

## Location, Location, Location: 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.

Over the last year, however, some lower courts have chipped away at the seemingly impenetrable shield that *Atlantic Marine* afforded to forum-selection clauses challenged in federal court. The recent

decisions that distinguish and 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.

#### I. The *Atlantic Marine* Standard Revisited

In *Atlantic Marine*, J-Crew Management, Inc. (a Texas corporation) entered into a subcontract with Atlantic Marine Construction Co. (a Virginia corporation) for work on a construction project. *Id.* at 575. The subcontract included a forum-selection clause, which stated that all disputes between the parties "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." *Id.* at 575.

When a dispute arose, however, J-Crew filed suit in the Western District of Texas, invoking that court's diversity jurisdiction. *Id.* at 576. Atlantic Marine moved to dismiss, arguing that the forum-selection clause rendered the Texas venue "wrong" under 28 U.S.C. § 1406(a) and "improper" under Federal Rule of Civil Procedure 12(b)(3). *Id.* In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a). *Id.* The district court denied both motions based on three Section 1404(a)<sup>1</sup> is the key rulings:

1. Section 1404(a)2 is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum;
2. Atlantic Marine (and not the party evading the forum-selection clause) bore the burden of establishing that a transfer consistent with the forum-selection clause would be appropriate under § 1404(a); and

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<sup>1</sup> Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S. § 1404(a).

<sup>2</sup> Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or

3. Consistent with § 1404(a), the district court is required to consider both public-interest and private-interest factors, only one of which was the forum-selection clause. After weighing those factors, the court held that Atlantic Marine failed to carry its burden.

*Id.*

The Fifth Circuit denied Atlantic Marine's petition for a writ of mandamus directing the district court to dismiss the case under § 1406(a) or to transfer it to the Eastern District of Virginia pursuant to § 1404(a). *Id.* Thereafter, Atlantic Marine petitioned the United States Supreme Court for certiorari and was granted review. *Id.* at 576-77.

From the outset, the Supreme Court rejected Atlantic Marine's argument that dismissal was warranted because J-Crew ignored the *forum-selection* cause and thus filed suit in the "wrong" or "improper" *venue* under § 1406(a) and Rule 12(b)(3). *Id.* at 577. The Court observed that Atlantic Marine incorrectly used the special statutory term "venue" synonymously with the word "forum". *Id.* The Court cautioned that venue in a federal district court is proper so long as the requirements of § 1391(b)<sup>3</sup> are met,

to any district or division to which all parties have consented." 28 U.S. § 1404(a).

<sup>3</sup> Section 1391 (b) provides that "[a] civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this

irrespective of any forum-selection clause in a contract. *Id.* at 578. Accordingly, venue in a court may be proper even though it does not comport with the forum-selection clause. *Id.*

The Court held, however, that forum-selection clauses may be enforced through a motion to transfer pursuant to § 1404(a). *Id.* at 579. The Court acknowledged that, typically, a district court considering a § 1404(a) motion to transfer must evaluate both the private interests of the parties and public-interest considerations. However, the Court held that the presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis in three critical ways:

1. "[T]he plaintiff's choice of forum merits no weight," and the plaintiff, who defied the forum-selection clause, bears the burden of demonstrating that transfer to the forum for which the parties bargained is unwarranted. *Id.* at 581.
2. In evaluating the motion to transfer, the district court should not consider the parties' private interests aside from those embodied in the forum-selection clause; it may consider only public interests. "Because [public-interest] factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* at 582.

3. "When a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id.* As such, the law of the court where plaintiff improperly filed will not follow the case to the forum contractually designated by the parties.

*Atlantic Marine* was decided on December 3, 2013 and, for the most part, federal courts have remained faithful to the standard that it set. See, e.g., *Pappas v. Kerzner Intern. Bahamas Ltd.*, 585 Fed.Appx. 962 (11th Cir. 2014) (upholding forum-selection clause signed when a guest checked into resort under *Atlantic Marine* standard); *Devil's Advocate, LLC v. Grynberg Petroleum Co.*, Nos. 14-1561, 14-1693, 2014 WL 7210731, at \*1 (4th Cir., Dec. 19, 2014) (explaining that, pursuant to *Atlantic Marine*, a forum-selection clause has no effect on whether venue is proper, and "[t]he appropriate way to enforce a forum-selection clause pointing to a state ... forum is through the doctrine of forum non conveniens."); *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646 (7th Cir. 2014) (stating that, pursuant to *Atlantic Marine's* reasoning, "[i]n all but the most unusual cases, ... 'the interest of justice' is served by holding parties to their bargain.>").

