

"FLOATING" FORUM SELECTION AND CHOICE OF LAW CLAUSES

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Introduction

Parties to contracts are increasingly using contractual forum selection clauses both offensively to sue non-residents and to dispose of adverse cases filed outside the designated forum. Texas courts and laws continue to be feared by creditors and other businesses elsewhere in the United States, despite "tort reform" and other legislation which has lessened the rights and remedies of consumers and debtors. This fear and other concerns have also caused brought an increasing number of "long arm" suits by non-Texas residents against Texas residents on the basis of forum selection clauses. This article addresses the increasing use of "floating" forum selection clauses which do not specify any particular forum, different types of forum selection clauses, and limitations upon enforcing these clauses.

Significance

Use of Forum Selection Clauses

Forum selection clauses are often employed for suits in the designated forum over nonresidents and to dispose of adverse litigation in other forums. Texas state courts may dismiss or abate cases where another forum is designated, but may not transfer cases to state courts of another state or make a choice of law determination regarding the merits.¹ Conversely, federal courts may either dismiss or transfer cases to another federal court.² Forum selection clauses also are used in lawsuits in Texas against non-residents. Forum selection clause issues also may arise when a judgment from another state or country is domesticated in Texas.

Forum selection clauses may not be used offensively against consumers in transactions intended for personal, household, or family purposes. Such consumers may only be sued in the particular forum where they reside or where they actually signed the subject agreement.³ However, such clauses may be used defensively to require suits by consumers in the designated forum.

An enforceable forum selection clause eliminates issues as to whether or not a nonresident is subject to personal jurisdiction in the forum. A party which has contractually agreed to suit in a particular forum need not have "minimum contacts" with that forum. A party who signs a contract with a valid forum selection clause has either consented to personal jurisdiction or waived the requirements for personal jurisdiction in the designated forum.⁴ Personal jurisdiction is a waiveable right,⁵ which a party may bargain away.⁶

¹ *Barnette v. United Research Co., Inc.*, 823 S.W.2d 368, 370 (Tex. App. – Dallas 1991, writ denied).

² *E.g. ABC Rental Sys., Inc. v. Colortyme, Inc.*, 893 F.Supp. 636, 638 (E.D.Tex. 1993).

³ 15 U.S.C. §1692i(a)(2); Tex. Bus. & Com. Code §17.46(b)(22)(Vernon 200_). The latter provision, contained in the Texas Deceptive Trade Practices – Consumer Protection Act provides that such a suit is a "false and misleading or deceptive act under the DTPA, and also applies to transactions intended for agricultural purposes.

⁴ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 14, 105 S. Ct. 2174, 2182 n. 14 (1985); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-05, 102 S. Ct.

A comprehensive forum selection clause encompasses suits sounding in tort as well as in contract when if the claims are related to the agreement.⁷ Forum selection clauses apply to parties who are not parties to the subject agreement when they are transaction participants.⁸

Forum selection clauses are more significant due the 2004 Texas Supreme Court decisions in *In re AIU Insurance Co.*⁹ and *In re Automated Collection Technologies, Inc.*¹⁰ The court held in *AIU* that "[w]hen a trial court denies a motion to enforce a valid, enforceable forum-selection clause that specifies another state or country as the chosen forum, the trial court's final judgment is subject to *automatic reversal* at the request of the party seeking enforcement of the clause."¹¹

Forum Selection Clauses Enforceable Through Mandamus

The *AIU* and *Automated Collection* decisions held that that mandamus relief is appropriate when a court erroneously declines to enforce a forum selection clause.¹² The court in *AIU* explained its basis for enforcing forum selection clauses through mandamus:

"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. There is no benefit to either the individual case or the judicial system as a whole. The only benefit from breach of a forum-selection clause inures to the breaching party. That party hopes that its adversary will weary or avoid the cost of protracted litigation and settle when it would

2099, 2105 (1982); see *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316, 84 S. Ct. 411, 414 (1964) ("it is well settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court....").

⁵ *Rudzewicz*, 471 U.S. at 473 n.14, 105 S. Ct. at 2182 n. 14; *Compagnie des Bauxites de Guinee*, 456 U.S. at 703-05, 102 S. Ct. at 2105; *Abacan Technical Servs. Ltd. v. Global Marine Int'l Servs. Corp.*, 994 S.W.2d 839, 843-45 (Tex. App. – Houston [1st Dist.] 1999, no pet.).

⁶ *Tri-State Bldg. Specialties, Inc. v. NCI Bldg. Sys., Inc.*, 2005 Tex. App. – (Tex. App. – Houston [1st Dist.] 2005, n.p.h.); see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

⁷ *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66 (Tex. App.-Dallas 1996, no writ); *Barnette v. United Research Co., Inc.*, 823 S.W.2d 368, _ (Tex. App. – Dallas 1991, writ denied); *Brock v. Entre Computer Ctrs., Inc.*, 740 F.Supp. 428, 430-31 (E.D.Tex. 1990). Some appellate cases have held that such a clause "does not apply to a tort action alleging that the plaintiff was induced by misrepresentation to enter into the contract, where construction of the rights and liabilities of the parties under the contract is not involved." *Busse v. Pacific Cattle Feeding Fund #1 Ltd.*, 896 S.W.2d 807, 813 (Tex. App. – Texarkana 1995, writ denied); *Pozero v. Alpha Travel, Inc.*, 856 S.W.2d 243, 245 (Tex. App. – San Antonio 1993, no writ).

⁸ *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. App.-Dallas 1996, no writ); *Brock v. Entre Computer Ctrs., Inc.*, 740 F.Supp. 428, 430-31 (E.D.Tex. 1990).

⁹ 148 S.W.3d 109, 115-21 (Tex. 2004).

¹⁰ 156 S.W.3d 557, 558 (Tex. 2004).

¹¹ *AIU*, 148 S.W.3d at 117 [emphasis added].

¹² *Automated Collection*, 156 S.W.3d at 558; *AIU*, 148 S.W.3d at 115-20.

not otherwise have done so. Likewise, in comparing the respective burdens on the parties the burden on a party seeking to enforce a forum-selection clause of participating in a trial then appealing to vindicate its contractual right is great while there is no legitimate benefit whatsoever to the party who breached the forum-selection agreement."¹³

Prompt enforcement of forum selection clauses through mandamus is understandable. However, the *AIU* and *Automated Collection* opinions also run counter to this goal by permitting parties to litigate for several months before seeking to enforce the forum selection clause.¹⁴ The court found that prolonged litigation on the merits – including filing of counterclaims – does not waive the clause.¹⁵

Choice of law provisions are also very important, especially in defending adverse claims asserted under Texas law. Such provisions have been used to successfully defend usury claims and defenses.¹⁶

General Requirements for Enforcement of Forum Selection Clauses

The Texas Supreme Court in *AIU* changed at least one of the two requirements for enforcement of forum selection clauses. Formerly, a party seeking to enforce a forum selection clause in Texas was generally required to establish that (1) the parties have contractually agreed to submit to the exclusive jurisdiction of another state, and (2) that the other state recognized the validity of such provisions.¹⁷

The Texas Supreme Court held in *Automated Collection* that enforcement of a forum-selection clause was mandatory unless a party opposing enforcement "clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reason as fraud and overreaching."¹⁸ The opinions of the First Court of Appeals in *Phoenix Network Technologies (Europe) Ltd. v. Neon Systems, Inc.*¹⁹ and the Dallas Court of Appeals in *Tyco Electronics Power Systems, Inc.*²⁰ noted that the *AIU* opinion omitted any mention of recognition of validity by the designated state as a requirement.²¹

¹³ *AIU*, 148 S.W.3d at 117.

