Financial Hardship and Forum Selection Clauses

The U.S. Supreme Court has long held that a forum selection clause should not be enforced when "trial in the contractual forum will be so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court." The financial status of the plaintiff is obviously a factor that should be considered as part of this inquiry. Large corporations can usually afford to litigate cases in distant courts. Individual plaintiffs frequently lack the resources to do so. Nevertheless, the lower federal courts in the United States have repeatedly held that financial hardship on the part of the plaintiff is not enough to make an otherwise valid forum selection clause unenforceable.

In a new article, *Financial Hardship and Forum Selection Clauses,* I argue that this practice is both doctrinally incorrect and deeply unfair. U.S. courts can and should consider the plaintiff's financial circumstances when deciding whether to enforce foreign forum selection clauses. To illustrate the perversity of current practice, one need look no further than *Sharani v. Salviati & Santori, Inc*.

Jay Sharani, his wife Catherine, and their two young children were moving from the United Arab Emirates to San Franciso, California. They paid $3600 to IAL Logistics Emirates, LLC (IAL), a shipping company, to transport seventy pieces of household goods to the Bay Area. Although the goods were successfully delivered to a warehouse in Oakland, IAL never communicated this fact to the Sharanis. The Sharanis repeatedly sought to contact IAL over the course of two months. They received no response. When the company finally responded, the Sharanis discovered that many of their goods were in the process of being sold at auction. When the remaining goods were finally delivered, most of them were damaged and unusable.

The Sharanis filed a lawsuit, *pro se*, against IAL's delivery agent in federal district court in California alleging breach of contract and negligence under the Carriage of Goods by Sea Act. The defendant moved to dismiss the case based on a forum selection clause in the shipping agreement. That clause required all lawsuits to be brought in London, England. The Sharanis argued that the clause should not be enforced because it would deprive them of their day in court. Specifically, they

alleged that (1) they could not afford to hire counsel in the United Kingdom, and (2) they could not afford to take extended time away from their jobs and family responsibilities to represent themselves abroad. The court rejected these arguments. It held that the Sharanis had failed to show that litigating in England would be so expensive as to deprive them of their day in court. It also held that that the Sharanis had not explained "why one parent could not stay with the children while the other parent pursues the claim, or why their income is insufficient to pay for childcare." The case was dismissed. So far as I can determine, it was never refiled in England.

In my article, I demonstrate that the outcome in *Sharani* is no outlier. In case after case, decided decade after decade, U.S. courts have enforced foreign forum selection clauses knowing full well that the practical effect of enforcement would almost certainly deprive plaintiffs of their day in court because they lack the financial resources to bring their cases abroad. The end result is a long trail of abandoned lawsuits where plaintiffs holding legal claims were denied access to a forum in which to assert those claims.

[This post is cross posted at Transnational Litigation Blog.]