ENFORCEMENT OF THE FORUM-SELECTION CLAUSE IN TEXAS

BY

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FIGHTING THE FORUM: AVOIDING LITIGATION IN TEXAS STATE COURT

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TABLE OF CONTENTS

I. Introduction

As business deals become more and more complex and frequently involve parties that are citizens of different forums, the issue of contracting for dispute resolution in a particular forum has become very common. Parties often spend much time and effort resolving this issue in the negotiation process that results in a contractual clause – a forum-selection clause – in their agreement. A forum-selection clause is a clause in a contract that provides that any dispute between the parties shall be filed in a particular jurisdiction. Otherwise stated, a "mandatory forum-selection clause" is a contractual provision that requires certain claims to be decided in a forum or forums other than the forum in which the claims have been filed. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Of course, disputes arise when a party to the contract simply disregards the forum-selection clause and files suit in a forum that violates the parties' agreement. For example, the parties may choose to have their disputes resolved in states such as New York, Illinois, California, and Florida, or may choose a foreign country such as England, Germany, or Brazil. If a dispute arises, and a party files suit in Texas, the defendant may want to hold the plaintiff to their agreement and have the dispute resolved in the forum previously agreed upon. The defendant would then file a motion to dismiss the suit. A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 111-21 (Tex. 2004). Once dismissed, the plaintiff would then have to file suit in the jurisdiction contained in the parties' agreement. Otherwise, where there is a forum-selection clause that identifies Texas as the forum for dispute resolution, a plaintiff may raise that in defense of a special appearance objection.

This paper addresses the many issues involved in filing a motion to dismiss in Texas and attempting to enforce or defend against a forum-selection clause.

II. Scope of The Clause

The first issue that may arise in attempting to enforce such a provision is whether the dispute at hand actually falls in the scope of the agreement to submit certain disputes to a particular forum for resolution. A court should first review whether a plaintiff's claims are within the scope of the forum-selection clause before determining whether that provision is enforceable. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687-88 (Tex. App.—Houston [14th Dist.] 2007, pet. filed) (analyzing scope before enforceability); *Braspetro Oil Servs. Co. - Brazil v. Modec (USA), Inc.*, 240 Fed. Appx. 612, 616 (5th Cir. 2007) ("Before we can consider enforcing a forum-selection clause, we must first determine 'whether the clause applies to the type of claims asserted in the lawsuit.'").

A. Courts Construe Clause Under Contract Construction Principals

"A forum-selection clause is a creature of contract." *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A forum-selection clause does not govern claims that fall outside of its scope. *See, e.g., Major Help Ctr. v. Ivy, Crews & Elliott, P.C.*, 2000 WL 298282, Tex. App.—Austin 2000, no pet.) (DTPA claim was held to be independent of agreement, and forum-selection clause did not apply); *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807, 813 (Tex. App.—Texarkana 1995, writ denied) (FSC did not apply to claims based on fraudulent inducement where rights and liabilities under the contract were not at issue); *Pozero v. Alfa Travel, Inc.*, 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ) (forum-selection clause in cruise ticket contract did not apply to claims not based on the contract). *See also, Southwest Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324-25 (Tex. App.—Austin 1999, pet. denied) (applying contractual interpretation principles to analysis of forum-selection clause). Further, a court may not read into or rewrite an agreement to favor such a clause. *See Bates v. MTH Homes-Tex., L.P.*, 177 S.W.3d 419, 422 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (courts may not expand upon the terms of the contract or tolerate a liberal interpretation of it by reading into it an agreement to arbitrate when one does

not otherwise exist); *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 356 (Tex. App.—Houston [1st Dist.] 1995, no writ) (court cannot modify or rewrite an unambiguous contract to accommodate arbitration). An agreement should not be expanded past what the parties actually agreed to do. *See Clair v. Brooke Franchise Corp.*, No. 02-06-216-CV, 2007 Tex. App. LEXIS 2805 *9-*12 (Tex. App.—Fort Worth April 12, 2007, no pet.).

B. Mandatory Versus Permissive Language In Clause

Whether a trial court must dismiss a case may depend on whether the forum-selection clause is mandatory or permissive. *See Ramsay v. Texas Trading Co., Inc.*, 254 S.W.3d 620 (Tex. App.—Texarkana 2008, pet. denied) (court determined that trial court correctly dismissed suit based on a mandatory clause; however, a dissenting justice would have found the clause to be permissive and reversed). Courts have recognized that clauses in which parties merely "consent" or "submit" to the jurisdiction of a particular forum will not justify dismissing a suit that is filed in a different forum. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1063 (8th Cir. 2003); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974). *See also In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, original proceeding) (part of forum-selection clause dealing with any and all claims was merely permissive and did not require a dismissal of plaintiff's fraud claim); *Apollo Property Partners, LLC v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 Tex. App. LEXIS 5884 n. 4 (Tex. App.—Houston [14th Dist.] August 5, 2008, no pet. hist.); *Sw. Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 323-26 (Tex. App.—Austin 1999, pet. denied) (clause whereby parties "stipulate to jurisdiction [in] Minnesota, as if this Agreement were executed in Minnesota" was not a mandatory forum-selection clause); *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327, 330 (Fla. Dist. Ct. App. 2007) (distinguishing mandatory forum-selection clauses from permissive clauses that "constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum"). Simply consenting to one jurisdiction does not mean that the party agreed that there was only one appropriate forum. Whereas, a mandatory clause provides that there is only one appropriate forum for dispute resolution, and a trial court should dismiss a suit filed a forum that conflicts with the agreed-upon forum. *See In re AIU Insurance Co.*, 148 S.W.3d 109, 111 (Tex. 2004) (the clause stated: "*all litigation, arbitration or other form of dispute resolution* shall take place . . . ").

A recent example of the difference between a mandatory and permissive clause is in *In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, original proceeding). There the clause stated:

> Consent to Jurisdiction. [McAfee] and [Goyal] each hereby irrevocably consent to the jurisdiction of the courts of the State of Delaware for all purposes in connection with any action or proceeding which arises out of or relates to this Agreement and agree that any action instituted under this Agreement shall be brought only in the state courts of the State of Delaware.

Id. at *9. The defendant filed a motion to dismiss the plaintiff's fraud claim that was filed in Texas. The court of appeals held that the clause did not require the dismissal of that claim because the broad "arises out of or relates to" language only modified a consent clause. The mandatory clause only dealt with actions instituted under the agreement, i.e., breach of contract claims. *Id.* Therefore, the court of appeals denied the defendant's petition for writ of mandamus and allowed the plaintiff's tort-based, fraud claim to continue in Texas.

C. Breadth Of Language In Mandatory Clause

Review of Texas case law illustrates that forum-selection clauses are broadly enforced when "any and all" claims that "relate to" or "arise from" the contract are referenced. *See, e.g., In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (in context of arbitration

clause, Court recognized that the use of language "any" dispute "arising out of or related to" as broad language that expressly includes tort and other claims). For example, in *Deep Water Slender Wells, Ltd. v. Shell International Exploration & Production, Inc.*, the broad forum-selection clause stated: "The Netherlands shall have exclusive jurisdiction to resolve any controversy or claim of whatever nature arising out of or relating to the Consulting Agreement or breach thereof." 234 S.W.3d at 683-84 (emphasis added). If the plaintiff's claims fall within the scope of the forum-selection clause, the analysis then turns to whether the clause is enforceable. Other examples of broad clauses are as follows:

- In *In re Autonation, Inc.*, the clause stated: "[t]he parties agree that *any action, suit or proceeding arising out of or relative to* this Agreement or the relationship of Employee and Company . . ." 228 S.W.3d 663,665 n. 3 (Tex. 2007);

- In *In re AIU Insurance Co.*, the clause stated: "*all litigation, arbitration or other form of dispute resolution* shall take place . . . "148 S.W.3d 109, 111 (Tex. 2004);

- In *Michiana Easy Livin' Country, Inc. v. Holten*, the clause stated: "You and I agree that if *any dispute between us* is submitted to a court for resolution, such legal proceeding shall take place in..." 168 S.W. 3d 777, 792 (Tex. 2005).

- In *Greenwood v. Tillamook Country Smoker, Inc.*, the clause stated: "the parties hereby agree that *any legal action* concerning this agreement..."857 S.W. 2d 654, 655 (Tex. App.—Houston [1st Dist.] 1993, no writ); and

- In *Tri-State Building Specialties, Inc. v. NCI Building Systems, L.P.*, the clause stated: "the parties hereto agree and stipulate that venue shall be in ... for *any and all claims and disputes arising out of all transactions* between [the parties]. . ." 184 S.W.3d 242 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Courts broadly enforce clauses that use these terms and generally apply them to all claims asserted between the parties. However, an arbitration clause that omits these broad terms indicates that the parties did not agree to arbitrate all disputes arising out of their business relationship. *See Associated Air Freight, Inc. v. Meek*, No. 01-00-00994-CV, 2001 Tex. App. LEXIS 1586 (Tex. App.—Houston [1st Dist.] March 8, 2001, no pet.) (not designated for publication) (finding that claims were outside of scope of arbitration provision). *See also Beckham v. William Bayley Co.*, 655 F.Supp. 288, (N.D. Tex. 1987); *Belmont Constructors, Inc. v. Lyondell Petrochem. Co.*, 896 S.W.2d 352, 355 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).

For example in *Hooks Industrial, Inc. v. Fairmont Supply Company*, the court held that a narrow forum-selection clause was not implicated by the plaintiff's claims and therefore did not require dismissal of the suit. No. 14-00-00062-CV, 2001 Tex. App. LEXIS 2568 (Tex. App.—Houston [14th Dist.] April 19, 2001, pet. denied) (not designated for publication). The clause in that case stated that "any and all actions at law ... for breach of ... this contract .. shall be instituted and maintained only in a court ... in Allegheny County, Pennsylvania ...." *Id.* at *5. "This contract" was a specific contract regarding the purchase and sale of products. *See id.* The plaintiff sued the defendant in Harris County for breach of the contract in failing to use reasonable efforts to promote the solicit orders for the plaintiff's products and in failing to purchase products. *See id.* at *8-9. The court held that the suit was not about the sales or purchases, which were controlled by the forum-selection clause; but rather, was about the failure to sell and purchase. *See id.* Because the pleaded claims were not within the scope of the forum-selection clause, the court found that the plaintiff could maintain suit in the forum of its choice, barring any jurisdictional and due process impediments. *See id* at *9-10.

For another example, consider the forum-selection clause language in *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*: "This agreement and the rights and obligations of the parties arising hereto shall be construed in accordance with the laws of the State of Iowa, with venue in [certain Iowa counties]." 896 S.W. 2d 807, 812-13. The court of appeals determined that the clause was narrowly written and did not encompass the extra-contractual claims in that case: "[t]his case does not involve an interpretation or construction of the contracts...." *Id.* at 813. "The rights, obligations, and cause of action do not arise from the contracts but from the Deceptive Trade Practices Act, the Texas Securities Act, and the common law." *Id.* "A forum-selection clause...does not apply to a tort action alleging that the plaintiff was induced by misrepresentations to enter into the contract, where construction of the rights and liabilities of the parties under the contract is not involved." *Id. See also Major Help Ctr., Inc. v. Ivy, Crews & Elliot, P.C.*, No. 03-99-00285-CV, 2000 Tex. App. LEXIS 1836 (Tex. App.—Austin March 23, 2000, no pet.) (not designated for publication) (finding DTPA claim was outside of scope of forum-selection clause because it was not based on any contractual provision). Conspicuously missing from the contract language in *Busse* was a reference to "any" or "all" claims "relating" to the agreement.

Highlighting the importance of the contract language, other courts have distinguished *Busse* when analyzing forum-selection clauses with much broader language. For example, in *My Café-CCC Ltd. v. Lunchstop, Inc.*, the court of appeals enforced a forum-selection clause finding that the clause in question "encompasse[d] all causes of action concerning the contract." 107 S.W.3d 860, 867 (Tex. App.—Dallas 2003, no writ). The court explained that the *Busse* case "only related to contract disputes." 107 S.W.3d 860, 867 (Tex. App.—Dallas 2003, no writ). *See also Clark*, 192 S.W.3d at 798-99 (finding *Busse* distinguishable because forum-selection clause at issue encompassed "any action, claim or demand arising under or as a result of this Agreement..." and because parties were signatories to contract).

A court will resolve the scope of a forum-selection clause by looking to the language of the parties' agreement and determining their intent by that language as compared to the plaintiff's claims. In fact, having the language "arising out of or related to" does not mean that a plaintiff's claim will automatically fall under the scope of a forum-selection clause. *See Apollo Property Partners, LLC v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 Tex. App. LEXIS 5884 (Tex. App.—Houston [14th Dist.] August 5, 2008, no pet.) (finding that plaintiff's claim did not fall within scope of forum-selection clause despite use of the language "arising out of or related to").

