

Civil Procedure—Venue

Belizean Government Back in U.S. Court; New Precedent Resurrects Dismissed Case

A Florida-based lessor of telecommunications equipment can continue pursuing in U.S. courts its breach of contract claims against the Belizean government because the lower court should have considered a forum selection clause that was in the underlying contract, the U.S. Court of Appeals for the Eleventh Circuit held April 22 (*GDG Acquisitions LLC v. Gov't of Belize*, 2014 BL 111188, 11th Cir., No. 13-11616, 4/22/14).

The U.S. Supreme Court last year issued its opinion in *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 2013 BL 333527, 82 U.S.L.W. 4021 (U.S. 2013) (82 U.S.L.W. 838, 12/10/13), which held that courts must consider forum selection clauses when conducting a forum non conveniens analysis, after the district court's dismissal order but before the Eleventh Circuit's decision here, Judge Stanley Marcus' opinion said.

The appeals court said the change in the law wrought by *Atlantic Marine* made the district court's forum non conveniens dismissal of the contract breach claims without considering the effect of the forum selection clause in the Belizean contract an abuse of discretion.

The appeals court remanded the case for the district court to "determine whether the Master Lease Agreement contains a mandatory forum-selection clause that binds the Government" to litigate in Florida, it said.

A mandatory forum selection clause in a contract dictates an exclusive forum for litigation, whereas a merely permissive clause authorizes jurisdiction in a designated forum but does not prohibit litigation elsewhere, the court said.

A law professor who filed an amicus brief in the *Atlantic Marine* case told BNA the facts here are unusual for a party seeking enforcement of a forum selection clause because it is the plaintiff seeking to keep the case where it currently is, rather than a defendant trying to move the case from where it was first filed. But the analysis is the same, and the appeals court seems to have applied the principles of *Atlantic Marine* properly, he said.

According to *Atlantic Marine*, an enforceable forum selection clause "carries near-determinative weight"

because a court "must deem the private interest factors to weigh entirely in favor of the preselected forum," meaning "a district court may consider arguments about public interest factors only" in a forum non conveniens analysis, the appeals court said.

The "problem" is that each argument "require[s] the interpretation and analysis of the Master Lease Agreement. We are reluctant to address them until the district court has had an opportunity to consider them first," it said.

The company alleges Belize has not made any payments on its leased equipment since 2008 and owes the company \$14 million. Belize says the equipment is defective and that the government minister lacked actual authority to sign the telecommunications agreement.

Unusual Invocation of Clause. Professor Stephen E. Sachs of the Duke University School of Law, Durham, N.C., who filed an amicus brief in the *Atlantic Marine* case and who is a scholar of civil procedure and conflicts of laws, told BNA in a phone interview April 24 that the court properly applied the new precedent, but that the procedural posture of this case is "most unusual."

Most of the time "when forum selection clauses come up, they are brought up by a defendant who is upset because the plaintiff filed in the wrong place," and they are trying to get the case removed, Sachs said.

"Here, it's being invoked by a plaintiff who filed in the right place" according to the contract, "and is trying to keep the case right where it is," he said.

According to Sachs, "it's the flipside of *Atlantic Marine*," but "it's perfectly sensible that the same rules would apply."

Even though the Supreme Court didn't specifically address and "didn't need to think" about a fact pattern like this one in its opinion, "it seems like the right answer for the mirror in this case," he said.

The high court made clear that "both venue transfer and also forum non conveniens in a foreign forum" are covered, Sachs said.

Usual Garden-Variety Dispute. "This dispute resembles so many other garden-variety commercial contract actions," the court said.

"It may be true that adjudication in federal court could require some application of Belizean law" to determine whether the agent acted with the authority to bind the government to the contract, "but federal courts

New Precedent Evolves

The Eleventh Circuit is the third federal appellate court to interpret and apply the Supreme Court's *Atlantic Marine* decision so far. Here's how other litigants have fared:

Second Circuit: *Martinez v. Bloomberg LP*, 2014 BL 9157, 740 F.3d 211 (2d Cir. 2014). Held: where a contract contains both a valid choice-of-law clause and a forum selection clause, the substantive law identified in the choice-of-law clause governs the interpretation of the forum selection clause, while federal law governs the enforceability of the forum selection clause. The court did not reach the question whether a showing of private hardships might be sufficient to invalidate a forum selection clause designating a foreign forum.

