Ironclad Clauses, Ironclad No More: Practice Tips for Drafting Enforceable Forum-Selection Clauses under Atlantic Marine

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Following the Supreme Court's decision in *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), **forum-selection clauses** in contracts appeared ironclad and impossible to circumvent in federal court. After all, in *Atlantic Marine*, the Court held that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases" and will be enforced under the transfer provisions of 28 U.S.C. § 1404(a). *Id*. at 579, 581-82. *Atlantic Marine* explained that in evaluating contracts containing forum-selection clauses, courts should not consider arguments about the parties' private interests, as the parties have "waive[d] the right to challenge the preselected forum as inconvenient." *Id*. at 582. Courts may take into account public-interest factors, such as court congestion and the local interest in deciding localized controversies at home. However, "[i]n all but the most unusual cases ... the 'interest of justice' is served by holding parties to their bargain." *Id*. at 583 (quoting 28 U.S.C. § 1404(a)). Based on the holding in Atlantic Marine, it seemed as if forum-selection clauses would serve as the last word on venue and transfer in federal court proceedings.

Over the last two years, however, some lower courts have chipped away at the seemingly impenetrable shield that *Atlantic Marine* afforded to forum-selection clauses in federal court. Recent decisions that decline to enforce forum-selection clauses under *Atlantic Marine* offer valuable lessons to practitioners on "**what not to do**" when counseling clients and drafting forum-selection clauses. These recent decisions have done much to redefine the scope of *Atlantic Marine* and the factual nuances that alter the protection it affords to forum-selection clauses. Going forward, practitioners seeking to draft and enforce such clauses should be mindful of lessons learned from the Supreme Court's decision in *Atlantic Marine* and the lower courts' interpretation and application of it.

Below are five practical tips to bear in mind when drafting forum-selection clauses to avoid surprise and best ensure that the forum identified in the contract will control:

Tip #1 - Identify a favorable yet realistic forum that has some relationship to the parties or the contractual performance.

While private interests may not be considered under *Atlantic Marine*, the Supreme Court doespermit consideration of *public-interest* factors such as administrative convenience, the benefits of litigating a local dispute at home, and the ease of choosing a court whose law will substantively apply to the facts of the case. If parties select a logical forum, either based on the parties to the contract or the contract itself, then it is difficult to identify a public interest that would qualify as an "exceptional case" that would outweigh the forum-selection clause.

But remember -- designating a specific federal court does not create jurisdiction; rather, a basis for federal jurisdiction must exist for a case to be litigated there. Therefore, prior to including a forum-selection clause for a particular federal court,

consider whether a distinct basis for jurisdiction exists, through diversity of parties and the requisite amount in controversy, or because the matter involves a question of federal law.

Tip #2 - Designation of a foreign jurisdiction renders Atlantic Marine inapplicable.

The Second Circuit's decision in *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014)illustrates that the selection of a forum outside of the United States is a risky proposition – one that may be unenforceable. In *Martinez*, plaintiff sued Bloomberg and certain employees, alleging discrimination in violation of the Americans with Disabilities Act, as well as state and local laws. *Id*. at 214. Plaintiff's employment contract contained a combined choice-of-law and choice-of-forum clause that designated English law and English courts. *Id*. Plaintiff filed suit in the Southern District of New York, and also brought a claim before the London Employment Tribunal. *Id*. at 215-16. He later abandoned the English proceeding due to the cost of litigation and the unavailability of fee shifting under English law. *Id*. at 216. The district court granted defendants' motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3), finding that the forum-selection clause controlled the venue question. Plaintiff appealed this decision.

In its lengthy analysis, the Second Circuit addressed, among other things, whether "private hardships" can suffice to render a forum-selection clause unenforceable. *Id*. at 229-30. The court found that claims relating to foreign jurisdictions raise important challenges to the holding in *Atlantic Marine*, because where a motion to transfer under § 1404(a) involves only a transfer from one federal district court to another, a transfer to a foreign court may implicate much more considerable hardships related to loss of rights and remedies under foreign law. *Id*. at 230. That said, the Second Circuit chose not to reach the question of whether private hardships may invalidate a forum-selection clause designating a foreign jurisdiction, finding that the plaintiff had failed to make this showing. *Id*.

The Second Circuit clearly signaled that it was inclined to consider and give great weight to "private hardships" attendant to the enforcement of clauses that designate a foreign jurisdiction. Accordingly, courts may be reluctant to enforce such clauses, and drafters are best advised to avoid this practice wherever possible. If the selection of a foreign jurisdiction is absolutely necessary, then parties should be prepared to defend their designation based on both public and private interest factors.