¹⁴ *Automated Collection*, 156 S.W.3d at 558; *AIU*, 148 S.W.3d at 121.

¹⁵ *AIU*, 148 S.W.3d at 115-21; *Automated Collection*, 156 S.W.3d at 558.

¹⁶ *Potomac Leasing Co. v. Housing Auth. of El Paso*, 743 S.W.2d 712, 713 (Tex. App.–El Paso 1987, writ denied); *Southwest Park Outpatient Surgery, Ltd. v. Chandler Leasing Div.*, 572 S.W.2d 53 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ).

¹⁷ *Tyco Electronics Power Systems, Inc.*, 2005 WL 237232 (Tex. App. – Dallas Feb. 2, 2005, pet. denied), citing *Holeman v. Nat'l. Bus. Inst., Inc.*, 94 S.W.3d 91, 97 (Tex. App.–Houston [14th Dist.] 2000, pet. denied); *Mabon Ltd. v. Afri-Carib Enters, Inc.*, 29 S.W.3d 291 (Tex. App.–Houston [14th Dist.] 2000, no pet.); *Southwest Intelecom, Inc. v. Hotel Networks Corp.* 997 S.W.2d 322 (Tex. App.–Austin 1999, pet. denied); and *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66 (Tex. App.–Dallas 1996, no writ).

¹⁸ *Automated Collection*, 156 S.W.3d at 558.

¹⁹ 177 S.W. 605 (Tex. App. – Houston [1st Dist.] 2005, no pet. hist.).

²⁰ 2005 WL 237232.

²¹ *Phoenix Network*, 177 S.W.2d at 613-14; *Tyco*, _.

What Law Governs Enforcement?

The omission of establishing enforceability of the forum selection clause may in *AIU* and *Tyco* suggest that only Texas case law is pertinent in determining whether or not a forum selection clause is enforceable in Texas courts.²² However, the *AIU* opinion noted that courts in other states have enforced forum selection cases through mandamus.²³ It is uncertain if Texas courts will look to case law of other states for guidance, even when the same forum selection clause has been adjudicated elsewhere.

The law of the state designated in a forum selection clause will continue to be applied when a judgment from another state is domesticated in Texas. As with all domesticated judgments, the court will determine whether or not the court of original rendition had jurisdiction under the laws of the state of rendition and whether or not the exercise of jurisdiction comports with the due process requirements under the constitution of that state and the United States Constitution.²⁴ Due process requires that a party reasonably anticipate that it can reasonably anticipate being hailed into court in another state.²⁵ However, consent to jurisdiction under a forum selection clause which is enforceable under the laws of the state where the judgment was rendered removes any issue regarding personal jurisdiction of the court where the judgment was rendered.²⁶ The party which has domesticated the judgment is required to establish the content and effect of the law of the state where the judgment was rendered. If it fails to do so, a Texas court will assume that the law of the other state is the same as Texas law.²⁷

Exceptions to Enforcement

The *AIU* and *Tyco* opinions adopted the limited exceptions for enforcement set forth in United States Supreme Court decision in *M/S Bremen v. Zapata Off-Shore Co.*²⁸ The party opposing enforcement must clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.²⁹ The Court indicated that a clause would come within these exceptions if its enforcement would contravene a strong public policy of the forum in which suit was brought, or when the contractually selected forum would be seriously inconvenient for

²² Laws of other states still apply with enforcement and recognition of judgments rendered in other states, as discussed in Section ___ of this article.

²³ *AIU*, 148 S.W.3d at 119-20, 120 n. 74.

²⁴ ___. The plaintiff in judgment must also meet the statutory requirements under Texas law for domesticating the judgment. Tex. Civ. Prac. & Rem. Code §37.001 et seq (Vernon 200__).

²⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 564 (1980).

²⁶ *Monesson v. National Equip. Rental, Ltd.*, 594 S.W.2d 780, 781 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.); *A & S Distrib. Co., Inc. v. Providence Pile Fabric Corp.*, 583 S.W.2d 281, 284 (Tex. Civ. App. – Dallas 1977, writ ref'd n.r.e.).

²⁷ E.g. *Fender v. Delta Mud and Drilling*, 697 S.W.2d 655, __ (Tex. App. – Tyler 1985, writ ref'd n.r.e.).

²⁸ 407 U.S. 1 (1972).

²⁹ *Id* at 15.

trial.³⁰ Texas public policy had previously been rejected as a basis for contesting a forum selection clause.³¹

The Supreme Court noted in *Bremen* that both parties were sophisticated and had negotiated the terms of the agreement. However, the court in *Carnival Cruise Lines, Inc. v. Shute*,³² subsequently enforced a forum selection clause in a "boilerplate" cruise ticket, finding that a forum selection clause "is not *per se* invalid simply because it is found in a form contract."³³ Supreme Court rejected the notion that a non-negotiated clause in a form contract is never enforceable simply because it is not the subject of bargaining.³⁴ This exception had previously been mentioned only occasionally enunciated in Texas case law.³⁵ Moreover, Texas appellate courts have recently opined that Texas public policy favors enforcement of forum selection clauses.³⁶ Federal venue statutes, of course, pre-empt forum selection clauses.³⁷

Proper draftsmanship is absolutely crucial for enforcement of forum selection clauses. The Texas Supreme Court held in *In re AIU Insurance Co.* that enforcement of forum selection clauses is mandatory unless the party opposing enforcement "clearly shows that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching."³⁸

Permissive and Mandatory Clauses

A permissive forum selection clause provides that one or both parties consent to jurisdiction, venue, or suit in a particular forum. A party may file suit in that forum, but is not required to do so.

A mandatory forum selection clause requires suit in a particular forum by designating a forum which has exclusive jurisdiction.³⁹ These clauses provide that all litigation must, shall, or is to be filed in that forum.⁴⁰ The clause must contain explicit language regarding exclusivity.⁴¹

³⁰ *Id.*

³¹ *Holeman v. Nat'l. Bus. Inst., Inc.*, 94 S.W.3d 91, 95 (Tex. App.-Houston [14th Dist.] 2000, pet. denied).

³² 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

³³ *Shute*, 499 U.S. at 593, 111 S.Ct. at 1527.

³⁴ *Id.*

³⁵ *E.g. Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203 (Tex. App. – Eastland 2001, pet. denied). Indeed, a 1978 federal court in Texas rejected the contention that a forum selection clause was an impermissible waiver of the Texas Deceptive Trade Practices – Consumer Protection Act. *Wydel Assocs. v. Thermosol, Ltd.*, 452 F.Supp. 739, 742 (W.D.Tex. 1978). However, this cursory holding in *Wydel* improperly relied upon the reasonable relationship standard for enforcement of *choice of law* provisions in UCC transactions as authority for that holding. *Id.*

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³⁷ *E.g. In re AIU*, 148 S.W.3d at 112 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)).

³⁸ *Southwest Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324-25 (Tex. App. – Austin 1999, pet. denied).