The Texas Supreme Court has recently rejected a plaintiff's argument that the his claims fell outside the scope of a forum-selection clause. *See In re International Profit Associates, Inc.*, No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009). The Court framed the issue thusly:

> We held in *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131-32 (Tex. 2005), a case dealing with arbitration clauses, that whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading. We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law. *Id.* at 132. The principles explicated in *Weekley Homes* apply here. Additionally, we look to federal law for guidance in analyzing forum-selection clauses. *See* AIU, 148 S.W.3d at 111-14. The Court of Appeals for the Fifth Circuit recently reiterated that it has foresworn "slavish adherence to a contract/tort distinction; to hold to the contrary would allow a litigant to avoid a forum-selection clause with 'artful pleading.'" *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 444 (5th Cir. 2008). The court called for a common-sense

> examination of the claims and the forum-selection clause to determine if the clause covers the claims. *Id.* at 444-45. The Fifth Circuit's approach is instructive: determining whether a contract or some other general legal obligation establishes the duty at issue and dictates whether the claims are such as to be covered by the contractual forum-selection clause should be according to a common-sense examination of the substance of the claims made. *See Weekley Homes*, 180 S.W.3d at 131-32; *see also In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 209 (Tex. 2007) (per curiam).

Id. The Court concluded: "No matter how Tropicpak characterizes or artfully pleads its claims, the claims and alleged damages arise from the contractual relationship between the parties, not from general obligations imposed by law. We conclude that Tropicpak's claims are within the scope of the forum-selection clauses." *Id.*

D. Review Of Pleadings As Compared To Clause

Another issue in determining whether a plaintiff's claims fall within the scope of the clause is how the trial court should construe the plaintiff's pleadings. One court of appeals has stated the review of pleadings as follows:

> In determining the nature of a cause of action, the court looks to the plaintiff's petition as a whole. *Fleetwood Constr. Co., Inc. v. Western Steel Co.*, 510 S.W.2d 161, 165 (Tex. Civ. App.—Corpus Christi 1974, no writ). The pleadings will be construed as favorably as possible for the pleader. *Paradissis v. Royal Indemnity*, 496 S.W.2d 146, 148 (Tex. Civ. App.—Houston [14th Dist.] 1973), *aff'd*, 503 S.W.2d 526 (Tex. 1974). We take the allegations in the Pozeros' pleading as true. *Hachar v. County of Webb*, 563 S.W.2d 693, 694 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

Pozero v. Alfa Travel, Inc., 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ). Another court of appeals disagreed with the "must construe as favorably as possible" standard, and stated:

> On appeal, the Deep Water Parties assert that this court must construe the allegations in their petition as favorably as possible, and they rely on *Pozero v. Alfa Travel, Inc.*, 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ). Because no special exceptions were sustained against the petition, this court must liberally construe the petition to contain any claims that reasonably may be inferred from the specific language used in the petition, even if the petition fails to state all of the elements of that claim. *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 354-55 (Tex. 1995). Nonetheless, we cannot use a liberal construction of the petition as a license to read into the petition a claim that it does not contain. *See San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 336 (Tex. App.—Houston [14th Dist.] 2005, no pet). The petition must give fair notice of the claims being asserted, and, if we cannot reasonably infer that the petition contains a claim, then we must conclude the petition does not contain this claim, even under our liberal construction. *See SmithKline Beecham Corp.*, 903 S.W.2d at 354-55. We respectfully disagree with the different legal standard stated by the *Pozero* court. *See Pozero v. Alfa Travel, Inc.*, 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ). The *Pozero* court appeared to

> strictly construe the forum-selection clause before it, and its analysis and result are incompatible with the current analysis adopted by the Supreme Court of Texas. *Compare In re AIU Ins. Co.*, 148 S.W.3d at 111-14, *with Pozero*, 856 S.W.2d at 245.

Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc., 234 S.W.3d 679, 689 n.5 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

E. Time Period For Clause

Courts find that unless there is something in writing to the contrary, that a forum-selection clause will remain in force after the expiration or termination of the remainder of the agreement. *See id.; Texas Source Group, Inc. v. CCH, Inc.*, 967 F.Supp. 234, 238-39 (S.D. Tex. 1997); *Strata Heights Int'l Corp. v. Petroleo Brasileiro, S.A.*, No. 02-20645, 2003 WL 21145663, at *1, *6-7 (5th Cir. April 28, 2003). Indeed, such a clause is intended to address the forum in which the parties will litigate any *future* disputes. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d at 691.

F. Ambiguous Forum-Selection Clause

If there is an ambiguity in the forum-selection clause, the trial court is the correct party to discern the correct meaning as intended by the parties. *See In re Sterling Chemicals, Inc.*, 261 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2008, original proceeding). In *Sterling Chemicals*, the court of appeals determined that there was a latent ambiguity regarding a forum-selection clause in a memorandum of understanding ("MOU"). *See id.* The parties had a dispute regarding the MOU, and the plaintiff filed suit. The defendant filed a motion to dismiss based on a forum-selection clause in the MOU. The plaintiff argued that the clause only applied to disputes regarding future agreements and not to the MOU itself, and referred to several other contemporaneous agreements and their forum-selection clauses to support its argument. The trial court denied the motion to dismiss. The court of appeals found that the MOU was not ambiguous by itself, but when put in context with the other agreements, it was ambiguous. The court of appeals held that it could not find that the trial abused its discretion in denying the motion to dismiss where the trial court sat as a fact finder regarding an ambiguous forum-selection clause. The court of appeals did not discuss whether such a fact finding should be resolved by a jury or not, but certainly, in the interim, the judge's decision stood as the fact finding. In theory, if a jury later finds to the contrary, i.e., that the forum-selection clause did apply to the relevant dispute, then the defendant may be able to raise the forum-selection clause issue again on appeal after judgment.

III. Historic Enforcement of Forum-Selection Clauses in Texas

Texas courts, like others across the country, had historically invalidated forum-selection clauses for violating public policy. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004). *See also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S. Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972). However, since the United States Supreme Court's landmark decision in *M/S Bremen*, and its later refining pronouncements in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595-96, 113 L.Ed.2d 622, 111 S.Ct. 1522 (1991), Texas courts have begun enforcing forum-selection clauses. *See In re AIU Ins. Co.*, 148 S.W.3d at 111-12.

Historically, Texas courts and federal courts used different analyses to determine the enforceability of mandatory forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-14 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Under the test of *M/S Bremen* and *Shute*, forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen*, 407 U.S. at 10, 92 S. Ct. at 1913; *see Shute*, 499 U.S. at 588, 111 S. Ct. at 1525. The clause's opponent has a "heavy burden" to make a "strong showing" that the forum-selection clause should be set aside. *M/S Bremen*, 407 U.S. at 15, 92 S. Ct. at 1916. This burden includes "clearly" showing that enforcement would be "unreasonable and unjust"; that the clause was "invalid for such reasons as fraud or overreaching"; that "enforcement would contravene a strong public policy of the forum in which suit is brought,

whether declared by statute or by judicial decision"; or that "the contractual forum will be so gravely difficult and inconvenient" that the opponent "will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 15, 18, 92 S. Ct. at 1916, 1917.

In contrast, most Texas courts of appeals had recognized a two-part test to determine whether a forum-selection clause was valid and enforceable: the clause was enforceable if (1) the parties contractually consented to submit to the exclusive jurisdiction of another jurisdiction and (2) the other jurisdiction generally recognized the validity of such provisions. *See Satterwhite Aviation Serv. v. Int'l Profit Assocs.*, No. 01-07-00053-CV, 2008 Tex. App. LEXIS 674 (Tex. App.—Houston [1st Dist.] January 31, 2008, no pet. h.) (court cited historical standard as correct standard even after Texas Supreme Court opinions); *My Cafe-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 864-65 (Tex. App.—Dallas 2003, no pet.); *Holeman v. Nat'l Bus. Inst., Inc.*, 94 S.W.3d 91, 97 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203 (Tex. App.—Eastland 2001, pet. denied); *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 296-97 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Southwest Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, pet. denied); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ); *Greenwood v. Tillamook Country Smoker, Inc.*, 857 S.W.2d 654, 656 (Tex. App.—Houston [1st Dist.] 1993, no writ). *See also In re GNC Franchising, Inc.*, 22 S.W.3d 929 (Tex. 2000) (Hecht, J. dissenting from denial of petition for writ of mandamus). Even if these two threshold criteria were met, however, a forum-selection clause would not bind a Texas court if the interests of witnesses and public policy strongly favored that the suit be maintained in a forum other than the one to which the parties had agreed. *See My Cafe-CCC, Ltd.*, 107 S.W.3d at 865; *Holeman*, 94 S.W.3d at 97; *Southwest Intelecom, Inc.*, 997 S.W.2d at 324; *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 71; *Greenwood*, 857 S.W.2d at 656.

One court has held that the principal differences between the *M/S Bremen* and *Shute* test and the Texas courts-of-appeals test were:

> (1) the M/S Bremen and Shute test views the forum-selection clause as prima facie valid and enforceable, while the Texas test requires the clause's proponent to establish, as a threshold matter, that the forum that the parties selected recognizes the validity of the general type of forum-selection clause and (2) the M/S Bremen and Shute test allows the opponent to defeat the forum-selection clause if, among other things, its enforcement would be unreasonable or unjust, while the Texas test does not expressly recognize this enforcement exception.

Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc., 177 S.W.3d at 611-14.

IV. Texas Supreme Court Enforces Forum-Selection Clauses Following The Federal Test For Enforcement

The Supreme Court of Texas has issued six opinions dealing with the enforceability of forum-selection clauses: *In re International Profit Associates, Inc.*, No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 232 (Tex. 2008) (per curiam); *In re Autonation*, 228 S.W.3d 663 (Tex. 2007); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005); *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557, 558-59 (Tex. 2004); and *In re AIU Ins. Co.*, 148 S.W.3d 109, 111-14 (Tex. 2004).

"Texas state courts employ the federal standard for analyzing forum selection clauses; thus, our analysis under federal law is substantively similar to state law, and we apply Texas procedural rules." *In re Omega Protein, Inc.*, NO. 01-08-00656-CV, 2009 Tex. App. LEXIS 419 (Tex. App.—Houston [1st Dist.] January 20, 2009, original proceeding) (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005)). One court has come to at least two conclusions. "First, the Texas Supreme Court has expressly adopted the *M/S Bremen* and *Shute* test, including who has the burden to show that the forum-selection clause should not be enforced and of what that burden consists." *See Phoenix Network Techs.*

(Europe) Ltd. v. Neon Sys., Inc., 177 S.W.3d at 611-14. "Second, the Texas Supreme Court has implicitly adopted the presumption from *M/S Bremen* and *Shute* that forum-selection clauses are prima facie valid." *Id.* The Texas Supreme Court's implicit adoption of the federal presumption supplants the threshold requirement that the clause's proponent establish that the forum that the parties selected recognizes the validity of forum-selection provisions. *See id.*

The following is a discussion of the six Texas Supreme Court opinions dealing with forum-selection clauses and the issues raised in those cases.

A. *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004)

In *In re AIU Insurance*, AIU, a New York corporation, provided pollution-liability coverage for, among other entities, a Delaware corporation ("Dreyfus") with its principal place of business in Texas. 148 S.W.3d 109, 110-11 (Tex. 2004). Dreyfus sued AIU in Texas for breach of contract, statutory, and tort claims regarding whether certain environmental claims against it were covered by the policy. *See id.* at 111. AIU moved to dismiss the suit because the policy contained a forum-selection clause providing for suit in New York. *See id.* The trial court denied AIU's dismissal motion, the court of appeals denied writ of mandamus, and the Texas Supreme Court granted writ. *See id.* at 110-11.

The Court noted that this was the first case where it addressed the validity of a forum-selection clause. *See id.* at 111. Historically, forum-selection clauses were not favored because they were viewed as "ousting" a court of jurisdiction. *See id.* However, the Court noted that the United States Supreme Court had held that such clauses should be given full effect "absent fraud, undue influence, or overweening bargaining power." *Id.* (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L.Ed. 513, 92 S.Ct. 1907 (1972)). The United State Supreme Court held that such a clause should control absent a strong showing that it should be set aside," and that "the correct approach [is] to enforce the forum clause specifically unless [the party opposing it] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* A clause may come under one of these exceptions "if enforcement would contravene a strong public policy of the forum" where the suit was filed, or "when the contractually selected forum would be seriously inconvenient for trial." *Id.*

The Texas Supreme Court held that the forum-selection clause was enforceable and rejected Dreyfus's arguments that certain of the factors established in *M/S Bremen* and *Shute* made the clause unenforceable. *See id.* at 111-16. The Court placed the burden on Dreyfus, the party opposing enforcement of the forum-selection clause, to carry its "heavy burden" of showing that the forum-selection clause should not be enforced under the *M/S Bremen* and *Shute* test. *Id.* at 113-14. The Court found that Dryfus did not meet its burden: "In the present case, the State of New York is not a 'remote alien forum.' There is no indication that AIU or Dreyfus chose New York as a means of discouraging claims. Nor is there any evidence of fraud or overreaching." *Id.* at 114. The Court held that it was certainly foreseeable to Dreyfus that it would have to litigate in New York, and that Dreyfus had shown that litigating in New York would essentially deprive it of its day in court. *Id.* at 113. After a lengthy discussion about whether AIU had an adequate remedy at law, the Court granted its petition for writ of mandamus.