However, recent federal court decisions have distinguished *Atlantic Marine* and, in doing so, diminished the scope of the Supreme Court's decision under certain factual scenarios.

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section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b).

Practitioners should be mindful of these cases and proceed with caution when drafting forum-selection clauses.

## II. **Forum-Selection Clauses that are "Permissive" May Not Be Enforceable Under *Atlantic Marine***

Several federal courts have construed *Atlantic Marine* as affording protection to *mandatory* forum-selection clauses. However, the same protection has not been applied to *permissive* forum-selection clauses. Unlike their mandatory counterparts, *permissive* forum-selection clauses allow but do not require litigation in a designated forum. While *Atlantic Marine* involved a mandatory clause, it was silent on the issue of permissive forum-selection clauses. The Supreme Court's holding and analysis drew no distinctions between mandatory and permissive clauses, nor did it limit the scope of its holding to mandatory forum-selection clauses. Federal courts have interpreted the Supreme Court's silence as grounds for denying motions to transfer based on arguably permissive forum-selection clauses.

The Eleventh Circuit was the first federal court of appeals to tackle this issue. In *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024 (11th Cir. 2014), GDG Acquisitions, LLC ("GDG") alleged that the Government of Belize ("Belize") breached a contract for the lease of office telecommunications equipment. *Id.* at 1026. The Master Lease Agreement contained provisions stating that Belize waived its sovereign immunity and consented to suit in the United States:

[R]ights and obligations under this Master Lease or any Lease Schedule

shall be determined exclusively in accordance with the governing laws of the State of Florida, irrespective of conflict of law principles. Lessee irrevocably submits to the exclusive jurisdiction of any of the federal and state courts in the State of Florida in any action or proceeding arising out of or relating to the Master Lease or any Lease Schedule, and Lessee hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in any court of competent jurisdiction in the State of Florida.

*Id.* at 1026-27. The lease also contained a waiver of objections to venue or to claims of inconvenient forum:

Lessee hereby irrevocably waives any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to the Master Lease or any Lease Schedule and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum. Lessee specifically acknowledges that Miami-Dade County, Florida is a proper venue for the Lessor to bring suit against Lessee pursuant to the Master Lease or any Lease Schedule.

*Id.* at 1027.

When a dispute arose, GDG sued Belize in the United States District Court for the Southern District of Florida. Belize moved to dismiss on the grounds of foreign sovereign immunity, *forum non conveniens*, and international

comity. Without reaching the merits of the dispute, the district court dismissed GDG's claims on two alternative grounds: (1) *forum non conveniens*, and (2) international comity. *Id.* GDG appealed, arguing that *Atlantic Marine* demands enforcement of the forum-selection clause in the lease. *Id.*

As an initial matter, the Eleventh Circuit held that the district court abused its considerable discretion in dismissing for *forum non conveniens* without first evaluating the significance of a forum-selection clause in the underlying contract under *Atlantic Marine*. *Id.* at 1029. The Eleventh Circuit indicated that under *Atlantic Marine*, forum-selection provisions are enforceable when they are mandatory, and not merely permissive. *Id.* The court further acknowledged that there were competing forum-selection clauses in this case – one stated “Lessee specifically acknowledges that Miami–Dade County, Florida is a proper venue for the Lessor to bring suit against Lessee pursuant to the Master Lease or any Lease Schedule,” while the other provided that the “Lessee irrevocably submits to the *exclusive* jurisdiction of any of the federal and state courts in the State of Florida in any action or proceeding arising out of or relating to the Master Lease....” *Id.* at 1029-30 (emphasis added).

Accordingly, the court vacated the dismissal and remanded to allow the district court “to determine whether Master Lease Agreement contains a *mandatory* forum-selection clause that binds” Belize. *Id.* at 1030 (emphasis added). The Eleventh Circuit further instructed, “[i]f the forum-selection clause binds the Government, the district court must find that the *forum non conveniens* private

factors unequivocally support the selected forum.” *Id.* (citing *Atlantic Marine*, 134 S.Ct. at 582).

