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## Trials&TRIBULATIONS

### Forum selection clauses: Pros and cons

Contractual forum selection clauses are generally prima facie valid and enforceable, *Chiarizia v. Xtreme Rydz Custom Cycles*, 43 AD3d 1353, 1353-1354 (4th Dept 2007). Indeed, parties are free to contractually designate a forum for any dispute that may arise between them in the future. While there is peace of mind in knowing that you will likely not be dragged into court in some far-off jurisdiction should a dispute arise under a contract (unless you agreed to it), it is important to be cognizant that forum selection clauses are not always enforceable, and can even be waived.

Moreover, as a matter of practice, it is important to note that if a party desires to limit the forum of any potential future litigation to state court, for example, it must expressly do so in the contract. In other words, including a clause that provides that any dispute must submit to the "exclusive jurisdiction of the courts located in the City and State of New York," may not preclude commencement of an action in federal court sitting in the state of New York, see *Cronin v. Family Educ. Co.*, 105 F Supp 2d 136, 137-139 (EDNY 2000).

To be safe, if parties to a contract wish to limit the forum of any disputes to, for instance, Monroe County, they should draft the clause with specificity — i.e., forum in "Courts of the State of New York, Monroe County."

Furthermore, special rules govern forum selection clauses with respect to contracts involving one million dollars or more, see CPLR 327(b) and General Obligations Law §5-1402. In such cases, New York courts are generally precluded from declining jurisdiction, see, *Id.*

#### Pros

As a party to a contract containing a forum selection clause, there is comfort in knowing that if a dispute does arise in connection with that contract, a familiar forum has been chosen in advance. This may offer a sense of predictability to the outcome of any dispute. In addition, forum selection clauses ostensibly remove the possibility that a party could be forced to litigate in a jurisdiction that is wholly foreign to it — whether it be a different state or even a different country.

Similarly, a party can significantly limit its potential future litigation costs with the inclusion of a favorable forum selection clause. Consider a contract between a party located in New York

and one located in England, where that contract provides that any dispute that may arise between the parties is to be commenced in New York courts. The party located in New York has undoubtedly saved itself both time and money by including a favorable forum selection clause.

In addition, forum selection clauses can confer personal jurisdiction over a party to a court that would otherwise not be able to exercise such jurisdiction had that party not contractually agreed to it, see *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Williams*, 223 AD2d 395, 398 (1st Dept 1996). Basically,

when a party signs a contract, it is presumed that it fully read, understood and agreed to the contents of that contract, including any forum selection clause contained therein, and is therefore bound by its terms, see, e.g., *Frankford Crossing Shopping Ctr. v. Pho Partners, LLC*, \_\_ F Supp 2d \_\_, 2013 WL 1800115, at \*4 (WDNY April 29).

The inclusion of a forum selection clause can also be beneficial where different forums have a different statute of limitations for the same cause of action. By agreeing to a forum selection clause, parties to the contract are also agreeing to the application of the statute of limitations utilized in that forum, and are thus precluded from forum shopping for a more favorable time limitation, see *Boss v. American Express Fin. Advisors, Inc.*, 15 AD3d 306, 308 (1st Dept 2005), *aff'd* 6 NY3d 306 (2005).

Indeed, where a valid forum selection clause exists, a party will usually be unable to set it aside even if its entire action would be precluded in the designated forum, see *Kasper Global Collection & Brokers, Inc. v. Global Cabinets & Furniture Mfr., Inc.*, \_\_ F Supp 2d \_\_, 2013 WL 3388427, at \*17 (SDNY July 1).

Moreover, it is no easy task for a party to challenge the application of a valid forum selection clause. Where parties have freely entered into a contract containing a forum selection clause, a party seeking to later challenge that clause faces a difficult burden if an action was commenced in accordance with the clause. This is consistent with New York's public policy of enforcing contracts between willing parties.

