Practice Points for Forum Selection Clauses

By Michael S. Oberman

Introduction

As commercial litigators, we often must deal with the unexpected, the unknown and the unavoidable—be it surprising evidence, a new area of technology, or a line of cases to be distinguished. We act with thorough preparation and advance planning whenever possible in facing such challenges in litigation. But we can also help our clients enhance the likelihood of a favorable outcome of a litigation and avoid litigating over unnecessary issues by what we do in advance of litigation. The purpose of this article is to suggest ways of drafting forum selection clauses in order to increase the chance of your client's action being litigated in a preferred court and to minimize the chance of an unexpected change in venue. Specifically, this article will focus on clearly stating whether a clause is permissive or mandatory, in which court or courts the action may be brought, and what claims are covered by the clause.

General Principles

A forum selection clause is simply a contract provision that designates by mutual agreement a specific forum for litigation, most typically by providing a particular location and sometimes a particular court in that location.[1] In 1972, the Supreme Court held in *M/S Bremen v. Zapata Off–Shore Co.*[2] that a "forum [selection] clause should control absent a strong showing that it should be set aside."[3] To overcome the clause, the resisting party must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[4]

Forum selection clauses are subject to the general rules for contract interpretation, most basically that the intent of the parties, as reflected in the language employed, is to be enforced.[5] Courts generally differentiate between two types of forum selection clauses that determine whether parties are "*required* to bring any dispute to the designated forum or simply *permitted* to do so."[6] "A so-called permissive forum clause only confers jurisdiction in the designated forum, but does not deny plaintiff his choice of forum, if jurisdiction there is otherwise appropriate."[7] "Alternatively, contracting parties may intend to agree in advance on a forum where any and all of their disputes *must* be brought" and such a "mandatory forum clause is entitled to the *Bremen* presumption of enforceability."[8]

Whether mandatory or permissive, a forum selection clause can have the effect of establishing venue in a district that would not otherwise be available under the applicable venue statute; in effect, it is an advance waiver of any objections to venue in the designated forum.[9] A mandatory clause has its greatest impact when a foreign or a U.S. state court is designated as the exclusive venue. When a foreign venue is designated, any action brought in a state or federal court in the U.S. is subject to dismissal (unless a reason for not enforcing the forum selection clause is established).[10] When a state court venue is designated, an action brought in a federal district court should similarly be dismissed (or, if a removed action, remanded).[11]

In contrast, the distinction between mandatory and permissive clauses—while still important—has less impact when a federal forum is designated because an action filed in the designated district may be subject to a transfer motion. The Supreme Court held in *Stewart Org., Inc. v. Ricoh Corp.*[12] that even a mandatory forum selection clause is not dispositive of a transfer motion under 28 U.S.C. § 1404(a).[13] While the presence of such a clause will be a "significant factor that figures centrally in the district court's calculus" of case-specific transfer factors,[14] district courts must also weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of "the interest of justice."[15] In the weighing of the transfer factors, lower federal courts have treated a valid forum selection clause as a waiver of the right to claim that the designated forum is inconvenient,[16] and have only rarely declined to enforce a mandatory clause.[17]

Most federal courts construe the language, and determine the validity, of forum selection clauses based on federal common law, not state law, even in diversity cases.[18] Where a clause is valid, courts tend to reject attempts to plead around the scope of the clause—for example, by asserting tort, rather than contract, claims; tort claims related to the contractual relationship, unless expressly excluded, will generally come within the clause.[19]

Designating the Type of Clause

Attorneys who are aware of the distinction between mandatory and permissive clauses should be able to employ the appropriate language to create the type of clause they intend to include in the contract. By now, many courts have held that inclusion of the word "exclusive" in a forum selection clause or of the phrase "shall be" connotes a mandatory clause, while use of the word "may" connotes a permissive clause.[20] The intent of the parties can be emphasized by using "Mandatory Forum Selection" or "Permissive Forum Selection" as the heading for the forum selection clause.[21]

Designating the Court

It is common to see in contracts drafted by attorneys in Manhattan the designation of "any court of competent jurisdiction located in the County and State of New York." Because New York County has within it both state courts of primary jurisdiction and the main courthouse of the Southern District of New York, this formulation should allow a plaintiff to select a state forum or, if subject matter jurisdiction otherwise exists (because it cannot be created by a contract clause), the federal court. Litigated issues can—and do—arise where the parties refer to other counties without considering what courthouses are physically located in that county when the contract is made and without correctly predicting what courthouses might be located in that county when an action is commenced.