B. *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557, 558-59 (Tex. 2004)

Later the same year, the Texas Supreme Court issued a per curiam opinion on the forum-selection clause issue. *See In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 48 Tex. Sup. Ct. J. 162 (Tex. 2004). *In re Automated Collection Technologies* involved a suit between a Texas corporate plaintiff and a Pennsylvania corporate defendant for failure to pay for services rendered pursuant to a written contract. *See id.* at 558. The court stated, "In *In re AIU Ins. Co.*, we held that enforcement of forum-selection clauses is mandatory unless the party opposing enforcement 'clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *Id.* at 559 (quoting *In re AIU Ins. Co.*, 148 S.W.3d at 112). The Court found that the trial court abused its discretion in refusing to enforce the forum-selection clause. The Court noted that the party opposing the clause's enforcement had not sustained "its

burden" because it had "submitted no evidence" showing that enforcement would be "unreasonable or unjust" and had not asserted that the clause was invalid. *Id.* Therefore, once a party offers a seemingly valid forum-selection clause in a contract between the plaintiff and defendant, the Court clearly placed the burden to produce evidence on the plaintiff to establish some reason why it should not be enforced.

The Court also addressed a waiver argument. The plaintiff argued that the defendant waived the forum-selection clause by answering, filing counterclaims, serving written discovery, and filing a motion to compel discovery shortly after filing a motion to dismiss due to the forum-selection clause. *See id.* at 558-59. However, the plaintiff never established any prejudice as a result of the defendant's delay, participation in the suit, or counterclaims. *See id.* The Court held that the defendant did not waive its right to enforce the forum-selection clause:

> Automated did not waive enforcement of the forum-selection clause by seeking affirmative relief on the underlying contract and by participating in the underlying litigation. In AIU, we addressed a similar waiver argument and concluded that a delay of five months in seeking enforcement of a forum-selection clause along with requesting a jury trial, paying the jury fee, and filing a general denial that did not raise the forum-selection issue were not sufficient to waive the forum-selection clause under consideration in that case. In so holding, we relied on cases concerning waiver in the arbitration context we found to be analogous. *In re Bruce Terminix Co.*, an arbitration case, held that "even substantially invoking the judicial process does not waive a party's arbitration rights unless the opposing party proves that it suffered prejudice as a result."
>
> PSC asserts that the parties have spent significant time and resources litigating this dispute. . . [and] [a] dismissal would result only in duplication of time and resources that are unnecessary." But this does not establish that PSC has been prejudiced by Automated's participation in the underlying litigation and four-month delay in seeking enforcement of the forum-selection clause. Moreover, PSC chose to initiate proceedings in a forum other than the one to which it contractually agreed and cannot complain about any duplication of time or efforts that resulted from that choice.

Id. at 559-60.

C. *In re Autonation*, 228 S.W.3d 663 (Tex. 2007)

In *In re Autonation*, the Court dealt with enforcing a forum-selection clause that existed in a covenant not to compete in an employment relationship. 228 S.W.3d 663 (Tex. 2007). The plaintiff argued that public policy dictated that the employee should be allowed to file suit in Texas. The plaintiff cited *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), wherein the Court held that the enforcement of a covenant not to compete was a matter fundamental to Texas public policy and that it would be governed by Texas law even if the parties had agreed to the law of a different forum. The Court in *Autonation* determined that the forum-selection clause did not offend public policy, and that it should be enforced. The Court concluded: "Accordingly, and without offending *DeSantis*, we will not presume to tell the forty-nine other states that they cannot hear a non-compete case involving a Texas resident-employee and decide what law applies, particularly where the parties voluntarily agree to litigate enforceability disputes there and not here." *Id.* at 670.

D. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005)

In *Michiana Easy Livin' Country, Inc. v. Holten*, the Court reaffirmed, in a case concerning a ruling on a special appearance, that "enforcement of a forum-selection clause is mandatory absent a showing that 'enforcement would be unreasonable and unjust, or that the clause was invalid due to fraud or overreaching.'" 168 S.W.3d 777 (Tex. 2005). The Court first acknowledged that having a forum-selection clause in a contract does not mean that the defendant did not have sufficient contacts with Texas such that a Texas court would have personal jurisdiction over that defendant: "Generally, a forum-selection clause operates as consent to jurisdiction in one forum, not proof that the Constitution would allow no other." *Id.* at 792-93. The Court then addressed the plaintiff's argument that the defendant waived enforcement of the clause by waiting two years, and shortly before the special appearance hearing, to first assert the clause. *See id.* at 293. The Court disagreed because the record indicated that little activity had occurred and that there was nothing to suggest any prejudice the plaintiff in the delay. *See id.* The Court then determined that the scope of the clause was broad enough to encompass the plaintiff's tort claims where it referred to "any" dispute between the parties. *Id.* Finally, the Court determined that the trial court had no discretion to refuse to enforce the clause absent a showing that "enforcement would be unreasonable and unjust, or that the clause was invalid due to fraud or overreaching." *Id.*

E. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228 (Tex. 2008) (per curiam)

In *In re Lyon Financial Services Inc.*, a Texas imaging company ("MNI") entered into a lease with Lyon for the use of imaging equipment. 257 S.W.3d 228 (Tex. 2008) (per curiam). The lease agreement contained a forum-selection clause that provided that the state and federal courts of Pennsylvania had jurisdiction over all matters arising out of the lease, but that Lyon had the right to file suit in any jurisdiction where MNI, a surety, or the collateral resided or were located. Furthermore, there were three related schedules all incorporating by reference the equipment lease and a subsequent restructuring agreement incorporating the previous lease. The agreements also specified that Pennsylvania law would be used for interpretation. After a dispute arose concerning whether Lyon had improperly charged MNI for equipment, MNI sued Lyon in Texas state district court for usury and unjust enrichment. Lyon filed a motion to dismiss and asserted that the forum-selection clause mandated that MNI file suit in Pennsylvania. The trial court denied the motion, and the court of appeals denied Lyon's petition for writ of mandamus.

The Texas Supreme Court first stated that forum-selection clauses are presumptively enforceable. It then addressed MNI's arguments as to why the clause should not be enforced. First, MNI argued that the clause was a product of fraudulent misrepresentations. The Court held that fraudulent inducement to sign an agreement containing a forum-selection clause will not bar enforcement of that provision unless the specific forum-selection clause was the product of fraud or coercion. MNI had an affidavit from its representative that stated that he was misled that the forum-selection clause only applied to a schedule that he was not suing upon. The Court determined that this was insufficient because the agreements contained clauses that represented that they were the entire agreements between the parties and that there were no prior representations not contained in the agreements. The Court stated that a party who signs an agreement is presumed to know its contents, and that includes documents specifically incorporated by reference. Further, MNI's representative failed to state that he would not have signed the agreement absent the alleged misrepresentation. The Court found that there was no evidence that the forum-selection clause was secured by a misrepresentation or fraud.

Second, MNI argued that the clause should not be enforced because there was a disparity in bargaining power in that MNI's representative did not have legal advice, had no formal business school training, was not aware of the clause when he signed the agreement, and that the agreements were presented on a take-it-or-leave-it basis. The Court determined that these facts did not show unfairness or overreaching. The Court held that the agreements were not a result of unfair surprise or oppression because the forum-selection clause was in all capital letters. The Court also found that the clause was not unfair simply because the

clause allowed Lyon to file suit in Texas or Pennsylvania and required MNI to solely file suit in Pennsylvania because these types of clauses do not require mutuality of obligation so long as adequate consideration is exchanged.

Third, MNI argued that Pennsylvania was an inconvenient forum and that enforcing the provision would produce an unjust result. MNI produced evidence that it was a small business and did not have the ability to pursue claims in Pennsylvania. The Court stated that by entering into the agreements both parties effectively represented to each other that the agreed forum was not so inconvenient that enforcing the clause would deprive either party of their day in court. The Court then held that Pennsylvania is not a "remote alien forum," and that there was no proof that an unjust result would occur in enforcing the clause.

Fourth, MNI argued that it would be unjust to enforce the clause because Pennsylvania does not allow a corporation to sue for usury. The Court held that MNI's inability to assert its usury claim does not create a public policy reason to deny enforcement of the clause. Texas law in an area does not establish public policy that would negate a contractual forum-selection clause, absent a statute requiring suit to be brought in Texas. Further, MNI made no showing that even using Pennsylvania law, that Pennsylvania would not apply Texas law in determining the parties' rights. Therefore, the Court conditionally granted the petition and ordered the trial court to grant the motion to dismiss.

There are several interesting points raised by *In re Lyon Financial Services Inc.* First, the Texas Supreme Court will make it very difficult for a plaintiff to argue that he was defrauded into entering into a forum-selection (or arbitration) clause where the agreement contains language that it is the final agreement and that there are no other representations outside of the agreement. This language is typical in most agreements and seemingly trumps a plaintiff's affidavit evidence to the contrary. Second, the Court seems to be very unwilling to find that a forum-selection clause is not enforceable simply because the plaintiff did not read it, it is contained in an "adhesion" contract, and/or it would be expensive for the plaintiff to litigate in the forum of choice.

F. *In re International Profit Associates, Inc.*, No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009).

In *In re International Profit Associates, Inc.*, the plaintiff entered into two-page consultation agreements with the defendants whereby the defendants would provide business consulting services. No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009). There was a forum-selection clause above the signature line of the agreements that stated: "It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying." *Id.* The defendants then recommended that the plaintiff hire an individual named David Salinas to help increase sales. Allegedly, Salinas then embezzled large sums of money from the plaintiff. The plaintiff sued the defendants in Texas state court based on negligence, fraud, negligent misrepresentations, and a breach of good faith and fair dealing. The defendants filed a motion to dismiss the suit based on the forum-selection clauses contained in the agreements.

The plaintiff argued that the clauses were unenforceable because (1) they were ambiguous; (2) they were procured through overreaching and fraud; (3) the interests of the defendants' witnesses and the public favored litigating the case in Texas; and (4) enforcement of the clauses would effectively deprive the plaintiff of its day in court. The Texas Supreme Court disagreed with each of these, and, in a per curiam opinion, conditionally granted the petition and ordered the trial court to grant the defendants' motion to dismiss.

The Court started its analysis with the following statement: "Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden." Id. In discussing the ambiguity argument, the Court stated that just because the clauses did not mention "litigation" did not mean that they were ambiguous:

> A contract is ambiguous when it is susceptible to more than one reasonable interpretation. The forum-selection clauses in this case are not susceptible to more than one reasonable

> interpretation. Each clause specifies that exclusive jurisdiction and venue shall vest in [Illinois]. The only reasonable interpretation is that the clauses fix jurisdiction and venue for judicial actions between the parties in a specific location and court in Illinois.

Id. The plaintiff also argued that the clauses were ambiguous as to whether they applied to contract and tort claims, and therefore its tort claims should not be dismissed. The Court refused to answer that question because it found that all of the plaintiff's factual claims arose from the contract. The Court drew heavily from arbitration and federal precedent regarding whether a claim sounded in tort or contract. Specifically, the Court cited to its prior opinion in *In re Weekley Homes, L.P.*, where the court found that certain tort claims sounded solely in contract and were controlled by an arbitration clause. 180 S.W.3d 127, 131-32 (Tex. 2005). The Court stated that:

> whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading. We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law.

2009 Tex. LEXIS 5. The Court stated that "determining whether a contract or some other general legal obligation establishes the duty at issue and dictates whether the claims are such as to be covered by the contractual forum-selection clause should be according to a common-sense examination of the substance of the claims made." *Id.*

In analyzing the pleadings of the case, the Court stated that the plaintiff's claims all arose out of the consulting agreements because the defendants recommended Salinas in the course of their consulting work and because the agreements did not limit the scope of the defendants' consulting work. The Court determined that the plaintiff's claims were within the scope of the forum-selection clauses.

The Court then turned to the plaintiff's argument that the forum-selection clauses were not enforceable because they were procured by fraud and overreaching. The plaintiff supported that allegation by arguing that its representative did not know about the clauses and that the defendants did not point those clauses out to her at a time when all of the communications were going on in Texas. The Court disagreed. Because the clauses were in two page contracts, were in the same font style and size as the other terms of the contract, and were located near the signature lines, the defendants had no duty to affirmatively point them out to the plaintiff.

Finally, the Court dismissed the plaintiff's arguments regarding the interests of the witnesses and public, convenience of litigation, and deprivation of the plaintiff's day in court. The Court stated that the plaintiff could have foreseen litigation in Illinois, which is not a remote alien forum. Further, the fact that there may be two suits – one in Texas against other defendants not parties to the agreements and one in Illinois against the defendants – did not deprive the plaintiff of its day in court. The Court concluded: "[the plaintiff] presented no evidence to overcome the presumption that the forum-selection clauses are valid." *Id.*

V. Should The Enforcement of A Forum-Selection Clause Differ From An Arbitration Clause and A Jury-Waiver Clause?

Arbitration, forum-selection, and jury-waiver clauses all fundamentally alter a party's right to dispute resolution. However, those clauses seemingly have different tests for their enforcement.

