

US Supreme Court Reaffirms that Forum-Selection Clauses Are Presumptively Enforceable

Forum-selection clauses are common, and highly useful, features of commercial contracts because they help make any future litigation on a contract more predictable for the parties and, in some cases, less expensive. But what procedure should a defendant use to enforce a forum-selection clause when the defendant is sued in a court that is not the contractually selected forum?

On December 3, 2013, the US Supreme Court issued a decision in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*¹ that answers this question. The Court held that, if the parties' contract specifies one federal district court as the forum for litigating any disputes between the parties, but the plaintiff files suit in a different federal district court that lawfully has venue (and therefore could be a proper place for the parties to litigate), the defendant should seek to transfer the case to the court specified in the forum-selection clause by invoking the federal statute that permits transfers of venue "[f]or the convenience of the parties and witnesses, in the interest of justice."² If the contract's forum-selection clause instead specifies a state court as the forum for litigating disputes, the defendant may invoke a different federal statute that requires dismissal or transfer of the case.³

Importantly, the Court held that the parties' contractual choice of forum should be enforced except in the most unusual cases, and that the party resisting the forum-selection clause (i.e.,

the plaintiff who filed in a different court) has the burden of establishing that public interests disfavoring transfer outweigh the parties' choice.

Atlantic Marine is significant for the banking and finance community because it provides greater certainty regarding the enforceability of forum-selection clauses, giving banks and other lenders that employ such clauses in their contracts greater predictability about where they will face future litigation. The Court in *Atlantic Marine* reinforced the strong federal policy favoring the enforcement of such clauses, and clarified the mechanism for their enforcement.

As the Court explained, "[w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain."⁴

In *Atlantic Marine*, the US Army Corps of Engineers hired Atlantic Marine Construction to build a child-development center on a military base in Texas. Atlantic Marine subcontracted with another construction company, J-Crew Management, to provide labor and materials.

That contract called for all disputes between Atlantic Marine and J-Crew Management to be resolved in the state or federal court in Norfolk, Virginia, where Atlantic Marine is based. But J-Crew Management sued Atlantic Marine in federal court in Texas over Atlantic Marine's alleged failure to pay for construction work.

Preferring to litigate in Virginia, as the parties had agreed to do, Atlantic Marine asked the federal district court in Texas to enforce the forum-selection clause. It argued that there were two ways that the district court might enforce that clause: under a federal statute that requires the dismissal or transfer of a case brought in the "wrong" venue,⁵ or under another federal statute that authorizes a transfer to a more convenient location.⁶ (The federal venue statute specifies which federal district or districts are permissible locations for a civil action to be brought, based on the residency of the defendants, the location of the events that are the subject of the suit, or the existence of personal jurisdiction over the defendant.⁷)

The district court denied Atlantic Marine's request under both theories, reasoning that venue was proper in Texas despite the contract's forum-selection clause, and that a convenience transfer was not warranted based on the balance of public and private interests. Atlantic Marine then asked the Fifth Circuit for a writ of mandamus to require the district court to transfer or dismiss the case. Over a dissent that noted the presumptive enforceability of forum-selection clauses, the court of appeals rejected that request.

The Supreme Court granted Atlantic Marine's request for review to resolve a circuit split over how to enforce a contract provision that selects a federal forum other than the one in which the case was filed. Whereas several courts of appeals had held that a forum-selection clause renders venue in other federal courts "improper" or "wrong"—requiring dismissal or transfer of the case for improper venue—the Fifth Circuit had joined a group of courts of appeals holding

instead that a forum-selection clause is only one among many factors to be weighed in determining whether a convenience transfer is appropriate.

In a unanimous opinion by Justice Alito, the Supreme Court reversed and remanded. In doing so, it effectively disagreed with both sides of that dispute among the courts of appeals.

