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Forum Selection Clauses

Despite presumption of validity, they can still come under attack.

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THE SIGNIFICANCE of a forum selection clause, once disdained, now embraced,[1] varies depending on whether the practitioner is drafting the provision or seeking to enforce it. What seems like a clear and simple boilerplate section in a standard contract, can, should the parties fall out, turn into a clause rife with ambiguity encouraging motion practice. To best serve our clients, transactional attorneys drafting contracts can learn from the practical experience of litigators.

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Clauses Presumed Valid

New York attorneys should presume that since the Supreme Court's holding in M/S *Bremen v. Zapata Off-Shore Co.*,[2] a choice of forum clause is "prima facie valid" and enforceable unless the clause is "unreasonable under the circumstances"[3] resulting in the virtual deprivation of a party's day in court.[4] The U.S. Court of Appeals for the Second Circuit has explicitly held such clauses are presumptively valid;[5] moreover, the court "gives substantial deference to [forum selection] clauses…where the choice of forum [is] made in an arms length negotiation by experienced and sophisticated businessmen."[6]

New York state courts also respect choice of forum provisions.[7] Indeed, in certain situations, they are statutorily bound to enforce them.[8] If forum selection clauses are enforceable absent an important countervailing interest,[9] why is an ostensibly enforceable clause negotiated between two commercially sophisticated parties so often the subject of dispute?

The answer is that, unlike New York state courts, in federal courts,[10] the decision to transfer or dismiss a case lies not in a statutory mandate, but within the equitable powers of the federal judiciary.[11] Judges weigh a party's right to contract against an interested state's legislative policies, and indeed, their own authority to decide questions of forum.[12] More vexingly perhaps, because of the quasi-procedural/quasi-substantive nature of choice of forum, federal courts sitting in diversity, owing to the Erie Doctrine, have had difficulty consistently deciding whether federal procedural law or state substantive law applies.[13]

Differing state laws,[14] the lack of consistency among circuits as to the substantive or procedural question (and the various tests for weighing the equities)[15] combined with the unpredictability of decisions based upon judicial discretion, encourage defendant's counsel to move to dismiss or transfer. Despite the trend in the common law toward the privatization of forum selection[16] and a statutory provision, passed by the New York State Legislature, codifying a commercial party's right to choose its forum,[17] the door of opportunity for transfer or dismissal is slimly ajar.

State Court

A commercial litigant in New York state court will have his forum selection clause enforced. In 1984, the New York Legislature enacted Sections 5-1401 and 5-1402 of General Obligations Law. These sections provide that parties may choose New York law if the underlying transaction involves $250,000 or more whether or not such contract bears a reasonable relation to the state. Additionally, if a party elects New York law and (i) the transaction involves an amount of $1 million or more and (ii) the parties agree to submit to the jurisdiction of a New York court, a New York court must entertain such actions.[18]

Moreover, New York CPLR 327(b) precludes a court from staying or dismissing the action on the grounds of inconvenient forum. Yet, in a very few instances, the state court reserves the right to set aside a forum selection clause for the same reasons set forth in *Bremen*.[19] The New York State Legislature and courts have unequivocally stated that

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New York's public policy is to encourage New York as a choice of forum for large commercial litigations.

Federal Court

New York federal courts, not limited by statutory constraints, have decided that a choice of forum is procedural in nature,[20] and therefore governed by federal case law—*Bremen* and its progeny. In federal court, General Obligations Law 1402 is merely used to demonstrate that New York's public policy favors the enforcement of forum selection clauses.[21] It is in federal court, therefore, that a forum selection clause is most vulnerable.

The analysis often begins with whether the provision is mandatory or permissive. Unfortunately, courts have not been consistent with respect to that determination. For example, in *Orix Credit Alliance, Inc. v. Mid-South Materials Corp.*, the court found a clause to be permissive, because the operative language merely stated the parties' agreement to jurisdiction.[22] The court opined that more "compelling" language such as a "court shall have jurisdiction"[23] would have created a mandatory clause. Conversely, in *Cambridge Nutrition v. Fotheringham*, the court in the Southern District of New York was not nearly so stringent. The clause read "[a]ll parties hereby submit to the jurisdiction of the courts…." The court found that the instant clause was mandatory[24] (owing to the fact that the preceding choice of law sentence read: New York law shall govern).[25]