⁴⁰ *E.g. Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App. – Dallas 1996, no writ); *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004); *My Café-CCC, Ltd. v. Lunchstop, Inc.*, 107

Use of Permissive Clauses

Permissive clauses allow creditors flexibility as to where to file suit, depending upon the circumstances and the laws of the state where the debtor resides. Creditors often decline to sue in the designated forum and instead sue the debtor where it resides. The creditor may wish to avert the delay in obtaining judgment in one forum and domesticating in the state where the debtor resides. The creditor may wish to use judicial means to recover collateral or leased goods, and judgment domestication statutes often address money judgments but not orders or judgments granting other relief. It may wish to use prejudgment remedies, and courts generally do not have subject matter jurisdiction to enforce their judgments in other forums.

Permissive clauses are less useful in dealing with adverse litigation outside the designated forum. These clauses generally do not warrant dismissal of state court cases or transfer of federal cases.⁴² Permissive clauses simply allow a party to file suit in the designated forum, but do not preclude a party from filing suit elsewhere. The best way to effectively use a permissive clause for a contested case is for a party to recognize the dispute and likelihood of litigation and to immediately file suit and "win the race to the courthouse." A subsequently filed suit in a different forum involving the same matter and parties should at least be abated until issues regarding personal jurisdiction and venue are resolved by the trial court in the case which was filed first.

Permissive clauses may also be used to support a special appearance which includes other grounds.⁴³ By contrast, mandatory clauses are enforced through a motion to dismiss instead of a special appearance.⁴⁴ The permissive clause can help establish that the nonresident did not purposefully avail itself of any benefit of doing business in Texas.⁴⁵

Use of Mandatory Clauses

Mandatory clauses are best suited to deal with adverse litigation outside the designated forum. There is a very pervasive trend toward enforcing these clauses. Indeed, it is now the public policy of Texas to enforce such clauses.⁴⁶ When faced with a clause that requires suit in a particular named forum outside of Texas, Texas state

S.W.3d 860, 865-67 (Tex. App. – Dallas 2003, no pet.); *In Re Tyco Electronics Power Systems, Inc.*, 2005 Tex. App. Lexis 819 (Tex. App. – Dallas Feb. 2, 2005, pet. denied).

⁴¹ *Mabon Ltd. v. Afri-Carib Enter., Inc.*, 29 S.W.3d 291, 297 (Tex. App. Houston [14th Dist.] 2000, no pet.); *Southwest Telecom*, 997 S.W.2d at 325 (stipulation to jurisdiction and venue in particular forum was not exclusive).

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⁴³ *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793, 2005 WL 1252268 *9 (Tex. 2005).

⁴⁴ *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 71 (Tex. App. – Dallas 1996, no pet.).

⁴⁵ *Michiana*, 168 S.W.3d at __, 2005 WL 1252268 *9; *Phoenix Network*, 177 S.W.2d at 611.

⁴⁶ *Phoenix Network Techs., Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex. App. – Houston [1st Dist.] 2005 __).

courts must dismiss or at least abate the suit. State courts lack authority to transfer cases to any court other than another court in the same state.⁴⁷

Mandatory clauses do not afford any flexibility as to where to file suit, as underscored in *Automated Collection*. The plaintiff in *Automated Collection* filed a collection case in Dallas County, Texas even though the subject agreement provided that all litigation was to occur in Montgomery County, Pennsylvania.⁴⁸ The defendant answered, counterclaimed, and served discovery requests.⁴⁹ After *four months* of active litigation, the defendant then filed a motion to dismiss on the basis of the forum selection clause.⁵⁰ The trial court found that the defendant had waived the clause and denied the motion.⁵¹ The Texas Supreme Court granted the defendant's petition for mandamus, found that there was no waiver, and directed the trial court to promptly dismiss the case.⁵² The court noted that the plaintiff "chose to initiate proceedings in a forum other than the one to which it contractually agreed and cannot complain about any duplication of time and efforts that resulted from that choice."⁵³

Is A Clause Mandatory or Permissive?

The distinction between a permissive clause and a mandatory clause is not always clear. The clause in *Automated Collection* provided that "[t]he parties hereto consent to the exclusive jurisdiction of the courts of Montgomery County, Pennsylvania."⁵⁴ The term "consent" indicates that the clause was permissive, whereas the term "exclusive" suggests that the clause was mandatory. The plaintiff asserted to the trial court that the clause was permissive. It is unclear whether or not this argument was made or addressed in the mandamus proceedings; the Texas Supreme Court decision does not address that issue. A clause which provided only that "[t]he [parties stipulate to jurisdiction and venue in Ramsey County, Minnesota, as if this Agreement were executed in Minnesota" and a clause which provided that "the Federal District of Nigeria shall have venue" were held to be permissive.⁵⁵

"Floating" Forum Selection Clauses: Has A Forum Been Selected?

The threshold question in determining whether or not a forum selection is enforceable is whether or not a forum has been selected. Equipment lessors and other creditors often assign transactions or payment rights to one or more assignees in exchange for capital. Like other creditors, assignees often wish to have forum selection clauses which permit or even require suit to be in the forum where their home offices are located. There may be several different potential assignees which are located in

⁴⁷ *Barnette v. United Research Co.*, 823 S.W.2d 368, 370 (Tex. App. – Dallas 1991, writ denied).

⁴⁸ *Automated Collection*, 156 S.W.3d at 558.

⁴⁹ *Automated Collection*, 156 S.W.3d at 559.

⁵⁰ *Id.*

⁵¹ *Automated Collection*, 156 S.W.3d 557, 559.

⁵² *Automated Collection*, 156 S.W.3d at 559, 560.

⁵³ *Automated Collection*, 156 S.W.3d at 560.

⁵⁴ *Automated Collection*, 156 S.W.3d at 558.

⁵⁵ *Southwest Intelecom*, 997 S.W.2d at 925-26; *Mabon*, 29 S.W.3d at 297.

different states. Consequently, the lessor will not know what forum to name in the forum selection clause.

What Is A "Floating" Forum Selection Clause?

Assignors and prospective assignees often attempt to address this situation with a "floating" forum selection clause, perhaps combined with a "floating" choice of law provision, such as the following:

"APPLICABLE LAW ... This agreement shall be governed by, construed, and enforced in accordance in with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located without regard to such State's choice of law considerations and all legal actions relating to this Rental Agreement shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's sole option..."⁵⁶

Do "Floating" Clauses Fail For Lack Of Notice?

The basic problem with a "floating" forum selection clause is that it does not provide the debtor or lessee with notice of any particular state in which litigation is to occur after the transaction is assigned. Due process requires that a party reasonably anticipate that it can reasonably anticipate being hailed into court in another state.⁵⁷

Shapiro

In a decision later recognized in Texas, the New Jersey Court of Appeals held in *Shapiro v. Copelco Capital, Inc.*,⁵⁸ that the following forum selection clause in an equipment lease to be unenforceable:

"You consent to the jurisdiction of any local, state, or federal court located within our or our assignee's state."⁵⁹

The appellate court in *Shapiro* reasoned that because the clause included "assignee's", the proper forum could be any state in the country, thereby defeating the objective of forum selection clauses, which is to ensure a *predictable* and neutral locus

⁵⁶ This provision is found in most of the 11,000 equipment rental agreements entered into by Norvergence, Inc. in connection with telecommunications service agreements; approximately 1,000 of those agreements were with Texas residents. Norvergence assigned most of the rental agreements to over 40 equipment leasing companies. It went into bankruptcy after it failed to pay the ultimate providers of the telecommunications services. This same Norvergence "floating" forum selection clause is the subject of the cases cited in notes ____ *infra*.

⁵⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 564 (1980).

⁵⁸ 331 N.J. Super. 1, 750 A.2d 773, 775 (App. Div. 2000).

