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TRENDS

FORUM SELECTION

Forum selection clauses—a valuable tool for minimizing the risks of class action litigation before unfamiliar courts and unfavorable jury pools—often come under attack by opponents based on choice-of-law issues, attorneys Sean A. Commons and Amanda V. Lopez say in this BNA Insight. The authors contend an emerging body of federal court decisions offers a new line of defense by differentiating forum selection and choice-of-law issues.

An Emerging Trend in Enforcement of Forum Selection Clauses in Federal Court

BY SEAN A. COMMONS AND AMANDA V. LOPEZ

For businesses that operate in multiple states or overseas, a forum selection clause can minimize the risk of being hailed into a distant and unfamiliar court, as well as trying a case before an unfavorable jury pool.

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With careful research and drafting, a forum selection clause can be a powerful ally in your efforts to mitigate the expense and risks associated with litigation. But that is why such clauses often come under attack, as opponents attempt to regain the advantage of litigating in their chosen forum. For those unwilling to give up on forum selection clauses, an emerging body of federal court decisions offers hope, at least when litigating in federal court.

State and federal courts generally consider a forum selection clause presumptively reasonable so long as any party to the contract has maintained offices or conducted activities in the forum, or the contract was negotiated or performed in the forum.[1] Most courts place the burden on the party opposing enforcement to demonstrate that a clause is unreasonable, particularly in disputes between sophisticated parties[2] or in class ac-

[1] *See, e.g., Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632-33 (1985); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

[2] *See, e.g., Ingenieria Alimentaria Del Matatipac S.A. de C.V. v. Ocean Garden Products, Inc.*, 320 F. App'x 548, 549 (9th Cir. 2009) (enforcing clause designating Mexico); *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336, 1338 (9th Cir. 1997) (Korea); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) (England); *Instrumentation Assoc., Inc. v. Madsen Elec.*, 859 F.2d 4, 9 (3rd Cir. 1988) (Canada).

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tions,[3] where courts increasingly have rejected complaints of undue burden.

Opponents have adapted to the modern presumption favoring forum selection clauses by advocating for narrow interpretation of clauses[4]; exploiting disagreements among state and federal courts about how to construe clauses[5]; and by suing parents, subsidiaries, affiliates, or partners who were not parties to contracts containing the forum clause.[6]

Even when you and your client have drafted a clause to head-off attacks, the other side often can manufacture a fall-back argument—that enforcement would violate public policy because the designated forum has different procedural or substantive laws.

As a practical matter, it is impossible to account for every potential difference in the laws of the 50 states when drafting a forum selection clause. Fortunately, and perhaps for this very reason, courts generally do not consider any difference in the laws of two states sufficient to defeat a forum selection clause, even when transferring a case will impact the outcome or relief available.[7] Indeed, many courts have upheld forum selection clauses notwithstanding an objector's assertion of claims based on unwaivable statutory rights,[8] unless the statute in question explicitly forbids litigating outside of the forum.[9]

A number of state and federal courts, however, frequently refuse to enforce forum selection clauses when confronted with an objection that transfer could result in the loss of unwaivable or fundamental rights.[10] The rationale offered by these courts is that, if parties cannot agree by contract to waive particular rights afforded under local law, then they should not be able to waive those rights through a forum selection clause.

These courts often find added justification for believing that a forum selection clause will violate a strong public policy of the local forum when a contract contains a choice-of-law clause,[11] or when state courts in the designated forum do not, for example, permit class actions, punitive damages, or other remedies.[12] In those circumstances, some courts assume that a transferee court will apply its local laws without regard to the public policies of the original forum.

Emerging Trend

An emerging body of federal district court decisions provides a straightforward and effective counterpoint to this line of authority, at least when seeking to transfer a case from one federal district court to another. ''A forum selection clause determines where the case will be heard,'' not the law that will govern once a case is transferred.[13] The validity of a forum selection clause is ''separate and distinct'' from choice-of-law questions.[14] For choice of law to be relevant, one must assume that a judge in the transferee forum lacks either the ability ''to address the legal issues related to'' choice of law[15] or the willingness to ''safeguard'' fundamental rights.[16] Neither assumption is appropriate or warranted,[17] especially when the transferee forum is a co-equal federal district court judge.

In addition, depending on where the two district courts at issue sit, choice-of-law questions may be irrelevant because (1) the transferee court is required to ap-

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[3] *See, e.g.*, *Gamayo v. Match.com LLC*, C 11-00762 SBA, 2011 BL 218352, *5 (N.D. Cal. Aug. 24, 2011) (rejecting argument ''that it would be 'economically irrational' '' to pursue individual claims because plaintiff ''commenced this action as a class action''); *Madanat v. First Data Corp.*, C 10-04100 SI, 2011 BL 16426 (N.D. Cal. Jan. 21, 2011) (enforcing clause because plaintiff failed to establish ''a hardship that would deprive [him] of his day in court in [a] class action case''); *Chudner v. TransUnion Interactive, Inc.*, 626 F. Supp. 2d 1084, 1091 (D. Or. 2009) (''collectively the potential damage award [in a class action] should render the increased costs associated with travel . . . de minimis'').

