Forgotten Equity: The Enforcement of Forum Clauses

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I
INTRODUCTION

When courts differ widely and sharply on which of three or four procedural courses should be taken to enforce a contractual right of unquestioned validity, and every such course openly strains orthodox procedural doctrine, we may suspect they are all wrong. We can confirm they are wrong when we recognize the right in question is not a procedural incident at all but the right to a substantive performance, bargained for by the parties, that has about it an illusory appearance of procedure and, because of its substance, does not fit comfortably within merely procedural doctrine. Such is the right to be sued, if at all, only in the jurisdiction named in the forum clause of a contract.1

Equity courses have been out of fashion for decades. Those who remember one, however, may recognize that the enforcement of a contractual forum clause is a clear instance of specific performance in equity and the known defenses to its enforcement are precisely those that equity makes available. While enforcement has grown more familiar, however, it has come adrift from its doctrinal basis.2 The result is confusion, as courts and

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1By forum clauses we mean those contract clauses by which the parties select an exclusive forum to resolve their disputes, and not mere service of suit clauses, by which a party agrees to personal jurisdiction in a non-exclusive forum. Service of suit clauses are found in insurance policies, where they obligate the insurer to accept service of process in a stated jurisdiction but do not necessarily preclude suit elsewhere. See, e.g., International Ins. Co. v. McDermott Inc., 956 F.2d 93, 1992 AMC 2594 (5th Cir.), cert. denied, 506 U.S. 826 (1992) (insured and insurer each may choose in which forum to sue). But see Rokeby-Johnson v. Kentucky Agric. Energy Corp., 489 N.Y.S.2d 69 (App. Div. 1985) (treating a service of suit clause as the equivalent of forum selection).

2Specific performance usually is mentioned in the forum clause cases without reference to equity. It has even been described as though it were a statutory modification of the common law. See, e.g., Southland Corp. v. Keating, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part).
counsel search through procedural rules and practices for pigeonholes in which to fit such enforcement.

II

SUBSTANCE OR PROCEDURE?

As a result of the Supreme Court's decisions in three maritime cases, forum clauses are now often given effect in both federal and state courts. In those three cases, the Court enforced a clause in a towing contract for exclusive jurisdiction in London, making a strong policy statement for general enforcement; a passenger ticket clause for exclusive jurisdiction in Florida; and a bill of lading clause for arbitration in Japan.

Arbitration clauses in interstate and foreign commerce are enforced under a statute and two international conventions. For the purpose of discussing contract doctrine, however, they are simply forum clauses of a special kind: in the words of the Supreme Court, "foreign arbitration clauses are but a subset of foreign forum selection clauses in general."

The courts generally recognize that when the issue arises in a maritime case, in either a federal or state court, the maritime rule must be enforced. But both the state courts and the lower federal courts display confusion about the doctrinal basis of enforcement. If we ask why they do not simply enforce the clauses according to precedent without concerning themselves further about doctrine, the answer is they try to fit enforcement into the familiar frameworks of procedural statutes and rules, and the doctrines of jurisdiction, venue, forum non conveniens, and pleading, none of which is in its proper setting, and all of which are troubled by the obviously ill fit.

Dismissal from the wrong forum has been urged and ordered for lack of subject matter jurisdiction, although it is hard to see how a court can properly investigate the validity of a contract clause and enforce it without

(referencing to the "common law rule against specific enforcement of arbitration agreements"). Of course, never offering such a remedy, the common law has had no occasion for such a rule.

8Vimar Seguros, 515 U.S. at 533.
jurisdiction;\textsuperscript{12} indeed, in the arbitration cases, jurisdiction is clearly recognized and retained while the clause is enforced.\textsuperscript{13} Motions to enforce forum clauses in a number of cases have been made and granted for improper venue, occasionally by dismissal,\textsuperscript{14} and more often by transfer under 28 U.S.C. § 1404(a) or § 1406, moved alternatively by the defendant\textsuperscript{15} or defensively by the plaintiff.\textsuperscript{16} Again, it is cause for wonder that a court disqualified by improper venue can validate and enforce contract terms without statutory authority.

Violations of a forum clause have been attacked on the ground of forum non conveniens,\textsuperscript{17} although the mandate of the forum clause and the limited exceptions to its enforcement, which must be proved by the plaintiff,\textsuperscript{18} are far from consistent with the accepted factors of forum non conveniens,\textsuperscript{19} as to which the defendant has the burden.\textsuperscript{20} California courts, for example, have found no other basis for dismissal in their procedural law, although they

\textsuperscript{12}In Seven Seas Ins. Co. v. Danzas S.A., 1997 AMC 961, 962 (S.D. Fla. 1996), the court evaded this problem by saying that “its subject matter jurisdiction is limited to enforcement of the forum selection clause.” But the jurisdictional statutes do not confer jurisdiction over discrete issues or segments of cases.

\textsuperscript{13}See, e.g., Vimar Seguros, 515 U.S. at 540.