The Court first rejected the argument that a forum-selection clause affects whether venue in a given district is "wrong" or "improper," because the venue statute does not address forum-selection clauses.⁸ Accordingly, when a case is filed in a district in which venue is authorized by law, a party seeking to enforce a forum-selection clause must seek transfer to a more convenient forum. A clause selecting a federal forum may be enforced using the statutory convenience transfer, while a clause selecting a state forum may be enforced under the *forum non conveniens* doctrine.⁹

The Court then described the appropriate standard for transfer. In ordinary cases not involving forum-selection clauses, courts must balance "the convenience of the parties and various public-interest considerations" to determine whether transfer would promote "the interest of justice."¹⁰ But that analysis shifts in three important ways, the Court explained, in cases involving forum-selection clauses.¹¹

First, in balancing interests, the court may not consider "the plaintiff's choice of forum," because the plaintiff already agreed by contract that another forum is more appropriate. Although "plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous," when the parties have agreed in advance to a forum-selection clause, "the plaintiff has effectively exercised its 'venue privilege' before a dispute arises. Only that initial choice deserves deference."¹²

Second, because forum-selection clauses "waive" the parties' "right to challenge the preselected forum as inconvenient," the courts are limited to

“consider[ing] arguments about public-interest factors only.”¹³ And the parties’ contractual choice of forum will outweigh public-interest factors “in all but the most exceptional cases.”¹⁴

Finally, the court should apply the choice-of-law rules of the state in which the parties selected their forum, so the plaintiff does not gain an unfair advantage by ignoring the forum-selection clause. Ordinarily, plaintiffs may affect the substantive law that applies to their case by choosing where to file suit, because a federal court typically applies “the choice-of-law rules of the State in which it sits.”¹⁵ Although the Supreme Court has recognized an exception for cases transferred because of convenience—under which the court applies the choice-of-law rules of the district where the plaintiff first filed suit¹⁶—the Court rejected that approach in *Atlantic Marine*. The transferee court in the contractually selected forum will apply that forum’s choice-of-law rules as if the case had been filed there initially, in order to avoid privileging a party that “flouts its contractual obligation and files suit in a different forum.”¹⁷

The Supreme Court did not ultimately decide which forum was proper in *Atlantic Marine*, however. Instead, it rejected the lower courts’ balancing of public and private interests, because the private interests cannot weigh against enforcing the forum-selection clause, and remanded to allow the lower courts to consider in the first instance whether any public-interest factors preclude enforcement of the clause in this case.

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Endnotes

¹ ___ S.Ct. ___, 2013 WL 6231157 (U.S. Dec. 3, 2013).

² 28 U.S.C. § 1404(a).

³ 28 U.S.C. § 1406(a).

⁴ 2013 WL 6231157, at *12-13.

⁵ See § 1406(a).

⁶ See § 1404(a).

⁷ See 28 U.S.C. § 1391.

⁸ 2013 WL 6231157, at *6-8.

⁹ *Id.* at *9-10.

¹⁰ As the Supreme Court explained, “[f]actors relating to the parties’ private interests include ‘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.’ Public interest factors may include ‘the administrative difficulties flowing from court congestion; the local 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.’ The Court must also give some weight to the plaintiffs’ choice of forum.” *Id.* at *11 n.6 (internal citations omitted).

¹¹ The same revised analysis would apply regardless of whether the forum specified in the forum-selection clause is a federal, state, or foreign court; because the federal transfer statute codifies the *forum non conveniens* doctrine, both the statute and the doctrine function exactly the same way for these purposes, except

that the remedy under the latter is dismissal (allowing the plaintiff to refile in a state or foreign court) rather than transfer. *See id.* at *10, 13 n.8.

¹² *Id.* at *11.

¹³ *Id.* at *12.

¹⁴ *Id.* at *11 (quoting *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

¹⁵ *Id.* at *12 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494-96 (1941)).

¹⁶ *Id.*; see *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

¹⁷ 2013 WL 6231157, at *12-13.

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