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435 Federal Building
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October 8, 2008

TO: Ms. Louise Ellen Teitz
Ms. Kathy Patchel

RE: Drafting Committee--Hague Convention on Choice of Court Agreements

Attached you will find a short article prepared by my law clerk dealing with federal court enforcement of forum selection clauses. If you see some further points on this subject that we should address prior to our next meeting, please let me know.

Attachment



cc: Mr. Rex Blackburn
Ms. Rhoda B. Billings
Mr. K. King Burnett
Mr. Robert H. Cornell
Mr. Henry Deeb Gabriel, Jr.
Ms. Harriet Lansing
Mr. Fred H. Miller
Mr. Harvey S. Perlman
Ms. Martha Lee Walters
Mr. Robert A. Stein
Mr. John A. Sebert
Mr. William R. Breetz, Jr.
Mr. David P. Stewart

MEMORANDUM

TO: Drafting Committee on the Hague Convention on Choice of Court Agreements

FROM: Elizabeth Culhane, Law Clerk for the Honorable C. Arlen Beam

DATE: October 7, 2008

RE: The Enforcement of Forum Selection Clauses in Federal Courts

This article discusses the enforcement of forum selection clauses in the federal courts today. Generally, litigants seek to enforce forum selection clauses either through motions to dismiss or through motions for change of venue to the contractually designated forum. This article discusses each of these options in turn, and procedural issues that arise within the context of each type of motion.

Within the context of motions to dismiss based on a forum selection clause requiring the action be filed in another forum, there is some variation among the federal courts today. Specifically, the federal circuit courts are split over the applicable legal framework that should be applied to determine whether a forum selection clause is enforceable. Generally, a federal court sitting in diversity applies federal law to procedural issues, but answers substantive legal questions by looking to the laws of the relevant state.¹ Because the Supreme Court has never decided whether the enforceability of a forum selection clause is a substantive or a procedural matter, however, there is some disagreement among the lower federal courts over whether state or federal law governs that question. Federal law generally favors the enforcement of such provisions, while some state laws prohibit the enforcement of forum selection clauses in certain instances. Accordingly, the choice between federal or state enforceability standards may, in some cases, have important ramifications.

By contrast, the courts agree that motions to transfer a pending action to another venue based on a forum selection clause are governed by federal law, and specifically, by the court's assessment of the various considerations set forth in the

¹ Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

federal transfer statute.² Moreover, the fact that the parties' contractual forum selection clause would be unenforceable under state law is not dispositive of such motions. Therefore, depending on where the relevant circuit stands on the Erie enforceability question, a litigant's decision to seek a transfer to the contractually designated forum, rather than an outright dismissal based on the parties' forum selection clause, may affect whether a state law prohibiting the enforcement of the clause will be dispositive. In Part I, this article discusses these issues in turn.

In Part II, this article discusses a substantive legal doctrine that may affect a litigant's ability to enforce a forum selection clause in federal court. In rare circumstances, federal courts will abstain from hearing actions otherwise within their jurisdiction because a similar action involving the same parties is already pending in state court.³ Part II addresses the impact that this abstention doctrine may have in the forum selection clause context.

I. Procedural Issues

A. Motions to Dismiss

Motions to dismiss pending actions based on contractual forum selection clauses are generally addressed in a two-part inquiry.⁴ First, a court considers whether the clause at issue is mandatory or permissive. Second, and only if the clause is found to be mandatory, the court considers whether the clause is enforceable, warranting dismissal of the pending action.

²Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 (1988).

³Colo. River Water Conservation Dist. v. United States., 424 U.S. 800, 817 (1976).

⁴Motions to dismiss pending actions based on a contractual forum selection clause between the parties are not treated uniformly by litigants or courts. Generally, however, such motions are characterized as motions to dismiss for lack of subject matter jurisdiction, improper venue, or failure to state a claim under Federal Rule of Civil Procedure 12(b)(1), (3) or (6). Sec. Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 371 n.2 (6th Cir. 1999).

