

New Decision Highlights the Importance of Forum Selection Clauses in Cross-Border Employment Agreements

By Philip M. Berkowitz

Multinational employers often negotiate, with their key employees, employment agreements and restrictive covenants that prohibit unfair competition across borders. To prevent inconsistent judgments and give the parties a firmer expectation regarding their rights, many employers negotiate choice-of-law and choice-of-forum provisions that select one jurisdiction's laws or forum over another's.

The enforceability of these provisions in the United States was recently affirmed by the U.S. District Court for the Southern District of New York in *Martinez v. Bloomberg LP*, 2012 U.S. Dist. LEXIS 113227 (S.D.N.Y. Aug. 10, 2012). This decision holds important lessons for multinational employers concerning the enforceability and limitations of these clauses.

The lawsuit was filed by a former employee who was initially hired by Bloomberg in New York, spent three years in Tokyo, and was then transferred to the London office. In London, he entered into a new employment agreement that designated London as his primary place of business, provided that English law would govern his employment, and that "any dispute arising hereunder shall be subject to the exclusive jurisdiction of the English courts."

In 2011, the employee lost his job in a workforce reduction. He sued the company in New York federal court, alleging employment discrimination under the U.S. Americans with Disabilities Act, as well as New York State and New York City anti-discrimination laws.

Three days after filing suit in New York, the former employee sued in England under English employment law. He did not assert any claims for discrimination before the English tribunal, and later withdrew his action there, citing the high cost of litigating in England. The employer moved to dismiss the New York action for improper venue based on the forum selection clause, and also moved to dismiss the state and city law claims for lack of jurisdiction.¹

While the former employee did not dispute that the choice-of-forum clause was reasonably communicated to him and was "mandatory," he argued that the clause was not meant to bar statutory claims, but, by virtue of the clause's express language ("any dispute arising *hereunder*"), only claims that related to the employment contract *per se*. He asserted that the discrimination claims could

go forward despite the language of the agreement because those claims were statutory, not contractual.

This argument might have passed muster under New York law. As the court noted, a clause mandating arbitration of "any claims arising under [the Employment] Agreement" has been held not to be specific enough to include claims of statutory discrimination.² Such language failed to fairly notify the employee that statutory discrimination claims were also subject to arbitration or to other limitations.

However, the court held that the contract's choice-of-law clause mandated that English law governed interpretation of the forum selection clause. And unlike in the United States, claims of discrimination in England may *only* be brought if the employment relationship is predicated upon the existence of a valid contract. As a result, the discrimination claim technically arose "under the agreement" because without the contract, under English law, there could be no claim for discrimination. In addition, English law broadly interprets choice of forum clauses, and the words "arising out of" have been interpreted to include *every* dispute except a dispute as to whether there was a contract at all. As a result, the court held that the forum selection clause, under English law, included discrimination claims, and enforced the forum selection clause and dismissed the lawsuit.

Prior to the *Martinez* decision, the U.S. Supreme Court had upheld and reinforced the "strong federal policy in favor of enforcing forum selection clauses." Enforcing these clauses "removes uncertainty" in economic transactions, ensures that the parties' expectations are fulfilled, and complies with the dictates of international comity to respect the integrity and competence of the selected foreign tribunals.³

Generally, a forum selection clause will be enforced if it was reasonably communicated to the party resisting enforcement, it is mandatory and not merely permissive, and the claims involved in the suit are subject to the clause. If these requirements are met, then the burden shifts to the non-moving party to rebut the presumption of enforceability by showing that the clause was the result of fraud or overreaching; the law to be applied in the selected forum is fundamentally unfair; enforcement would contravene a strong public policy of the forum state; or trial in the selected forum would be so difficult and inconvenient that

the party would effectively be deprived of his or her day in court.⁴

Critically, the court in *Martinez* concluded that the employee was a “sophisticated international businessman.” Therefore, the court declined to be bound by English cases that could be construed to protect the rights of laborers in an employment dispute from an unfavorable forum selection (or mandatory arbitration) clause. The court considered the agreement to be more in the nature of a commercial contract between parties with equal bargaining power. Thus, the validity of the choice of forum clause did not depend on whether the law of the selected forum was less favorable to the plaintiff.

Martinez is, somewhat ironically, consistent with the holding of a well-known English restrictive covenant case that declined to enforce a New York choice of forum clause against employees working in London. In *Samengo-Turner v. J & H Marsh & McLennan (Services) Ltd.*,⁵ an English Court of Appeal refused to give effect to a restrictive covenant’s New York jurisdiction clause, where the London-based employees were employed by an English company that belonged to a group of companies headquartered in New York. The brokers had applied to the English court for an anti-suit injunction to stop proceedings that had been initiated in the Southern District of New York.

In Europe, the issue of forum selection is a matter of statute, and employers may only sue the employees where they are domiciled. U.S. employers have more flexibility, but a court in which an employee is domiciled could well determine that it has a superior interest in hearing a matter than does a remote jurisdiction with which the employee has had little or no contact, particularly if the law of that jurisdiction would contravene the public policy of the employee’s domicile state.

Forum selection clauses, if properly drafted, can be helpful to employers. They should be drafted broadly enough to cover any and all claims, including statutory claims like discrimination, and not just contractual ones.

The clauses should also use mandatory, not permissive language. The agreement should provide that the exclusive jurisdiction and law *shall be* (rather than *may be*) the city of, e.g., New York, New York. And finally, common sense dictates that if the employee is to be assigned to a non-English speaking jurisdiction, the employer should consider having the employee sign a translated copy of the agreement in the language of the assignment country.

Endnotes

1. The former employee theoretically (absent the English choice-of-law clause) could assert claims under the Americans with Disabilities Act for alleged overseas discrimination because that law prohibits extraterritorial discrimination by U.S. companies against U.S. citizens, regardless of where they work and reside. However, claims under the New York State and New York City laws for alleged overseas discrimination against non-residents may only go forward where the plaintiff can show that the alleged discrimination had an impact in New York. See *Hoffman v. Parade Publications*, 2010 N.Y. Slip Op. 05706 (July 1, 2009).
2. See, e.g., *Cronas v. Willis Group Holdings Ltd.*, 2007 U.S. Dist. LEXIS 68797 (S.D.N.Y. Sept. 17, 2007) (the court’s analysis repeatedly draws parallels between mandatory arbitration and forum selection clauses).
3. *Martinez*, at *9 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Aguas Lenders Recovery Grp., LLC v. Suez, S.A.*, 585 F.3d 696 (2d Cir. 2009); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353 (2d Cir. 1993).
4. *Phillips v. Audio Active, Ltd.*, 494 F.3d 378 (2d Cir. 2007).
5. [2007] EWCA Civ 723.

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