Texas courts liberally enforce arbitration clauses notwithstanding the fact that a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision. In Texas, arbitration agreements are interpreted under general contract principles. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). Further, there are instances where Texas courts have enforced arbitration agreements against

nonparties under the theory of estoppel. *See, e.g., In re Weekly Homes,* 189 S.W.3d 127 (Tex. 2005); *In re Kellog, Brown & Root,* 166 S.W.3d 732 (Tex. 2005). There is no requirement that the party relying on the arbitration agreement prove that it is conspicuous or that all parties entered into the agreement voluntarily or knowingly.

Contractual jury waivers are clauses in contracts that state that the parties waive the right to a jury and will submit their disputes to the court. Because contractual jury waivers are less intrusive than arbitration agreements, common sense would lead to the conclusion that they are at least as easily enforced as arbitration agreements. However, because contractual jury waivers are not enforced under the same standards as arbitration clauses, parties have a more difficult burden to enforce jury waivers.

In *In re Prudential,* the Texas Supreme Court for the first time held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The Court held that such an agreement may be unenforceable where it was not entered into voluntarily, knowingly, and intelligently:

> [A] waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences. We echo the United States Supreme Court's admonition that 'waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' Under those conditions, however, a party's right to trial by jury is afforded the same protections as other constitutional rights.

Id. Despite creating a "voluntary, knowing, and intelligent" requirement, the Court acknowledged that a contractual jury waiver was less of a depravation of constitutional rights than an arbitration clause:

> By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

Id. The Texas Supreme Court once again addressed contractual jury waivers in *In re GE Capital,* where the court once again granted mandamus relief to enforce a contractual jury waiver. 203 S.W.3d 314, 316-17 (Tex. 2006).

Texas courts of appeals have been less friendly to the contractual jury waiver. In *Mikey's Houses, LLC v. Bank of America, N.A.,* the Fort Worth Court of Appeals found that a trial court erred in enforcing a contractual jury waiver because the defendant did not prove that it was entered into voluntarily and knowingly. 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.). The court found that contractual jury waivers were very different from arbitration agreements. It found that "public policy favors arbitration; the same cannot be said of the waiver of constitutional rights;" "although statutes generally require courts to compel contractual arbitration, no comparable statutory mandate directs courts to enforce contractual jury trial waivers"; "application of the standards for enforcing arbitration clauses would conflict with the *Brady* 'knowing and voluntary' standard that the Texas Supreme Court adopted in *In re Prudential*"; and "a distinction exists between an agreement to resolve disputes out of court and an agreement to resolve disputes in court but to waive constitutional aspects of that in-court resolution." *Id.* at 151-52.

In *In re Credit Suisse First Boston Mortgage Capital, L.L.C.,* the Houston Fourteenth Court of Appeals similarly did not enforce a contractual jury waiver. No. 14-08-

00132-CV, 2008 Tex. App. LEXIS 4661 (Tex. App.—Houston [14th Dist.] June 17, 2008, orig. proceeding). The court then held that it would not apply equitable estoppel in the context of contractual jury waivers:

> We decline to recognize direct-benefits estoppel as a vehicle by which a jury waiver clause may be applied to claims against a party that did not sign the contract containing the clause. We are unaware of any court, in Texas or elsewhere, that has applied direct-benefits estoppel to a jury waiver provision.

The court then stated that arbitration clauses are different from and implicate different policy issues than jury waivers:

> We recognize that Texas courts have occasionally referenced arbitration principles in deciding jury-waiver issues. However, these occasional references do not signal a departure from the longstanding principle that jury waivers are disfavored in Texas. Nor can Prudential or Wells Fargo be read as placing jury-waiver provisions on the same footing as arbitration clauses. These mechanisms cannot be treated interchangeably merely because they both lead to decisions by factfinders other than jurors. Jury waiver provisions and arbitration clauses implicate significantly different policies and principles. In upholding parties' freedom to contract, the Texas Supreme Court noted that arbitration agreements--which are strongly favored--allow parties to contractually opt out of the civil justice system altogether. The use of arbitration as an example of contractual waiver should not be read as a statement that, henceforth, jury waivers are to be analyzed interchangeably with arbitration agreements.

Id. at *13-14. The court concluded that it would "not use equitable estoppel as a vehicle to circumvent the required "knowing and voluntary" waiver standard." *Id.* at *14.

The Texas Supreme Court has not discussed why there are different standards for contractual jury waivers than for arbitration agreements or forum-selection clauses. However, in *In re Prudential* the Court clearly stated that contractual jury waivers were less intrusive than arbitration agreements and forum-selection clauses. One reason that arbitration clauses are favorably viewed is that there are federal and state statutes extolling arbitration's virtue and there is no such statute for jury waivers. Of course, a statute should not be able to trump a constitutional right. If the "knowing and voluntary" requirement is constitutional, it should apply to arbitration agreements notwithstanding statutory enactments. However, it does not. Arbitration agreements are judged as contractual clauses, and there merely has to be a showing of mutual assent. Arbitration agreements are valid and enforceable without any showing of voluntary and knowing waiver and there is no conspicuousness requirement. These agreements are often enforced against and by parties who were not even signatories to the agreements.

Moreover, courts have not limited arbitration precedent solely to arbitration. As this article indicates, Texas courts apply arbitration precedent to forum-selection clauses. The Supreme Court's forum-selection clause cases liberally cite to and refer to arbitration precedent: *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005); *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557, 558-59 (Tex. 2004); and *In re AIU Ins. Co.*, 148 S.W.3d 109, 111-14 (Tex. 2004). Enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *See In re AIU Ins. Co.*, 148 S.W.3d at 112. The party opposing the clause's enforcement has the burden to prove the clause is invalid. *See id.* Courts have not held that there has to be any showing of knowing or voluntary

agreement to a forum-selection clause. Moreover, courts have applied equitable estoppel so that non-signatories can enforce forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Is there any reason to apply arbitration precedent and presumptions to forum-selection clauses and not to contractual jury waivers? Certainly, litigating in other countries of the world has a huge impact on parties' constitutional rights. Few countries provide a right to a jury. Moreover, there are other rights that may be limited such as the examination of witnesses, presentation of evidence, and right to appellate relief. Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason. For example, in *In re Palm Harbor Homes, Inc.*, the Texas Supreme Court held that when a contractual jury waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). Why should a different, more strenuous, standard apply when jury waiver clauses are not included in arbitration agreements?

Arbitration, forum-selection, and jury waiver clauses should all be judged by the same standard. They all deprive a party of constitutional rights – however, as courts acknowledge, a party can waive those rights. They should all be judged either under the contract/mutual assent standard of arbitration agreements or by some higher "knowing and voluntary" standard. Further, equitable estoppel should apply to all of these clauses or none of them. There is no logical difference between them.

VI. Impact of Choice-of-Law Provision On Enforcement Of A Forum-Selection Clause

Another issue is the application of choice-of-law clauses on forum-selection clauses. It is not uncommon for forum-selection clauses to also provide that all of the contractual clauses will be construed by a foreign jurisdiction's law. For example, a clause may state: "The validity, construction, interpretation, and effect of this Contract will be governed in all respects by the law of England." "The most basic policy of contract law is the protection of the justified expectations of the parties." *Clair v. Brooke Franchise Corp.*, No. 02-06-216-CV, 2007 Tex. App. LEXIS 2805 (Tex. App.—Fort Worth April 12, 2007, no pet.) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990)). Further, in construing a contract, a court must determine the parties' true intentions as expressed in the contract by examining the entire writing "in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

Texas courts generally respect the parties' contractual choice-of-law and apply the law that the parties choose. *See Ill. Tool Works, Inc. v. Harris*, 194 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("The parties contractually agreed to apply the law of Illinois to this contract. Texas courts will respect that choice and apply the law the parties choose."). Specifically, Texas courts uphold choice-of-law provisions in the context of the enforceability of arbitration provisions. *See In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 321 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 480-81 (Tex. App.—Dallas 2006, no pet.); *In re Alamo Lumber Co.*, 23 S.W.3d 577, 579 (Tex. App.—San Antonio 2000, orig. proceeding). *See also West Tex. Positron, Ltd. v. Cahill*, No. 07-05-0297-CV 2005 WL 3526483, at *2 (Tex. App.—Amarillo 2005, no pet.) (parties' choice of Texas law pointed to Texas interpretation of waiver). *See also ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. Tex. 1999) (parties can choose state arbitration law via a choice-of-law clause).

Where the issue has been raised, some courts hold that forum selection clauses are to be construed under the law of the forum that the parties have contractually agreed to. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003); *Lambert v. Kysar*, 983 F.2d 1110, 1118 (1st Cir. 1993); *Nutter v. New Rents, Inc.*, 1991 U.S. APP. LEXIS 22952 (4th Cir. 1991); *Instrumentation Assocs. v. Madsen Elecs.*, 859 F.2d 4, 7 (3d Cir. 1988); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357-58 (3d Cir. 1986); *AVC Nederland B.V. v.*

Atrium Inv. P'ship, 740 F.2d 148 (2d Cir. 1984); *Eisaman v. Cinema Grill Sys. Inc.*, 87 F.Supp.2d 446 (D. Md. 1999); *Triple Quest Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 384 (N.D. 2001); *Jacobson v. Mailboxes, Etc. U.S.A., Inc.*, 419 Mass. 572, 575 (1995). *See also Hooks Indus., Inc. v. Fairmont Supply Co.*, No. 14-00-00062-CV, 2001 Tex. App. LEXIS 2568 (Tex. App.—Houston [14th Dist.] April 19, 2001, pet. denied) (not designated for publication) (court interpreted contract with forum-selection clause under law designated by parties).

For example in *Yavuz*, the court of appeals dealt with how to interpret a forum-selection clause when the contract contained a choice-of-law provision. *Yavuz v. 61 MM, Ltd*, 465 F.3d 418, 426-32 (10th Cir. 2006). The court stated that there were several issues that had to be addressed: "(1) Is the forum-selection clause provision mandatory? ... (2) Are all of Mr. Yavuz's claims governed by the provision, or only some? ... (3) Does the clause bind Mr. Yavuz with respect to claims against all the defendants, or with respect to only his claims against FPM, or perhaps only those against FPM and Mr. Adi?" *Id.* at 427. The last issue dealt with which parties could enforce the forum-selection clause. The court then analyzed in depth what law controlled and concluded that these issues should be determined under the law chosen by the parties. *See id.* at 430-31.

Determining how a foreign country would interpret or enforce a forum-selection clause may require the admission of evidence. Under Texas Rule Evidence 203, a trial court may consider affidavits in determining the law of a foreign nation. *See* TEX. R. EVID. 203; *Dankowski v. Dankowski*, 922 S.W.2d 298, 302-03 (Tex. App.—Fort Worth 1996, writ denied). A trial court will likely not abuse its discretion in believing one credible expert witness over another. *See Phoenix Network Techs. Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 618 n. 15 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (in the context of whether a foreign jurisdiction would enforce a forum-selection clause, a trial court did not abuse discretion in being advised on foreign law by one party expert's affidavit over the opponent's expert's affidavit).

It should be noted that a choice-of-law provision in a contract that applies only to the interpretation and enforcement of the contract does not govern tort claims. *See Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433, 42 Tex. Sup. Ct. J. 493 (Tex. 1999); *Red Roof Inns, Inc. v. Murat Holdings, LLC*, 223 S.W.3d 676, 684 (Tex. App.—Dallas 2007, pet. denied). *See also NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 759 F. Supp. 1004, 1011 n.11 (S.D.N.Y. 1991) (observing, although contract at issue provided for construction of agreement under Illinois law, promissory estoppel is a claim outside the contract and, therefore, parties' choice-of-law was not binding).

VII. Enforcement of Forum-Selection Clause By Or Against A Non-Signatory To The Agreement Containing The Clause

Another issue that will continue to be of importance is the enforceability of a forum-selection clause by a party that is not a signatory to the contract or against a party that is not signatory to the contract. The Texas Supreme Court has noted six theories recognized by the federal courts in which a nonsignatory may be bound to an arbitration agreement: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739, 48 Tex. Sup. Ct. J. 678 (Tex. 2005). Importantly, when a defendant attempts to enforce a forum-selection clause that is contained in an agreement to which it is not a signatory or against a plaintiff that is not a signatory, the defendant has the burden to establish some theory to allow enforcement of the clause. *See CNOOC Southeast Asia Ltd. v. Paladin Res. (Sunda) Ltd.*, 222 S.W.3d 889 (Tex. App.—Dallas 2007, pet. denied) ("When a party seeks to enforce a forum-selection clause against a nonsignatory to the contract containing the forum-selection clause, that party bears the burden to prove the theory upon which it relies to bind the nonsignatory to the contract."). The two theories that are raised most often are estoppel and agency.