Two cases presenting such issues made it all the way up to the Second and Fifth Circuits within the past year, a cautionary message about the need for care in drafting. In *Yakin v. Tyler Hill Corp.*,[22] the parties entered into a summer camp contract in 1999 which contained this clause: "It is agreed that the venue and place of trial of any dispute . . . shall be in Nassau County, New York." Yakin commenced an action in May 2007 in Supreme Court, Nassau County for injuries allegedly sustained in 1999, and Tyler Hill removed the action to the Eastern District of New York. At the time the contract was made and the injury sustained, there was a federal courthouse for the Eastern District located in Uniondale, Nassau County. However, by the date the action was commenced, the Uniondale courthouse had closed with the opening of the new courthouse for the Eastern District in Central Islip, Suffolk County (to which the *Yakin* action was removed). On Yakin's motion to remand, the district court held that the clause was ambiguous as to whether an action could be brought in either state or federal court and – construing it in favor of the non-drafter (Yakin)—remanded the action to state court. The Second Circuit, in a published opinion (rather than summary order), affirmed on different grounds. The circuit court first found no ambiguity in the clause, concluding as a matter of law that a "reasonable person . . . would necessarily conclude that the parties intended that litigation take place in an appropriate venue in Nassau County and that this commitment was not conditioned on the existence of a federal courthouse in that county."[23] The court reasoned that a "forum selection clause may bind parties to either a specific jurisdiction or, as here, a specific venue."[24] The court then held: "Given that the forum selection clause contains only obligatory venue language, we will effectuate the parties' commitment to trial in Nassau County. Had there been a federal court in Nassau County at the time of this litigation, remand would have been improper."[25] The court further observed that "no reasonable reading of the clause permits the interpretation that the parties agreed to trial in Suffolk County or Brooklyn because those courthouses were within the Eastern District of New York, which spans an area including Nassau County."[26] In words seemingly custom-tailored for quotation in this article, the court concluded: "Had the parties intended to provide for that result, they could, of course, have drafted a different forum selection clause that communicated that intent."[27]

In *Alliance Health Group, LLC v. Bridging Health Options, LLC*,[28] a contract for computer programming services made in 2003 included a clause providing that "exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi."[29] An action was brought in 2006 in the federal court for the Southern District of Mississippi, Southern Division, at which time a courthouse for that division was located in Harrison County. The Fifth Circuit affirmed the denial of a motion to dismiss the action for improper venue, finding that the language "venue shall occur in Harrison County, Mississippi" permitted an action to be brought in either a state court or federal court located in Harrison County.[30] The court distinguished prior district court decisions as well as one of its own unpublished decisions that had held an action could not be brought in a federal court whose district included the specified county but whose courthouse was not physically located in the specified county. The court also distinguished another of its earlier decisions that had held that a clause specifying "[t]he Courts of Texas, U.S.A." excluded federal district courts which "may be *in* Texas, but . . . they are not *of* Texas."[31] The court concluded that "it can hardly be said that a reference to 'county' clearly suggests the Harrison County Circuit Court rather than the United States District Court when it has a courthouse in, and jurisdiction over, Harrison County."[32] Finally, the court reported finding no precedent construing the words "shall occur in," leading to its holding that "the use of the phrase "occur in" suggests "a general lack of specificity" and not "an intent to limit venue to a single tribunal."[33] The Fifth Circuit—like the Second Circuit—ended its opinion with language suitable for this article: "Obviously, had the parties intended . . . to limit venue to the state courts located in Harrison County, they easily could have eliminated any question in that regard by writing the forum-selection clause differently."[34]

Designating Claims

It is common to see forum selection clauses that apply to "any and all claims arising from this Agreement." Two very recent Second Circuit cases teach us that a broader formulation should be employed if parties wish to increase the likelihood that the forum selection clause will be applied to statutory claims that result from their relationship.