1. The Mandatory vs. Permissive Inquiry

In ruling on a motion to dismiss a pending action based on a contractual forum selection clause, a court's first task is to ascertain whether the clause at issue is mandatory or permissive.⁵ This is a question of contract interpretation governed by the substantive contract law of the relevant state.⁶ Nonetheless, many federal courts make this initial determination simply by comparing the language of the clause at issue to that in clauses previously found by other federal courts to be either mandatory or permissive, without specifically addressing the applicable legal framework or referencing the contract law of any particular state.⁷

As a general rule, mandatory forum selection clauses contain explicit language indicating that jurisdiction is only appropriate in the contractually designated forum.⁸ Thus, for example, in Eisaman v. Cinema Grill Systems, Inc., the court found a forum selection clause was mandatory where it stated that "all litigation, arbitration, and mediation related to" a particular franchising agreement "will be proper only in" one of the designated fora.⁹ Similarly, in Koch v. America Online, Inc., the court found a forum selection clause was mandatory where it stated that "exclusive jurisdiction for any claim or dispute resides in the courts of the Commonwealth of Virginia."¹⁰ By contrast, permissive clauses merely authorize jurisdiction in a particular forum

⁵See, e.g., Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997); Gita Sports Ltd. v. SG Sensortechnik GmbH & Co. KG, 560 F. Supp. 2d 432, 436 (W.D.N.C. 2008).

⁶See, e.g., Dunne v. Libbra, 330 F.3d 1062, 1064 (8th Cir. 2003) (applying Illinois law in accordance with a choice-of-law provision in the relevant contract to determine whether a forum selection clause in the same contract was mandatory or permissive); Vessel Sys., Inc. v. Sambucks, LLC, No. 05-CV-1028-LRR, 2007 WL 715773, at *3-4 (N.D. Iowa March 6, 2007) (same).

⁷See, e.g., Gita Sports Ltd., 560 F. Supp. 2d at 436.

⁸Excell, 106 F.3d at 321.

⁹87 F. Supp. 2d 446, 450 (D. Md. 1999).

¹⁰139 F. Supp. 2d 690, 693-94 (D. Md. 2000).

without prohibiting litigation elsewhere.¹¹ Applying that definition, the court in AmerMed Corp. v. Disetronic Holding AG found a forum selection clause was permissive where it simply stated that the courts of Switzerland "shall have jurisdiction for all disputes arising out between the parties."¹² Although the clause gave Swiss courts jurisdiction over all claims between the parties, the court noted that it did not contain language of exclusivity indicating jurisdiction was *only* proper in Swiss courts.¹³

Ultimately, the distinction is an important one. Notwithstanding a permissive forum selection clause, a litigant may bring suit "in other reasonably convenient forums where personal jurisdiction exists."¹⁴ A mandatory forum selection clause, on the other hand, can usually be avoided only if shown to be unfair, unreasonable or otherwise unenforceable.¹⁵

2. The Question of Enforceability

If the court determines that the forum selection clause at issue is mandatory, the court must next consider whether the clause is enforceable. If the clause is both mandatory and enforceable, dismissal is warranted.¹⁶ It is within the context of this second inquiry that the Erie problem arises, because the federal circuit courts are currently split over whether the enforceability question is substantive or procedural for Erie purposes.

The majority view today is that the enforceability of a forum selection clause is a procedural matter governed by federal law. The Second, Fifth, Ninth and

¹¹Dunne, 330 F.3d at 1063.

¹²6 F. Supp. 2d 1371, 1373-75 (N.D. Ga. 1998).

¹³Id. at 1375

¹⁴Dunne, 330 F.3d at 1063.

¹⁵Excell, 106 F.3d at 321. See also, e.g., Marrero v. Aragunde, 537 F. Supp. 2d 305, 308-09 (D.P.R. 2008); Gita Sports Ltd., 560 F. Supp. 2d at 436.

¹⁶E.g., Marrero, 537 F. Supp. 2d at 309.

Eleventh Circuits all adhere to this view, based on the conclusion that questions of venue and the enforcement of forum selection clauses are predominantly procedural matters.¹⁷ Additionally, district courts in those circuits that have not definitively answered the Erie question tend to follow the majority trend, and apply federal law to determine the validity and enforceability of forum selection clauses.¹⁸

Courts that follow the majority trend have uniformly adopted the test set out by the Supreme Court in M/S Bremen v. Zapata Off-Shore Co. as the federal standard.¹⁹ Under the Bremen test, a forum selection clause is presumptively valid and enforceable, and will be enforced unless the resisting party carries the heavy burden of demonstrating that enforcement would be unreasonable under the circumstances.²⁰ Unreasonableness may be shown where, among other things: (1) the

¹⁷ Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1068 (11th Cir. 1987) (en banc) (per curiam), aff'd on other grounds, 487 U.S. 22 (1988); Manetti-Farrow, Inc., v. Gucci Amer., Inc., 858 F.2d 509, 513 (9th Cir. 1988); Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990); Int'l Software Sys., Inc. v. Amplicon, Inc., 77 F.3d 112, 114-15 (5th Cir. 1996).