Tip #3 -Avoid "permissive" language in forum-selection clauses.

Of the federal courts that have addressed this issue, the vast majority have determined that *Atlantic Marine* applies to enforce **mandatory** but not permissive forum-selection clauses. While *Atlantic Marine* involved a mandatory clause, it was silent on the issue of permissive forum-selection clauses. Many courts have used this silence to carve out permissive clauses from the *Atlantic Marine* framework. *See, e.g, Fin. Cas. & Sur., Inc. v. Parker*, 2014 WL 2515136, at *3 (S.D.Tex. 2014); *Networld Communications, Corp. v. Croatia Airlines, D.D.*, 2014 WL 4724625, at * 2 (D.N.J. 2014); *RELCO Locomotives, Inc. v. AllRail, Inc*., 4 F.Supp.3d 1073, 1085 (S.D.Iowa 2014); *Residential Fin. Corp. v. Jacobs*, 2014 WL 1233089, at *3 (S.D.Ohio 2014); *United States ex. Rel. MDI Servs., LLC v. Fed. Ins. Co.*, 2014 WL 1576975, at *3 (N.D.Ala. 2014); *Taylor v. Goodwin & Assoc. Hospitality Services, LLC*, 2014 WL 3965012 (W.D.Wash.2014); *Lavera Skin Care North America, Inc. v. Laverana GMBH & Co. KG*, No. 2:13-cv-02311, 2014 WL 7338739 (W.D. Wash., Dec. 19, 2014); *but see Compass Bank v. Palmer*, 2014 WL 355986, at *5 (W.D.Tex. 2014); *United Am. Healthcare Corp. v. Backs*, 997 F.Supp.2d 741, 750 (E.D.Mich. 2014).

Given this uncertainty, forum-selection clauses must include **unequivocal language** that binds the parties to seek relief in the designated forum. The terms "shall", "must", and "exclusive" ought to be used to make it clear that the parties have agreed that they are "required" to litigate in the selected forum. Where courts find that **permissive** terminology has been used in drafting the forum-selection clause, the traditional *forum non conveniens* test will likely be applied, inserting much more uncertainty into the analysis of whether the designated forum will control.

Tip #4 -Manage client expectations and be prepared for the unexpected.

The Fifth Circuit's decision in *In re Rolls Royce Corporation*, 775 F.3d 671 (5th Cir. 2014) demonstrates that even with a properly drafted forum-selection clause, procedural loopholes may still complicate the analysis of whether the clause will be enforced. In *Rolls Royce*, the Court held that *Atlantic Marine* does not mandate enforcement of a forum-selection clause **in multiparty cases** unless all parties have signed the underlying contract. *Id*. at 673-74. The Fifth Circuit's distinction effectively limits the scope of *Atlantic Marine* to two-party disputes and, in doing so, creates a simple loop-hole through which plaintiffs can evade forum-selection clauses. As observed by Circuit Judge Jones, who concurred in the judgment only, "the majority's view sacrifices the clarity of *Atlantic Marine* to easy manipulation, because, if it is correct, any clever party to a lawsuit can readily join another party or individual in an attempt to avoid the forum selection clause." *Id*. at 685. Even as you carefully draft your forum-selection clauses to comply with the factors set out in *Atlantic Marine*, it is still wise to caution your clients about the potential procedural loop-holes through which plaintiffs can evade forum-selection clauses – e.g., joinder of additional parties.

Tip #5 - Carefully consider procedural steps leading up to your motion to transfer.

Do not overlook this critical first step to enforcement: the case must already be in federal court in order to enforce forum-selection clauses under *Atlantic Marine*. If a case has been improperly filed in state court, then (1) consider whether there is a basis for federal jurisdiction, and if so then (2) file the Notice of Removal to federal court. Once the case is properly venued in federal court, then move to transfer the case to the designated court under 28 U.S.C. 1404(a).

The holding in *Atlantic Marine* has spurred extensive discussion of forum-selection clauses and how to get around them. The case law is constantly evolving, and it is therefore important to stay on top of recent developments and incorporate these practical tips into drafting forum-selection clauses. While the ironclad holding of *Atlantic Marine* may not be as ironclad as it once seemed, careful drafting of forum-selection clauses can still provide significant protection for a client's interests.