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The Effect of Forum Selection Clauses on a District Court's Power to Compel Arbitration

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Section 4 of the Federal Arbitration Act creates a trap for unwary drafters of arbitration clauses because it contains conflicting directions to district courts on the proper venue to hear motions to compel arbitration. For this reason, having a forum selection clause in an arbitration agreement may not achieve the desired certainty that the forum selected will be the locale for resolving any disputes that may arise. Courts have adopted three approaches for resolving § 4’s internal conflict and have managed to turn the selection of arbitral venue into a process that requires the undivided attention of parties and their attorneys.

Typically, forum selection clauses provide a measure of predictability and certainty to contracts. However, forum-selection clauses in arbitration agreements may not provide the certainty that contracting parties expect. Because of conflicting language in § 4 of the Federal Arbitration Act (FAA), much judicial confusion exists on the district courts’ authority to compel arbitration in the location mandated by the parties’ agreement. Specifically, § 4 provides that district courts should compel arbitration in accordance with the terms of the parties’ agreement, but it also provides that the arbitration should take place within the district where the motion to compel arbitration was filed. Section 4 does not explain, however, how a district court should proceed when a party seeking to compel arbitration files a motion to compel in a district outside of the parties’ contractually selected forum. In the absence of such guidance, courts have adopted three different approaches to resolving the issue and have turned what should be a straightforward analysis into a surprisingly complex inquiry. This article attempts to explain the three approaches and examines each in light of the Federal Arbitration Act.


Several federal circuit courts have decided that a district court has the power to compel
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parties' agreement was "implicit at best," while § 4's requirement that arbitration take place in the district where the motion to compel is filed was "clear and unequivocal." Thus, relying on its interpretation of congressional intent, the 3rd Circuit dismissed the case and ordered arbitration to proceed in the Virgin Islands. The 9th Circuit reached a similar result in Continental Grain Co. v. Dant & Russell, Inc., which involved a motion to compel filed in Portland and an arbitration agreement that mandated arbitration in New York. After a brief discussion of congressional intent, the 9th Circuit concluded that the arbitration should take place in Oregon. In addition to stating that specific language in § 4 required this result, the court also relied on the waiver doctrine in making its decision. According to the 9th Circuit, the party that filed the motion to compel in the Oregon district court was in no position to complain that the district court exercised its jurisdiction. Antilles Car Rentals and Continental Grain have two traits that are common among cases where district courts decide to compel arbitration within their own districts. The first is that the party seeking to compel arbitration initiated the dispute resolution process by filing its motion to compel outside of the jurisdiction contemplated by the parties' contract. Under such circumstances, these courts typically find that parties waive any rights to object to arbitration in a court's jurisdiction by invoking that court's authority. The second common characteristic in these cases is that the courts typically cite legislative intent in deciding that the district court—despite contrary language in the parties' contract—had authority to compel arbitration in its jurisdiction. According to these courts, the explicit language in § 4 evidenced Congress's desire that district courts compel arbitration within their own districts.

Unfortunately, neither rationale provided by the circuit courts in upholding the district courts' authority to compel arbitration in their own districts is persuasive. First, a finding of waiver makes sense only if both parties explicitly waive their right to compel arbitration in the contractually selected forum. Simply seeking to compel arbitration in a jurisdiction outside of the one contemplated by the parties' contract should not constitute such a waiver. Second, relying on legislative intent to uphold the district court's authority to compel arbitration within its own district is equally unconvincing. While § 4 does explicitly state that the arbitration proceedings resulting from a motion to compel must take place in the jurisdiction where the motion was filed, it also states that courts must compel arbitration in accordance with the terms of the parties' contract. One of the reasons that Congress adopted the FAA was to convince courts to respect private arbitration agreements. Further, when originally introduced in the House and Senate, the bills that became the FAA did not include the directive that arbitration proceedings take place within the district where the motion to compel was filed. The amendment that included this language was added when the bill came out of committee. In describing the amendment's effects, the Senate Committee on the Judiciary appeared to indicate that the party seeking to compel arbitration would be required to file its motion to compel in the proper court. Thus, it does not appear that Congress intended the
venue provision of § 4 to override a freely negotiated, unambiguous forum selection clause.16

