

IN PRACTICE

CONTRACTS

Supreme Court Clarifies Rules for Enforcing Forum-Selection Clause

By Peter J. Gallagher

In recent years, the U.S. Supreme Court has taken a keen interest in the enforceability of contractual arbitration provisions. But in one of the first cases argued during the current term, it took up an important issue surrounding another common contractual provision—the forum-selection clause.

In *Atlantic Marine Construction Co. v. United States District Court* (No. 12-929), the Court held that a defendant who is sued in a forum other than the one it agreed to in its contract with the plaintiff, must move to transfer the lawsuit to the agreed-upon forum under 28 U.S.C. §1404(a), rather than move to dismiss the complaint under 28 U.S.C. §1406(a) or Fed. R. Civ P. 12(b)(3).

Moreover, the Supreme Court held that a motion to transfer the lawsuit to a forum agreed upon by the parties in a valid forum-selection clause should ordinarily be granted absent “extraordinary circumstances.” While this decision, on a relatively dry, procedural issue, is not likely to rank as one of the most talked-about cases of the current term, it is nonetheless important given

Gallagher is a commercial litigator at Porzio, Bromberg & Newman in Morristown.

how common forum-selection clauses are in modern contracts, and how often these clauses are the subject of motion practice.

In *Atlantic Marine*, the U.S. Army Corps of Engineers hired Atlantic Marine Construction Co., a Virginia company, to build a child development center at Fort Hood in Texas. Atlantic Marine subsequently entered into a subcontract with J-Crew Management, a Texas corporation, to perform certain work on the project. The subcontract contained a forum-selection clause, which provided that any disputes arising under the subcontract “shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.” Notwithstanding this clause, after a dispute arose between the parties, J-Crew sued Atlantic Marine in the U.S. District Court for the Western District of Texas.

Atlantic Marine moved to dismiss the complaint under Section 1406(a) and Rule 12(b)(3), which allow for dismissal when venue is “wrong” or “improper.” Alternatively, Atlantic Marine moved to transfer the case to Virginia under Section 1404(a), which allows for transfer in the interests of justice or for the convenience of the parties and witnesses. The district court rejected both arguments, and denied the motion. The

district court held that Section 1406(a) and Rule 12(b)(3) did not apply because venue was properly in the U.S. District Court for the Western District of Texas, and that transfer under Section 1404(a) was inappropriate because of the inconvenience to J-Crew of litigating in Virginia.

The U.S. Court of Appeals for the Fifth Circuit affirmed the district court’s decision, and Atlantic Marine appealed. The Supreme Court reversed the Fifth Circuit, sort of. It held, in a unanimous opinion written by Justice Samuel Alito, that the Fifth Circuit correctly concluded that a motion to transfer was the proper procedure to follow, but that the Fifth Circuit did not give enough weight to the forum-selection clause when determining whether the motion should have been granted.

On the threshold issue, the Supreme Court held that a motion to dismiss under Section 1406(a) or Rule 12(b)(3) was not the proper mechanism to enforce a forum-selection clause, unless venue was “wrong” or “improper” in the chosen district. Under Section 1391, venue is proper in: any district where any defendant resides; any district where a substantial part of the events giving rise to the dispute occurred; or any district in which any defendant is subject to the court’s personal jurisdiction. If a case falls within one of these three broad cat-

egories, then venue is proper regardless of whether the parties agreed, in a contractual forum-selection clause, to a different forum. In *Atlantic Marine*, it was undisputed that the Western District of Texas was a “proper” venue under Section 1391, therefore dismissal under Section 1406(a) or Rule 12(b)(3) was inappropriate.

Because venue was proper in the Western District of Texas, *Atlantic Marine* could only enforce the forum-selection clause through a motion to transfer under Section 1404(a), which provides that “for the convenience of the parties, in the interest of justice, a district court may transfer any civil action to...any district...to which all parties have consented.” The Supreme Court held that when considering a motion like this, a forum-selection clause should be given “controlling weight in all but the most exceptional cases,” and the Fifth Circuit erred when it failed to do so.