A year later, the Second Circuit, overturning the Eastern District of New York, opined, "Although the word 'shall' is a mandatory term, here it mandates nothing more than that the [Greek courts] shall have jurisdiction."[26] The court found that "exclusive jurisdiction is [not] conferred by a contract term specifying which courts 'shall have jurisdiction'…unless it contains specific language of exclusion."[27] *Boutari* has created a precedent—generally heeded—that in addition to the word 'shall,' clauses should indicate "the parties' intent to make jurisdiction exclusive."[28]

The court may consider a 1404(a) transfer motion even though there is jurisdiction based on a valid forum selection clause.[29] It is a further testament to the conflict in case law (and the difficulty in determining the state of jurisprudence on this issue) that the Second Circuit utilizes more than one analysis to examine an FRCP 1404(a) motion to transfer.

Initially, there was doubt whether the *Bremen* doctrine could extend beyond admiralty law.[30] In order to address the issue, informed by *Bremen*, the court utilized a convenience analysis set forth in *Stewart Org. v. Ricoh Corp.* (see discussion infra). Although, some two years later, in *Jones v. Weibrecht, Jr.*,[31] the court did extend the *Bremen* doctrine to federal courts sitting in diversity, New York courts continue to use both analyses.[32]

Under *Bremen*, the party must convince the court that enforcement would be unreasonable and unjust, or that the clause is the result of fraud or overreaching.[33] Reasonableness is measured by whether the clause deprives the complaining party of its day in court due to the grave inconvenience or unfairness of the selected forum, or if the clause contravenes a strong public policy of the forum state.[34] Under *Bremen*, a properly drafted mandatory forum selection agreement will control absent any countervailing public policy. Under *Ricoh*, a mandatory clause carries more weight than a permissive clause, but neither is dispositive.

Notwithstanding conflicting court decisions, the practitioner ought not assume that negotiated forum selection clauses under New York law are easily attacked.

Although *Jones* extended *Bremen* to the Second Circuit, *Ricoh*, which embodies the flexible standards of FRCP 1404(a)[35] continues to be applied in New York as well. A *Ricoh* analysis examines the convenience of the parties and witnesses, the ease of access to proof, the ability to compel unwilling witnesses, a forum's familiarity with governing law, and the interests of justice.[36] Unlike *Bremen*, under this analysis, the forum selection clause, whether mandatory or permissive, is merely a factor to be weighed. Indeed, the court stated explicitly that "a forum selection clause is determinative of convenience…. [b]ut… other factors…may count for more."[37]

Drafting Considerations

Careful drafting may help assure certainty. The following is a suggested forum selection clause:

> Section 1.1: Governing Law. This Agreement and all disputes or controversies arising out of or relating to this Agreement or the transactions contemplated hereby shall be governed by, and construed in accordance with the internal laws of the State of New York, without regard to the laws of any other jurisdiction that might be applied because of the conflicts of laws principles of the State of New York other than Section 5-1401 of the New York General Obligations Law.
>
> Section 1.2: Submission to Jurisdiction. Each of the parties irrevocably agrees that any legal action or proceeding arising out of or relating to this Agreement and the transactions contemplated hereby or for recognition and enforcement of any judgment in respect hereof brought by the other party or its successors or assigns may be brought and determined in any New York State or federal court sitting in the Borough of Manhattan in the City of New York, and each of the parties hereby irrevocably submits to the exclusive jurisdiction of the aforesaid courts for itself and with respect to its property, generally and unconditionally and agrees not to commence any action, suit or proceeding relating thereto except in such courts.
>
> Each of the parties further agrees to accept service of process in any manner permitted by such courts. Each of the parties hereby irrevocably and unconditionally waives, and agrees not to assert, by way of motion or as a defense, counterclaim or otherwise, in any action or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby, (a) any claim that it is not personally subject to the jurisdiction of the above-named courts for any reason other than the failure lawfully to serve process, (b) that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) and (c) to the

fullest extent permitted by law, that (i) the suit, action or proceeding in any such court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper or (iii) this Agreement, or the subject matter hereof, may not be enforced in or by such courts.

Note that the clause above is as narrowly drawn as possible allowing for little elasticity in interpretation. A practitioner should consider the following issues when drafting such a clause.

Although consent to personal jurisdiction is implicit in a forum selection clause, it is always advisable to include an express consent to personal jurisdiction.

Jurisdiction should be mandatory and exclusive. This can be attained by using the directive mood, that is, a "shall" statement, combined with an explicit exclusion of all other jurisdictions.