Consistent with the Eleventh Circuit's interpretation of *Atlantic Marine*, the vast majority of federal district courts that have addressed this issue have refused to apply the Supreme Court's standard to permissive forum-selection clauses and instead applied the traditional *forum non conveniens* test. 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.*, 2014 WL 1047153, at \* 8 (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).

Because of this trend in federal district courts, the Fifth Circuit recently declined to review an interlocutory appeal where a permissive forum-selection clause was at issue. In *Waste Management of Louisiana, L.L.C. v. Jefferson Parish*, No. 14-90040, 2014 WL 6713203 (5th Cir., Nov. 28, 2014), the forum-selection clause stated:

Jurisdiction: This Agreement and the performance thereof shall be governed,

interpreted, construed and regulated by the laws of the State of Louisiana and the parties hereto submit to the jurisdiction of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. The parties hereby waiving any and all plea[s] of lack of jurisdiction or improper venue.

*Id.* at \*1. Waste Management filed suit for breach of contract in the Eastern District of Louisiana, and defendant Jefferson Parish moved to dismiss on *forum non conveniens* grounds. *Id.* Jefferson Parish argued that pursuant to *Atlantic Marine*, suit should have been brought in state court, because the Supreme Court has held that “forum selection clauses should be enforced absent exceptional circumstances.” *Id.* (citing to *Atlantic Marine*, 134 S.Ct. at 581). The district court denied Jefferson Parish’s motion to dismiss, finding that the contract’s forum-selection clause was permissive, not mandatory, and thus not controlled by *Atlantic Marine*. Jefferson Parish sought interlocutory review and asked the Fifth Circuit to decide whether *Atlantic Marine* applies to permissive forum-selection clauses. *Id.* Jefferson Parish agreed that for the purposes of its appeal, it would assume that the forum-selection clause at issue was permissive. *Id.*

However, the Fifth Circuit declined to hear this interlocutory appeal, finding that the issue certified for review did not involve a controlling question of law where there was “substantial ground for difference of opinion.” *Id.* The Fifth Circuit observed that it has “long recognized a distinction between mandatory and permissive forum selection clauses” and the “vast majority” of district

courts had rejected the application of *Atlantic Marine* to permissive forum selection clauses. *Id.* at \*2. The Court further acknowledged that the Eleventh Circuit also drew a distinction between mandatory and permissive forum selection clauses with regard to *Atlantic Marine*’s application. *Id.* at \*2 (citing to *GDG Acquisitions*, 749 F.3d at 1029-30 (remanding case for determination whether the contract “contains a mandatory forum-selection clause that would implicate *Atlantic Marine*)). Given the “lopsided nature” of cases decided on this issue following *Atlantic Marine*, and the fact that the Supreme Court’s decision was silent on the issue of permissive forum-selection clauses, the Fifth Circuit denied Jefferson Parish’s motion for leave to appeal from the interlocutory order. *Id.* at \*2.

### III. Forum-Selection Clauses May Not Be Enforceable in Multiparty Litigation

The Fifth Circuit recently held that *Atlantic Marine* does not mandate enforcement of a forum-selection clause in multiparty cases unless all parties have signed the underlying contract. See *In re Rolls Royce Corporation*, No. 14-30510, 2014 WL 7403467 (5th Cir., Dec. 30, 2014). The *Rolls Royce* case arose from a helicopter crash in the Gulf of Mexico. *Id.* at \*1. The owner of the helicopter alleged that an engine-bearing failure caused the crash and the flotation system’s failure caused the aircraft to sink, rendering it a total loss. The owner sued three defendants: Rolls Royce (designer/manufacturer of the engine bearing); Apical Industries, Inc. (“Apical”) (designer/manufacturer of the pontoon flotation system); and Offshore Helicopter Support Services, Inc. (“OHS”) (repaired flotation system prior to the crash). *Id.* The

defendants timely removed on the basis of diversity jurisdiction. *Id.*

Once in federal court, Rolls Royce moved to sever plaintiff's claims against it and to transfer those claims to the Southern District of Indiana. *Id.* Rolls Royce relied on the forum-selection clause set forth in a warranty that applied to the engine bearing, which stated, in relevant part:

Any controversy or claim arising out of or relating to this Limited Warranty or breach thereof shall be litigated only in the Circuit or Superior Courts of Marion County, Indiana or of the United States District Court for the Southern District of Indiana, Indianapolis Division. In connection with the foregoing, the Purchaser consents to the jurisdiction and venue of such courts and expressly waives any claims or defenses of lack of jurisdiction or proper venue by such courts.