⁵⁹ *Shapiro*, 750 A.2d at 775.

for the resolution of any dispute.⁶⁰ The court also reasoned that a clause providing for a forum that could not be identified until sometime after the agreement was entered into would violate the notice requirement and rendered the clause unfair and unreasonable.⁶¹

CMS Partners

The analysis and holdings in *Shapiro* were recognized and applied by Texarkana Court of Appeals in *CMS Partners, Ltd. v. Plumrose USA, Inc.*⁶² The clause in *CMS Partners* provided as follows:

"The laws in the State in which the defending party maintains business shall govern the application and enforcement of this agreement, and all litigation pursuant to this agreement shall be conducted in the County and the State of the defendant."⁶³

The franchise agreement in *CMS Partners*, however, was never assigned.⁶⁴ The defendant was thus successful in having the case dismissed because the clause specifically provided for suit by or against the original party to the contract where that party was located.⁶⁵

CMS Partners discussed *Shapiro* at some length, and focused its analysis upon whether or not there was an assignment of the contract containing the forum selection clause.⁶⁶ The appellate court reasoned as follows:

"Because the contract was *not* assigned, and Plumrose was the defendant, the terms of the contract dictated that suit be brought in New Jersey, a forum reasonably within the contemplation of the parties. In contrast, the *Copelco Capital* contract expressly provided that any lawsuit would be litigated in our or our assignee's state. *Id.* at 775. Further, that contract was assigned, thus selecting a forum not within the reasonable contemplation of those parties. *Id.*"⁶⁷

CMS Partners instructs that when a party knows who it is contracting with and can determine where that party is located, that party thereby knows or should know what state the forum selection clause designates.⁶⁸ Again, the absence of an assignment was crucial to enforcement of the forum selection clause in *CMS Partners*:

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 101 S.W.3d 730, 734-36 (Tex. App. – Texarkana 2003, no pet.)

⁶³ *Id.* at 733.

⁶⁴ *Id.* at 733; *CSM Partners*, 101 S.W.3d at 735.

⁶⁵ *CMS Partners*, 101 S.W.3d at 735-36.

⁶⁶ *CMS Partners*, 101 S.W.3d at 735.

⁶⁷ *CMS Partners*, 101 S.W.3d at 735 [italics original].

⁶⁸ *Id.*

"Because the facts of this case *do not involve assignees*, however, CMS had adequate notice that New Jersey would be the proper forum for any CMS claim."⁶⁹

Forseeability is the primary components for enforcement of "floating" forum selection clauses in Texas under *CMS Partners*. When the original forum is readily apparent from the contract documentation and the contract has not been assigned to a party located in another forum, then the clause is enforceable as to the original forum.⁷⁰ Similarly, a Texas appellate court rejected a contention that a provision which permitting litigation in "the court of any jurisdiction in which [the debtor] or any of his assets or property or assets is located" was vague.⁷¹ That provision clearly did not present any issue of forseeability or fair notice to the debtor.

CMS Partners is the *only* Texas appellate decision which has analyzed floating forum selection clauses.⁷² In the *Law Offices of R. Jack Ayres v. Norvergence, Inc.*, the Eastern District of Texas found *CMS Partners* to be the leading authority on "floating" clauses, and denied the motion of the assignee to transfer venue to Missouri pursuant to a floating clause.⁷³ The order in *Ayers* noted found that "the terms of the Equipment lease gave no notice to the contracting parties of the particular forum which might be applicable in the case of an assignment."⁷⁴

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The very same forum selection clause involved in *Shapiro* was actually enforced in federal court in New Jersey in *Danka Funding, LLC v. Page, Scantom, Spouse, Tucker and Ford, P.C.*,⁷⁵ a New Jersey case which predates *Shapiro*. The *Page* decision enforced a floating forum selection clause in *Page* on the basis that one of the parties was a law firm and that there was no evidence that the firm would be seriously inconvenienced by litigating in the assignee's state.⁷⁶

The court held in *Page* that "[t]he law firm, because it professes to be bound by such an agreement, must make any inquiries it feels necessary to ascertain the identity

⁶⁹ *Id* [emphasis added].

⁷⁰ *Id*.

⁷¹ *Sarieddine v. Moussa*, 820 S.W.2d 837, 839 (Tex. App. – Dallas 1991, writ denied).

⁷² Appellate courts in Beaumont, Dallas, and Houston have each denied petitions for mandamus complaining of the refusal to enforce the same type of "floating" forum selection clause. *In re Popular Leasing USA, Inc.*, 2005 WL 1110666 (01-05-00001-CV, Tex. App. – Houston [1st Dist.] 2005, orig. proceeding); *In re Popular Leasing USA, Inc.* 2005 WL 1908967 (09-05-00223-CV, Tex. App. – Beaumont Aug. 11, 2005, orig. proceeding); *In re Studebaker-Worthington Leasing Corp.*, 2005 WL 3047065 (05-05-01434-CV, Tex. App. – Dallas Nov. 15, 2005, orig. proceeding). The Texas Attorney General filed an amicus brief in the first of those mandamus cases (in the 1st District Court of Appeals) in opposition to enforcement of the clause.

⁷³ Order filed on July 20, 2005, p. 1, E.D. Tex. Civil Action No. 2:04-CV-295.

⁷⁴ *Id.* at p. 3.

⁷⁵ 21 F.Supp.2d 465 (D.N.J. 1998).

⁷⁶ *Id* at 471-72.

before it enters into the agreement.⁷⁷ That reasoning totally ignores the facts and reality. There is no indication of who the law firm should have made any inquiries with.⁷⁸ There is no indication in the *Hale* opinion that the original lessor intended to assign the lease at the time the law firm entered into the lease,⁷⁹ so any inquiries made at that time may have been fruitless. Moreover, the only Texas case to address floating forum selection clauses – *CMS Partners* – looked to *Shapiro* as being the primary case on point.

Enforceability In Other States

The case law elsewhere is mixed; almost all decisions involve the same “floating” Norvergence clause as in *Ayres*. Courts in Iowa, Minnesota and Pennsylvania enforced a “floating” forum selection clause in an equipment lease.⁸⁰ State courts in Iowa and Minnesota have also upheld “floating” clauses.⁸¹ A Massachusetts appellate court has declined to enforce such a clause.⁸² New York state trial courts have generally declined to enforce “floating” forum selection clauses.⁸³

The Seventh Circuit recently found a “floating” forum selection clause to be valid in held in *IFC Credit Corp. v. Alliano Brothers General Contractors*.⁸⁴ The clause was identical to that which Texas courts have refused to enforce in the cases following *CMS Partners*.⁸⁵ The *Alliano* opinion recognizes that the most federal and state cases in Illinois had held the clause to be invalid or expressed skepticism about its validity,⁸⁶ but states that those results were incorrect.⁸⁷

⁷⁷ *Hale*, 21 F.Supp.2d at 472.

⁷⁸ See generally *Hale*, 21 F.Supp.2d 465.

⁷⁹ *Id.*

⁸⁰ *Great America Leasing Corp. v. Telular Corp.*, Civ. A. 98-127, 1999 WL 33656867 at *4 (N.D. Iowa, April 20, 1999)(finding forum selection clause and assignability provision in lease made it reasonable to infer that the lessee “could have ... anticipated litigating in Iowa or a number of other states” [emphasis added]); *Commerce Commercial Leasing, LLC v. Jay's Fabric Cent.*, 2004 WL 2457737 (E.D.Pa. 2004).

