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Supreme Court Strengthens Forum-Selection Clauses

Should Be Enforced in All but the "Most Exceptional Cases"

Contracting parties have always been free to agree in advance about the location in which they will resolve any future dispute over their contract. But courts have not always enforced contractual forum-selection clauses, sometimes allowing a plaintiff to sue in a forum different from that established by the contract. In deciding whether to enforce a forum-selection clause, these courts have allowed issues of the parties' convenience to trump their contractual choice—opening the door to forum shopping and potentially rewarding the winner of a race to the courthouse.

In a recent, unanimous decision, the United States Supreme Court strengthened the power of contracting parties to decide where their disputes will be resolved by ruling that contractual forum-selection clauses should be enforced in all but the "most exceptional cases." The Court's decision in *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, 571 U.S. --, (2013) (http://www.supremecourt.gov/opinions/13pdf/12-929_olq2.pdf), undermined the ability of parties to shop for the most favorable forum regardless of their contractual forum selection.

In *Atlantic Marine*, the Court ruled that enforcement of forum-selection clauses protects the parties' "legitimate expectations and furthers the vital interests of the judicial system." Additionally, the overarching consideration in evaluating a motion to transfer to honor a forum-selection clause is whether a transfer will promote "the interest of justice." Because enforcement of a forum-selection clause protects both the parties' expectations and the interests of justice, forum-selection clauses should be given "controlling weight in all but the most exceptional cases."

To be sure that courts ordinarily enforce forum-selection clauses, the Court changed both the factors to be considered under a transfer motion and the way those factors should be considered. First, the Court ruled that the plaintiff's initial choice of forum deserved no weight in the analysis of a motion to transfer. Although plaintiffs are usually granted the "privilege" of selecting the venue, the plaintiff's prior contractual agreement to file suit only in a specified forum constitutes the exercise of that privilege before the dispute arose. Given that the parties presumably bargained for the selected forum, only that initial choice deserves deference from a court evaluating a motion to transfer.

Second, the Court squarely placed on the plaintiff the burden of establishing why the forum-selection clause should not be enforced. This reverses the roles that apply to a typical transfer motion. In the presence of a forum-selection clause, the party defying its previous selection of a forum bears the burden of establishing that the forum for which it bargained is unwarranted.

Third, the Court ruled that the parties' private interests should not be considered in deciding whether to enforce a forum-selection clause. When parties select a forum, they waive the right to challenge its convenience. Whatever inconvenience the parties would suffer from litigating in the contractual forum "was clearly foreseeable at the time of contracting." Thus, courts deciding motions to transfer must presume that all of the parties' private-interest factors weigh in favor of the contractual forum and consider only public-interest factors in deciding whether to refuse to transfer the case.

Fourth, the Court ensured that a plaintiff who defies a forum-selection clause but then loses a motion to transfer cannot reap a reward for engaging in the tactic. Normally, a court to which a case is transferred applies the law of the state of the transferring court. This exception to the standard rule that federal courts apply the laws of the states in which they sit exists to prevent defendants from seeking to transfer cases to gain the benefit of laws in the transferee jurisdiction. But to apply that exception to cases filed in derogation of a forum-selection clause could reward plaintiffs by preserving to them the benefit of laws of a forum to which they had not contractually agreed. In the Court's view, doing so would "encourage gamesmanship." For that reason, the Court ruled that transferee courts should not apply the law of the transferor venue in cases involving forum-selection clauses.

Atlantic Marine strengthens the ability of parties to decide for themselves where their disputes will be resolved. Those agreements will be enforced "in all but the most exceptional cases." The Court has established substantial hurdles to repudiating a forum-selection clause and has put the burden on the party seeking to avoid enforcement of the clause. Forum-selection clauses are stronger today than ever before. Contracting parties should consider their selections carefully, as those selections will likely be enforced in the future.

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