*Id.* Defendants Apical and OHS were not subject to the warranty or its forum-selection clause; accordingly, they joined plaintiff in opposing the motion for severance and transfer. *Id.*

The district court denied Rolls Royce's motion on three bases. *Id.* at \*2. First, the court found that the entire action could not be transferred to Indiana under 28 U.S.C. § 1404(a) because the Indiana district court would lack personal jurisdiction over OHS. *Id.* Second, the district court determined that severance was not warranted after conducting the five-factor analysis required under Federal Rule of Civil Procedure 21. *Id.* Third, the district court held that *Atlantic*

*Marine* did not mandate transfer because, unlike the parties in *Atlantic Marine*, "not all parties to the [present] litigation had signed a forum selection contract." *Id.* Thereafter, Rolls Royce petitioned the United States Court of Appeals for the Fifth Circuit for mandamus relief. *Id.*

The Fifth Circuit granted the petition and reversed the district court, holding that it erred "by failing to properly consider the impact of *Atlantic Marine*" on Rolls Royce's motion "when conducting its severance-and-transfer analysis." *Id.* at \*3, 7. Significantly, however, the Fifth Circuit held that district courts should deviate from the *Atlantic Marine* standard in multiparty cases where (a) all parties have not signed the contract with the forum-selection clause; and (b) one party seeks to enforce the forum-selection clause through a motion for severance *and* transfer. *Id.* at \*5-6. The court reasoned that this deviation was necessary because *Atlantic Marine* does not speak directly to the issue of severance, which is "more focused on judicial efficiency" than the transfer inquiry under § 1404(a) and *Atlantic Marine*. *Id.* Accordingly, the Fifth Circuit decided that district courts must apply the following three-factor analysis in considering whether to sever and transfer a case consistent with a valid forum-selection clause:

1. "[P]ursuant to *Atlantic Marine*, the private factors of the parties who have signed a forum agreement must, as matter of law, cut in favor of severance and transfer to the contracted for forum." *Id.* at \*6.

2. "The district court must consider the private factors of the parties who have *not* signed a forum selection agreement as it would under a Rule 21 severance and section 1404 transfer analysis." *Id.*
3. "Finally, [the district court] must ask whether this preliminary weighing is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit. In so determining, the district court should consider whether there are procedural mechanisms that can reduce the costs of severance, such as common pre-trial procedures, video depositions, stipulations, etc. Such practices could echo those used by judges in cases managed pursuant to multidistrict litigation statutes." *Id.*

The Fifth Circuit's new test 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 the Circuit Judge Jones, who concurred in 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 \*8.

#### **IV. *Atlantic Marine* Does Not Apply to Forum-Selection Clauses that Designate A Foreign Jurisdiction**

In *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014), plaintiff Brian Anthony Martinez brought suit against Bloomberg and two of its

employees, alleging discrimination in violation of the Americans with Disabilities Act, as well as state and local laws. *Id.* at 214. Martinez claimed that he was terminated from his employment with Bloomberg because of a perceived disability and his sexual orientation. *Id.* at 215. Martinez's employment contract contained a combined choice-of-law and choice-of-forum clause, which provided that the agreement "shall be interpreted and construed in accordance with English law and any dispute arising hereunder shall be subject to the exclusive jurisdiction of the English courts." *Id.* Martinez originally 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.

Bloomberg and its employees moved to dismiss the Southern District of New York action under Federal Rule of Civil Procedure 12(b)(3), citing improper venue. *Id.* The district court granted the motion, finding that under the forum-selection clause in Martinez's employment contract, New York federal court was not the proper venue. *Id.* Martinez appealed this decision, arguing first that the forum-selection clause does not control with regard to the discrimination claims, and second that even if it does control, the court should find it unenforceable, as it will have the practical effect of forfeiting his Americans with Disabilities Act claim. Additionally, given that Martinez had already abandoned the earlier action brought in English court, any new claims would be time-barred. *Id.*

In deciding this appeal, the Second Circuit explained the four-part test for determining whether dismissal on the basis of a forum-selection clause was proper. The relevant questions are:

- (1) whether the clause was reasonably communicated to the party resisting enforcement;
- (2) whether the clause is mandatory or permissive, i.e. ... whether the parties are required to bring any dispute to the designated forum or simply *permitted* to do so; and
- (3) whether the claims and parties involved in the suit are subject to the forum selection clause.

