

My Sandbox or Yours? Enforcement of Forum-Selection Clauses in Employment Agreements

By Sacha Dyson and Kevin D. Johnson

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

The U.S. Supreme Court's decision in *Bremen v. Zapata* represented a sea change in the way courts view forum-selection clauses. In the past, these clauses were viewed with disfavor and skepticism and were rarely enforced. However, the Supreme Court made clear in *Bremen* and reaffirmed in subsequent decisions¹ that these clauses should usually be enforced.² Even though it is well settled that these clauses are enforceable in the admiralty, commercial, and international litigation contexts, the question remains as to whether these clauses will be enforced in employment cases, particularly in cases where statutory claims of discrimination or retaliation have been asserted.

The High Bar to Avoid Forum-Selection Clauses

Forum-selection clauses are "presumptively valid and enforceable" absent a "strong showing that enforcement would be unfair or unreasonable under the circumstances."³ There are four recognized exceptions to the enforcement of such clauses: "(1) its formation was induced by fraud or overreaching; (2) the plaintiff would be deprived of its day in court because of inconvenience or unfairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy."⁴

When a plaintiff⁵ attempts to avoid a forum-selection clause based on fraud or overreaching, the plaintiff must show, by specific evidence, that the forum clause itself was the product of fraud or overreaching. It is not enough to allege that the underlying contract was procured by fraud or overreaching or to make bald allegations or to speculate.⁶ Moreover, a forum-selection clause is not unfair or unenforceable merely because the parties did not negotiate or bargain for it or because it was included in a form or boilerplate contract.⁷

For a forum-selection clause to be rejected on the grounds of inconvenience, the plaintiff must show that the inconvenience was not contemplated or foreseeable at the time that the agreement was executed.⁸ The inconvenience of the selected forum also must be "so gravely difficult" as to deprive the plaintiff of his or her day in court, and it must be

established by more than speculation or conclusory allegations.⁹ As recognized by the Second and Fifth Circuits, "with modern conveniences of electronic filing and videoconferencing, 'a plaintiff may have his "day in court" without ever setting foot in a courtroom.'"¹⁰ Thus, for example, the Tenth Circuit has rejected an employee's claim of financial hardship and inconvenience in a case in which many of the witnesses, who were located in the original forum, could be deposed in that forum and their depositions could be used in the selected forum.¹¹

In addition, a selected forum will not be unfair merely because the remedies of that forum are less favorable. Instead, the plaintiff must show that the remedies "are so inadequate that enforcement would be fundamentally unfair."¹² Similarly, neither the inequality in bargaining power nor a party's financial difficulty in litigating in the forum alone is sufficient to render the agreement unenforceable.¹³

Under *Bremen*, to avoid a forum-selection clause, the plaintiff bears the heavy burden of making a strong showing that enforcement would be unreasonable for one of the above-mentioned reasons.¹⁴ This heavy burden is imposed in recognition of the court's unwillingness to undo an agreed-upon contractual obligation, which one or more parties have relied on, as well as an acknowledgment of the importance that these clauses serve to promote business and commerce in the United States and the world.¹⁵ Although the burden to overcome enforcement is difficult, it is not insurmountable.¹⁶ The determination of whether to enforce a forum-selection clause is a factually intensive, case-by-case analysis conducted by reviewing the language of the agreement as well as the circumstances of the dispute.

Common Obstacles to Enforcement in Employment Cases

While the Ninth Circuit has recognized explicitly that there is no reason to analyze a forum-selection clause in an employment agreement differently than in other contracts,¹⁷ courts continue to scrutinize these clauses more in employment cases than in other commercial cases. For example, even when courts have enforced forum-selection clauses, they have questioned, in dicta, whether it would be appropriate to enforce them when an international forum is selected, the employee is uneducated, the employee relied on representations of the employer regarding the agreement, or the employee is physically

unable to return to the selected forum.¹⁸

Moreover, in other instances, courts have refused to enforce such clauses altogether. In these cases, the courts have focused on the employee's ability or willingness to pursue the claim in the selected forum as well as whether the scope of the clause includes statutory claims.¹⁹ Some district courts also have refused to enforce a forum-selection clause based on the belief that such a clause would violate the venue provision in Title VII of the Civil Rights Act of 1964.²⁰ Other district courts, however, have rejected this argument, finding that (1) no other courts have followed these decisions, (2) the Title VII venue provision allows suit to be filed where the records are kept as well as where the employer operates its principal place of business, and (3) Congress did not include any language in Title VII invalidating forum-selection clauses.²¹ Indeed, the plain language of the Title VII venue provision does not require the action to be filed only where the alleged acts of discrimination occurred.²² Recently, the Eleventh Circuit suggested that there is no public policy reason that renders forum-selection clauses in discrimination cases unenforceable.²³ There also are other circuit decisions in which the courts have enforced forum-selection clauses in employment agreements.²⁴

