

Floating Forum Selection Clauses: Where Are They Landing?

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The enforceability of "floating" forum selection clauses providing for one or more appropriate forums has been the question of debate in the federal and state courts. As evidenced by the NorVergence litigation throughout the country, the current trend in most jurisdictions is to enforce such clauses.

In 2003, NorVergence contracted with thousands of small to mid-size U.S. businesses, entering into Equipment Rental Agreements ("ERAs") for the lease of telecommunications equipment for use with telecom services. After entering into an ERA, NorVergence would sell only the payment rights under the ERAs to third party leasing companies.

The ERAs contain "floating" forum selection clauses shifting venue, upon assignment, to the state in which the subsequent assignee's principal office is located. The clauses provide:

APPLICABLE LAW: This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option.

The clauses are appealing to finance lessors because an assignee can file suit in the state where its principal office is located, instead of in a distant forum.

Nearly every leasing company in the U.S. purchased paper from NorVergence. When NorVergence was placed into bankruptcy in 2004, the lessees defaulted on the ERAs. When leasing companies began to file lawsuits in their home jurisdictions based on the forum selection clauses, they were confronted with unprecedented opposition to the provisions from the lessees, the courts, state attorneys general, and the Federal Trade Commission (the "FTC"), who claimed the clauses were unenforceable because they were confusing or unclear, and thus violated either statute or public policy.

Litigation across the nation regarding the enforceability of the forum selection clauses ensued, resulting in overall favorable outcomes to the leasing companies. Two federal appellate courts, the U.S. Courts of Appeals for the Seventh and Eleventh Circuits, unequivocally held that the forum selection clauses are enforceable. [IFC Credit Corp. v. Aliano Brothers](#), 437 F.3d 606 (7th Cir. 2006); [Pure Solutions v. IFC Credit Corp.](#), 2006 WL 1316974 (11th Cir. May 15, 2006) (citing [Aliano](#)). The [Aliano](#) decision was significant in that it was authored by Judge Richard Posner, a respected judge and legal scholar. [Aliano](#) was also the first appellate decision on the ERAs' forum selection clause and laid the analytical framework for subsequent appellate decisions. The state appellate courts of Colorado, Georgia, Illinois, Iowa, Maryland, New York, and Pennsylvania similarly upheld the clauses. Though no Minnesota or Missouri state appellate court has addressed the issue, federal district courts of those jurisdictions held that the clauses are enforceable.

Those federal and state courts consistently found that enforcement of the provisions was not unfair or unreasonable. They reasoned that, contrary to the lessees' contention that the clauses were vague, the provisions were clear and specific in that they designate the assignee's principal place of business as the forum. The courts also found that even if it

was inconvenient for the lessees to litigate in the assignees' home states, the lessees contemplated that inconvenience when they signed the ERAs. Reasoning that the lessees were sophisticated commercial entities, the courts held that if the lessees did not want to be bound by the clauses, they should have negotiated to change the provisions or not contracted with NorVergence. The courts noted that general allegations of NorVergence's fraud is not enough to circumvent a forum selection clause; instead, the lessees had to show the inclusion of the forum selection clauses themselves was a product of fraud. Finally, the courts concluded that floating forum selection clauses serve the legitimate business interest of making the ERAs more attractive to potential assignees, a characteristic which promotes the free negotiability of commercial paper.

Notably, a Chicago federal district court recently held that enforcement of the NorVergence floating forum selection clauses is not an "unfair practice" under the Federal Trade Commission Act. In June 2007, the FTC filed a three-count complaint against IFC Credit Corporation; one of the counts charged IFC with "unfair use of distant forums" for its suing of out-of-state lessees in Illinois pursuant to the ERAs' forum selection clause. In dismissing the count, the court held that: (1) under Aliano, the clause was unambiguous and enforceable; (2) the lessees, acting reasonably, could have avoided the "harm" of being sued outside their home state by not signing the ERAs. FTC v. IFC Credit Corp., 543 F.Supp.2d 925 (N.D. Ill. 2008). The court concluded that the lessees were not members of a highly susceptible class; they were under no economic pressure to contract with NorVergence; and they are deemed to know the contents of contracts they sign. Id. at 949, 951.

Not all jurisdictions have enforced the clause. The Ohio Supreme Court invalidated the provision on the grounds that it violated the state's public policy of providing notice to the lessees of where they could potentially be sued. Preferred Capital v. Power Engineering, 860 N.E.2d 741 (Ohio 2007). Preferred Capital led the U.S. Court of Appeals for the Sixth Circuit, which had previously upheld the clause, to reverse its prior decision and similarly find the provision unenforceable on public policy grounds. Preferred Capital v. Sarasota Kennel Club, 489 F.3d 303 (6th Cir. 2007). Though the New Jersey appellate court has not specifically addressed the clause, it declined to enforce a similar floating forum selection clause. Copelco Capital, Inc. v. Shapiro, 750 A.2d 773 (N.J. Super. 2000). The enforceability of the clause in Texas is unclear. While no Texas appellate court has addressed the validity of the clause on the merits, the courts have enforced judgments obtained in others states through the provision.

Thus, equipment lessors generally can take comfort in placing reliance on such provisions, unless they or their lessees are based in New Jersey or Ohio.

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