⁸¹ *Great America Leasing Corp. v. ___*, 1999 WL 33656867 at *4 (N.D. Iowa, April 20, 1999)(finding forum selection clause to be ___

⁸² *AT&T Capital Leasing Servs. v. CJP*, 1997 Mass. Super. LEXIS 181 (1997).

⁸³ *Sterling Nat'l Bank v. Borger, Jones & Keeley-Cain* (Index 58826CV, 2004, April 25, 2005(J. Scarpulla); *Sterling Nat'l Bank v. Kings Manor Estates, LLC*, 9 Misc.3d 1116(A), 2005 WL 2464167 *7 (N.Y.City Civ. Ct., 2005 N.Y. Slip Op. 51604(U))(Oct. 6, 2005).

⁸⁴ 437 F.3d 606, 613, 2006 WL ___ (7th Cir. Feb. __, 2006).

⁸⁵ *IFC Credit Corp. v. Alliano Bros. Gen. Contractors*, 437 F.3d 606, 613, 2006 WL ___ (7th Cir. Feb. 1, 2008).

⁸⁶ *Id.* at 607-08, citing *IFC Credit Corp. v. Burton Indus., Inc.*, No. 04 5906, 2005 WL 1243404 at *2-3 (N.D. Ill. May 12 2005) as upholding validity of the clause, *IFC Credit Corp. v. Warner Robbins Supply Co.*, No. 04 C 8093, 2005 U.S. Dist. LEXIS 26450 at*9-11 (N.D.Ill. Oct. 26, 2005), *IFC Credit Corp. v. Century Realty Funds, Inc.*, No. 04 C 5908, slip op. at 7-8 (N.D. Ill. March 4, 2005), *IFC v. South Coast Dental Labs*, No. 04 M3 2846, slip op. at 15-21 (Ill. Cook Cty. Cir. Ct. June 21, 2005), *IFC v. Main Street Mortgage*, No. 04 M3 2649, slip op. at 15-19 (Ill. Cook Cty. Cir. Ct. Mar. 30, 2005) and *IFC v. Thomas Printing, Inc.*, No. 04 M3 2654, slip op. at 2-4 (Ill. Cook Cty. Cir. Ct. Mar. 17, 2005) as denying validity, and *IFC Credit Corp. v. Kay Auto. Distribs., Inc.*, No. 04-5907, slip op. at 1-2 (N.D.Ill. June 13, 2005), *IFC Credit Corp. v. Austin Auto. Warehouse Corp.*, No. 04-8030, slip. Op. at 2-4

The lessee in *Alliano*, a New Jersey construction company, contended that the forum selection clause was required to be "clear and specific" and that the clause failed to satisfy this requirement because it failed to name a specific state.⁸⁶ The trial court had dismissed the case because the clause the "provision fails to identify a specific jurisdiction."⁸⁸ The Seventh Circuit noted that the lessee's concession at oral argument could be brought in several different forums if so indicated in the contract gutted this argument. It correctly recognized that "[t]he purpose of requiring that a forum selection clause be "clear and specific" is to head off disputes over where the forum selection clause directs that the suit be brought."⁹⁰

The *Alliano* decision simply refused to recognize that "floating" forum selection clauses do not provide reasonable notice to a party that it might be subject to suit or required to litigate in another forum. Instead, the court stated that "[t]here was no possibility of such a [forum selection] dispute here, because the forum selection clause designates the state of suit unequivocally: It is the headquarters state of either NorVergence or, if the contract has been assigned, of the assignee." The court did not employ any foreseeability analysis,⁹¹ such as in *Shapiro* or *CMS Partners*. The court instead focused upon possible inconvenience to assignees who would have to litigate in one specifically named forum, and speculated that such inconvenience would impede the assignment of contracts and increase prices charged to customers.⁹²

There is a split between two Ohio courts of appeals regarding the enforceability of "floating" forum selection clauses. One appellate court found in 2005 that the Norvergence "floating" clause was enforceable and reversed dismissal of a series of cases against nonresidents.⁹³ Another appellate court found that the same clause at issue in *Shapiro* and *Page* was unenforceable.⁹⁴ The Ohio Supreme Court has accepted the appeal of the former decision.⁹⁵ Two federal district courts in Ohio have found the Norvergence forum selection clause to be unenforceable.

(N.D.Ill. April 6, 2005) and *IFC Credit Corp. v. Eastcom, Inc.*, 2005 WL 43159 at *1 (N.D.Ill. Jan. 7, 2005) as expressing skepticism about validity of the clause.

⁸⁷ *Alliano*, 437 F.3d at 608, 2006 WL ____.

⁸⁸ *Alliano*, 437 F.3d at 612, 2006 WL ____.

⁸⁹ *IFC Credit Corp. v. Alliano Bros. Gen. Contractors*, 2005 WL 643288 (N.D. Ill. 2005), reversed *IFC Credit Corp. v. Alliano Bros. Gen. Contractors*, 437 F.3d 606, 613, 2006 WL ____ (7th Cir. Feb. __, 2006).

⁹⁰ *Alliano*, 437 F.3d 612, 2006 WL ____.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Preferred Capital, Inc. vs. Power Eng'g Group, Inc.*, 839 N.E.2d 424, 163 Oh. App. 3d 522, 2005 Ohio 5113 (9th Dist., Sept. 28, 2005). The Supreme Court of Ohio accepted discretionary appeal of this decision. Case Announcements, Feb. 22, 2006.

⁹⁴ *Copelco Capital, Inc. v. St. Marks Presbyterian Church*, No. 77633, 2001 WL 1066328 (Ohio App. 8th Dist., Feb. 1, 2001).

⁹⁵ Ohio Sup. Ct. Case Announcements, Feb. 22, 2006..

At least one trial court in Missouri has likewise declined to enforce the same "floating" forum selection clause,⁹⁶ but a federal district court in that state found the same clause to be enforceable.⁹⁷

"Floating" forum selection clauses also may not satisfy the exclusivity requirement for mandatory clauses.⁹⁸ A "floating" clause restricts litigation to the forum of the assignor, and then restricts litigation to an unnamed forum of the assignee once the agreement is assigned. The change of the required forum may indicate lack of exclusivity. However, the case law has yet to address that particular issue.⁹⁹

While a party seeking to enforce a forum selection clause is no longer required to show that its state would enforce a "floating" forum selection clause, certainly the limited review and disposition in Texas and decidedly mixed outcome in courts of other states indicates that such clauses are not likely to be enforced in Texas in the foreseeable future.

Notice Requirements Under the Texas Business & Commerce Code

Section 35.53

Floating forum selection clauses – and floating choice of law clauses – also may be unenforceable in Texas for failing to comply with statutory notice requirements for sales and leases involving \$50,000.00 or less. The current version of Section 35.53 of the Texas Business and Commerce Code requires that a forum selection clause in a "contract ... for sale, lease, exchange, or other disposition of goods for the price, rental or other consideration of \$50,000.00 or less" is voidable unless it is "set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would know."¹⁰⁰

⁹⁶ *Popular Leasing USA, Inc. v. Harry Major Machine & Tool Co.*, Master Cause No. 04CC-3753B, Order and Judgment filed July 21, 2005 (Cir. Ct. St. Louis County, Missouri).