For example, in the *Chiarizia* case, the plaintiff, who alleged he was injured while riding a purportedly defective motorcycle,

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sought to litigate against the seller of the motorcycle in New York. However, the court granted the seller's motion to dismiss because the sales contract included a forum selection clause providing that any litigation "will be submitted only in Orange County, Florida," despite the fact that the plaintiff argued that it would cause him great economic hardship to litigate the matter in Florida, including paying for traveling expenses of witnesses, *Id.*

While there are many benefits to forum selection clauses, they are not iron-clad and can be found unenforceable or even be waived if a litigant is not careful.

## Cons

Forum selection clauses can be found to be unenforceable on several different grounds. A party seeking to avoid the application of the clause must demonstrate at least one of the following: that the clause is unreasonable or unjust; that it is against public policy; or that it is invalid due to fraud or overreaching, see *Chiarizia*, 43 AD3d at 1353-1354. In addition, a forum selection clause can be set aside where a party can demonstrate "that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court," *Id.*

A review of both New York state and federal case law demonstrates, however, that forum selection clauses are not often disregarded. In many cases, parties sought to set aside a forum selection clause by claiming that they were fraudulently induced into entering the contract containing the forum selection clause. However, the courts have consistently held that a party seeking to avoid the application of a forum selection clause on the grounds of fraud must specifically demonstrate that the clause itself was included in the contract as a result of fraud, not that the entire contract was the product of fraud.

One interesting case in which a purported forum selection clause was deemed unenforceable involved the sale of goods over the Internet. In *Jerez v. JD Closeouts, LLC*, 36 Misc 3d 161 (Nassau Dist Ct 2012), a buyer of thousands of pairs of tube socks commenced an action in Nassau County, New York against the sellers — two Florida corporations.

The sellers moved to dismiss the action claiming that there existed a forum selection clause requiring that any litigation be commenced in Florida. The court found the forum selection clause to be unenforceable because the clause was "submerged" or buried within multiple layers of Web pages and further found that the sellers did not make any effort to ensure that the clause became part of the contract. The court suggested that to avoid

this result, the sellers should have perhaps sent a printed contract or confirming letter incorporating the forum selection clause by reference, or included some type of click-through acceptance of its terms and conditions on the website.

Moreover, despite the inclusion of an otherwise valid forum selection clause in a contract, a party's conduct can operate to waive that clause. For example, in a recent case out of the Eastern District of New York, the court held that the plaintiff waived its right to enforce a clause in a contract providing that "any action or proceeding arising out of, in connection with, or in relation to this subcontract, shall be resolved by litigation in the Courts of the State of New York, Suffolk County," *Dart Mech. Corp. v. Johnson Controls, Inc.*, 2013 WL 5937424, at \*1 (EDNY Nov. 4).

In *Dart*, involving claims for breach of contract, the plaintiff commenced an action in Supreme Court of the State of New York, Nassau County. The thereafter removed the case to federal court sitting in the Eastern District of New York. The plaintiff then sought to remand the case back to Supreme Court, Nassau County, arguing that the forum selection clause contained in the parties' contract mandated that the action be brought in New York state courts.

The court denied the plaintiff's motion, holding that while the plaintiff was correct in asserting that the forum selection clause at issue provided that any litigation be commenced in New York state courts, the clause specifically provided that any such action be commenced in Suffolk County and the plaintiff initially commenced the action, and sought remand to, Nassau County. As a result, the court concluded that the plaintiff waived its right to enforce the forum selection clause.

Finally, it is worth noting that although generally a defendant has the right to remove a case to federal court if it involves a federal question or is based upon diversity, that right may be waived by the defendant if he is party to a contract specifically providing that any disputes arising between the parties be addressed in state court, *JP Morgan Chase Bank, N.A. v. Reijnenbagh*, 611 F Supp 2d 389, 390 (SDNY 2009).

## Conclusion

A well-drafted and negotiated forum selection clause can help to greatly reduce the inevitable burden and stress that accompanies any litigation. Parties and their attorneys should be cognizant of the mandates of any clauses contained in contracts to which they are a party and conduct themselves in accordance with those clauses if they wish to benefit from them.

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