*Id.* at 217 (internal citations and quotations omitted). If the first three elements are met, the validity of the forum-selection clause is presumed, and a party can only overcome this presumption by satisfying the fourth prong of this analysis, “making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *Id.* (internal citations and quotations omitted).

The Second Circuit first addressed whether a contract with a combined choice-of-law and choice-of-forum clause is governed by federal law, or by the law specified in the choice-of-law clause. *Id.* at 217. The court explained that for issues of *interpretation*, such as whether a forum-selection clause is mandatory or permissive, the choice-of-law state controls. *Id.* This notion comports with the intentions of the contracting parties, who expect that regardless of which court, state or federal, where an action is brought, the meaning of the forum-selection clause will

stay the same. *Id.* at 220. However, “[f]ederal law must govern the ultimate *enforceability* of a forum selection clause to ensure that a federal court may decline to enforce a clause if trial in the contractual forum would be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court or if enforcement would contravene a strong public policy of the forum in which suit is brought.” *Id.* at 218 (emphasis added, internal citations and quotations omitted). Regarding Martinez’s employment contract, the Second Circuit found that the district court had properly applied *English law* in concluding that the forum-selection clause encompassed the discrimination claims raised by Martinez. *Id.* at 223-24.

The Second Circuit next addressed whether Martinez could overcome the presumption of enforceability by demonstrating that enforcement would be “unreasonable or unjust.” *Id.* at 227. Because this determination goes directly to enforceability, it is governed by federal law. *Id.* The court reasoned that the Americans with Disabilities Act’s special venue provision, which allows plaintiffs to bring claims in a range of possible venues, indicates a commitment to combatting discrimination based on disability. *Id.* at 228-29. The purpose of the special provision is to ensure that plaintiffs are not forced to litigate far from home, and expresses a federal public interest in ensuring access to a proper forum. *Id.* The Second Circuit notes that it “would hesitate to enforce a forum selection clause if the party resisting enforcement demonstrated that the foreign forum’s anti-discrimination law was insufficient to deter employers from violating the civil rights of individuals with disabilities.”

*Id.* at 229. Here, however, the court determined that Martinez had not made such a showing. *Id.*

The Second Circuit concluded by addressing whether “private hardships” can suffice to render a forum-selection clause unenforceable. *Id.* at 229-30. The court distinguished *Atlantic Marine*, where the Supreme Court held that private interests do not play a role in determining whether transfer based on a forum selection clause is proper. *Id.* The Second Circuit found that claims that involve foreign jurisdictions raise distinct and 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 harsher considerations. *Id.* at 230 (citing to a Ninth Circuit case where a court found that forcing a plaintiff to proceed on a claim in Saudi Arabia would “effectively deprive the plaintiff of any remedy”). 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 Martinez had failed to make this showing, though it did leave the question open for future cases. *Id.*

## V. Practice Pointers

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 devise and enforce such clauses should be mindful of lessons learned from the Supreme Court's decision

and the lower courts' interpretation and application of it:

1. *Identify a favorable yet realistic forum that has some relationship to the parties or the contractual performance.* *Atlantic Marine* permits consideration of public-interest factors such as administrative convenience and the benefits of litigating a local dispute. If parties select a logical forum, then it is difficult to identify a public interest that would qualify as the type of “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.

2. *Designating a foreign jurisdiction renders Atlantic Marine inapplicable.* The Second Circuit's decision in Martinez illustrates that the selection of a forum outside of the United States will re-inject the “private interest” factors of convenience and litigation costs into a court's analysis when deciding whether to enforce a forum-selection clause.

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. It is therefore necessary to draft forum-selection clauses using 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. The federal district court decisions cited *supra* offer a

primer on the permissive terminology that ought to be avoided at all costs.

4. *Manage client expectations.* The Fifth Circuit's decision in *Rolls Royce* demonstrates that the presumption of enforceability provided under *Atlantic Marine* may not apply unless all parties to the litigation were also signatories to the contract. Caution your clients about the potential procedural loopholes through which plaintiffs can evade forum-selection clauses – e.g., joinder of additional parties.

5. *Carefully consider procedural steps leading up to your motion to transfer.* The case must be in federal court in order to enforce a forum-selection clause under *Atlantic Marine*. For example, if the case was improperly filed in state court, then consider removing it to federal court based on diversity jurisdiction and then move to transfer the case under Section 1404(a).