A. Estoppel Theory

The main exception that would allow a non-signatory to a contract to enforce a forum-selection clause is the estoppel theory. Texas cases enforcing forum-selection clauses presuppose the existence of a contractual relationship between the parties to the litigation, which includes a negotiated and agreed upon contractual term regarding forum-selection. *See*

In re AIU Ins. Co., 148 S.W.3d 109, 111 (Tex. 2004); *In re Automated Collection Techs.*, 156 S.W.3d 557, 559 (Tex. 2004). Absent very limited exceptions, forum-selection clauses do not govern litigation between strangers to the contract, or between one party to a contract and a stranger to it. *See Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) (holding that arbitration agreements "must be in writing and signed by the parties" and may apply to non-signatories only "in rare circumstances"). The Fifth Circuit has aptly explained why courts should not readily allow nonsignatories to enforce clauses such as arbitration or forum-selection clauses:

> Preliminary matters aside, we now turn to the question of whether Sadoux could compel arbitration even though he was not party to an arbitration agreement. . . . The point is that this twining of private and public fora facilitates the private choices of the market by enforcing only the expectation of parties captured in their contracts.
>
> It signifies that we will read the reach of an arbitration agreement between parties broadly, but that is a different matter from the question of who may invoke its protections. An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems – an openness this country has been committed to from its inception. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.
>
> Categories of dispute that cannot exit the public court houses aside, it is well and good if the parties to a private agreement wish to choose an alternative dispute system, but we are wary of choices imposed after the dispute has arisen and the bargain has long since been struck. And hence we will allow a nonsignatory to invoke an arbitration agreement only in rare circumstances.
>
> . . . .
>
> Directly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules—the cardinal prerequisite to all dispute resolution.

Westmoreland v. Sadoux, 299 F.3d 462 (5th Cir. Tex. 2002).

Some Texas courts have applied an "equitable estoppel" theory to determine whether non-signatories may rely upon a forum-selection clause. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Specifically, several courts of appeals hold that equitable estoppel may permit a non-signatory to enforce a forum-selection clause where either of the following two circumstances were present: (1) "under 'direct benefits-estoppel,' a non-signatory may enforce an arbitration agreement when the signatory plaintiff sues it seeking to derive a direct benefit from the contract containing the arbitration provision" and (2) "[e]stoppel theory also applies when a signatory plaintiff sues both signatory and non-signatory defendants based upon substantially interdependent and concerted misconduct by all defendants." *Phoenix*, 177 S.W.3d at 622. *See also In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, original proceeding); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d at 693-94.

1. Concerted Misconduct Estoppel Theory

The Texas Supreme Court refused to follow the "concerted-misconduct" estoppel theory in the context of arbitration agreements. In *In re Merrill Lynch Trust Co. FSB*,, the Court did not allow non-signatory, affiliated company defendants to enforce an arbitration agreement. 235 S.W.3d 185, 191 (Tex. 2007). The affiliated companies could not invoke the arbitration agreement based on their relationship with the signatory defendant, in the absence of any allegations of alter ego. Disagreeing with some aspects of Fifth Circuit precedent, the Court rejected the affiliated companies' estoppel theory of substantially interdependent and concerted misconduct:

> [W]hile Texas law has long recognized that nonparties may be bound to a contract under traditional contract rules like agency or alter ego, there has never been such a rule for concerted misconduct. Conspiracy is a tort, not a rule of contract law. And while conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other's arbitration agreements. As other contracts do not become binding on nonparties due to concerted misconduct, allowing arbitration contracts to become binding on that basis would make them easier to enforce than other contracts, contrary to the Arbitration Act's purpose.

Id. at 194. The Court denied the motion to compel arbitration for the affiliated companies. In so holding, the Court essentially partially reversed its holding in *Meyer v. WMCO-GP LLC,* 211 S.W.3d 302 (Tex. 2006) (mentioning concerted misconduct theory in support of granting motion to compel arbitration). *See also In re Trammell,* No. 05-07-00351-CV, 2008 Tex. App. LEXIS 1396 *10 (Tex. App.—Dallas Feb. 27, 2008, original proceeding) (The Court decided *Merrill Lynch* six months after the *Meyer* opinion and therefore overruled *Meyer* regarding the application of the concerted-misconduct exception).

2. Direct-Benefits Estoppel Theory

A defendant can potentially hold a non-signatory plaintiff to a forum-selection clause that is contained in a contract to which the plaintiff is seeking a direct benefit from. In the context of arbitration agreements, the Texas Supreme Court held that "a litigant who sues based on a contract subjects him or herself to the contract's terms." *In re FirstMerit Bank,* 52 S.W.3d 749, 755 (Tex. 2001). The Court in *In re Kellogg Brown & Root, Inc.*, defined what it meant by "to sue 'based on a contract,'" holding that "a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provisions." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005) (emphasis added). "While the boundaries of direct-benefits estoppel are not always clear, nonparties generally must arbitrate claims if liability arises from a contract with an arbitration clause, but not if liability arises from general obligations imposed by law." *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 761, 49 Tex. Sup. Ct. J. 445 (Tex. 2006). With regard to an arbitration provision, the Texas Supreme Court has held that parties can contractually agree to limit the application of equitable estoppel. *See Meyer v. WMCO-GP LLC,* 211 S.W.3d 302, 306 (Tex. 2006), *overruled in part by In re Merrill Lynch Trust Co. FSB,* 235 S.W.3d 185 (Tex. 2007).

For example, in *St. Clair v. Brooke Franchise Corp.*, the court of appeals reversed a trial court's dismissal of a wife's suit against her husband's former employer No. 2-06-216-CV , 2007 Tex. App. LEXIS 2805 (Tex. App.—Fort Worth April 12, 2007, no pet. hist.). The court of appeals found that the plaintiff was not bound by the forum-selection clause in a contract between defendant and her husband because she was a non-signatory, and she did not seek or obtain benefits from the contract. *See id.* The court framed the issue thusly:

> [T]o be compelled to arbitrate, a nonsignatory must either (1) bring claims in a lawsuit that seek direct benefits from a contract containing an

> arbitration clause, or (2) deliberately seek and obtain substantial benefits from the contract itself outside of litigation. Thus in this case, we could only enforce the forum selection clause against Tina if by bringing her claims, she sought direct benefits from the Agreement, determined by deciding whether liability on her claims arises solely from the Agreement between Tim and BFC and must be determined by reference to it, or if by her conduct during the life of the Agreement, she deliberately sought or obtained substantial benefits from the Agreement itself.

Id. The court held that the defendant only raised the second issue. After considering the evidence in the record, the court found that the plaintiff had not sought a direct benefit from the contract outside if litigation, and therefore, she was not estopped from bringing suit in Texas. *See id.*

3. Unclean Hands Defense To Estoppel Theory

Unclean hands is a potential defense to a party asserting an estoppel theory to enforce a forum-selection clause against a non-signatory. Under Texas law, "one who comes seeking equity must come with clean hands." *Texas Enterprise Inc. v. Arnold Oil Company*, 59 S.W. 3d 244, 249 (Tex. App.—San Antonio, 2001, no writ); *Anco Ins. Servs. of Houston v. Romero*, 27 S.W. 3d 1 (Tex. App.—San Antonio 2000, pet. denied). The doctrine of "unclean hands" prohibits a party from seeking equitable relief if its "own conduct in connection with the same matter or transaction has been unconscientious, unjust or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing." *In Re Jim Walter Homes, Inc.* 207 S.W. 3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).

For example, the court in *Anco Insurance Services of Houston v. Romero*, found that a party seeking to enforce an arbitration clause in a settlement agreement had unclean hands because of that party's misrepresentations that related to the very agreement containing the arbitration clause. *Anco Insurance Services of Houston v. Romero*, 27 S.W. 3d at 6. Consequently, the defendant was precluded from seeking enforcement of an arbitration clause. *See id.* Additionally, in *Hawkins v. KPMG LLP*, the court found that the defendant could not rely on an equitable estoppel argument to enforce an arbitration provision where the defendant had unclean hands:

> Even if defendants were able to make a prima facie showing that equitable estoppel might apply, the doctrine of unclean hands would preclude the court from applying equitable estoppel in this case. "The unclean hands doctrine closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."
>
> The relief sought by defendants in this case is enforcement of the terms of the Warrant against plaintiff. Defendants' invocation of the Warrant is tainted by bad faith in a number of ways. First, defendant KPMG has stipulated on the public record that the Warrant agreement was fraudulent. Second, as the parties discussed at oral argument, Harbourtowne itself was created for the sole purpose of facilitating the tax shelter at issue in this case -- a tax shelter which KPMG has acknowledged to be in violation of federal tax laws. Third, defendants had ample opportunity to choose arbitration in their own engagement letters with plaintiff but failed to do so. *What defendants ask this court to do – enforce an arbitration clause in a fraudulent contract, not signed by defendants, involving a phantom, now-defunct company, and bearing only an incidental relationship*

> *to the dispute at the heart of this lawsuit – would make a mockery of this court's equitable powers.*

423 F. Supp. 2d 1038 (N.D. Ca. 2006) (emphasis added). It is questionable whether this equitable defense would apply to assist a signatory to an agreement from defending against a motion to dismiss filed by another signatory because the motion would be based on a pure breach of contract action and would not rely on equity.

Additionally, if the parties to the agreement choose a forum's law to control the interpretation and enforcement of the agreement, including the forum-selection clause, and the forum would not allow third parties to enforce the contract under an "equitable" exception, then those third parties should not be entitled to enforce it. Whether parties to a forum-selection clause intended third parties to enforce that provision should be judged by the contract itself. *See Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305-6 (Tex. 2006) ("We agree that an arbitration provision may limit the application of equitable estoppel"). This is consistent with other precedent that holds that equitable estoppel should be judged under the law chosen by the parties in a choice-of-law clause. *See, e.g., Advertising Specialty Institute v. Hall-Erickson, Inc.*, 2004 U.S. Dist. LEXIS 19090 (N.D. Ill 2004) (equitable estoppel claim judged by choice-of-law designated by parties); *SLF Limited Pshp v. Molecular Biosystems, Inc.*, No. 01-C-9576, 2003 U.S. Dist. LEXIS 21612 (N.D. Ill December 2, 2003) (same); *Sperry Marketing, Inc. v. Swing 'N Slide Corp.*, No. 96-2155-GTV, 1997 U.S. Dist. LEXIS 2378 (D.C. Kan. February 13, 1997) (same).

B. Transaction-Participant

Another exception that would allow a non-signatory to enforce a forum-selection provision is the "transaction participant" exception. The Texas Supreme Court has never addressed whether it is appropriate to use the transaction-participant analysis as a theory for allowing a non-signatory to enforce a forum-selection clause. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d at 693. However, the Texas Supreme Court would likely adopt an exception for non-signing parties that is similar to the one that the Court has adopted for arbitration provisions. To conclude that such a theory did not apply in Texas would enable a party to bypass a valid forum-selection clause by naming in its petition a signing party's representative who was not a party to the contract solely to avoid the clause.

Where accepted, Texas courts have consistently defined "transaction-participant" very narrowly: "By transaction-participant, we mean an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum-selection clause." *Accelerated Christian Education, Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. App.—Dallas 1996, no writ). *See also, In re Wilmer Cutler Pickering Hale And Door LLP,* No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, original proceeding); *CNOOC Southwest Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889, 898-99 (Tex. App.—Dallas 2007, pet. denied); *PCC Sterom, S.A. v. Yuma Exploration & Prod. Co.*, No. 01-06-00414-CV, 2006 Tex. App. LEXIS 8702 (Tex. App.—Houston [1st Dist.] October 5, 2006, no pet.) (owner of signatory or successor entity); *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 2002 WL 418206 *3 (Tex. App.—Dallas 2002, no pet.) (not designated for publication); 1 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE (2nd ed. 2004) § 3.19, p. 382 ("'Transaction-participant' means an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum-selection clause"). If the defendant is simply an agent or employee of the signatory, and is being sued for his or her work in the course of his or her relationship with the signatory, then the non-signatory defendant can enforce the clause.

For example, in *Accelerated Christian*, the plaintiff filed suit against Oracle and one of its employees in a dispute involving the purchase of software. *See Accelerated Christian*, 925 S.W.2d at 68. The trial court dismissed the suit pursuant to a forum-selection clause in the contract between Accelerated Christian and Oracle, which was affirmed on appeal. *See id.* at 68-69. Among other points of error, Accelerated Christian contended that Oracle's employee, Brady, could not rely upon the forum-selection clause because he was not a party to the contract. The court of appeals disagreed, stating the test

described above, and pointing out that Accelerated Christian sued both a signatory (Oracle) and non-signatory (Brady) alleging identical claims against both. *See id.* at 75.