¹⁸See, e.g., ADT Sec. Servs., Inc. v. Apex Alarm, LLC, 430 F. Supp. 2d 1199, 1204 (D. Colo. 2006) (applying federal law in accordance with the majority rule, after noting that the Tenth Circuit has not expressly ruled on the Erie issue); Vessel Sys., Inc., 2007 WL 715773, at *5-6 (reaching similar conclusion after noting that the Eighth Circuit has not definitively answered the question); Gita Sports Ltd., 560 F. Supp. 2d at 437-38 (applying the majority rule and declining to follow the Fourth Circuit's unpublished opinion in Nutter v. New Rents, Inc., No. 90-2493, 1991 WL 193490 (4th Cir. Oct. 1, 1991), because it was issued before most circuits addressed the Erie issue). But see McCloud Constr., Inc. v. Home Depot USA, Inc., 149 F. Supp. 2d 695, 698-700 (E.D. Wis. 2001) (applying state law after noting that the Seventh Circuit has not definitively spoken on the Erie question).

¹⁹407 U.S. 1 (1972). Although Bremen was an admiralty case, the Supreme Court has since applied the Bremen test in other contexts. Following the Court's lead, those circuits that treat the enforceability of forum selection clauses as a procedural matter apply the Bremen test as the general federal standard. Haynsworth v. The Corp., 121 F.3d 956, 962 (5th Cir. 1997).

²⁰Bremen, 407 U.S. at 10.

clause's inclusion in the contract was the product of fraud or overreaching; (2) enforcement would effectively deprive the party resisting enforcement of his or her day in court; (3) the resisting party would essentially be deprived of a remedy due to the unfairness of the chosen law; or (4) enforcement of the clause would contravene a strong public policy of the forum state.²¹ A forum selection clause will not be deemed unenforceable under Bremen merely because litigation in the designated forum would be inconvenient for the resisting party, however, so long as the claimed inconvenience would have been reasonably foreseeable to the parties when the contract was made.²²

Notwithstanding the majority rule, the Third Circuit applies state law to determine whether forum selection clauses are enforceable in diversity actions.²³ The Third Circuit was apparently the first circuit to definitively address the Erie issue, and concluded that the question of whether a forum selection clause is enforceable is a matter of substantive contract interpretation.²⁴ Noting that the construction of contracts has traditionally been a matter of state common law, the Third Circuit concluded that the validity of a forum selection clause should be determined in accordance with state, and not federal, enforceability standards.²⁵ The Fourth Circuit also applied state law in an early unpublished opinion.²⁶ Because that opinion was unpublished, however, and was issued before a majority of circuits had ruled on the

²¹Haynsworth, 121 F.3d at 963.

²²Bremen, 407 U.S. at 16-17.

²³Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356-57, & 357 n.4 (3d Cir. 1986).

²⁴Id. at 356.

²⁵Id. at 357 & 357 n.4.

²⁶Nutter v. New Rents, Inc., No. 90-2493, 1991 WL 193490, at *5-6 (4th Cir. Oct. 1, 1991).

issue, some district courts in the Fourth Circuit still consider the issue undecided today and continue to reach varying results on the Erie question.²⁷

Ultimately, the choice between federal and state enforceability standards often has little practical significance because many states also follow the Bremen standard.²⁸ For this same reason, several circuits have been able to sidestep the Erie question.²⁹ Nonetheless, some state laws still prohibit the enforcement of forum selection clauses in certain instances. Accordingly, in rare circumstances, the choice to follow state enforceability standards may affect the outcome of the case.³⁰

B. Motions for Change of Venue

Another common method of enforcing a forum selection clause in federal court is through a motion for change of venue to the contractually designated forum under 28 U.S.C. § 1404(a). That section gives a federal district court discretion to transfer an action to any other district or division where the suit might have been brought.³¹

In deciding whether a transfer to the contractually designated forum would be appropriate, the Supreme Court has directed the lower federal courts to look to the considerations set forth in section 1404(a).³² The statute, in turn, directs courts to

²⁷ Compare Gita Sports, 560 F. Supp. 2d at 438 (declining to follow Nutter and instead following majority rule and applying federal law) and Eisaman, 87 F. Supp. 2d at 448 (applying state law in reliance on Nutter).