In *Phillips v. Audio Active Ltd.*, decided in 2007,[35] a recording contract between a musician and a music company contained a forum selection clause providing that "any legal proceedings that may arise out of [the contract] are to be brought in England."[36] Phillips brought suit in the Southern District of New York alleging both breach of

the agreement and violation of the U.S. Copyright Act.[37] The district court, finding the forum selection clause to be mandatory, dismissed the action. The Second Circuit affirmed the dismissal of the contract claim, but reversed on the copyright claims—even though, as a result, the parties would end up litigating the contract claim in England and the copyright claims in New York.

Using federal law, *Phillips* construed the words "arise out of" to mean "to originate from a specified source,"[38] and stated that "[w]e do not understand the words 'arise out of' as encompassing all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be 'associated with,' or 'arise in connection with' the contract."[39] The court "examine[d] the substance of Phillips' claims as they relate to the precise language of the clause" because the court "cannot presume that the parties intended to exclude all statutory claims, or even all copyright claims, from the forum selection clause."[40] The court ultimately held that the copyright claim did not originate from the recording contract, such that the forum selection clause was inapplicable to the copyright claims.[41]

In July 2009, the Second Circuit reversed a dismissal for improper venue in *Altvater Gessler-J.A. Baczewski International (USA) Inc. v. Sobieski Destylarnia S.A*.[42] The court held that a forum selection clause providing for claims "resulting from" a licensing agreement to be venued in Poland did not apply to claims of trademark infringement and unfair competition that could be stated without reference to the agreement. Plaintiff/licensor had licensed a licensee to use a proprietary recipe to make a liquor called Krupnik; after the expiration of the license, a successor to licensee started to make Krupnik using the proprietary recipe and distributed Krupnik (using that name) in the U.S. When a corporation clearly related to the licensor sued that successor for trademark infringement, unfair competition, and other related claims in the Southern District of New York, the district court enforced the forum selection clause and dismissed the action for improper venue.[43] Citing *Phillips*, the Second Circuit said that the phrase "resulting from" was very similar in meaning to the phrase "arise out of" and held that claims not originating from the agreement were not covered by the forum selection clause.[44]

Conclusion

These recent cases illustrate how reformulation of stock forum selection clauses is needed to avoid unnecessary litigation over the scope of a forum selection clause and to lessen the chance of an untoward result. Designation of a clause as mandatory or permissive is not difficult; the intent of the parties just must be clear. Similarly, the designation of a locale can expressly state the option to sue in federal court, even if a federal courthouse is not located in the county specified in a clause, by adding a phrase like "in a federal or state court in or for [name] County, [State], including the federal district court having jurisdiction for such county." And the designation of claims can be drafted broadly, to attempt to draw in all claims that might arise between the parties, by providing: "any claim of whatever character arising under this Agreement or under any statute or common law relating in any way, directly or indirectly, to the subject matter of this Agreement or to the dealings between the parties during the term of this Agreement."

Endnotes

1. *See generally* Gary P. Naftalis & Michael S. Oberman, *Venue, Forum Selection and Transfer, in* R. Haig, Business and Commercial Litigation in Federal Courts, Ch. 3 (2d ed. 2005).
2. 407 U.S. 1 (1972).
3. 407 U.S. at 15.
4. *Id.* This article focuses on federal court decisions, but the practice points are applicable to actions brought in New York State courts. *See generally* T. Barry Kingham, *Enforcement of Forum Selection and Arbitration Clauses*, *in* R. Haig, Commercial Litigation in New York State Courts, Ch. 11 (2d. ed. 2005).
5. *See Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386–87 (2d Cir. 2007).
6. *Id*. at 383 (emphasis in original).
7. *Id*. at 386.
8. *Id.* (emphasis added).
9. *See Falconwood Fin. Corp. v. Griffin*, 838 F. Supp. 836, 839 (S.D.N.Y.1993) ("[T]he forum selection clause guarantees that this action shall not be dismissed for improper venue.").
10. *See Phillips*, 494 F.3d at 393. *See also Aguas Lenders Recovery Group LLC v. Suez, S.A.*, 2009 WL 3403172, at *3 (2d Cir. Oct. 23, 2009) (observing that the combination of a permissive forum selection clause and a waiver of any claims of *forum non conveniens* "amounts to a mandatory forum selection clause at least where the plaintiff chooses the designated forum").
11. *See Yakin v. Tyler Hill Corp.*, 566 F.3d 72, 76-77 (2d Cir. 2009) (affirming remand of an action based on mandatory forum selection clause); *Rainforest Café, Inc. v. EklecCo., L.L.C.*, 340 F.3d 544, 545 (8th Cir. 2003) (affirming dismissal of an action based on forum selection clause specifying that any action "shall be brought in the New York Supreme Court, Onondaga County").
12. 487 U.S. 22 (1988).
13. *Id*. at 31.
14. *Id*. at 29.
15. *Id*. at 30.
16. *See Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 727 n.5 (8th Cir. 2001) (holding that "a forum selection clause may be viewed as a waiver of a defendant's right to object to venue").
17. *See Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992) ("[O]nce a mandatory choice of forum clause is deemed valid, the burden shifts to the plaintiff to demonstrate exceptional facts explaining why he should be relieved from his contractual duty.").
18. *See Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (holding that "[questions] of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature").
19. *See, e.g., Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983) ("We agree with those courts which have held that where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain.").
20. *See, e.g., Falconwood Fin. Corp.*, 838 F. Supp. at 838 n.1 (treating as mandatory the following clause: "The parties hereby agree that