In the context of arbitration agreements, the Texas Supreme Court found that an agent of a signatory, sued in that capacity, may enforce an arbitration agreement. In *In re Merrill Lynch Trust Co. FSB*, investors agreed to arbitrate any disputes with their investment company. 235 S.W.3d 185 (Tex. 2007). As a part of their financial plan, the investors set up an irrevocable life insurance trust with a trust company that was affiliated with their investment company. *See id.* The trust company then purchased a variable life policy from a life insurance company that was affiliated with the investment company. *See id.* Both of these affiliated companies had their own contracts with the investors, neither of which contained an arbitration clause. *See id.* A life insurance agent who worked for the investment company received a commission. *See id.* The investors sued the affiliates and the agent, but not the investment company and alleged various claims, all related to the insurance trust, and all asserted against the defendants collectively without differentiating the actions of each. *See id.* The defendants moved to compel arbitration, which the trial court denied, and the court of appeals denied mandamus relief.

The Texas Supreme Court held that the claims against the agent had to go to arbitration because the agent acted on behalf of the investment company and the substance of the suit was against the agent's conduct in the course and scope of his employment. *See id.* at 188-89. "Parties to an arbitration agreement may not evade arbitration through artful pleading, such as by naming individual agents of the party to the arbitration clause and suing them in their individual capacity." *Id.* at 188. "As there is no question [agent] was acting in the course and scope of his employment, if he is liable for the torts alleged against him, then [investment company] is too." *Id.* Importantly, the Court did not find that employees/representatives can always enforce an arbitration agreement: "When actions outside of the course of employment cannot be attributed to an employer, the latter would have no need to invoke its arbitration protections." *Id.* at 190.

To rely on this theory, the moving party should offer evidence that the non-signatory defendant was an "employee" or "agent" of the signatory. *See, e.g., CNOOC S.W. Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889 (Tex. App.—Dallas 2007, pet. denied) (to bind an affiliate entity under agency principles, there must be evidence of conduct by the affiliate that would give rise to actual or apparent authority). Finally, even where non-signatories are entitled to enforce a forum-selection clause, they do not have any greater right to enforce the clause than the signatories themselves have. *See In re Trammell*, No. 05-07-00351-CV, 2008 Tex. App. LEXIS 1396, *10 (Tex. App.—Dallas February 28, 2008, original proceeding).

C. Agency

Another potential ground that could bind a non-signatory to a contractual forum-selection clause is agency. In other words, a principal that allows an agent to bind the principal to the clause is bound to that clause. The existence of an agency relationship may be based on actual or apparent authority. *See Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549-53 (Tex. App.—Houston [14th Dist.] 2003, no pet.). An essential element of the principal-agent relationship is the alleged principal's right to control the actions of the alleged agent. *See id.* Actual authority is created through written or spoken words or conduct of the principal communicated to the agent. *See id.* It may be implied from the conduct of the parties or from the facts and circumstances surrounding the transaction in question. *See id.* But a finding of actual authority cannot be based merely on the words or deeds of the agent. *See id.* Apparent authority, on the other hand, is created by written or spoken words or conduct by the principal to third parties, not to the agent. *See id.* at 550. Absent actual or apparent authority, an agent cannot bind a principal. *See CNOOC S.W. Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889 (Tex. App.—Dallas 2007, pet. denied)

For example, in *Paladin*, the court of appeals found that in a special appearance appeal the plaintiff did not establish that the nonsignatory defendants were bound by the forum-selection clause naming Texas as the chosen forum. *See id.* The plaintiff alleged agency as a reason to bind the non-signatory defendants, but the court of appeals held to the contrary:

> To establish apparent authority, Paladin was required to show that International and Muturi said or did something that would lead a reasonably prudent third party to believe that SAL, LTD, or SES had the authority to bind them to the forum-selection clause. We do not look at the words or conduct of the alleged agent—in this case, SAL, LTD, or SES. Rather, we consider only the words or conduct of the principal—in this case, International and Muturi—to make this determination. Here, the record does not contain any evidence that International or Muturi did or said anything to authorize SAL, LTD, or SES to bind them to the forum-selection clause.

Id. See also PCC Sterom, S.A. v. Yuma Exploration & Prod. Co., No. 01-06-00414-CV, 2006 Tex. App. LEXIS 8702 (Tex. App.—Houston [1st Dist.] October 5, 2006, no pet.).

VIII. Use of Forum-Selection Clause in Special Appearance/Objections To Personal Jurisdiction

The paper does not address the use of forum-selection clauses by plaintiffs in fighting attempts to have a suit dismissed due to personal jurisdiction. However, it should be noted that personal jurisdiction is a waivable requirement. *See Halabu v. Petroleum Wholesale, LP.*, No. 01-07-00614, 2008 Tex. App. LEXIS 3852 (Tex. App.—Houston [1st Dist.] May 22, 2008, no pet.); *PCC Sterom, S.A. v. Yuma Exploration & Prod. Co.*, No. 01-06-00414-CV, 2006 Tex. App. LEXIS 8702 (Tex. App.—Houston [1st Dist.] October 5, 2006, no pet.). "A forum-selection clause is one of several ways in which a litigant may expressly or impliedly consent to personal jurisdiction." *Abacan Technical Servs. Ltd. v. Global Marine Intern. Servs. Corp.*, 994 S.W.2d 839, 843 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Accordingly, if the parties' contract has a forum-selection clause that designates Texas as the forum for conflict resolution, a plaintiff should raise that fact in defending against a defendant's special appearance or objection to personal jurisdiction.

Conversely, if a defendant that is sued in Texas has a contract that names another state as a permissive forum for conflict resolution, then the defendant should raise that as a factor in convincing the trial court that it did not have sufficient contacts in Texas to satisfy personal jurisdiction. *See J.A. Riggs Tractor Co. v. Bentley*, 209 S.W.3d 322 (Tex. App.—Texarkana 2006, no pet.). For example in *Bentley*, the court of appeals stated:

> In light of the scant[] evidence in support of Riggs' purposeful availment, we note that the forum selection clause in the credit agreement suggests that Riggs anticipated suit in Arkansas and further suggests that Riggs was not availing itself of the benefit of Texas' laws. Although forum-selection clauses are not dispositive, they "should not be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws.'"

Id. (internal citation omitted).

IX. Defenses To A Motion To Dismiss Due To A Forum-Selection Clause

Under the applicable legal standard, a trial court should presume that a mandatory forum-selection clause is valid and enforceable. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972); *In re AIU Ins. Co.*, 148 S.W.3d at 111-12. However, a party defending against such a clause may raise certain arguments and defenses to defeat a motion to dismiss based on such a clause.

A. Defendant Has Not Met Burden

A party moving to dismiss a case based on a forum-selection clause does have the burden to establish the basic requirements for a contract. If the defendant fails to do so, then the trial court does not abuse its discretion in denying a motion

to dismiss. *See, e.g., In re Int'l Profit Assocs.*, No. 05-07-00454-CV, 2007 Tex. App. LEXIS 5105 (Tex. App.—Dallas June 29, 2007, original proceeding). For example, in *In re Int'l Profit Assocs,* the defendant had been sued for a pre-suit deposition in Texas. *See id.* The defendant argued that the trial court should deny the request for deposition because of a forum-selection clause in the parties' agreement. *See id.* However, the defendant never offered the agreement into evidence. After the trial court granted the petition to take the deposition, the defendant filed a petition for writ of mandamus challenging that order. The court of appeals denied the defendant's petition because the agreement and the forum-selection clause was not in the record. *See id.* Further, when a defendant attempts to enforce a forum-selection clause that is contained in an agreement to which it is not a signatory or against a plaintiff that is not a signatory, the defendant has the burden to establish some theory to allow enforcement of the clause. *See CNOOC Southeast Asia Ltd. v. Paladin Res. (Sunda) Ltd.*, 222 S.W.3d 889 (Tex. App.—Dallas 2007, pet. denied) ("When a party seeks to enforce a forum-selection clause against a nonsignatory to the contract containing the forum-selection clause, that party bears the burden to prove the theory upon which it relies to bind the nonsignatory to the contract.").

B. Scope of Clause Does Not Cover Plaintiff's Claim

A party defending against a motion to dismiss based on a forum-selection clause should assert that its claims do not fall within the scope of the clause, and therefore, the clause does not require that the plaintiff file them in a particular forum. *See In re Wilmer Cutler Pickering Hale & Door LLP,* No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, original proceeding) (court denied the defendant's petition for writ of mandamus and allowed the plaintiff's tort-based, fraud claim to continue in Texas because it fell outside of scope of clause); *Apollo Prop. Partners, LLC v. Diamond Houston I, L.P.,* No. 14-07-00528-CV, 2008 Tex. App. LEXIS 5884 (Tex. App.—Houston [14th Dist.] August 5, 2008, no pet.) (same). See a previous section of this paper on scope of the clause for further discussion.

C. Contract Defenses

One defense that a plaintiff may raise concerns regular contract-type defenses, such as fraud, undue influence, or overweening bargaining power. *See M/S Bremen*, 407 U.S. at 10-15, 92 S. Ct. at 1913-16; *In re AIU Ins. Co.*, 148 S.W.3d at 111-12. The most common defense raised is fraud. However, it is important to note that in *Scherk v. Alberto-Culver Co.*, the United States Supreme Court clarified the fraud exception to enforceability mentioned in *Bremen* to require that the forum-selection clause itself must be fraudulently induced, and not merely the agreement of which it was one provision. 417 U.S. 506, 519 n.14, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). *See also In re Lyon Financial Services Inc.*, 257 S.W.3d 228 (Tex. 2008) (per curiam) (fraud claim must apply solely to forum-selection clause and not contract in general); *In re GNC Franchising, Inc.*, 22 S.W.3d 929 (Tex. 2000) (Hecht, J. dissenting from denial of petition for writ of mandamus). A party asserting that it was fraudulently induced into entering an agreement must show that (1) the other party made a material representation, (2) the representation was false and was either known to be false when made or made without knowledge of its truth, (3) the representation was intended to be and was relied upon by the injured party, and (4) the injury complained of was caused by the reliance. *See Am. Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 436 (Tex. 1997).

For example, in *In re International Profit Associates, Inc.*, the Texas Supreme Court rejected a plaintiff's argument that the forum-selection clauses were not enforceable because they were procured by fraud and overreaching. No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009). The plaintiff supported that allegation by arguing that its representative did not know about the clauses and that the defendants did not point those clauses out to her at a time when all of the communications were going on in Texas. The Court disagreed. Because the clauses were in two-page contracts, were in the same font style and size as the other terms of the contract, and were located near the signature lines, the defendants had no duty to affirmatively point them out to the plaintiff. *See id.*

Another example is *In re Lyon Financial Services Inc.*, where the Texas Supreme Court held that fraudulent inducement

to sign an agreement containing a forum-selection clause will not bar enforcement of that provision unless the specific forum-selection clause was the product of fraud or coercion. 257 S.W.3d 228 (Tex. 2008) (per curiam). In that case, the plaintiff had an affidavit from its representative that stated that he was misled that the forum-selection clause only applied to a schedule that he was not suing upon. *See id.* The Court determined that this was insufficient because the agreements contained clauses that represented that they were the entire agreements between the parties and that there were no prior representations not contained in the agreements. The Court stated that a party who signs an agreement is presumed to know its contents, and that includes documents specifically incorporated by reference. *See id.* Further, the plaintiff's representative failed to state that he would not have signed the agreement absent the alleged misrepresentation. *See id.* The Court found that there was no evidence that the forum-selection clause was secured by a misrepresentation or fraud. *See id.*

D. Enforcement of Clause Would Be Unreasonable, Unjust, or Otherwise Against Public Policy

A plaintiff may also defend against a motion to dismiss based on a forum-selection clause if enforcement of that clause would be unreasonable or unjust. *See M/S Bremen*, 407 U.S. at 10-15, 92 S. Ct. at 1913-16; *In re AIU Ins. Co.*, 148 S.W.3d at 111-12. Enforcement of a forum-selection clause would be unreasonable and unjust if (1) enforcement of the clause would contravene a strong public policy of the forum in which suit was filed or (2) the balance of convenience is strongly in favor of litigation in the forum in which suit was filed, and litigation in the forum identified in the clause would be so manifestly and gravely inconvenient to the resisting party that the resisting party effectively would be deprived of a meaningful day in court. *See M/S Bremen*, 407 U.S. at 15-19, 92 S. Ct. at 1916-18; *In re AIU Ins. Co.*, 148 S.W.3d at 111-12. Courts have held that this is essentially a fundamental fairness inquiry. In determining the fairness of such a clause, courts should consider (1) whether there is an indication that the forum was selected to discourage legitimate claims, (2) whether the opposing party was given adequate notice of the forum-selection clause, and (3) whether the opposing party retained the option of rejecting the contract with impunity following notice of the forum-selection clause. *See Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 235 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 1522, 1528, 113 L. Ed. 2d 622 (1991)). *See also Luxury Travel Source v. American Airlines, Inc.*, No. 02-08-100-CV, 2008 Tex. App. LEXIS 9688 (Tex. App.—Fort Worth, December 31, 2008, no pet. hist.).