⁹⁷ *Popular Leasing USA, Inc. v. Terra Excavating, Inc.*, 2005 WL 1523950 *1-4 E.D. Mo. June 28, 2005, citing *Popular Leasing USA, Inc. v. Mednet Healthcare Technologies, Inc.*, No. 4:04-CV-1571 JCH (Order of May 16, 2005) (Hamilton, J.) [Doc. 16]; *Popular Leasing USA, Inc. v. National Restoration Sys., Inc.*, 4:04-CV-1629 AGF (Mem. and Order of May 3, 2005) (Fleissig, J.) [Doc. 23]; *Popular Leasing USA, Inc. v. Austin Auto. Warehouse Corp.*, 4:04-CV-1619 TCM (Mem. and Order of Mar. 17, 2005) (Mummert, J.) [Doc. 26].

⁹⁸ See *infra* n. _ and accompanying text.

⁹⁹ See generally *CMS Partners*, 101 S.W.3d 730.

¹⁰⁰ Tex. Bus. & Com. Code §35.53(a)(1), (b)(Vernon 2004). The entire text of Section 35.53 is as follows:

§ 35.53. Notice of Law; Dispute Resolution Forum Applicable to Contract

- (a) This section applies to a contract only if:
- (1) the contract is for the sale, lease, exchange, or other disposition for value of goods for the price, rental, or other consideration of \$ 50,000 or less;
 - (2) any element of the execution of the contract occurred in this state and a party to the contract is:

Section 35.53(a)(3) provides that Section 35.53 "applies to a contract only if ... Section 1.105 of this code does not apply to the contract."¹⁰¹ Section 1.105, which is the former choice of law provision of the Uniform Commercial Code, provided for enforcement of choice of law provisions in Uniform Commercial Code transactions when there is a reasonable relationship between the chosen state, the parties, and the transaction. Section 1.105 of the Texas Business and Commerce Code was amended in September 2003, as was Section 1.301. The amended Section 1.105 deals with severability of the UCC.

My Café

The two primary cases regarding the exclusions to the applicability of Section 35.53, *My Café-CCC, Ltd. v. Lunchstop, Inc.*¹⁰² and *Drug Test USA v. Buyers Shopping Network, Inc.*,¹⁰³ reached opposite results. Both cases correctly recognize that Section 35.53 requires that a contractual forum selection clause must satisfy the "reasonable relationship" test under the Uniform Commercial Code.

The Dallas Court of Appeals in *My Café* simply held that the exclusion under Section 1.105(a)(now Section 1.301(a)) renders the notice requirements under Section 35.53(b) rendered Section 35.53 inapplicable.¹⁰⁴ The *My Café* decision ignored the provisions of 1.105(b), which limited the scope of Section 1.105(a).¹⁰⁵ The *My Café* decision is also curious because Section 35.53 applies only to transaction involving goods,¹⁰⁶ and the subject agreements were franchise agreements,¹⁰⁷ there is no indication that any goods were involved.¹⁰⁸

Drug Test

The more recent decision of the Waco Court of Appeals in *Drug Test* analyzed the relationship between these statutes and determined that the exclusion only applies

-
- (A) an individual resident of this state; or
 - (B) an association or corporation created under the laws of this state or having its principal place of business in this state; and
 - (3) Section 1.105 of this code does not apply to the contract.

(b) If a contract to which this section applies contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, the provisions must be set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice. If the provision is not set out as provided by this subsection, the provision is voidable by a party against whom it is sought to be enforced.

¹⁰¹ Tex. Bus. & Com. Code §35.53(a), (a)(3)(Vernon 2004).

¹⁰² 107 S.W.2d 860 (Tex. App-Dallas 2003, no pet).

¹⁰³ 154 S.W.3d 191, 196, 2003 Tex. App. LEXIS 5072 (Tex. App. – Waco Dec. 8, 2004, n.p.h.).

¹⁰⁴ *Id* at 865.

¹⁰⁵ *Id*.

¹⁰⁶ Tex. Bus. & Com. Code §35.53(a)(1)(Vernon 2004).

¹⁰⁷ *My Café*, 107 S.W.3d at 862.

¹⁰⁸ See generally *My Café*, 107 S.W.3d at 862-65.

to transactions which are subject of certain specific UCC provisions listed in 1.105(b)(now 1.301(b)). None of those specific provisions apply to commercial transactions where "floating" forum selection and choice of law provisions are most often found.¹⁰⁹

The *Drug Test* decision found that application of Section 1.105(a)(now 1.301(a)) as well as Section 1.105(b) (now 1.301(b)) was not a viable construction of these statutes:

"It would be difficult to fathom a contract which fits within this definition but is not covered by the UCC. Thus a UCC/non-UCC differentiation does not appear to be a viable construction."¹¹⁰

From the statutory history, it appears that the section 1.105 exclusion was added as part of a broader collection of modifications to the statutory scheme relevant to choice-of-law and choice-of-venue provisions in multi-state contracts. These modifications indicate a legislative intent to maintain the various components of this statutory scheme, including the conspicuousness requirement of section 35.53(b). To effectuate this intent, we believe that the Legislature intended the section 1.105 exclusion of section 35.53(a)(3) to refer to one of the exclusionary provisions contained in section 1.105: subsection (b) or subsection (b).¹¹¹

A reference to subsection (c) would make little sense in this regard because transactions referred to in subsection (c) (those involving \$1,000,000 or more) can never come within those transactions potentially included within section 35.53 (those involving \$ 50,000 or less). Therefore, we construe the section 1.105 exclusion to be a reference to those commercial transactions expressly excluded by subsection (b).¹¹²

Even if Section 1.301(a) was part of the exclusion in Section 35.53(a)(3), in spite of the holdings in *Drug Test*, a "floating" forum selection clause is still not subject to that exclusion because there is no agreement to apply the law of any particular state, and

¹⁰⁹ Tex. Bus. & Com. Code §1.301(b)(Tex. UCC)(Vernon 2004). One of these provisions is as follows:

Applicability of the chapter on leases. Sections 2A.105 and 2A.106.

This provision does not apply to most personal property leases because Section 2A.105 applies to goods covered by a certificate of title, and Section 2A.106 applies to "consumer leases", which involve "a personal, family, or household purpose" for less than \$25,000.00. Tex. Bus. & Com. Code §§2A.103(a)(5), 2A.105, 2A.106 (Tex. UCC)(Vernon 2004). Further, a purported lease is not within the scope of Article 2A of the UCC if the lease is actually intended for security because that article applies only to leases. A lease is intended for security when there is an option or requirement to purchase the equipment or renew the lease for nominal additional consideration. Tex. Bus. & Com. Code §1.203. A lease is also intended for security when the primary term of that agreement exceeds the remaining economic life of the equipment. Tex. Bus. & Com. Code §1.203(b)(1).

¹¹⁰ *Drug Test USA v. Buyers Shopping Network, Inc.*, 154 S.W.3d 191, 192-95, 2003 Tex. App. LEXIS 5072 (Tex. App. – Waco Dec. 8, 2004, n.p.h.).

¹¹¹ *Drug Test*, 154 S.W.3d at 194.

¹¹² *Drug Test*, 154 S.W.3d at 195.

Section 1.301 applies when the parties have agreed as to what state's law will apply.

