Enforcing Outbound Forum Selection Clauses in U.S. State Court

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European legal scholars have long bemoaned the difficulty in identifying "black letter rules" when it comes to U.S. private international law. One area where this law is famously opaque relates to state enforcement of "outbound" forum selection clauses. Outbound clauses—which are known as derogation clauses in the rest of the world—state that a dispute must be heard by a court other than the one where the suit was brought. State courts in the United States generally refused to enforce these provisions prior to 1972. After the U.S. Supreme Court rendered its seminal decision in *The Bremen*, however, attitudes began to change. Today, it is generally acknowledged that state courts are far more likely to enforce outbound forum selection clauses than they were fifty years ago. To date, however, nobody has attempted to determine empirically the extent to which state court practice has shifted since the early 1970s. Our new paper seeks to accomplish this goal.

State Practice by the Numbers

We reviewed every published and unpublished state court decision addressing the enforceability of outbound forum selection clauses decided after 1972. Our analysis of these decisions revealed the following:

1. State courts in the United States enforce outbound forum selection clauses approximately 77% of the time when one party challenges the enforceability of the clause.

2. The enforcement rate is remarkably consistent across large states in the United States. In California, the enforcement rate was 80%. In Texas, it was 79%. In New York, it was 79%. In Florida, it was 78%. In Ohio, it was 78%. In Illinois, it was 74%.

We are currently gathering data about federal court practice. Our preliminary results suggest that the enforcement rate is at least as high, if not higher, when the enforceability of an outbound clause is challenged in federal court.

In addition to looking at enforcement rates, we also examined the rationales proffered by state courts in cases when they declined to enforce outbound clauses. Knowing how often state courts enforce these clauses, and more importantly, *why* they do not enforce them, offers valuable insights for contract drafters, judges, and scholars. We found that when a state court refuses to enforce an outbound clause, it is almost always because the clause is contrary to public policy (8% of all cases) or unreasonable (12% of all cases). What does it mean, however, for a clause to be contrary to public policy? And what are the situations when a clause will be deemed unreasonable? The cases in our data set shed light on both of these questions.

Public Policy

With respect to public policy, state courts most frequently refuse to enforce an outbound clause because there is a state statute directing them to ignore it. Forty-nine states have enacted states declaring outbound clauses unenforceable in consumer leases. Twenty-eight states have enacted statutes announcing a

similar rule with respect to clauses in construction contracts. All told, we identified more than 175 state statutes directing courts to refuse to enforce outbound clauses across a wide range of agreement types. Our paper includes a detailed chart that shows which statutes are in force in which states.

U.S. courts also sometimes refuse to enforce a clause on public policy grounds by citing an "anti-waiver" statute. Anti-waiver statutes provide that certain rights conferred by state law are non-waivable. When a state court is presented with a contract that contains an outbound forum selection clause, and when the forum court concludes that the courts in the chosen jurisdiction are unlikely to give effect to non-waivable rights conferred by the forum state, the forum court may refuse to enforce the forum selection clause on public policy grounds. On this account, the enforcement of the clause is contrary to the public policy of the forum not because the legislature has specifically directed the courts to ignore it. Instead, these clauses go unenforced because their enforcement would result in the waiver of non-waivable rights.

Reasonableness

The most common basis cited by state courts in refusing to enforce an outbound forum selection clause is a lack of reasonableness. The most common reason why state courts strike down clauses on reasonableness grounds is that the clause would result in duplicative litigation. Courts are reluctant to enforce the clause—and send litigation elsewhere—if it means the plaintiff would have to litigate the same set of facts in two different fora.

Second, many state courts refuse to uphold forum selection clauses if it means the plaintiff cannot secure effective relief in the chosen forum. Typical examples of this type of concern include procedural or jurisdictional problems in the chosen forum, claims that are so small as to make it uneconomical for a plaintiff to pay the costs to travel to pursue them, and fora that constitute a "serious

inconvenience" to the plaintiff. We should note here that most state courts do not refuse to enforce clauses because it would be expensive for the plaintiff to maintain the lawsuit in another state. However, when the plaintiff presents an extremely small claim or an extreme expense to litigate, some courts will take pity the plaintiff and refuse to enforce the outbound clause.

In several other categories of cases, state courts refuse to uphold outbound clauses when (1) the plaintiff has no notice of the clause, or (2) the chosen forum bears no reasonable relationship to the parties. The notice issue arises most frequently in cases of form passage tickets, mostly for cruise lines, and in online "clickwrap" agreements. Some courts have been reluctant to hold plaintiffs responsible for forum selection clauses in these two scenarios when the defendant did not reasonably communicate the clause to the plaintiff. In addition, some courts refuse to uphold outbound clauses against unsophisticated parties where the clause is buried in fine print amid other legal jargon. We note, however, that simply because a forum selection clause is contained in a contract of adhesion does not make it unreasonable. This scenario was obviated by the Supreme Court's ruling in *Carnival Cruise Lines, Inc. v. Shute*, where the Court upheld a forum selection clause on the back of a preprinted cruise ticket. Finally, the typical contract defenses, such as fraud, unconscionability, and problems with formation, all apply to forum selection clauses as well, with some variation among the states.