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"Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes."[1] Under New York law, forum selection clauses are deemed *prima facie* valid.[2] However, if a party demonstrates that the enforcement of the forum selection is unreasonable under the circumstances such that: (1) the clause was the product of fraud; (2) enforcement would be unjust or unreasonable; (3) proceeding with the contractual forum would be so difficult or inconvenient that for all practical purposes the non-enforcing party would essentially be deprived of their day in court; or (4) enforcement would go against public policy, then courts will not enforce the forum selection clause.[3] For example, the New York Appellate Division found a forum selection clause unreasonable and thus invalid in a case where every aspect of the transaction took place in Minnesota but the forum selection specified New York as the forum, and the defendant would have incurred a substantial hardship to defend the case in New York.[4]

Often, in a contract, the forum selection clause is part of an arbitration clause. Under the Federal Arbitration Act ("FAA"), for a court to mandate an arbitration clause, the arbitration must be in line with contract law.[5] Therefore, if a forum selection clause would be considered unconscionable under New York law, the FAA would not mandate the enforcement of arbitration in that forum.

However, in light of the COVID-19 pandemic, many courts have moved to a virtual setting. How does this affect a defendant's argument of unconscionability and unreasonableness regarding a forum selection clause? In a recent decision by the First Circuit,[6] the District Court of Rhode Island ruled that in a matter of an employment dispute, it was not unconscionable to make the employee "travel" from Rhode Island to Utah, in part because the arbitration would be virtual.[7] What does this mean for the future of both arbitral and labor and employment contracts with unreasonable forum selection clauses? Is it so simple to avoid defenses of unconscionability and unreasonableness as adding a virtual component to the clause?

The forum non conveniens doctrine allows a trial court to decline jurisdiction when a trial in another forum would better serve the ends of justice.[8] Forum non conveniens is applicable when the choice is between international, interstate, and intrastate forums.[9] Among the factors a court must consider when deciding if forum non conveniens applies are the private interests of the

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[1] Boss v. Am. Express Fin. Advisors, Inc., 6 N.Y.3d 242, 247 (2006) (quoting Brooke Grp. Ltd. v. JCH Syndicate 488, 87 N.Y.2d 530, 534 (1996)).

[2] *Court Upholds Forum Selection Clause Finding Enforcement Would Not Be Unconscionable*, FREIBERGER HABER LLP (Dec. 28, 2018), https://fhnylaw.com/court-upholds-forum-selection-clause-finding-enforcement-not-unconscionable [https://perma.cc/9FC8-4C2A].

[3] Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 217 (D. Me. 2016).

[4] Prospect Funding Holdings LLC v. Maslowski, 146 A.D.3d 535 (N.Y. App. Div. 2017).

[5] Federal Arbitration Act, 9 U.S.C. § 2.

[6] Trainor v. Primary Residential Mortg., Inc., No. CV 20-426 WES, 2021 WL 2454213 (D.R.I. June 16, 2021).

[7] Francesco (Fran) DeLuca, *Federal District Court Decision Highlights Importance of Thoughtful Drafting in Arbitration Agreements*, JD SUPRA (Aug. 18, 2021), https://www.jdsupra.com/legalnews/federal-district-court-decision-9582264 [https://perma.cc/V5DE-2G66].

[8] Ruch v. Padgett, 2015 IL App (1st) 142972, ¶ 37, 40 N.E.3d 448, 454 (2015).

[9] *See* Glass v. DOT Transp., Inc., 393 Ill. App. 3d 829, 832 (2009).

parties, such as "the convenience of the parties [and] the relative ease of access to sources of testimonial, documentary, and real evidence."[10] Traditionally, "dismissal w[ould] ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court."[11] However, the Ontario Superior Court recently decided that "[i]n the age of [Z]oom . . . no one forum is more convenient than another."[12] This may be a trend that spills over into the U.S. legal system as well, rendering much of the doctrine obsolete. The ramifications would be tremendous if this were the case, as both forum non conveniens and forum selection touch upon "virtually" any contract and arbitration agreement.

[10] *Id.* at 833.

[11] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981).

[12] Christina Doria & Brendan O'Grady, *Has Forum Non Conveniens Gone the Way of the VCR Player? Canadian Court Finds the Doctrine Obsolete in Age of Virtual Hearings*, KLUWER ARBITRATION BLOG (Aug. 16, 2021), http://arbitrationblog.kluwerarbitration.com/2021/08/16/has-forum-non-conveniens-gone-the-way-of-the-vcr-player-canadian-court-finds-the-doctrine-obsolete-in-age-of-virtual-hearings/ [https://perma.cc/YDL8-ZVEV].