the exclusive venue for suit with respect to this Agreement shall be the courts of the State of New York or the federal courts of the Southern District of New York . . ."); *ASM Communications Inc. v. Allen*, 656 F. Supp. 838, 839 (S.D.N.Y.1987) (finding that the "word 'shall' signifies a command. The word 'may' is permissive.").

21. Naftalis & Oberman, *supra* note 1, at §§ 3:56–3:57 (forms of mandatory and permissive clauses).
22. 566 F.3d 72, 74 (2d. Cir. 2009).
23. *Id.* at 76.
24. *Id.*
25. *Id*. *See also Eklecco Newco, LLC v. Gloria Jean's Gourmet Coffees Corp.*, No. 5:08-CV-00861 (NPM/GHL), 2009 WL 2185405, at *3 (N.D.N.Y. July 17, 2009) (denying remand motion where forum selection clause specified, in part, that '"any dispute . . . shall be brought in . . . Syracuse, New York," and the action had been removed to a federal courthouse located in Syracuse (citation omitted)).
26. 566 F.3d at 76.
27. *Id.* at 76–77.
28. 553 F.3d 397 (5th Cir. 2008).
29. *Id*. at 398 (emphasis omitted).
30. *Id*. at 400. The appeal from the denial of the motion to dismiss was brought on certification of the district court's ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id*. at 398.
31. *Id.* at 400 (emphasis in original).
32. *Id.* at 401. The Fifth Circuit declined to follow the Tenth Circuit's opinion in *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318 (10th Cir. 1997), which held that a clause specifying that "venue shall lie in the County of El Paso" allowed for venue only in the state court located in El Paso and excluded a federal court located in El Paso because "[f]or federal court purposes, venue is not stated in terms of 'counties'" but "in terms of 'judicial districts.'" *Alliance Health Group, LLC*, 553 F.3d at 321. The Fifth Circuit observed that federal districts and divisions were defined within 28 U.S.C. § 104(b)(4) "by specific reference to the counties they encompass" and that "Mississippi state courts are not simply defined by County." 553 F.3d at 401.
33. *Id.* at 401–02.
34. *Id*. at 402.
35. 494 F.3d 378 (2d Cir. 2007).
36. *Id*. at 382.
37. 17 U.S.C. §§ 101 *et seq*.
38. 494 F.3d at 389 (quoting Webster's Third New International Dictionary 117 (1981)).
39. *Id*. (declining to follow *Omron Healthcare, Inc. v. Maclaren Exps. Ltd*., 28 F.3d 600 (7th Cir. 1994), and stating that the construction of a forum selection is not governed by decisions construing arbitration clauses under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*.).
40. *Phillips*, 494 F.3d at 389.
41. *Id*. at 391.
42. 572 F.3d 86, 91 (2d Cir. 2009).
43. *Gessler v. Sobieski Destylarnia S.A.*, No. 06cv6510 (HB), 2007 WL 1295671 (S.D.N.Y. May 3, 2007).
44. 572 F.3d at 391–92.

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