The dispute that triggers the application of the clause should be defined as broadly as possible; therefore, "arising out of or relating to" is preferable to "the enforcement of any obligation contained herein" or "any litigation upon any of the contract terms."

Venue. In addition, while forum selection clauses often specify an entire state as the designated forum, one should consider the benefits of designating a specific county or federal judicial district. This decision is obviously an advantage in large states such as Texas, but choosing a county like New York, for example, may not only provide an advantage to the litigator familiar with the courts of the county, but, if the chosen venue is local to the firm, result in a significant savings for the client.

Another consideration may be to limit venue to the state courts for all claims other than claims as to which federal jurisdiction is exclusive. If it is critical to remain in New York state, the clause should choose New York state courts to the exclusion of all other jurisdictions because of the GOL provisions.

Substantive Law. Indicating the substantive law that applies may seem obvious, but worthy of careful consideration at the drafting stage. For example, if the practitioner wants to ensure a New York forum, explicitly providing that the document is governed under 1401 and 1402 of the GOL, except to the extent the federal law applies, should prove effective.

Waivers of Motion. Even though a waiver of motion to transfer or dismiss would be, without a doubt, redundant in a narrowly drawn mandatory forum selection clause, it may be just such a provision that secures the client's choice of forum in a permissive clause.

Conclusion

Notwithstanding conflicting court decisions, the practitioner ought not assume that negotiated forum selection clauses under New York law are easily attacked. They are not. Courts have consistently held that these clauses, particularly between commercially sophisticated parties, are presumptively valid, and the burden of proving them unenforceable is heavy. The purpose of this article is twofold. First, to inform practitioners of steps that can be taken to avoid what is at least an irritating development during a litigation and what can become a nightmare if a lawyer finds herself in a jurisdiction hostile to her client's legal position.

The second purpose is to illuminate the disarray of the law in this area, and the problems an attorney may face should the choice of forum provision in her client's contract be attacked. Best to avoid, to the extent possible, a court's review of the parties' intent, but if a litigator finds herself in such unhappy circumstances, she can at least apprehend the complexities of the task at hand.