\textsuperscript{17}See, e.g., Cuizon v. Kedma, Ltd., 1997 AMC 2890 (S.D.N.Y. 1997) (forum non conveniens elements evaluated and motion denied).

\textsuperscript{18}The Bremen, 407 U.S. at 15 (noting that such exceptions consist of fraud or overreaching, unreasonableness, and contrariety to public policy).

\textsuperscript{19}See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (explaining that such factors include both private interests—e.g., ease of access to proof, availability of compulsory process, cost of attendance of witnesses, possibility of viewing the premises, and ease of administration—and public interests—e.g., burden on courts, having local controversies decided at home, and the law to be applied).

have had to modify the doctrine by limiting the discretion it otherwise allows
them.\textsuperscript{21}

The federal circuits are said to be split as to whether dismissal should be
based on improper venue or yet another ground—failure to state a claim
upon which relief can be granted.\textsuperscript{22} The latter ground also is highly strained,
because failure to state a claim ordinarily is the apparent lack of any
substantial right and not just the inability to enforce it in a particular court.
The illusion involved in the federal “split” is neatly illustrated when courts
express it as the procedural question of whether the motion to dismiss should
be brought under Rule 12(b)(3) (venue) or under Rule 12(b)(6) (failure to
state a claim).\textsuperscript{23} In doing so, they treat explicitly as procedure what has been
held to be part of the substance of the contract.\textsuperscript{24}

The weakness of all the procedural approaches is exposed immediately
when the question of enforcement is raised in the designated court, rather
than an improper one, as where the defendant goes into the proper court to
enforce its contract and obtains an injunction against prosecution else-
where.\textsuperscript{25} Where is the procedural pigeonhole to be found for that?

In \textit{The Bremen}, the Supreme Court declared forum clauses to be of the
very substance of contracts: “The forum clause was a vital part of the
agreement, and it would be unrealistic to think that the parties did not
conduct their negotiations, including fixing the monetary terms, with the
consequences of the forum clause figuring prominently in their calcula-
tions.”\textsuperscript{26}

The foregoing discussion, arising in the context of a dispute regarding the
choice of a foreign court, was used directly to support enforcement of an

\textsuperscript{21}See, e.g., Premier Cruise Lines, Ltd. v. Superior Court, 1997 AMC 2797 (Cal. Ct. App. 1996);
prevents applying forum conveniens factor of available alternative forum where time for suit remains
open or is waived); Santos v. Royal Cruise Line Ltd., 1996 AMC 773 (Cal. Super. Ct. 1995).

\textsuperscript{22}See C. Wright & A. Miller, 5A Federal Practice and Procedure § 1352, at 127 n.4.1 (Supp. 1998).

\textsuperscript{23}Compare, e.g., Offshore Sportswear, Inc. v. Vuarnet Int’l, B.V., 114 F.3d 848 (9th Cir. 1997),
Argueta v. Banco Mexicano, S.A., 87 F.3d 320 (9th Cir. 1996), Commerce Consultants Int’l, Inc. v.
Vetrerie Riunite, S.p.A., 867 F.2d 697 (D.C. Cir. 1989), and Kelso Enters., Ltd. v. M/V Wisida Frost, 8
Kysar, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993), and Rawlins v. Clipper Cruise Lines, 1998 AMC 1254
(N.D. Cal. 1995) (failure to state a claim).

\textsuperscript{24}The ambivalence of one court of appeals, however, was between substance and procedure in a case
falling within both admiralty and diversity jurisdiction. The court rejected state law on the substantive
ground the charterparty was controlled by admiralty, and alternatively (if jurisdiction depended on
diversity), that the question was one of federal procedure. See Sun World Lines, Ltd. v. March Shipping
Corp., 801 F.2d 1066, 1988 AMC 1495 (8th Cir. 1986).

\textsuperscript{25}See, e.g., Farrell Lines Inc. v. Ceres Terminals Inc., 161 F.3d 115, 1999 AMC 305 (2d Cir. 1998)
(shipper and insurer enjoined from suing anywhere but in New York due to forum selection clause).
\textit{The Bremen}, 407 U.S. at 14 (footnote omitted).
arbitration clause as against restriction by state law. In holding the grounds of enforcement are not limited to the federal courts, the Court, rejecting a contrary view in dissent, held them not to be procedural and equated arbitration clauses with forum clauses as matters of substance. Thus, in The Bremen and its subsequent treatment of forum clauses and arbitration clauses, a "subset," the Court has recognized forum selection clauses are matters of contract substance rather than procedure.

III

EQUITY AS SOLUTION

How then are forum clauses to be enforced, if not under procedural rules? Equity was the answer first given by the Supreme Court in enforcing arbitration agreements; enforcement under a state statute in an admiralty case was to be done by the equitable remedy of specific performance. The Court said "[t]he substantive right created by an agreement to submit disputes to arbitration is recognized [in admiralty] as a perfect obligation." The Court described the exercise explicitly as "specific performance," referred to the reasons given by equity for sometimes denying it, and cited Justice Story in both reported decision and his treatise on equity jurisprudence.