Even though the U.S. Supreme Court has not yet been presented with the issue of whether a forum-selection clause in an employment agreement is enforceable, the Court has found that there is no distinction between employment agreements and other commercial contracts in enforcing an arbitration provision, even when this provision appears only in a collective bargaining agreement and the employee has asserted statutory discrimination claims.²⁵ Moreover, the Supreme Court has characterized an arbitration agreement as “a specialized kind of forum-selection clause.”²⁶ Therefore, these decisions further support the conclusion that forum-selection clauses in employment agreements should not be subject to additional scrutiny or be treated differently than other commercial contracts.

The Merry-Go-Round of Enforcement Mechanisms

In addition to general principles of enforceability, whether a particular forum-selection clause will be enforced may depend on the procedural vehicle the court uses to consider enforcement of the clause. Unlike the enforcement of arbitration provisions, there is no federal statute or rule of civil procedure that squarely addresses the enforcement of forum-selection clauses. As a result, courts have been left to fashion their own rules, an undertaking that has been met with inconsistent and, at times, confusing results. In particular, courts have looked to Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6), as well as 28 U.S.C. §§ 1404 and 1406, without any consistent agreement as to the proper mechanism. There is no dispute, however, that § 1404(a) cannot be used when the selected forum is a foreign country or state court.²⁷ In that instance, a Rule 12(b) motion or forum non conveniens motion must be used to enforce the agreement.

There is an important difference in the analysis, depending on whether it is conducted under 28 U.S.C. § 1404(a) or Rule 12(b), which may control the outcome of the request

to enforce the forum-selection clause. When the court is faced with a motion to transfer under § 1404(a), regardless of whether the court's jurisdiction is founded on diversity or a federal question, the court must review the public and private factors that are implicated by a motion to transfer under § 1404(a).²⁸ In this analysis, the forum-selection clause is not dispositive, but it is a significant factor that figures centrally in determining whether the case should be transferred. Moreover, the court does not conduct an analysis under *Bremen* to determine the enforceability of the forum-selection clause; instead, those factors are subsumed into consideration of the public and private interests under § 1404(a) and *Bremen* merely becomes “instructive” to the analysis.²⁹

On the other hand, the analysis under Rule 12(b) has been limited to whether the clause is enforceable using the *Bremen* decision—other factors are not considered or balanced.³⁰ However, the Rule 12(b) analysis may be more complex when the court's jurisdiction is based on diversity, because there may be instances under Rule 12(b) when a federal court would apply state law—which may be hostile to forum-selection clauses—under the *Erie* doctrine to determine the enforceability of the agreement.³¹

Table 1 provides a summary of the decisions made by the circuits that have considered the issue. The table demonstrates the lack of consensus as to the appropriate procedural mechanism.

Given the difference of opinions as to the appropriate enforcement mechanism, practitioners will need to look to the applicable circuit court to determine the proper vehicle, which, in turn, will govern the analysis to be employed in determining whether the forum-selection clause will be enforced.

Pitfalls in Drafting and Litigation

Because the enforcement of the forum-selection clause depends in large part on the language of the agreement as well as on the factual circumstances of the particular case, there are certain pitfalls in drafting or litigation of which practitioners should be aware to increase the chance of enforcement of the forum-selection clause.