[4] *See, e.g.*, *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 419 Mass. 572, 646 N.E.2d 741, 744 (1995) (construing ''all actions enforcing this agreement'' in forum clause as limited to contract disputes); *Hansa Consult of North Am., LLC v. Hansaconsult Ingenieurgesellschaft MBH*, 35 A. 3d 587, 593-94 (N.H. 2011) (adopting presumption, absent express language, that forum clauses do not cover disputes arising ''after the contract's expiration'').

[5] *Compare, e.g.*, *Huffington v. TC GROUP, LLC*, 637 F. 3d 18, 22 (1st Cir. 2011) (construing ''with respect to'' to mean ''with reference to,'' ''relating to,'' in connection with,'' and ''associated with,'' and, thus, as broader than ''arising out of'') *with Crowson v. Sealaska Corp.*, 705 P. 2d 905, 909-12 (1985) (construing ''in respect of'' as narrower than ''arising out of'').

[6] *See, e.g.*, *Berclain America Latina v. BAAN CO., NV*, 74 Cal. App. 4th 401, 407-09 (1999) (rejecting effort by nonsignatory corporate parent to invoke forum selection clause).

[7] *See, e.g.*, *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336, 1338 (9th Cir. 1997) (enforcing Korean forum selection clause despite loss of *in rem* claims); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) (''the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis to deny enforcement'').

[8] *See, e.g.*, *Huffington*, 637 F. 3d at 25 (citing ''chorus of authority'' enforcing forum selection clauses in the face of statutory ''anti-waiver provisions'').

[9] *See, e.g.*, *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 598 (9th Cir. 2000) (denying enforcement in light of Cal. Bus. & Prof. Code § 20040.5, which is unwaivable and prohibits forum selection clauses in franchise agreements); *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176, 192-97 (1996) (holding forum selection clause violated public policy animating New Jersey's Franchise Practices Act).

[10] *See, e.g.*, *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009); *Jones v. GNC Franchising, Inc.* 211 F.3d 495, 498 (9th Cir. 2000); *America Online Inc. v. Super. Ct.*, 90 Cal. App. 4th 1, 17-18 (2001).

[11] *See, e.g.*, *Mitsubishi Motors Corp*, 473 U.S. at 637 n.19 (noting forum selection and choice-of-law clauses can operate in ''tandem'' to effect waivers of fundamental rights); *Hall v. Super. Ct.*, 150 Cal. App. 3d 411, 416-17 (1983) (analysis of forum selection and choice-of-law clauses ''inextricably bound'' together); *Carson*, 734 S.E. 2d at 484-85 (assessing likelihood transferee court would enforce choice-of-law clause); *Melia v. Zenhire, Inc.*, 462 Mass. 164, 173-81 (2012) (enforcing clause after concluding New York court unlikely to rely on choice-of-law clause to defeat fundamental Massachusetts statutory rights).

[12] *See supra note* 10.

[13] *See, e.g.*, *Besag v. Custom Decorators, Inc.*, No. CV08-05463 JSW (N.D. Cal. Feb. 10, 2009).

[14] *See, e.g.*, *Multimin USA, Inc. v. Walco Int'l, Inc.*, CV F 06-0226 AWI SMS (E.D. Cal. Apr. 3, 2006); *St. Jude Med., SC, Inc. v. Biosense Webster, Inc.*, 2012 BL 112639 (D. Minn. May 4, 2012).

[15] *Whipple Indus., Inc. v. Opcon AB*, CVF-05-0902 REC SMS (E.D. Cal. Sept. 7, 2005).

[16] *Mahoney v. Depuy Orthopedics, Inc.*, CIV F 07-1321 AWI SMS (E.D. Cal. Nov. 8, 2007).

[17] *Cagle v. Mathers Family Trust*, 295 P.3d 460 (Colo. Feb. 4, 2013).

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ply the choice-of-law rules that would have governed in the transferor court[18]; or (2) the jurisdictions share the same choice-of-law rules, likely due to expanded adoption of the Restatement (Second) of Conflicts of Law.[19]

As a result, defendants have yet another reason to consider whether to remove a case to federal court. By removing an action to federal court, you free the transferor court from having to make difficult predictions about whether differences in the laws of two states exist and, if so, whether those differences could unfairly disadvantage one of the parties in violation of public policy. And as an added bonus, you may find that the district court resolves challenges to the validity of a forum selection clause by applying federal common law instead of state law,[20] further enhancing your chances of enforcing your agreements as drafted.

[18] *Consul Ltd. v. Solide Enter., Inc.*, 802 F.2d 1143, 1146 (9th Cir. 1986).

[19] *Sawyer v. Bill Me Later, Inc.*, CV 10-04461 SJO (JCGx) (C.D. Cal. Oct. 21, 2011).

[20] *See Lambert v. Kysar*, 983 F.2d 1110, 1116 & n. 10 (1st Cir. 1993) (collecting authorities addressing whether forum selection clauses are substantive or procedural for *Eerie* purposes; noting the Second, Ninth, and Eleventh Circuits treat forum selection clauses as procedural and resolve challenges to validity under federal common law).