The Enforceability of Forum Selection Clauses: Federal or State Law?

The Supreme Court has long-extolled a federal policy favoring liberal enforcement of forum selection clauses and has held that such clauses "should control absent a strong showing that [they] should be set aside." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587, 591 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972). Despite this federal policy, however, when federal courts derive their jurisdiction from diversity, the familiar *Erie* doctrine requires those courts to apply state—and not federal—law to determine the enforceability of all contracts. The United States Court of Appeals for the Sixth Circuit is the most recent federal court to grapple with a question at the intersection of these concepts: When sitting in diversity, is the enforceability of a forum selection clause in an international contract determined by reference to state or federal law? A deep split of federal authority on this issue has been acknowledged for over fifteen years. *See, e.g., Lambert v. Kysar*, 983 F.2d 1110, 1116 n.10 (1st Cir. 1993) (citing conflicting authority, and calling the resolution a "daunting question").

In *Wong v. PartyGaming Ltd.*, No. 09-cv-0432 (6th Cir., Dec. 21, 2009), the Defendant—a Gilbralter-based company—earned a dismissal of the lawsuit filed against it in Ohio on the basis of forum non conveniens. One of the private factors that guided that determination was the existence of a forum selection clause favoring Gibraltar in the parties' contract. On review, the court of appeals had to consider the enforceability of that clause. Noting the divergences between Ohio and federal law, however, it first had to confront the choice of law issue. Looking at the law of other Circuits, the court noted that "six Circuits have held that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law." On the other hand, at least two circuits have considered the question to be substantive, and thus determined under state law, while two others remain plagued by intra-circuit conflicts on the issue. The Sixth Circuit found "persuasive the law used in the majority of circuits," and held that "[g]iven the possibility of diverging state and federal law on an issue of great economic consequence, the risk of inconsistent decisions in diversity cases, and

the strong federal interest in procedural matters in federal court," federal law should govern the question. The clause was deemed valid, and the decision affirmed.

Judge Lynch in the Southern District of New York noted nearly a decade-ago that this "question may become increasingly academic, as more and more states adopt the federal rule on forum-selection clauses. At one time, American jurisdictions generally rejected their validity. Today, a clear majority of the states have reversed this stand, and, in agreement with the federal rule of *The Bremen*, will enforce forum-selection clauses unless they create injustice or were imposed by fraud." *Licensed Practical Nurses, Technicians & Healthcare Workers v. Ulysses Cruises*, 131 F. Supp. 2d 393 (S.D.N.Y. 2000). Still, as Ohio law illustrates, the problem remains a practical concern. This question will certainly keep arising in forum non conveniens cases, and in cases seeking to enforce the forum selection clauses at the outset of a case. At least when those clauses underlie a foreign judgment that is submitted for recognition in the United States, however, the legislation implementing the Hague Choice of Courts Convention should force some much-needed harmony into the field.