The Court soon reiterated the equitable basis in its first decision involving the FAA. It again called enforcement "specific performance" and attributed it to equity jurisprudence, saying that Congress had the power to "draw upon other systems" and pointing out that admiralty also exercised equitable powers in other ways. And again later, the Court declared that a defense setting up arbitration in a contract case is "an equitable defense or cross-bill." In discussing the FAA more recently, the Court has pointed out

30Id. at 121.
"[t]he Arbitration Act sought to 'overcome the rule of equity, that equity will not specifically enforce any arbitration agreement.'"\textsuperscript{34}

In one case, the Supreme Court dealt with a forum clause in a way that sheds no light directly on the subject here but needs to be discussed lest it be misunderstood at a glance. \textit{Stewart Organization, Inc. v. Ricoh Corp.},\textsuperscript{35} was a diversity case arising from a contract governed by the law of Alabama. A motion was made to transfer it from Alabama to New York under 28 U.S.C. § 1404(a) ("convenience of parties and witnesses"). The contract contained a New York forum clause and the question that reached the Supreme Court was whether consideration of the forum clause in deciding the motion was precluded by Alabama's policy of not enforcing such clauses. The Court decided the clause could be considered because of the discretion existing in such situations, but that it would not be conclusive. The opinion, explicitly narrow, concerned the force and scope of § 1404(a) as raised by the procedural motion\textsuperscript{36} and did not deal with the enforceability of the forum clause as such or with the question whether forum selection clauses are substantive or procedural.\textsuperscript{37}

While the policy of federal jurisprudence clearly appears to favor enforcement of forum clauses, neither the federal courts nor others can enforce all forum clauses that come before them. In many cases the proper law of the contract is that of some state or foreign nation. It is said that equity follows the law; more specifically, it supplements but does not controvert the law.\textsuperscript{38} When the proper law invalidates the forum clause or denies equity the power to enforce it, it can no more be directly enforced than any other invalid contract.\textsuperscript{39}

As the basis of enforcement lies in equity, the defenses to enforcement are equitable. In \textit{The Bremen}, the Court concluded that the clause should be enforced unless it were shown that it "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."\textsuperscript{40} The Court also said that a forum clause should not be enforced "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."\textsuperscript{41} These defenses are the very stuff of equity; the standard defenses to specific

\textsuperscript{34} Southland Corp., 465 U.S. at 13 (quoting Hearing on S.4213 and S.4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 6 (1923)).
\textsuperscript{35}487 U.S. 22 (1988).
\textsuperscript{36}Id. at 32.
\textsuperscript{37}See Lambert, 983 F.2d at 1116 n.10.
\textsuperscript{38}See generally 3 W. Blackstone, Commentaries *430-33; J. Story, Commentaries on Equity Jurisprudence §§ 8–20 (1st Eng. ed. 1884).
\textsuperscript{40}1107 U.S. at 15.
\textsuperscript{41}Id.
performance have been fraud, unconscionability, and lack of clean hands.\footnote{See, e.g., Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236 (1892) ("unconscionable, oppressive, or iniquitous contracts"); Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 276 (1831) ("concealment, misrepresentation, or any unfairness").} And as equity’s sources and nature indicate, it will not rule contrary to strong public policy.\footnote{See, e.g., Pope, 144 U.S. at 233–35.} The equity cases teach that the defenses involve the exercise of sound discretion,\footnote{Id. at 237.} as do the modern cases dealing with forum clauses.\footnote{See, e.g., Sun World Lines, 801 F.2d at 1068 n.3; Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 n.4 (9th Cir. 1984).} Recognition that equity is the true source of enforcement thus engages the power and duty to deny enforcement when it is met with the defenses the Court acknowledged in \textit{The Bremen}.

When specific performance is recognized as the proper ground of enforcement, the forum clause can be honored, with exceptions on equitable grounds and without discreditable strains on other rules and doctrines. A court need not deny jurisdiction or venue contrary to statutes and usual legal doctrine while contradicting its denial by interpreting and validating the contract. The court need not propagate a new legal fiction of “failure to state a claim” about a complaint because it does not derogate from its claim by mentioning a disregarded forum clause. It need not torture 28 U.S.C. § 1404(a) by transferring a case to an inconvenient district on the purported ground of convenience of parties and witnesses or strain the doctrine of forum non conveniens by dismissing a case on that ground from a convenient forum. And even where it cannot be directly enforced, the equity of the clause, and the consent which it represents, can be taken into account in a motion to transfer, in accordance with \textit{Stewart Organization}.

\section*{IV

\textbf{CONCLUSION}}

The history of enforcement of forum clauses in the Supreme Court leaves no doubt of its legitimate doctrinal foundation in equity. Conscious and explicit resort to that foundation deals with all the questions that normally arise and obviates strain on other rules and doctrines. It should be the normal course in all the courts.