KING & SPALDING

Client Alert

International Arbitration Practice Group

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U.S. Supreme Court Clarifies How to Enforce Forum Selection Clauses

Case Summary

On December 3, 2013, the U.S. Supreme Court, in *Atlantic Marine Construction Company v. United States District Court for Western District of Texas*[1] clarified the procedures for enforcing forum selection clauses in federal courts. Petitioner Atlantic Marine Construction Company, a Virginia corporation, entered into a contract with the Army Corps of Engineers to construct a child-development center at Fort Hood, located in the Western District of Texas. Atlantic Marine subcontracted with respondent J-Crew Management, Inc., a Texas corporation, for work on the project. The subcontract contained a clause requiring that all disputes arising out of the contract be settled in state or federal court in Virginia. But when a dispute arose, J-Crew instead filed suit in the Western District of Texas. In light of the contract's forum selection clause, Atlantic Marine moved to dismiss the suit for "wrong venue" under 28 U.S.C. § 1406(a)[2] and "improper" venue under Rule 12(b)(3)[3] of the Federal Rules of Civil Procedure. It also moved, in the alternative, for a transfer to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), which permits a district court having venue to transfer a case "for convenience" and "in the interest of justice" to another district in which venue would also be proper.[4]

The district court denied Atlantic Marine's motions. It rejected Atlantic Marine's attempt to enforce the forum selection clause through a challenge to venue and held that section 1404(a) is the exclusive means for enforcing a forum selection clause in favor of another federal forum. In general, the transfer-for-convenience analysis involves a balancing of multiple "public interest" and "private interest" factors, with the moving party bearing the burden of showing that transfer is "in the interest of justice" and the district court enjoying substantial discretion concerning whether to grant the motion.[5] The district court applied section 1404(a) in this ordinary manner, treating the forum selection clause as just one of many factors to be considered and balanced. Even though J-Crew did not dispute the validity of the forum selection clause, the court denied transfer, concluding that certain "private interest" factors—compulsory process would not be available in Virginia for many of J-Crew's witnesses, for example, and it would be expensive for J-Crew's willing witnesses to travel there—weighed in favor of keeping the case in Texas.

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A decision denying a motion to dismiss for improper venue or to transfer for convenience is not immediately appealable, but Atlantic Marine filed a petition for a writ of mandamus asking the Fifth Circuit to order the district court to dismiss or transfer the case. The Fifth Circuit agreed that section 1404(a) was the proper avenue to seek to enforce the forum selection clause and declined to disturb the district court's decision. Even though the parties never disputed the validity of the forum selection clause, the case would remain in Texas.

The Supreme Court granted Atlantic Marine's petition for certiorari to resolve a circuit split over how to enforce forum selection clauses. Some circuits, in contrast to the Fifth Circuit's approach, treated forum selection clauses as matters of venue, so that a suit filed in violation of a valid forum selection clause was subject to dismissal for improper venue under Rule 12(b)(3) and section 1406(a). Atlantic Marine advocated that approach. J-Crew defended the lower courts' application of section 1404(a). King & Spalding filed an amicus brief on behalf of Duke Law School professor Stephen E. Sachs in support of neither party. Professor Sachs argued, first, that Atlantic Marine was wrong because a forum selection clause in a contract between private parties cannot change the statutory criteria for when venue is "wrong" under section 1406(a), and venue under the statute was clearly appropriate in Texas because a substantial part of the events giving rise to the suit occurred there. But Professor Sachs argued that J-Crew was also wrong, because a section 1404(a) motion to transfer for convenience is not an appropriate or adequate vehicle to enforce a valid forum selection clause, because the multi-factor, discretionary analysis under section 1404(a) would make it too easy for courts to deny effect to valid forum selection clauses and too hard for contracting parties to predict whether their agreement will be enforced. Professor Sachs suggested a third option: treating a forum selection clause as an ordinary defense. If a suit is filed in violation of a valid forum selection clause, the defendant is entitled to dismissal or transfer, rather than being relegated to an exercise of discretion by the district court in balancing multiple factors. And the defense could be raised at any stage of the case where it is procedurally appropriate, like any other defense—in a Rule 12(b)(6) motion to dismiss where the forum selection clause is incorporated into the complaint, or a motion for judgment on the pleadings or a motion for summary judgment if not.

In a unanimous opinion by Justice Alito, the Supreme Court reversed the Fifth Circuit. The Court agreed with J-Crew that a valid forum selection clause does not defeat venue, because venue is governed by statute and whether venue is "wrong" or "improper" depends "exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws." Section 1391(b) lists the federal districts in which venue may be proper in any civil action,[6] and "[w]hether the parties entered into a contract containing a forum selection clause has no bearing on whether a case falls into one of the categories listed in § 1391(b)." The Court declined to decide whether a forum selection clause could be raised as an ordinary defense as advocated by Professor Sachs, noting that no party had attempted to raise such a defense in this case. The Court held that a motion to transfer under section 1404(a) is the proper way to enforce a forum selection clause in federal court. But although it agreed with J-Crew and the Fifth Circuit that section 1404(a) was the appropriate procedural vehicle, the Court rejected their view of how a section 1404(a) motion should be evaluated when it asserts a valid forum selection clause as the basis for transfer.