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1. *Mercury W. A.G., Inc. v. R.J. Reynolds Tobacco Co.*, No. 03-Civ.-5262 (JFK), 2004 WL 421793 (S.D.N.Y. March 5, 2004).
2. 407 U.S. 1 (1972); See also, P. Kornfield, "The Enforceability of Forum-Selection Clauses After *Stewart Organization, Inc. v. Ricoh Corporation*," 6 ALASKA L. REV. 175 (1989) for a discussion of *Zapata's* factors for determining reasonableness.
3. Id. at 10.
4. Id. at 18.
5. *Strategic Mktg. & Commc'n., Inc. v. Kmart Corp.*, 41 F.Supp.2d 268, 271 (S.D.N.Y. 1998).
6. *New Moon Shipping Co. v. Man B&W Diesel A.G.*, 121 F.3d 24, 29 (2d Cir. 1997) (quoting *M/S Bremen*). The Southern District is unmoved by the argument of "unequal bargaining power," see, e.g. *Mercury W. A.G.*, 2004 WL 421793. ("According to plaintiff, the forum selection clause is the result of a bigger, more powerful company exerting its strength to take advantage of an unequal business partner in a lesser bargaining position. This is an argument that carries extremely little weight with the court.")
7. *Fleet Capital Leasing/Global Vendor Fin. v. Angiuli Motors, Inc.*, 790 N.Y.S.2d 684 (2d Dept. 2005).
8. For example, under Gen. Obligations Law §§1401-1402, see discussion infra.
9. *M/S Bremen*, at 12.
10. See discussion of Gen. Obligations Law §§1401-1402 infra.
11. See discussion infra regarding the *Bremen*, *Ricoh* and federal forum non conveniens analyses.
12. See Michael E. Solimine, "Forum-Selection Clauses and the Privatization of Procedure," 25 CORNELL INT'L L.J. 51 (1992), for a discussion of the increasing deference to party autonomy in jurisdictional matters.
13. On one hand, a forum selection clause designates where a dispute will be brought for adjudication and may be deemed procedural. On the other hand, a forum selection clause in a contract…has been bargained for between the parties…consti-tut[ing] a substantive part of the contract. See Young Lee, "Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts," 35 COLUM. J. TRANSNAT'L L. (1997) 663, citing *Piercy v. Black*, 801 F.2d 1075, 1089 (8th Cir. 1986).
14. Michael E. Solimine, "Forum-Selection Clauses and the Privatization of Procedure," 25 CORNELL INT'L L.J. 51 (1992).
15. Some federal courts have held that state laws control in diversity actions. Other federal courts have ruled that *Bremen* applies. Yet, others have refused to provide a definitive answer, on the grounds that federal and state laws are equally favorable to forum selection clauses. The U.S. Court of Appeals for the Eighth Circuit alternated between both views in the same year. See Jason W. Yackee, "Choice of Law Considerations in the Validity and Enforcement of International Forum Selection Agreements: Whose Law Applies," 9 UCLA J. INTL. FOREIGN AFF. 43-96 (2004).
16. See Michael E. Solimine, "Forum-Selection Clauses and the Privatization of Procedure," 25 CORNELL INT'L L.J. 51 (1992).
17. Gen. Obligations Law 1402.
18. *Cambridge Nutrition A.G. v. Fotheringham*, 840 F.Supp. 299, 302 (S.D.N.Y. 1994), citing *Banco do Commercio e Industria de Sao Paolo S.A. v. Esusa Engenharia e Construcoes S.A.*, 173 A.D.2d 340, 342 (1st Dept. 1991) ("[T]he legislature has specifically expressed its willingness that the courts of this state exercise jurisdiction…defendants, having agreed,…may not now argue that this action should be dismissed."); *Rochester Cmty. Sav. Bank v. Smith*, 569 N.Y.S.2d 277, 278 (4th Dept. 1991); *Credit Francais Int'l., S.A. v. Sociedad Financiera de Comercio, C.A.*, 490 N.Y.S.2d 670, 676 (Sup. Ct. New York Co. 1985) ("New York, as the center of international trade and finance, has expressly recognized…that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationships.").
19. *Babcock & Wilcox Co. v. Control Components, Inc.*, 614 N.Y.S.2d 678, 681 (Sup. Ct. New York Co. 1993), citing *British West Indies Guar. Trust Co. v. Banque Int'l A Luxembourg*, 567 N.Y.S.2d 731 (1st Dept. 1991).
20. *Jones v. Weibrecht*, 901 F2d 17, 19 (2d Cir. 1990).
21. *Composite Holdings, L.L.C. v. Westinghouse Elec. Corp.*, 992 F.Supp. 367, 370; *Nat'l. Union Life Ins. Co. v. Casmalia Res. Ltd.*, No. 89-Civ-1045 (SWK), 1990 WL 102199 (S.D.N.Y. July 11, 1990).
22. 816 F.Supp 230 (S.D.N.Y. 1993). The exact wording of the contract read: "[the parties] agree to the jurisdiction of a court located in the state and county of New York."
23. Id.
24. 840 F.Supp. 299 (S.D.N.Y. 1994).
25. Id.
26. *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs. Inc.*, 22 F.3d 51 (2d Cir. 1994).
27. Id.
28. *Hudson Highlands Veterinary Med. Group v. Veterinary Equip. & Tech Supply*, 390 F.Supp.2d 393, 394. See also, *City of New York v. Pullman, Inc.*, 477 F.Supp. 438, 442 n. 11. (Although there are no magic words to create a mandatory enforceable forum selection clause, specific language of exclusion…is required); But cf *Brennen v. Phyto-Riker Pharm. Ltd*, No. 01-CIV-11815 (DLC), 2002 WL 1349742 (S.D.N.Y. June 20, 2002) and *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993).
29. *Nat'l. Union Life Ins. Co. v. Casmailia Res. Ltd.*, No. 89-Civ-1045 (SWK), 1990 WL 102199 (S.D.N.Y. July 11, 1990).
30. *Mercury W. A.G., Inc.*
31. 901 F.2d 17 (2d Cir. 1990).
32. *Pisani v. Staten Island Hospital*, 205 WL 468311 *1.
33. *Mercury W. A.G., Inc. v. R.J. Reynolds Tobacco Co.*, No. 03-Civ.-5262 (JFK), 2004 WL 421793 (S.D.N.Y. March 5, 2004).
34. Id.
35. *Composite Holding, LLC v. Westinghouse Elec. Corp.*, 992 F.Supp. 367 (S.D.N.Y. 1998).
36. *Ricoh* at 22.
37. *Orix Credit Alliance, Inc. v. Mid-South Materials Corp.*, 816 F.Supp. 230 (S.D.N.Y. 1993).