My Café correctly recognized that Section 1.105 requires a reasonable relation between the designated state and the transaction, and found that this relation existed by virtue of the home office of one of the parties being located in the designated state.¹¹³

The Reasonable Relationship Test

"Floating" forum selection and choice of law clauses may not satisfy the reasonable relationship test which is required to trigger the exclusion under Section 35.53(a)(3) and 1.301(a) once the agreement has been assigned to an assignee located in another state. Section 1.301 is the general UCC contractual choice of law section, and provides that "when a transaction bears a reasonable relation to this state and also to another state or nation or of such other state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties."¹¹⁴ Therefore, the prospect that a transaction may be within the scope of the UCC does not in itself mean that it is not within the scope of Section 35.53. The assignee's state usually does not have a reasonable relationship to the transaction. The assignor, the debtor, and the equipment or collateral usually are not located in the assignee's state.

A party attacking enforcement of a forum selection clause might attempt, based upon the adoption in *Automated Collection* by the Texas of the *Bremen* standard, to assert that enforcement of a forum selection clause is unreasonable and unjust for failing to comply with the conspicuousness requirements under Section 35.53.

Section 35.53 appears to be the only instance under Texas law where a forum selection clause must be conspicuous. There is no other authority for the proposition that a forum selection clause must be conspicuous.¹¹⁵ The Eastern District of Texas, without considering that proposition, determined in *Azadi v. Berry Network, Inc.* that a forum selection clause "not ... so obscure or confusing as to merit its rejection."¹¹⁶

¹¹³ Tex. Bus. & Com. Code §1.301(a)(Tex. UCC)(Vernon 2004). This subsection is as follows:

(a) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.

¹¹⁴ Tex. Bus. & Com. Code §1.301(a)(Tex. UCC)(Vernon 2004).

¹¹⁵ *In Re Kyocera Wireless Corporation*, 162 S.W.3d 758, 767 (Tex. App. – El Paso 2005, orig. proceeding); see *Azadi v. Berry Network, Inc.*, 858 F.Supp. 83, 85 (E.D. Tex. 1994)(enforcing forum selection clause which was not emphasized but not obscured or hidden).

¹¹⁶ 858 F. Supp. 83, 84 (E.D. Tex. 1994). The court also found that "[t]he language of the clause is not misleading, or cast in legalese terms which might not be understood by a small businessman...." There are apparently not Texas forum selection clause cases which focus upon comprehension.

Recognition and Enforcement of Judgments From Courts in Other States

Standard for Determining Recognition

The full faith and credit clause requires that a valid judgment from one state be enforced in other states regardless of the laws or public policies of other states.¹¹⁷ Determination of whether or not a judgment from another state is entitled to recognition and enforcement in Texas is confined to the following components:

1. whether or not service of process was obtained in accordance with the applicable statute - generally a "long arm" statute - in the state in which judgment was obtained;
2. whether or not the defendant was otherwise subject to personal jurisdiction in that state under the applicable statute and the constitution of that state;
3. whether or not the defendant was subject to personal jurisdiction in accordance with due process standards of the United States Constitution; and
4. whether or not the judgment has been domesticated in Texas in accordance with Chapter 35 of the Texas Civil Practice and Remedies Code.¹¹⁸

The filing of an authenticated copy of a sister state judgment establishes a prima facie case that the judgment is enforceable.¹¹⁹ The obtaining of the judgment by default does not defeat the presumption of validity.¹²⁰ Texas courts can only determine enforceability of a judgment from another forum in Texas; Texas courts lack authority to vacate a judgment from other forums, and mandamus is appropriate when such a judgment is vacated.¹²¹

¹¹⁷ *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 714-15, 102 S.Ct. 1357, 1371, 71 L.Ed.2d 558 (1982); *Bard v. Charles R. Myers Ins. Agency*, 839 S.W.2d 791, 794 (Tex. 1992); *Corporate Leasing Int'l v. Bridewell*, 896 S.W.2d 419, 421 (Tex. App.--Waco 1995, no writ).

¹¹⁸ *O'Brien v. Lanspar Co.*, 668 S.W.2d 719 (Tex. App.--Houston [1st Dist.] 1983, no writ); *Hill Country Spring Water of Texas, Inc. v. Krug*, 773 S.W.2d 637, 639 (Tex. App.--San Antonio 1989, writ denied); *First Nat'l Bank of Liberty, Mont. v. Rector*, 710 S.W.2d 100, 104 (Tex. App.--Austin 1986, writ ref'd n.r.e.).

¹¹⁹ *Minuteman Press Int'l v. Sparks*, 782 S.W.2d 339, 342 (Tex. App.--Fort Worth 1989, no writ); *Hill Country*, 773 S.W.2d at 639; *Medical Adm'r v. Koger Properties*, 668 S.W.2d 719 (Tex. App.--Houston [1st Dist.] 1983, no writ).

¹²⁰ *Hill Country*, 773 S.W.2d at 639; *Rector*, 710 S.W.2d at 103.

¹²¹ *Corporate Leasing Int'l, Inc. v. Bridewell*, 896 S.W.2d 419, 422 (Tex. App. - Waco 1995, no writ); *Trinity Capital Corp. v. Briones*, 847 S.W.2d 324, 325 (Tex. App. - El Paso 1995, no writ).

A party seeking to oppose enforcement of a judgment from another forum may not relitigate the merits of original controversy.¹²² Indeed, a debtor cannot defeat enforcement of a default judgment from another state by asserting that the person who contract sued upon – which contained a forum selection clause – lacked authority to execute the contract.¹²³

What Law Applies?

Enforceability and effect of a forum selection clause is thus determined under the laws of the state of original rendition. If the clause is enforceable under the laws of that state and no “minimum contacts” are required, then the judgment of the other state must be given full faith and credit.¹²⁴ The United States Supreme Court found in *National Equip. Rental, Ltd. v. Szukhent* that contractual consent to jurisdiction enforceable in the designated forum did not violate the United States Constitution.¹²⁵ This is the one situation even after AIU and Tyco where a Texas court should still determine if the forum selection clause is enforceable under the laws of the designated forum or forum of rendition.

Texas law regarding forum selection clauses is thus not a proper basis for contesting recognition and enforcement of a judgment from another state. Therefore, the requirements under Section 35.53 for enforcing forum selection clauses would not apply in this context.¹²⁶ However, if the judgment creditor fails to seek application of the law of the state of rendition and the effect of that law, Texas courts are to assume that the law of the other state is the same as Texas law.¹²⁷ Failure of the judgment creditor to do this may present an avenue for a Texas resident to assert lack of compliance, particularly when it is able to establish lack of minimum contacts with the state of rendition.

¹²² E.g. *Cash Register Sales and Servs. of Houston, Inc. v. Copelco Capital, Inc.*, 62 S.W.3d 278, 283 (Tex. App. – Houston [1st Dist.] 2001, no pet.); see *Strick Lease, Inc. v. Cutler*, 759 S.W.2d 776, 777 (Tex. App. – El Paso 1988, no writ); *Schwartz v. F.M.I. Props. Corp.*, 714 S.W.2d 97, 99 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.).

¹²³ *Cash Register Sales*, 62 S.W.3d at 283.

¹²⁴ *Monesson v. National Equip. Rental, Ltd.*, 594 S.W.2d 780, 781 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.), citing *A & S Distrib. Co., Inc. v. Providence Pile Fabric Corp.*, 563 S.W.2d 281, 284 (Tex. Civ. App. – Dallas 1977, writ ref'd n.r.e.), *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), and *National Equip. Rental, Ltd. v. Reagin*, 338 F.2d 759, 762 (2nd Cir. 1964).