Where the lower courts had engaged in a traditional transfer-for-convenience analysis, the Court refashioned the standards that govern such a motion in this unique context. The end result is a section 1404(a) analysis that treats a valid forum selection clause as something very close to a defense—an entitlement to dismissal or transfer—rather than merely one of multiple factors to be considered in an indeterminate balancing.

Specifically, a forum selection clause changes the section 1404(a) analysis in three ways. First, the plaintiff's choice of forum—normally a factor to be weighed—should carry no weight, as the forum selection clause must be viewed as the plaintiff's pre-dispute exercise of its choice of forum. Second, the court should not consider *any* "private interest" factors,[7] because "[w]hen the parties agree to a forum selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." That leaves the "public interest" factors, which include the administrative difficulties flowing from court congestion, the interest in having localized controversies decided at home, and the interest in having the trial of a diversity case in a forum that is at home with the law.[8] Because public interest factors "will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual

cases." Third, while ordinarily a section 1404(a) transfer requires the transferee court to apply the choice-of-law rules of the original venue, that rule does not apply when the transfer is based upon a forum selection clause. As a result, the transferee court—the court chosen by the parties in their forum selection clause—will not be saddled with having to apply a different body of law by virtue of the plaintiff's having initially filed suit in violation of the forum selection clause. In turn, this reinforces the point that public interest factors will rarely defeat transfer; one of those factors is whether transfer would require the new court to apply unfamiliar law.[9]

The Court also explained that the same analysis applies where the forum selection clause points to a forum other than a federal court. If the selected forum is a state court or a foreign court, transfer under section 1404(a) is not available because there is no mechanism for a federal court to actually transfer a case to a non-federal forum. But section 1404(a) is simply "a codification of the doctrine *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system," and the common-law version of that doctrine remains applicable where the would-be "transferee" court is a non-federal forum to which transfer is not technically available. In short, if transfer under section 1404(a) would be appropriate were the selected forum a federal one, dismissal pursuant to the doctrine of *forum non conveniens* is appropriate where the selected forum is a non-federal one: "because both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause [pointing to a different federal district]."

Although the Court left the door open for courts to decline to transfer (or dismiss) cases filed in violation of valid forum selection clauses, it made no secret of its view that such cases should be few and far between: "When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause," and "[o]nly under extraordinary circumstances unrelated to the convenience of the parties should a §1404(a) motion be denied." The Court recognized that the enforcement of forum selection clauses is important to contracting parties—who negotiate such clauses precisely so that they can control and predict where litigation may occur—emphasizing the need to "protect [the parties'] legitimate expectations." The Court also recognized that enforcing valid forum selection clauses "further[s] vital interests of the justice system."

Applying its modified section 1404(a) analysis to the case at hand, the Court held that the lower courts had erred by placing the burden on Atlantic Marine to show that transfer was appropriate, by giving weight to various private interest factors favoring J-Crew, and by applying Texas choice-of-law rules to decide the governing contract law. The Court strongly signaled that there was no valid basis to deny transfer on the facts of this case, but it remanded to allow the lower courts to consider in the first instance whether any public interest factors defeat transfer under the standards articulated in the Court's opinion.

Conclusions

Forum selection clauses are a valuable risk management device, as they allow contracting parties—and particularly parties engaged in cross-border transactions—to avoid having to litigate in unfamiliar jurisdictions. The Supreme Court's decision in *Atlantic Marine* validates the forum selection clause as a bargained-for contractual term that a party should not be permitted to avoid or renounce once it becomes less desirable or convenient. Although the Court stopped short of holding that a valid forum selection clause must *always* be enforced, the Court's opinion should lead the vast majority of lower courts to enforce valid clauses on a routine basis, with far greater predictability than before. In addition, because the Court declined to decide whether a forum selection clause may also be raised as an ordinary defense—as well as via a section 1404(a) motion to transfer—companies that find themselves sued in violation of a forum selection clause may wish to preserve the argument by pleading the forum selection clause as an affirmative defense and seeking dismissal based on the clause. To the extent that the Court's re-fashioned section 1404(a) analysis leaves lower courts with some discretion to deny section 1404(a) motions based on public interest factors in unusual cases, treating a valid forum selection clause as a defense—*i.e.*, an entitlement to dismissal or transfer—would be preferable for defendants.

Finally, it bears emphasis that the Court's decision addressed only the enforcement of a valid forum selection clause and did not address the standards governing whether a clause is valid in the first place. J-Crew conceded that the parties' forum selection clause was valid and filed suit in Texas anyway, so it is not surprising that the Court rejected its position. In practice, parties that do not wish to abide by a forum selection clause may argue that the clause is invalid, and the Court's decision—as welcome as it is for companies that depend on forum selection clauses—does not hold that all forum selection clauses are valid or speak to how courts should decide challenges to their validity.

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[1] 571 U.S. __(2013).

[2] 28 U.S.C. § 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[3] Rule 12(b)(3) provides that the defense of "improper venue" must be asserted in "the responsive pleading if one is required," or by motion.

[4] 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

[5] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

[6] 28 U.S.C. § 1391(b) provides:

> A civil action may be brought in —
>
> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

[7] Such private interests would include the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper Aircraft*, 454 U.S. at 241 n.6 (internal quotation marks omitted).

[8] *Id.*

[9] *Id.*