When there is no forum-selection clause, courts are required to weigh both private interests—i.e., the convenience of the parties—and public interests to determine whether transfer would promote the “interest of justice.” However, the Supreme Court held that “[t]he presence of a valid forum-selection clause requires district courts to adjust their usual [Section] 1404(a) analysis in three ways.” The Fifth Circuit failed to adjust its analysis, therefore its reasoning and conclusions were flawed.

First, when the parties have agreed to a forum-selection clause, the plaintiff’s choice of forum, assuming it is a forum other than the one set forth in that clause, should be afforded no weight. While district courts normally defer to a plaintiff’s choice of forum—a concept courts have dubbed the “plaintiff’s venue privilege”—when there is a forum-selection clause in a bargained for agreement, the plaintiff has “effectively exercised its ‘venue privilege’ before a dispute arises.” According to the Supreme Court, “only

that initial choice deserves deference.”

Second, courts should not consider arguments about the parties’ private interests when evaluating a motion to transfer based on a forum-selection clause. Rather, the private interest factors automatically weigh “entirely in favor of the preselected forum” because, when they agree to a forum-selection clause, the parties waive the right to argue that the selected forum is inconvenient “for themselves or their witnesses, or for their pursuit of the litigation.”

Third, when a case is transferred under Section 1404(a), it does not carry with it the original venue’s choice-of-law rules. Normally, a district court sitting in diversity applies the law of the state in which it sits. However, the Supreme Court created an exception to this rule when a case is transferred under Section 1404(a). In that case, a district court is supposed to apply the law of the original forum state, not the state where it sits. The Supreme Court created this exception to prevent defendants from using Section 1404(a) to “defeat...the state-law advantages that might accrue from the exercise of the plaintiff’s venue privilege.” However, as discussed above, the Supreme Court held that a plaintiff who files suit in violation of a valid forum-selection clause enjoys no such privilege. As a result, the exception does not apply, and the district court to which a case is transferred should apply the law of the state in which it sits.

Ultimately, the Supreme Court held that court should not “unnecessarily disrupt the parties’ settled expectations” as set forth in a forum-selection clause. Instead, denying a motion to transfer in the face of such a clause would only be appropriate if the party “acting in violation of the forum-selection clause” demonstrated that “public interest factors overwhelmingly disfavor[ed] a transfer.” Although it did not believe any such factors were present from the record before it in *Atlantic Marine*, the Supreme Court

nonetheless remanded the case to the district court to decide that issue.

The Supreme Court also indicated that district courts should follow the same rules it set forth under Section 1404(a) when deciding whether to transfer a lawsuit to a nonfederal forum under the doctrine of forum non conveniens. Section 1404(a) only allows a district court to transfer a lawsuit to another federal forum, so it would not apply if a forum selection clause pointed to state court or some other forum. In these instances, a party seeking to enforce the clause would move to transfer based on forum non conveniens. In *Atlantic Marine*, the Supreme Court held that district courts should evaluate such a motion the same way they would under Section 1404(a)—giving the forum-selection clause controlling weight, ignoring private interest factors, and only denying the transfer if the public interest factors overwhelmingly tilt against transfer.

Finally, the Supreme Court left open the possibility that Rule 12(b)(6) could also be used to dismiss a lawsuit filed in contravention of a forum-selection clause. This option was proposed by an amicus party and was not briefed by the parties, therefore the Supreme Court did not directly address the issue. Nonetheless, the Supreme Court held that a motion to dismiss under Rule 12(b)(6) might not be practical, even if it was permissible, because such a motion, unlike a motion to transfer under Section 1404(a), might lead to factual issues related to the validity of the forum-selection clause, which might require a jury trial to resolve. As a result, the Supreme Court held that defendants might have “sensible reasons to invoke [Section] 1404(a)...in addition to Rule 12(b)(6).” Regardless of whether a motion to dismiss under Rule 12(b)(6) was an available alternative to a motion to transfer under Section 1404(a), however, the Supreme Court was clear that Section 1406(a) and Rule 12(b)(3) were not. ■