Second Approach: Court Can Compel Arbitration Outside Its Jurisdiction, Despite Prohibitive Language in FAA § 4

When faced with a motion to compel that was filed outside the jurisdiction called for by the parties' contract, the 5th Circuit decided that a district court has authority to compel arbitration in accordance with the terms of that contract, even if it means that the arbitration would take place outside the court's jurisdiction.17 In Dupuy-Busching General Agency Inc v. Ambassador Insurance Co., the contract required the parties to arbitrate any disputes in New Jersey. Dupuy-Busching ignored that contractual requirement and brought suit in the District Court for the Southern District of Mississippi, specifically requesting that the district court enjoin Ambassador from seeking arbitration.18 The district court denied Dupuy-Busching's request and ordered arbitration to proceed in New Jersey. On appeal, the 5th Circuit affirmed the district court's decision—despite the prohibitive language of § 4.19 Noting the tension between the two conditions of § 4, the 5th Circuit reasoned that "where a party seeking to avoid arbitration brings a suit for injunctive relief in a district court other than that in which arbitration is to take place under the contract, the party seeking arbitration may assert its § 4 right to have the arbitration performed in accordance with the terms of the agreement."20 Thus, in allowing the district court to order arbitration outside of its own jurisdiction, the 5th Circuit suggested that courts need not apply the language of § 4 literally.21

The problem with the 5th Circuit's approach is that § 4 explicitly states that district courts must compel arbitration in the district where the motion to compel was filed.22 To ignore this clear directive, the 5th Circuit had to decide that it was more important to respect parties' agreements to arbitrate. While this is a laudable goal, the 5th Circuit's decision to compel arbitration in another jurisdiction is not supported by the language of § 4.23

Third Approach: Court Cannot Compel Arbitration Anywhere

In Ansari v. Qwest Communications, Inc., the 10th Circuit examined both of the approaches discussed above and decided that neither was correct.24 The case involved litigation in the District Court for the District of Colorado and a contract that mandated arbitration in Washington, D.C. After Ansari initiated the litigation, Qwest filed a motion to compel arbitration in Colorado with the Colorado district court. The district court denied the motion, finding, based on the parties' forum selection clause, that it had no such authority. The district court also decided, based on § 4 of the FAA, that it had no authority to compel arbitration in Washington, D.C., the location called for in the parties' contract.25

Relying on the principle that courts should construe statutes in a manner that leaves no clause, sentence, or word superfluous, the 10th Circuit affirmed the decision of the district court.26 Since § 4 expressly prohibits district courts from ordering arbitration outside of their own jurisdiction, while at the same time requiring them to compel arbitration in accordance with the parties' agreement, the 10th Circuit decided that the only appropriate response was to stay the proceedings under § 3 of the FAA and order the moving party to file a motion to compel in the jurisdiction contemplated by the parties' contract, which is what the district court had done in this case.27

The 10th Circuit also based its decision in part on the recent increase in the number of courts adopting this approach. Citing decisions from the 6th and 7th Circuits, the Southern District of New York, and the District of Colorado,28 the 10th Circuit noted that the majority approach was correct, and that any other result would render meaningless the directive in § 4 that arbitration and the order compelling arbitration take place within the same district.29