²⁸ See, e.g., Servewell Plumbing, LLC v. Fed. Ins. Co., 439 F.3d 786, 789 (8th Cir. 2006) (concluding that there was no need for the court to choose between federal law or the laws of either Arkansas or Florida in ruling on the enforceability issue, because both states follow the Bremen standard).

²⁹ Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993); Excell, 106 F.3d at 320; Sec. Watch, 176 F.3d at 375; Servewell, 439 F.3d at 789.

³⁰ E.g., McCloud, 149 F. Supp. 2d at 700-701.

³¹ 28 U.S.C. § 1404(a).

³² Stewart, 487 U.S. at 31.

examine whether a transfer would be convenient for parties and witnesses and would be in the interests of justice.³³ Accordingly, federal courts ruling on section 1404(a) motions consider a wide array of factors, including: (1) where important evidence is located; (2) where relevant parties and witnesses may be found; (3) the cost of securing the attendance of witnesses; (4) the availability of compulsory process; and (5) the interest in having local disputes decided at home.³⁴

Obviously, courts also consider the parties' contractually designated choice of forum in ruling on motions under section 1404(a). But while the parties' choice of forum is a significant factor entitled to consideration, the Supreme Court has made clear that a forum selection clause is only one of many relevant factors in the transfer analysis.³⁵ On the other hand, the Supreme Court has also indicated that federal courts ruling on section 1404(a) motions should not decline to consider, or to accord significant weight to, a forum selection clause simply because the clause would be unenforceable under state law.³⁶ Rather, regardless of whether the relevant state's laws would render the clause unenforceable, a court should always consider the presence of the forum selection clause as a relevant factor in deciding whether a transfer would be in the interests of justice. The contrary rule, the Supreme Court has recognized, would make the applicability of a federal statute dependent on the content of state law.³⁷

C. Case Study

As the above discussion indicates, there are several procedural issues that may affect whether a federal court will enforce a contractual forum selection clause today. Most importantly, the procedural vehicle by which a litigant seeks to enforce the

³³28 U.S.C. § 1404(a).

³⁴E.g., P.M. Enter. v. Color Works, Inc., 946 F. Supp. 435, 440 (S.D. W.Va. 1996); Medicap Pharmacies, Inc. v. Faidley, 416 F. Supp. 2d 678, 686 (S.D. Iowa 2006).

³⁵Stewart, 487 U.S. at 31.

³⁶Id. at 31, n.10.

³⁷Id.

clause may affect whether a state law prohibiting the enforcement of the clause will be dispositive. In the context of a motion to dismiss, the law of the relevant circuit may direct the court to follow state enforceability standards. And if state law prohibits enforcement of the clause, the court may refuse to grant a motion to dismiss the pending action despite the parties' contractual agreement. By contrast, a state law that prohibits the enforcement of the parties' forum selection clause will not always be dispositive of a motion to *transfer* an action to the contractually designated forum.

To illustrate, in McCloud Construction, Inc. v. Home Depot USA, Inc., a defendant corporation sought *dismissal* of a diversity action filed by a contractor in Wisconsin, based on a forum selection clause in the parties' construction contract that required the dispute be litigated in either federal or state court in Georgia.³⁸ After noting the split of authority over whether state or federal law controls the question of enforceability in a diversity action, the McCloud court conducted its own Erie analysis and chose to follow state law.³⁹ Looking to Wisconsin law, the court found the parties' forum selection clause contravened a state statute prohibiting such clauses in land improvement contracts.⁴⁰ Accordingly, the court denied the defendant's motion to dismiss on the ground that the clause was unenforceable under state law.⁴¹

By contrast, in Berg v. Sage Environmental Consulting of Austin, Inc., a defendant employer filed a section 1404(a) motion, seeking to *transfer* the plaintiff employee's action from the Middle District of Louisiana to the Northern District of Texas based on a forum selection clause in the employer's articles of incorporation.⁴² In opposing the motion, the plaintiff employee argued that the clause was unenforceable under Louisiana state law.⁴³ The Berg court noted, however, that the parties' contractually designated choice of forum is only one of many factors to be

³⁸McCloud, 149 F. Supp. 2d at 696-98.