Third Circuit: *Dawes v. Publish Am. LLLP*, 2014 BL 100555 (3d Cir. 2014, unpublished). Held: A forum selection clause that did not make jurisdiction exclusive was permissive, not mandatory, and did not mandate dismissal. However, the plaintiff's claims were still time-barred by the statute of limitations. The court said in a footnote that the presumption of enforceability of forum selection clauses would be overcome by the extraordinary circumstances, that the transfer "would be useless" because the "claims are plainly barred."

regularly interpret and apply foreign law without offending international interests," the court said.

Further, "the bulk of the law to be applied to the interpretation of the contract in this case plainly is American," it said.

To obtain dismissal forum non conveniens, "the moving party must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice," the court said.

If the district court concludes that the clause in this case is mandatory, "a binding forum selection clause requires the court to find that the forum non conveniens private factors entirely favor the selected forum," it said.

The "practical result is that forum selection clauses should control except in unusual cases," the court said.

No International Comity. The Eleventh Circuit also vacated the district court's alternate grounds for dismissal, based on the abstention doctrine of international comity, it said.

"Retrospective' international comity does not apply without a judgment from a foreign tribunal or parallel foreign proceedings," the court said.

"Nor does this commercial contract dispute fall within the markedly more limited reach of 'prospective'

Still Trickling Up

Even though the Second, Third and Eleventh circuits are so far the only federal appellate courts to address *Atlantic Marine* directly, there have been cases at the district court level in all circuits:

- **First Circuit:** Massachusetts, Puerto Rico
- **Second Circuit:** Eastern District of New York, Southern District of New York
- **Third Circuit:** New Jersey, Eastern District of Pennsylvania, Western District of Pennsylvania
- **Fourth Circuit:** Maryland, Eastern District of North Carolina, Eastern District of Virginia, Northern District of West Virginia
- **Fifth Circuit:** Western District of Louisiana, Northern District of Mississippi, Northern District of Texas, Southern District of Texas, Western District of Texas
- **Sixth Circuit:** Eastern District of Michigan, Northern District of Ohio, Southern District of Ohio, Middle District of Tennessee, Western District of Tennessee
- **Seventh Circuit:** Central District of Illinois, Northern District of Illinois, Eastern District of Wisconsin, Western District of Wisconsin
- **Eighth Circuit:** Southern District of Iowa, Minnesota, South Dakota
- **Ninth Circuit:** Arizona, Eastern District of California, Northern District of California, Nevada, Western District of Washington
- **Tenth Circuit:** Colorado, Kansas
- **Eleventh Circuit:** Northern District of Alabama, Middle District of Florida, Northern District of Georgia
- **D.C. Circuit:** District of Columbia

international comity, a doctrine we have reserved for exceptional diplomatic circumstances," the court said.

"A foreign sovereign's post hoc preference to defend a contract action at home is not a cognizable international comity interest," it said.

"Moreover, we are not inclined to give weight to another nation's interest merely because of the use of a product purchased in the United States. If foreign purchasers could avoid contract actions in American courts by simply citing the use of goods abroad, international comity abstention would lose its moorings," it said.

Judges L. Scott Coogler, sitting by designation from the Northern District of Alabama, and Dudley H. Bowen

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Jr., sitting by designation from the Southern District of Georgia, joined the opinion.

Angela Valentina Arango-Chaffin of The Florida Chaffin Law Firm, Miami, represented the company. John Bond Atkinson of Atkinson & Brownell P.A., Miami, represented the Belizean government

BY JEFFREY D. KOELEMAY

Full text at http://www.bloomberglaw.com/public/document/GDG_Acquisitions_LLC_v_Govt_of_Belize_No_1311616_2014_BL_111188_1/1