Technically, the 10th Circuit appears to have reached the right conclusion because its decision substantially respects both of the conflicting provisions of § 4. Nevertheless, examining the pros
and cons of the court’s decision is necessary to understand why its position is not universally accepted. First, the upside of the 10th Circuit’s decision is that it prevents forum shopping. In other words, it prevents parties from filing a motion to compel arbitration in a jurisdiction outside of the one contemplated by their contract. However, such an upside may be minimal because the parties are already limited by § 4 to filing motions to compel only in courts where jurisdiction is proper. Second, the court’s decision provides a clear line for lower courts in the 10th Circuit to follow, requiring them to stay proceedings under § 3 of the FAA and order the parties to refile their motions to compel in the proper district court. Yet, this, too, may have a distinct disadvantage. As Qwest attempted to argue before the 10th Circuit, the court in the jurisdiction where the arbitration is to take place may not have personal jurisdiction over the parties. Thus, under the 10th Circuit’s approach, the party seeking to compel arbitration potentially may not be able to do so in any jurisdiction. In sum, the 10th Circuit’s decision, like the courts’ decisions adopting the first and second approaches discussed above, also has its flaws.

General Conclusions

The location of arbitration proceedings may determine what law governs the substantive and procedural aspects of a case that are not covered by the FAA. Certain courts are prone to find that parties who file motions to compel automatically consent to the jurisdiction of the court where the motion was filed, even, at least in the case of the Southern District of New York, if the party files the motion to compel as a responsive pleading. Others find that parties are bound by the terms of their arbitration agreement and either compel arbitration in the location called for by the contract or dismiss the motion to compel and order the moving party to file the motion in the proper court.

The location of arbitration proceedings may determine what law governs the substantive and procedural aspects of cases that are not covered by the FAA. Thus, forum shopping is probably at least part of the reason that parties file motions to compel outside of the jurisdiction called for in their contracts. One way to avoid forum shopping, of course, is to explicitly state in the arbitration agreement that the motion to compel, and any other ancillary motions, must be filed in the jurisdiction specified in the parties’ contract. The agreement should also state that both parties agree to waive any objections to venue and personal jurisdiction in the contractually specified location. Nevertheless, should a party proceed to initiate litigation in another jurisdiction, the appropriate response appears to be filing a motion to stay proceedings under § 3 of the FAA, while concurrently filing the motion to compel in the proper jurisdiction. This is the only approach that respects both of the conflicting requirements of § 4.

ENDNOTES

1 See, e.g., Carnival Cruise Lines v. Shute, 499 U.S. 585, 593-94 (1991) (“A clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of piecemeal motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.”).

2 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.”).

3 499 F.2d 1391, 1392 (3d Cir. 1974).

4 Id.

5 The court also based its reasoning in part on cost efficiencies for the parties, stating “Certainly the saving of resources occasioned by the geographic concentration of all proceedings provides an appropriate legislative basis for this limitation on the district court’s power.” Id. at 1394.

6 Id. at 1393-94.

7 118 F.2d 967, 968 (9th Cir. 1941).

8 Similar to the 3rd Circuit’s decision in Antilles Car Rentals, the court stated that § 4’s specific language requiring arbitration in the district where the jurisdiction where the motion to compel was filed evidenced Congress’s intent that district courts should be able to compel arbitration in their own district despite contractual language to the contrary. Id; see also Textile Unlimited, Inc. v. A.B.M. & Co., 240 F.3d 781, 783-85 (9th Cir. 2001). In Textile Unlimited, the 9th Circuit concluded that the FAA does not require venue in the location designated in the parties’ arbitration agreement. According to the court, the venue provisions in the FAA are discretionary, not mandatory, and parties are free to file motions anywhere allowed by the general venue guidelines of 28 U.S.C. § 1391. Moreover, said the court, the plain language of § 4 provides that parties seeking to compel arbitration “may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28.” 240 F.3d at 784-85; see also FAA § 4.

9 See n. 7 supra, 118 F.2d at 969.

10 Id. The court also reiterated the appellee’s reasoning for not wanting to arbitrate in New York, stating that the appellee was “unwilling to do so at New York because its place of business was Portland, Oregon, and that it believed it had a good and meritorious defense to the petitioner’s claim; alleged that the witnesses needed to substantiate its claims resided in Portland, and that the appellant had an office and place of business in Portland; alleged it was willing to arbitrate the matter at Portland, Oregon, or within the District of Oregon, but that it would be unfair and unjust to require respondent to be
dragged across the country to arbitrate in New York." Id. at 968.