- ✓ *DO use mandatory language.* Courts typically recognize a distinction between mandatory and permissive forum-selection clauses. Only a mandatory forum-selection clause can support a motion to dismiss or a motion to transfer, and these clauses require the use of words of exclusion. Because there is some dispute as to whether the term “shall” is sufficient, drafters should further state that the selected forum is the sole and exclusive venue for the action.⁴³
- ✓ *DO select a forum that has some connection to the dispute.* In order to avoid an objection based on unreasonableness or inconvenience, courts have recognized that it is important for the selected venue to have some connection to the dispute, such as the employer's principal place of business. The forum-selection clause may not be enforced on inconvenience grounds if the selected venue is a remote, alien forum chosen for the purpose

Table 1. Enforcement Mechanisms Used in Forum-Selection Cases, by Circuit

Circuit	Procedural Vehicle
First	Rule 12(b)(6) ³²
Second	No vehicle specified, but Rule 12(b)(1) is not appropriate ³³
Third	Rule 12(B)(6), except if a federal forum is selected, then the movant should use 28 U.S.C. § 1404(a) ³⁴
Fourth	Rule 12(b)(3), except 28 U.S.C. § 1404(a) should be used if a federal forum is selected ³⁵
Fifth	No vehicle specified, but the court affirmed dismissal under Rule 12(b)(3) ³⁶
Sixth	Rule 12(b)(6), but only if a state or foreign court is selected; if a federal forum is selected, the movant must use 28 U.S.C. § 1404(a) ³⁷
Seventh	Rule 12(b)(3) or 28 U.S.C. § 1406 ³⁸
Eighth	No vehicle specified
Ninth	Rule 12(b)(3) ³⁹
Tenth	No vehicle specified ⁴⁰
Eleventh	Rule 12(b)(3) or 28 U.S.C. § 1404(a), depending on whether the movant seeks dismissal or transfer ⁴¹
D.C.	Rule 12(b)(3) ⁴²

of discouraging litigation.⁴⁴

- ✓ *DO carefully draft the forum-selection clause to ensure that it encompasses statutory claims or other torts, but excludes those claims, if any, that should be resolved in a local forum.* If the language of the forum-selection clause is limited to the claims arising under the contract, the court may interpret that clause to apply to contract claims only, not to statutory claims or torts.⁴⁵ On the other hand, if the tort or statutory claims are closely related to the contract claims, then courts have found those noncontract claims to be within the scope of the forum clause.⁴⁶ Nonetheless, in order to avoid needless litigation on the scope of the clause, the language should be explicit and should include all claims arising under the agreement or related to the employee's employment, including, but not limited to, any and all claims of workplace discrimination or retaliation under federal or state law. There may be, however, certain types of claims that are more cost-effective and efficient to litigate in the local forum, such as nonsolicitation or noncompete claims. As long as the clause is clear and specific, the clause can be limited to certain claims and not to others.
- ✓ *DO carefully draft the clause to allow a federal forum.* An imprecisely drafted forum-selection clause will prevent removal of the case to federal court. Although

there is some disagreement over whether "courts in the state or county" will preclude removal, the better drafting practice is to make explicit that the selected forum is either federal or state court.⁴⁷

- ✓ *DO ensure that the employee receives notice of the forum-selection clause.* When there has been no bargaining over the provision, it is important to be able to show that the employee had notice of the provision and could have rejected it. A party's notice of the agreement can be established from the manner in which the clause is presented. For example, if the clause is printed clearly and written in plain language, the form of the contract is not so long as to make it difficult or impossible to read, and the plaintiff had an opportunity to "become meaningfully informed of the clause and to reject its terms," then the clause has been found to be fair and not the result of overreaching.⁴⁸
- ✓ *DON'T forget claims against nonsignatories to the forum-selection clause.* A claim against a nonsignatory (such as an employee's supervisor) to the agreement may be subject to the forum-selection clause if the nonsignatory is a third-party beneficiary, affiliate of the signatory, or a nonparty who is closely related to the signatory or the dispute that is the subject of forum-selection clause.⁴⁹
- ✓ *DO seek to enforce the forum-selection clause promptly.* Because lack of venue is a defect that can be waived, the enforcing party needs to act promptly to avoid an argument that it has waived the right to enforce the clause. Typically, the movant must seek to enforce the clause prior to filing a responsive pleading.⁵⁰

Conclusion

Even though the Supreme Court has not yet considered whether a forum-selection clause in an employment agreement is enforceable, there is no reason that these claims should fall into the category of exceptional cases in which forum-selection clauses are unenforceable.⁵¹ However, practitioners must keep in mind that the enforceability of a forum-selection clause is a case-specific analysis that will depend on the particular facts presented as well as the language of the agreement. With careful drafting and a proactive strategy, an employer can ensure a more consistent, certain, and cost-effective defense of employment claims in its forum of choice. **TFL**

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