise applicable forum

selection clauses.

A defense attorney confronted with such clever pleading should not be dissuaded from arguing the applicability of the forum selection clause. A plaintiff generally will not be permitted to avoid the effect of a forum selection clause by alleging extracontractual misconduct, when the gravamen of the complaint principally focuses on an alleged breach of the contract.

Courts have often refused to "accept the invitation to reward attempts to evade enforcement of forum selection agreements through 'artful pleading of [tort] claims' in the context of a contract dispute." *Lambert v. Kysar*, 983 F.2d 1110,1121 (1st Cir 1993). "[W]here the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement" of a bargained-for forum selection clause. *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir.), cert. denied, 464 U.S. 938 (1983). Rather, "contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties." *Lambert*, 983 F.2d at 1121-22 A plaintiff also may not "vitiating the effect of a forum selection clause simply by alleging peripheral claims that fall outside its apparent scope." *Jacobson*, 419 Mass. at 579.

For similar reasons, a generalized claim of pre-contract misconduct is insufficient to vitiate an otherwise valid forum selection clause. *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1138 (6th Cir. 1991). The so-called fraud exception "does not mean that any time a dispute is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means only that [a] . . . forum-selection clause in a contract is not enforceable *if the inclusion of that clause in the contract* was the product of fraud or coercion." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n. 14 (1974) (emphasis in original).

Joining Strangers

Just as a plaintiff cannot defeat a well-drafted forum selection clause by pleading extraneous claims, he or she also cannot join unnecessary parties as defendants to accomplish the same objective. The fact that all to a lawsuit were not signatories to the contract containing the forum selection clause does not necessarily render that clause inoperative. In general, for a nonparty to be bound by a forum selection clause, the party must be "closely related" to the dispute such that it becomes foreseeable that the party will be so constrained. *Hugel*, 999 F.2d at 209; *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988).

Furthermore, the presence of a nonsignatory defendant will not defeat a

forum selection clause if that defendant agrees to be governed by the clause and the pleadings do not allege that a nonsignatory's conduct caused a separate harm. *Coastal Steel*, 709 F.2d at 203.

In *Lu v. Dryclean—U.S.A Of California, Inc.*, 14 Cal Rptr. 2d 906, 908 (Cal. App. 1992), the forum selection clause was enforced in a suit alleging fraudulent representations that induced the plaintiffs to enter into the operative agreement. Since two defendants who were not parties to the agreement were alleged to have participated in those representations, and since the alleged conduct was 'closely related to the agreement,' the fact that those two defendants did not sign the agreement did not render the forum selection clause unenforceable.

The Court in *Jordan v. SEI Corp.*, 1996 WL 296540 * 6 (E.D Pa.), reached a similar conclusion where the plaintiffs had alleged "an umbilical link" between the defendants who were parties to the agreement at issue and the remaining defendants.

Of course, if a plaintiff argues that claims or parties are too attenuated from the contract to warrant application of a forum selection clause, a defense attorney might attempt to sever those extraneous claims or parties from the main case, which would then proceed in the contractually-designated forum. See Fed. R. Civ. P. 21 (severance of misjoined claims or parties).

Focus on the Dispute at Hand

Two and a half decades of litigation since *The Bremen* reflect both an increased use of forum selection clauses in the stream of commerce and increasingly clever stratagems by plaintiffs' attorneys in their attempts to avoid agreed-upon fora. By focusing on the actual nature of the dispute at hand, rather than a plaintiff's characterization of the dispute, and by paying close attention to the language of the forum selection clause, a defense attorney will be well-equipped to ensure that disputes are litigated in the jurisdiction for which his or her client bargained.

End Notes

1. In deciding *The Bremen*, the Supreme Court partly relied upon the similar rule articulated a year earlier by the American Law Institute and advanced by other "noted scholars." 407 U.S. at 10 n.13. The Restatement (Second) of Conflict of Laws originally provided that "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." Restatement (Second) Conflict of Laws § 80 (1971). The Restatement now reads: "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable." Restatement (Second) Conflict of

Laws § 80 (1988 Rev Main Vol. Pkt. Pt.).

2. For similar reasons, choice of law provisions should also be carefully drafted and applied, as choice of law considerations will often mandate whether a forum selection clause will be enforced. In *Jacobson*, for example, the Court applied California law when determining the enforceability of a forum selection clause in Massachusetts, because the underlying contract specified that it was "to be construed under and governed by the laws of the State of California." 419 Mass. at 575.