³⁹Id. at 698-700.

⁴⁰Id. at 701.

⁴¹Id.

⁴²381 F. Supp. 2d 552, 553-54 (M.D. La. 2005).

⁴³Id. at 558.

considered in the section 1404(a) analysis, and should be considered even if state law would render the clause unenforceable.⁴⁴ Because no other factors weighed heavily in favor of litigation in either Texas or Louisiana, however, the court found the parties' forum selection clause was the most significant factor and that it weighed in favor of a transfer.⁴⁵ Accordingly, notwithstanding the fact that the clause might be unenforceable under state law, the court found a transfer to the contractually designated forum would be in the interests of justice and granted the defendant's motion to transfer the case to the Northern District of Texas.⁴⁶

II. The Colorado River Abstention Doctrine

In addition to the procedural considerations discussed above, the existence of a substantially similar, earlier-filed state court action between the same litigants may also impact a litigant's ability to enforce a forum selection clause in federal court.

As a general rule, federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them."⁴⁷ The Supreme Court has carved out several narrow exceptions to that rule, however, and a federal court may occasionally decline to hear a case otherwise within its jurisdiction because of certain exceptional circumstances.⁴⁸ One such circumstance that has particular relevance in the forum selection clause context is the existence of a parallel state proceeding. Under the so-called Colorado River doctrine, a federal court may choose to abstain from exercising jurisdiction over an action in federal court if a similar action is already pending in state court.⁴⁹ Where the two actions are substantially similar in terms of the parties and issues involved, principles of wise judicial administration such as the need to

⁴⁴Id.

⁴⁵Id. at 557.

⁴⁶Id. at 558-59.

⁴⁷Colo. River, 424 U.S. at 817.

⁴⁸Id.

⁴⁹Id. at 818.

conserve judicial resources and the interest in comprehensive disposition of litigation may counsel in favor of the federal court declining to hear the federal case.⁵⁰

In deciding whether to abstain from hearing an action under Colorado River, a federal court conducts a two-tiered inquiry. Initially, the court must consider whether the two actions are "parallel," in that they involve substantially the same parties litigating substantially the same claims.⁵¹ Even if the two actions are parallel, however, a federal court will not necessarily abstain from hearing the federal case—indeed, abstention is the exception, and not the rule.⁵² Accordingly, if the court determines that the actions are parallel, the court's next "task is to ascertain whether there exist 'exceptional' circumstances, the clearest of justifications,' that can suffice under Colorado River to justify [] surrender of [federal] jurisdiction."⁵³ To make that determination, courts consider a variety of factors, including (1) whether the state has assumed jurisdiction over property at issue in either case; (2) the inconvenience of the federal forum; (3) the interest in avoiding piecemeal litigation; (4) the order in which the various courts obtained jurisdiction; (5) whether state or federal law will govern the action; (6) the adequacy of the state-court action to protect the federal plaintiff's rights; (4) the relative progress of the state and federal actions; (8) the presence or absence of concurrent jurisdiction; (9) whether removal is available; and (10) whether the federal claims are vexatious or contrived.⁵⁴

⁵⁰Id. at 817.

⁵¹Great Amer. Ins. Co. v. Gross, 468 F.3d 199, 207-08 (4th Cir. 2006).

⁵²E.g., Stewart v. W. Heritage Ins. Co., 438 F.3d 488, 492-93 (5th Cir. 2006) (finding district court abused its discretion in abstaining under Colorado River, because even assuming the state and federal actions were parallel, a careful weighing of the Colorado River factors indicated that no truly exceptional circumstances existed to justify surrendering federal jurisdiction).

⁵³TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26 (1983)) (emphasis omitted).

⁵⁴E.g., TruServ, 419 F.3d at 592 n.2; Mountain Pure, LLC v. Turner Holdings, LLC, 439 F.3d 920, 926 (8th Cir. 2006).