2 Ian R. Macneil, Federal Arbitration Law § 24.2.3.6 (1999). This is especially true where the party is simply responding to a complaint filed in another district by the other party. See Dupuy-Busching Gen. Agency v. Ambassador Ins. Co., 524 F.2d 1275 (5th Cir. 1975) (finding that a motion to compel filed in response to the plaintiff’s complaint did not invoke the district court’s jurisdiction); but see Indian Harbor Ins. Co. v. Glob. Transp. Sys., Inc., 197 F. Supp. 2d 1, 3-4 (S.D.N.Y. 2002) (finding that defendant consented to district court jurisdiction by filing its motion to compel).

See FAA § 4.

3 Vol. Info. Sci. v. Board of Trustees, 489 U.S. 468, 474 (U.S. 1989) (“The Act was designed to overcome the jurisdictions’ longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts.”). See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985) (recognizing “a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions”).


5 Id. at 3 (“Section 4 provides a simple method for securing the performance of an arbitration agreement. The aggrieved party may apply to the proper district court on 5 days’ notice and the court will order the party to proceed.”). The argument against this, of course, is that § 4 states that parties may file motions to compel in any court where jurisdiction was proper, not just in the proper court.

6 Admittedly, the legislative history of § 4 is somewhat vague. However, this seems to be a reasonable interpretation. Macneil, supra n. 9 (citing Roney & Co. v. Goreen, 875 F.2d 1218, 1223 (6th Cir. 1989) (“When Congress enacted the Arbitration Act making arbitration agreements enforceable, it surely did not intend that the parties be able to disregard selected contractual obligations wilfully in order to choose an arbitral forum more convenient or more suited to a party’s particular needs.”)).

7 See Purdy v. Munex Inv’t Ltd., 867 F.2d 1251, 1253 (6th Cir. 1989); Dupuy-Busching, supra n. 11, 324 F.2d at 1278; see also Butner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (adapting as binding precedent all decisions of the 5th Circuit handed down prior to Oct. 1, 1981). But see National Iranian Oil Co. v. Ashbud Oil, 817 F.2d 326, 331 (5th Cir. 1987) (refusing to compel arbitration in Iran, the location in the parties’ forum selection clause, because Iran is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

8 Supra n. 11, 524 F.2d at 1276.

9 In answering Dupuy-Busching’s claim that Ambassador consented to the jurisdiction of the district court by filing its motion to compel, the 5th Circuit stated that compelling arbitration is a compulsory counterclaim that would have been waived by the principle of res judicata had Ambassador not filed it at that time. Id., 524 F.2d at 1277. However, the 5th Circuit has since retreated from that position. See Municipal Energy Agency of Mississippi v. Big Rivers Elec. Corp., 804 F.2d 338, 344-45 (5th Cir. 1986) (stating that Dupuy-Busching’s characterization of a motion to compel as collateral to its holding and not controlling).

10 Supra n. 17, 524 F.2d at 1277-78; see also Purdy, supra n. 17, 867 F.2d at 1523 (stating, “although [FAA] § 4 ... is somewhat unclear, a district court has the authority to order arbitration outside the district if the party seeking such a result has not waived his choice of forum.”).

11 See id.

12 FAA § 4 (“The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.”).

13 The 5th Circuit, although upholding the district court’s ruling, admitted that the ruling was contrary to the express terms of the FAA. Dupuy-Busching, supra n. 11, 524 F.2d at 1276, 414 F.3d 1214 (10th Cir. 2005).

14 Id. at 1215.

15 Id. at 1218, 1221.

16 Id. at 1220-21.


18 Supra n. 24, 414 F.3d at 1219-20.

19 Id. at 1214, 1221; see also Macneil, supra n. 9, (stating, “These questions could become even more complicated if the parties have agreed to arbitrate in a location where no district court meets the general venue requirements of 28 U.S.C. § 1391.”).