Regarding notice of the clause, a plaintiff may attempt to argue that it did not know that the forum-selection clause was in the agreement. However, courts will presume that a party that signs an agreement knows its contents. *See In re Lyon Fin. Servs.*, 257 S.W.3d 228, 232 (Tex. 2008); *Luxury Travel Source v. American Airlines, Inc.*, No. 02-08-100-CV, 2008 Tex. App. LEXIS 9688 (Tex. App.—Fort Worth, December 31, 2008, no pet. hist.).

For example, in *In re International Profit Associates, Inc.*, the Texas Supreme Court rejected a plaintiff's argument that the forum-selection clauses were not enforceable because of the interests of the witnesses and public, convenience of litigation, and deprivation of the plaintiff's day in court. No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009). The Court stated that the plaintiff could have foreseen litigation in Illinois, which is not a remote alien forum. Further, the fact that there may have to be two suits – one in Texas against other defendants not parties to the agreements and one in Illinois against the defendants – did not deprive the plaintiff of its day in court. The Court concluded: "[the plaintiff] presented no evidence to overcome the presumption that the forum-selection clauses are valid." *Id.*

In *In re Lyon Financial Services Inc.*, the Texas Supreme Court addressed a plaintiff's multiple arguments regarding why a forum-selection clause should not be enforced. 257 S.W.3d 228 (Tex. 2008) (per curiam). The plaintiff argued that the forum-selection clause should not be enforced because there was a disparity in bargaining power in that the plaintiff's representative did not have legal advice, had no formal business school training, was not aware of the clause when he signed the agreement, and that the agreements were presented on a take-it-or-leave-it basis. *See id.* The Court determined that these facts did not

show unfairness or overreaching. *See id.* The Court held that the agreements were not a result of unfair surprise or oppression because the forum-selection clause was in all capital letters. *See id.* The Court also found that the clause was not unfair simply because the clause allowed the defendant to file suit in Texas or Pennsylvania and required the plaintiff to solely file suit in Pennsylvania because these types of clauses do not require mutuality of obligation so long as adequate consideration is exchanged. *See id.*

The plaintiff also argued that Pennsylvania was an inconvenient forum and that enforcing the provision would produce an unjust result. *See id.* The plaintiff introduced evidence that it was a small business and did not have the ability to pursue claims in Pennsylvania. *See id.* The Court stated that by entering into the agreements both parties effectively represented to each other that the agreed forum was not so inconvenient that enforcing the clause would deprive either party of their day in court. *See id.* The Court then held that Pennsylvania is not a "remote alien forum," and that there was no proof that an unjust result would occur in enforcing the clause. *See id.*

The plaintiff also argued that it would be unjust to enforce the clause because Pennsylvania does not allow a corporation to sue for usury. The Court held that the plaintiff's inability to assert its usury claim does not create a public policy reason to deny enforcement of the clause. *See id.* Texas law in an area does not establish public policy that would negate a contractual forum-selection clause, absent a statute requiring suit to be brought in Texas. *See id.* Further, the plaintiff made no showing that even using Pennsylvania law, that Pennsylvania would not apply Texas law in determining the parties' rights. *See id.* Therefore, the Court conditionally granted the petition and ordered the trial court to grant the motion to dismiss. *See id.*

If a plaintiff does not present any evidence that litigating in the agreed-upon forum is manifestly or gravely inconvenient, a trial court does not err in granting the motion to dismiss. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d at 693. One court has held that a forum-selection clause could potentially be avoided if the defendant was forum shopping. *See In re Boehme*, 256 S.W.3d 878 (Tex. App.—Houston [14th Dist.] 2008, original proceeding). However, the court did not describe how this conduct may occur where the plaintiff files the suit. Rather, the court found that a defendant did not forum shop by defending against a temporary injunction hearing, and then after obtaining an adverse result, asserting a forum-selection clause. *See id.*

E. Other Forum Would Recognize The Validity Of the Forum-Selection Clause

As stated earlier in this paper, Texas courts historically had a requirement that the party moving to dismiss based on a forum-selection clause had to prove that the courts of the agreed forum would recognize the validity of the clause. *See, e.g., Mabon, Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 296-98 (Tex. App.—Houston [14th Dist.] 2000, no pet.). However, when the Texas Supreme Court addressed the standards for enforcing a forum-selection clause, the Court did not discuss this requirement. *In re AIU Ins. Co.*, 148 S.W.3d at 111-12. Accordingly, one court has held that there is no longer a requirement that a defendant establish that the courts of the agreed forum would recognize the validity of the clause. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d at 695. Accordingly, this would seem to no longer be a defense to a motion to dismiss. However, this fails to address the impact that a choice-of-law provision may have on the interpretation and enforceability of a forum-selection clause. This is discussed in this paper in the section dealing with choice-of-law clauses.

F. Waiver Of Right To Enforce Forum-Selection Clause

A party may waive its right to enforce a forum-selection clause. *See In re Automated Collection Techs., Inc.*, 156 S.W.3d 557 (Tex. 2004). There are two types of waiver – express and implied. For example, the Texas Supreme Court addressed intentional and implied waiver in *In re GE Capital*, 203 S.W.3d 314, 316-17 (Tex. 2006). The Court addressed the plaintiff's argument that the defendant had waived a contractual jury waiver. The initial bench trial setting was passed, and following the plaintiff's jury demand, the case was moved to the jury docket. However, the defendant asserted that it did not receive the jury demand and did not

notice that the court had moved the case to the jury docket. The court found that the defendant did not waive its contractual jury waiver by immediately filing a motion to quash the demand:

> Waiver requires intent, either the "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." In *Jernigan v. Langley*, we explained that:
>
> > Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right. Waiver is ordinarily a question of fact, but when the surrounding facts and circumstances are undisputed, as in this case, the question becomes one of law.
>
> As in *Jernigan*, we have no evidence here of General Electric 's specific intention to waive its contractual right nor can we imply intent from the surrounding facts and circumstances. The circumstances here may indicate inattention or a certain lack of care on the part of General Electric, but they do not imply that General Electric intended to waive its previously asserted contractual right by not complaining sooner.

Id. (internal citations omitted). Accordingly, it is difficult to find intentional waiver solely on the basis of actions and allowing trial court proceedings to continue.

A party's implied waiver has to be substantial and must cause some prejudice to the plaintiff before a court can avoid a forum-selection clause. When addressing waiver of a forum-selection clause, arbitration cases are analogous. *See Automated Collection Technologies*, 156 S.W.3d. at 559. Like any other contract right, parties can waive a forum-selection clause if they agree instead to resolve a dispute in Texas courts. *See Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008) (arbitration case). A party waives a forum-selection clause by substantially invoking the judicial process. *See id.* There is a strong presumption against waiver. *See id.* Waiver is a legal question decided on a case-by-case basis by reviewing the totality of the circumstances. *See id.* Those circumstances include: 1) whether the movant was the plaintiff, who chose to file in court, or the defendant, who merely responded; 2) how long the movant knew of the forum-selection clause before seeking dismissal; 3) whether the movant knew of the clause all along; 4) how much pretrial activity related to the merits, rather than the clause; 5) how much time and expense had been incurred in the ligation; 6) whether the movant sought or opposed the clause earlier in the case; 7) whether the movant filed affirmative claims or dispositive motions; 8) what discovery would be unavailable in the other forum; 9)

whether activity in court would be duplicated in the other forum; and 10) when the case was to be tried. *See id.* However, one court of appeals has held that the delay factors set forth above may not apply to a forum-selection clause analysis:

> The "delay" factors from *Perry Homes* do not translate well from the arbitration context. One of the benefits of arbitration is that it severely limits pretrial discovery. In the arbitration context, then, engaging in significant discovery can be inconsistent with an eleventh-hour request for arbitration. That concern is not as pronounced when the clause in question is designed not to eliminate or lessen pretrial discovery but, rather, to simply specify the forum that would resolve the dispute.

See In re Boehme, 256 S.W.3d 878 (Tex. App.—Houston [14th Dist.] 2008, original proceeding).

Finally, the plaintiff must establish that it suffered prejudice as a result of the actions constituting waiver. *See Automated Collection Techs.*, 156 S.W.3d at 559. Delay alone generally does not establish waiver. *See In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (orig. proceeding). Instead, prejudice connotes an effort by the moving party to "gain an unfair tactical advantage of the opposing party." *See Perry Homes*, 258 S.W.3d at 580. Generally, courts have looked to such factors as (1) the movant's access to information that would not be discoverable in arbitration, and (2) the opponent's incurring costs and fees due to the movant's actions or delay.

For example, *In re Automated Collection Technologies, Inc.*, the Texas Supreme Court also addressed a waiver argument. 156 S.W.3d 557 (Tex. 2004). The plaintiff argued that the defendant waived the forum-selection clause by answering, filing counterclaims, serving written discovery, and filing a motion to compel discovery shortly after filing a motion to dismiss due to the forum-selection clause. *See id.* at 558-59. However, the plaintiff never established any prejudice as a result of the defendant's delay, participation in the suit, or counterclaims. *See id.* The Court held that the defendant did not impliedly waive its right to enforce the forum-selection clause:

> Automated did not waive enforcement of the forum-selection clause by seeking affirmative relief on the underlying contract and by participating in the underlying litigation. In *AIU*, we addressed a similar waiver argument and concluded that a delay of five months in seeking enforcement of a forum-selection clause along with requesting a jury trial, paying the jury fee, and filing a general denial that did not raise the forum-selection issue were not sufficient to waive the forum-selection clause under consideration in that case. In so holding, we relied on cases concerning waiver in the arbitration context we found to be analogous. *In re Bruce Terminix Co.*, an arbitration case, held that "even substantially invoking the judicial process does not waive a party's arbitration rights unless the opposing party proves that it suffered prejudice as a result."
>
> PSC asserts that the parties "have spent significant time and resources litigating this dispute. . . [and] [a] dismissal would result only in duplication of time and resources that are unnecessary." But this does not establish that PSC has been prejudiced by Automated's participation in the underlying litigation and four-month delay in seeking enforcement of the forum-selection clause. Moreover, PSC chose to initiate proceedings in a forum other than the one to which it contractually agreed and cannot complain about any duplication of time or efforts that resulted from that choice.

Id. at 559-60.

One court has recently found that a defendant waived its right to enforce a forum-selection clause by allowing a co-defendant, who was also an agent for the first defendant, to file and hear a venue motion before the first defendant had a hearing on its motion to dismiss. *See In re ADM Investor Services, Inc.*, 257 S.W.3d 817 (Tex. App.—Tyler 2008, original proceeding). The court held that the first defendant should not have allowed the trial court to "irrevocably establish Hopkins County as the venue where" the suit would be tried. *Id.* at 821. The court concluded: "ADM's failure to assert its motion to dismiss prior to the hearing on Texas Trading's motion to transfer venue was inconsistent with its right to enforce the forum-selection clause. The granting of ADM's motion to dismiss would have resulted in prejudice to Prescott because she would be required to try two suits involving the same facts and the same witnesses in two separate states, Texas and Illinois." *Id.* at 822. One justice dissented and found that there was no waiver. *Id.*

Another court recently found that waiver did not occur where the defendant answered, deposed three witnesses, produced two witnesses for deposition, exchanged documents, and participated in a temporary injunction hearing as a defendant. *See In re Boehme,* 256 S.W.3d 878 (Tex. App.—Houston [14th Dist.] 2008, original proceeding).

G. Laches

A plaintiff may assert that the defendant waited too long to challenge via mandamus a trial court's ruling on a motion to dismiss. "Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." *In re Xeller*, 6 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). Equity aids the diligent, not those who slumber on their rights. *See Rivercenter Assoc. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). Delay alone can provide ample ground to deny mandamus relief. *See Xeller*, 6 S.W.3d at 624. Cases in which laches has applied to deny mandamus relief have involved delays of months. *See id.* (sixteen months); *Tarrant County Hosp. Dist. v. Henry,* 52 S.W.3d 434, 452 (Tex. App.—Fort Worth 2001, no pet.) (finding laches as to mandamus action stemming from two orders, entered eight months and nineteen months before mandamus was filed); *In re Little*, 998 S.W.2d 287, 290 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (six months); *Int'l Awards, Inc. v. Medina*, 900 S.W.2d 934, 935-36 (Tex. App.—Amarillo 1995, orig. proceeding) (four months); *Furr's Supermarkets, Inc. v. Mulanax*, 897 S.W.2d 442, 443 (Tex. App.—El Paso 1995, orig. proceeding) (same); *Rivercenter*, 858 S.W.2d at 367-68 (same). The Texas Supreme Court recently rejected a plaintiff's argument that the defendant waived its right to seek mandamus relief from an order denying a motion to dismiss based on a forum-selection clause because of laches – of course, this is a very fact-specific inquiry. *See In re International Profit Associates, Inc.*, No. 08-0238, 2009 Tex. LEXIS 5 (Tex. January 9, 2009).