The impact of the Colorado River doctrine in the forum selection clause context can be seen through a comparison of several recent cases. In Boccard USA Corp. v. TigPro Inc., for example, a Texas company sued a Maine company in federal district court in Texas over a dispute arising out of a construction contract between the two parties.⁵⁵ The contract at issue contained a forum selection clause indicating that all disputes between the parties should be litigated in either state or federal court in Texas.⁵⁶ Nonetheless, the defendant asked the federal court to abstain from hearing the federal action pending the outcome of a suit the defendant had filed against the plaintiff in New Hampshire state court two weeks earlier.⁵⁷ As an initial matter, the court determined that the two actions were not parallel, as they involved materially different claims.⁵⁸ Accordingly, the court concluded that there was little danger the state and federal courts would issue competing judgments.⁵⁹ Moreover, the court noted that even if the actions could be considered parallel, the Colorado River factors did not weigh in favor of abstention.⁶⁰ For example, the Boccard court concluded that the defendant had waived any claim that the Texas federal district court was an inconvenient forum by signing a valid forum selection clause consenting to that court's jurisdiction.⁶¹ Because none of the other factors weighed heavily in favor of abstention, the court refused to abstain.⁶² Accordingly, the plaintiff was able to proceed with its suit in the contractually designated forum, notwithstanding the earlier-filed state action.

By contrast, in Emerald Logistics, Inc. v. Crutcher, the plaintiff brought a breach of contract action against the defendants in an Ohio federal district court,

⁵⁵No. H-07-0177, 2007 WL 1894154, at *1 (S.D. Tex. July 2, 2007).

⁵⁶Id.

⁵⁷Id.

⁵⁸Id. at *4-7.

⁵⁹Id. at *7.

⁶⁰Id. at *7-12.

⁶¹Id. at *10.

⁶²Id. at *12.

arising out of the defendants' sale of their Tennessee corporation to the plaintiff several years earlier.⁶³ Almost a year and a half earlier, however, the defendants had sued the plaintiff in Tennessee state court based on the same transaction.⁶⁴ The stock purchase agreement signed by the parties at the time of the sale contained a forum selection clause requiring the parties to litigate all disputes in Ohio.⁶⁵ Nonetheless, the defendants asked the Ohio federal court to abstain from hearing the federal action pending the outcome of the Tennessee state court action.⁶⁶ The Emerald court first concluded that the two actions were parallel, because they involved essentially the same parties litigating essentially the same claims.⁶⁷ Indeed, the federal court plaintiff had counterclaimed against the federal court defendant in the earlier state action, and had asserted the exact same claims it later filed in federal court.⁶⁸

The Emerald court then balanced the Colorado River factors, and found they weighed heavily in favor of abstention.⁶⁹ For example, the court noted that the state proceeding was much further along than the federal action, making it highly likely that the state court would render a judgment first and deprive the federal court of jurisdiction.⁷⁰ Significantly, the court also did not believe that the forum selection clause, which made jurisdiction proper in the federal action, was dispositive of the abstention issue.⁷¹ In fact, the court concluded that "the forum selection clause is irrelevant to our [abstention] inquiry. [It] goes to whether Tennessee is a proper venue, not to whether this Court should abstain. Notably absent from the Colorado

⁶³No. 2:07-CV-1112, 2008 WL 3926441, at *1 (S.D. Ohio Aug. 25, 2008).

⁶⁴Id.

⁶⁵Id.

⁶⁶Id.

⁶⁷Id. at *2-3.

⁶⁸Id. at *2.

⁶⁹Id. at *3-5.

⁷⁰Id. at *4.

⁷¹Id. at *5.

River inquiry is a determination regarding the validity of jurisdiction and venue in state court."⁷² Accordingly, the court granted the defendants' motion to stay the federal court action, and the defendants were allowed to proceed with their Tennessee state court action despite the existence of the forum selection clause directing the parties to litigate all disputes in Ohio.⁷³

III. Conclusion

As the above discussion indicates, there are both procedural and substantive issues that may affect whether a federal court will enforce a forum selection clause today. Some of the procedural concerns are at least potentially within a litigant's control. For example, a litigant in a diversity action may choose to seek a transfer to the contractually designated forum, rather than outright dismissal based on the parties' forum selection clause, and thereby potentially avoid the possibility that a federal court will accord controlling weight to a state law that renders the clause void. On the other hand, a litigant has little control over whether a court will exercise its discretion to abstain from hearing a federal case under the Colorado River doctrine, based on the existence of a parallel action in state court.

⁷²Id.

⁷³Id. at *6.