X. Forum-Selection Clause Is Viewed Differently From A Venue-Selection Clause

There is a distinction between clauses that require a suit to be brought in another state – forum-selection clauses – and those that require a suit to be brought in a particular county in Texas – venue-selection clauses. "Forum" relates to the jurisdiction, generally a nation or State, where suit may be brought. *See Liu v. CiCi Enters., LP*, No. 14-05-00827-CV, 2007 Tex. App. LEXIS 81, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.). "Venue," on the other hand, generally refers to a particular county or a particular court. *See Gordon v. Jones,* 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.). "Thus, a "forum"-selection agreement is one that chooses another state or sovereign as the location for trial, whereas a "venue"-selection agreement chooses a particular county or court within that state or sovereign." *See In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 72-79 (Tex. App.—Corpus Christi 2008, orig. proceeding) (trial court properly refused to enforce agreement contracting away mandatory venue).

As shown herein, forum-selection clauses are generally enforceable. However, a court may not enforce a venue-selection clause if doing so is inconsistent with Texas' venue statutes. *See In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d at 72-79. Venue-selection clauses are generally enforceable by statute if they arise out of "major transactions" as

defined by the statute. *See* TEX. CIV. PRAC. & REM. CODE § 15.020; *In re Medical Carbon Research Inst., L.L.C.*, No. 14-08-00104-CV, 2008 Tex. App. LEXIS 2518 (Tex. App.—Houston [14th Dist.] April 9, 2008, original proceeding) (agreement was not enforceable where it was entered into after suit was filed).

XI. Appellate Review of Trial Court's Decision Regarding Motion To Dismiss Due To a Forum-Selection Clause

A. Trial Court's Findings And Conclusions

A party that loses a motion to dismiss based on a forum-selection clause should request that the trial court make findings of fact and conclusions of law. The purpose of findings of fact is the same as a jury verdict in that they resolve the factual issues in the case. The party must file a request for findings of fact and conclusions of law within twenty days of the signing of the judgment. *See* TEX. R. CIV. P. 296. The court is supposed to file its findings of fact and conclusions of law within twenty days of the request. *See id.* at 297. If the court fails to do so, then the requesting party must file a notice of past due findings of fact and conclusions of law within thirty days of the filing of the original request. *See id.* Thereafter, the court should file findings of fact and conclusions of law within forty days from the filing of the original request. *See id.* If a party fails to file a notice of past due findings of fact and conclusions of law, he has waived any error in the court failing to file such, and all facts will be presumed in favor of the judgment. *See Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Once the court files findings, a party can file a request for additional findings of fact within ten days after the original findings are filed. *See* TEX. R. CIV. P. 298. This request for additional findings must be specific and must contain proposed findings, otherwise any error in refusing the request is waived. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.--San Antonio 1992, writ dism'd).

If a trial court grants a motion to dismiss, it is a final judgment, and the trial court should enter findings and conclusions. However, if the trial court denies the motion, it is an interlocutory order, and the trial court may opt to not file any findings and conclusions. In an appeal from an interlocutory order, the trial judge may file findings and conclusions, but is not required to do so. TEX. R. APP. P. 28.1. If there are no findings, a court of appeals must uphold the court's ruling on any valid legal theory that was presented to the court and is supported by the evidence. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Furthermore, a court of appeals must imply that a trial court made all fact findings necessary to support the judgment. *See Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 276 (Tex. 1979); *Dresser Industries, Inc. v. Forscan Corp.*, 641 S.W.2d 311, 316 (Tex. App.—Houston [14th Dist.] 1982, no writ). In the context of a motion to compel arbitration, one court has stated:

> Since there is no statement of facts or findings of facts in the record, it must be presumed, as a matter of law, that the trial court found facts which will and do support the judgment. Nor is it incumbent upon the appellees to establish that the judgment rendered by the trial court is supported by the evidence, the burden being upon the appellant to bring forth a record which reveals a reversible error.

Star Hill Co. v. Johnson Controls, Inc., 673 S.W.2d 282, 283 (Tex. App.—Beaumont 1984, no writ). *See also CNOOC Southwest Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889, 894 (Tex. App.—Dallas 2007, pet. denied) (in the absence of express findings, findings implied in favor of interlocutory order denying special appearance). Dealing with a forum-selection clause, one court stated that where there were no express findings, the trial court's order granting the motion to dismiss could be sustained on any ground contained in the motion. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d at 693 n. 9. The same court found that where the trial court denied a motion to dismiss, that decision would also be sustained by any ground supported by the record. *See In re Boehme*, 256 S.W.3d 878 (Tex. App.—Houston [14th Dist.] 2008, original proceeding).

Some courts have held that traditional legal and factual sufficiency standards may be used in challenging findings in interlocutory

orders. A court should review the findings and conclusions under the appropriate standards of review. *See Beasley v. Hub City Tex., L.P.*, No. 01-03-00287-CV, 2003 Tex. App. LEXIS 8550 * 12 (Tex. App.—Houston [1st Dist.] September 29, 2003, no pet.) (mem. op.); *Green v. Stratoflex*, 596 S.W.2d 305, 307 (Tex. Civ. App.—Fort Worth 1980, no writ). A court should sustain fact findings if there is evidence to support them, and should review legal conclusions de novo. *See Beasley v. Hub City Tex., L.P.*, No. 01-03-00287-CV, 2003 Tex. App. LEXIS 8550 * 12; *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Other courts have held that findings of fact in an interlocutory order are not reviewed by legal and factual sufficiency standards. *See, e.g., CSSC Inc. v. Carter*, 129 S.W.3d 584, 593 (Tex. App.—Dallas 2003, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 883 (Tex. App.—Dallas 2003, no pet.). In an appeal from an interlocutory order, the trial judge may file findings and conclusions, but is not required to do so. TEX. R. APP. P. 28.1; *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d at 883; *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934, 937 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). Findings of fact and conclusions of law filed in conjunction with an order on interlocutory appeal may be "helpful" in determining if the trial court exercised its discretion in a reasonable and principled fashion. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding) (mandamus review of sanction order); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d at 883. However, they do not carry the same weight on appeal as findings made under rule 296, and are not binding when a court of appeals reviews a trial court's exercise of discretion. *See IKB Indus., Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442, 40 Tex. Sup. Ct. J. 273 (Tex. 1997); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d at 883.

B. Mandamus or Appeal?

If a trial court grants a motion to dismiss based on a forum-selection clause, then the court dismisses the suit. That order is a final judgment, and the plaintiff may file an appeal from it. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

However, if the trial court denies a motion to dismiss, that order is an interlocutory order that may not be appealed absent the parties agreeing to a permissive appeal under Texas Civil Practice and Remedies Code section 51.014(d). *See, e.g., Mikey's Houses, LLC v. Bank of America, N.A.*, 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.) (parties and court of appeals agreed to a permissive appeal of the trial court's order denying a motion to enforce a contractual jury waiver). *See also Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 798 (Tex. 2005) (Medina, J., dissenting) (no interlocutory appeal from the denial of a summary judgment based on forum-selection clause). The Texas Supreme Court held that a party that has a motion to dismiss denied has no adequate remedy at law, and therefore may challenge that order via mandamus. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 111-14 (Tex. 2004). *See also In re Autonation*, 228 S.W.3d 663 (Tex. 2007). The Court observed that

> "Subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment" – harassment that injuries not just the non-breaching part but the broader judicial system, injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics contrary to the parties' contracted-for expectations. Accordingly, forum-selection clauses – like arbitration agreements, "another type of forum-selection clause" – can be enforced through mandamus.

In re Autonation, 228 S.W.3d at 667-68.

So, if a trial court denies a motion to dismiss, the losing party has the right to file a petition for writ of mandamus challenging that order. There are no strict timelines to file a

petition for writ of mandamus, except that a party defending such a petition can challenge the petition on the basis of laches if the relator delays in filing the petition.

C. Standards of Review

If the trial court grants a motion to dismiss based on a forum-selection clause, the plaintiff has a right to appeal that decision, and the court of appeals reviews the trial court's decision under an abuse of discretion standard of review. *See Apollo Property Partners, LLC v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 Tex. App. LEXIS 5884 (Tex. App.—Houston [14th Dist.] August 5, 2008, no pet.); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). However, to the extent that the review involves the construction or interpretation of an unambiguous contract, the standard of review over those matters is de novo. *See id.*; *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 610 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

If a trial court denies a motion to dismiss based on a forum-selection clause, the defendant may file a petition for writ of mandamus. *See In re AIU Ins. Co.*, 148 S.W.3d at 109. A person may obtain mandamus relief from a court action if the trial court abused its discretion and the party requesting mandamus has no adequate remedy by appeal. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Generally, a trial court abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker*, 827 S.W.2d at 839-840.

With respect to factual issues or matters committed to the trial court's discretion, the relator must establish that the trial court could reasonably have reached only one decision. *See id.* at 840. The reviewing court may not substitute its judgment for that of the trial court, and even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *See id.* at 839-40. For example, if there is an ambiguity in the forum-selection clause, the trial court is the correct party to discern the correct meaning as intended by the parties and will not abuse its discretion in denying the motion. *See In re Sterling Chemicals, Inc.*, 261 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2008, original proceeding).

D. Relator Should Challenge All Potential Bases For The Trial Court's Order

A party challenging a trial court's order on a motion to dismiss based on a forum-selection clause should challenge every potential ground that the trial court could have based its ruling on. The party challenging a trial court's order has the duty to challenge all potential grounds that would sustain the order. *See Page v. Hulse*, No. 14-06-00731-CV, 2007 Tex. App. LEXIS 5827 (Tex. App.—Houston [14th Dist.] July 26, 2007, pet. denied); *In the Interest of M.Y.W. and C.C.W.*, No. 14-06-00185, 2006 Tex. App. LEXIS 10060 (Tex. App.—Houston [14th Dist.] November 21, 2006, pet. denied). Absent a specific complaint as to each potential ground, the court of appeals should summarily affirm the order on those unchallenged grounds. *See Specialty Retailers v. Demoranville*, 933 S.W.2d 490, 493 (Tex. 1996). This rule is based on the premise that an appellate court cannot alter an erroneous judgment in favor of a challenging party in a civil case who does not challenge that error on appeal. *See Britton v. Tex. Dept. of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993)). "The reasoning is that, if an independent ground fully supports the complained of ruling or judgment, but the appellant assigns no error to that independent ground, then (1) we must accept the validity of that challenged independent ground, ... and thus (2) any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment." *Id.*

This rule has been specifically applied to a challenge to a denial of a motion to dismiss based on a forum-selection clause. *See In re TCW Global Project Fund II, Ltd.*, No. 14-08-00116-CV, 2008 Tex. App. LEXIS 8891 (Tex. App.—Houston [14th Dist] September 22, 2008, orig. proceeding). In *TCW*, the defendant filed a motion to dismiss based on a forum-selection clause and asserted that it could enforce the clause due to direct-benefits estoppel and

transaction-participant theories. The plaintiff asserted that the clause's scope did not apply to the claims in the suit, and otherwise argued against the application of the direct-benefits estoppel and transaction-participant theories. The trial court denied the motion in a general order. The defendant filed a petition for writ of mandamus and only argued that the trial court abused its discretion because of the applicability of the direct-benefits estoppel and transaction-participant theories. In its response, the plaintiff/real party in interest argued that the defendant waived its right to challenge the order due to unassigned error – the defendant never challenged the trial court's implied finding that the scope of the clause did not apply to the claims in the suit. The defendant then argued scope in its reply brief. The court of appeals agreed with the real party in interest and held that the defendant/relator could not raise the issue for the first time in its reply brief, and therefore, it waived its right to complain of the trial court's order. *See id.* at *10.

XII. Future of The Forum-Selection Clause In Texas

Certainly, the future of forum-selection clauses in Texas is favorable to their enforcement. A forum-selection clause is essentially the same thing as an arbitration clause: they are both contractual clauses that dictate where and how disputes are to be resolved. The Supreme Court of the United States has stated that an arbitration agreement is a specialized kind of forum-selection clause. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 482-83, 109 S. Ct. 1917, 1921, 104 L. Ed. 2d 526 (1989). Likewise, the Supreme Court of Texas has described an arbitration agreement as "another type of forum-selection clause" and has stated that there is no meaningful distinction between a non-arbitration forum-selection clause and an arbitration clause. *See In re AIU Ins. Co.*, 148 S.W.3d at 115-16. Moreover, the Supreme Court of Texas has applied precedents involving waiver of arbitration and availability of mandamus to enforce a right to arbitration in determining the same issues as to a non-arbitration forum-selection clause. *See id.* at 115-16, 120-21. Generally, Texas courts are very friendly to arbitration provisions, and this trend should also apply to forum-selection clauses.

The party wanting the forum-selection clause should draft it broadly. As stated above, forum-selection clauses are broadly enforced when "any and all" claims that "relate to" or "arise from" the contract are referenced. Alternative narrow language may enable plaintiffs to plead a case such that a defendant cannot enforce a forum-selection clause. The future will certainly contain a large amount of litigation concerning the enforceability of forum-selection provisions. As the outcome of those disputes can mean substantive, procedural, and economic advantages for a defendant, clients are encouraged to incorporate properly drafted forum-selection clauses into their agreements.