¹²⁵ *Monesson*, 594 S.W.2d at 781, citing *Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). *Szukhent* did not specifically address due process because that issue was not presented in that case. *Monesson*, 594 S.W.2d at 781. The debtor in *Monesson* “made no due process claim because she raised no facts to show her consent was not valid.” *Id.*

¹²⁶ *Trinity Capital Corp. v. Briones*, 847 S.W.2d 324, 325 (Tex. App. – El Paso 1995, no writ) (reversing granting of motion for new trial regarding domestication of judgment of California court which rejected equipment lessee’s contention that noncompliance with Section 35.53 precluded suit outside of Texas).

¹²⁷ *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 483 (Tex. App. – Houston [14th Dist.] 2004 pet. denied).

Floating Choice of Law Provisions: Has Any Law Been Chosen?

Agreements containing "floating" forum selection clauses also may have "floating" choice of law provisions. The latter provide that the agreement is governed by the law of the state where the assignee is located.

Choice of law provisions, like forum selection clauses, are generally enforced.¹²⁸ These clauses have been used to negate usury claims and other dangerous causes of action.¹²⁹ Texas courts are increasingly enforcing these clauses to non-contractual causes of action when the clauses are sufficiently comprehensive.¹³⁰

General Requirements for Enforcement

Choice of law analysis differs in some respects from analysis of forum selection clauses.¹³¹ Choice of law provisions must bear some relationship between the designated state and the transaction.¹³² Forum selection clauses, by contrast, do not require any sort of relationship between the designated forum and the parties or the transaction, except when the conspicuousness requirements under Section 35.53 are involved.¹³³ Enforcing a forum selection clause does not automatically determine the applicable law.¹³⁴ Conversely, a choice of law provision does not act as a forum selection clause, and does not indicate that a party has availed itself of doing business in the designated state or country.¹³⁵ However, federal courts consider what law is applicable in determining whether or not to grant a motion to transfer venue, and look at choice of law provisions in making this determination.¹³⁶ An enforceable forum selection clause "at the very least neutralizes" the plaintiff's "traditional prerogative of forum selection."¹³⁷

¹²⁸ *E.g.*, _

¹²⁹ *Woods-Tucker Leasing Co. of Ga. v. Hutcherson-Ingram Dev. Corp.*, 642 F.2d 744, 754 (5th Cir. 1981)(usury); *Southwest Park Outpatient Surgery, Ltd. v. Chandler Leasing Div.*, 572 S.W.2d 53 (Tex. Civ. App. -- Houston [1st Dist.] 1978, no writ)(usury); *Walker v. Associates Fin. Servs., Inc.*, 588 S.W.2d 416, 417-18 (Tex. Civ. App. -- Eastland 1979, writ ref'd n.r.e.)(usury).

¹³⁰ *E.g.*, _

¹³¹ *Holeman v. National Business Instit., Inc.*, 94 S.W.3d 91, 96 (Tex. App. -- Houston [14th Dist.] 2002, pet. denied).

¹³² Tex. Bus. & Com. Code §1.301(a)(Tex. UCC)(Vernon 2004).

¹³³ See *infra* n. _ and accompanying text.

¹³⁴ *Holeman v. National Business Instit., Inc.*, 94 S.W.3d 91, 99 (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); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 71 (Tex. App. -- Dallas 1996, no pet.).

¹³⁵ *Aliena Spazio, S.p.A. v. Reid*, 130 S.W.3d 201, 219 (Tex. App. -- Houston [14th Dist.] 2003, _); see *Moni Pulo Ltd. v. Tutse Oil and Gas, Inc.*, 130 S.W.3d 170, 176 2003 WL 22902720, at *2 (Tex. App. -- Houston [14th Dist.] Dec.4, 2003, _).

¹³⁶ *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 2244, 101 L.Ed.2d 22 (1988); *E.g. ABC Rental Sys., Inc. v. Colortyme, Inc.*, 893 F.Supp. 636, 638 (E.D.Tex. 1993).. One federal court in Texas found that a *forum selection clause* did not violate the DTPA anti-waiver provision due to the enforceability of *choice of law* provisions under the UCC. *Wydell Assocs. v. Thermasol, Ltd.*, 452 F.Supp. 739, 742 (W.D. Tex. 1978).

¹³⁷ *Azadi v. Berry Network, Inc.*, 858 F.Supp. 83, 84 (E.D. Tex. 1994).

Lack of Certainty

"Floating" choice of law provisions share the same infirmities as "floating" forum selection clauses. Instead of eliminating uncertainty as to what law will apply, a "floating" choice of law clause may perpetuate uncertainty by expressly presenting the possibility that law of a different state will be applied each time the agreement is assigned. An attorney reviewing such an agreement with such a clause would be hard pressed to properly render an opinion as to enforceability.

The Reasonable Relationship Test

Assignment of an agreement with a "floating" choice of law provision from a party in one state to a party in another state may render the agreement unenforceable under Texas choice of law analysis. The choice of law section of the Texas version of the UCC, Section 1.301, provides as follows:

"[W]hen a transaction bears a reasonable relation to this state and also to another state ... the parties may agree that the law either of this state or of such other state ... shall govern their rights and duties. Failing such agreement [the Texas UCC] applies to transactions bearing an appropriate relation to this state."¹³⁸

A choice of law provision is unenforceable unless there is at least an appropriate relationship between the transaction and the designated state.¹³⁹ Merely choice the presence of a contractual provision that the law of a particular forum is to apply is not in itself a significant contact with that forum.¹⁴⁰ Without such a relationship, a choice of law provision may be determined to be a contrivance to avoid Texas usury laws.¹⁴¹

Neither the UCC nor Texas case law provide guidance as to what constitutes a "reasonable relation" or appropriate relation" between a transaction and a state. However, the assignee's state usually has no connection with the agreement at the time of formation; the agreement is often negotiated and executed elsewhere, and there is no connection with the assignee's state until after the assignment. It is likewise unlikely that the law of the assignee's state would be applied under the "most significant relationship" test which Texas courts use in determining whether or not to enforce a choice of law provision in a non-UCC transaction.¹⁴²

¹³⁸ Tex. Bus. & Com. Code §1.201(a).

¹³⁹ *Cook v. Frazier*, 765 S.W.2d 546, 549-51 (Tex. App. – Fort Worth 1989, no writ)(provision in contract for purchase by Texas residents of time share property located in Arkansas for application of Utah law unenforceable.

¹⁴⁰ *Cook*, 765 S.W.2d at 549.

¹⁴¹ *id.*

¹⁴² See *DeSantis v. Waackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1991).

Do Floating Clauses Fail for Lack of Notice?

Lack of foreseeability is likewise a problem with "floating" choice of law clauses in agreements which are assigned. The other party rarely knows who the agreement will be assigned to or where the assignee is located until after the assignment. This uncertainty is perpetuated when the assignment is not disclosed long after the assignment, such as with "private label" programs of certain leasing companies under which billing and other communications are conducted by the assignee under the name of the assignor.¹⁴³

The conspicuousness requirements under Section 35.53(b) apply to choice of law provisions as well as forum selection clauses.¹⁴⁴ These requirements apply to sales and leases of goods involving \$50,000.00 or less.¹⁴⁵

No reported Texas cases have considered the enforceability of a "floating" choice of law provision. A New York state trial court, however, found in *Sterling National Bank v. Kings Manor Estates, LLC* that such a clause in an equipment lease to be unenforceable.¹⁴⁶ The court found that "no rationale indicates that the law governing the original contracting parties and their transaction prior to the assignment could be changed retroactively."¹⁴⁷ The court noted that the UCC choice of law provision requires a reasonable relation between the designated state and the transaction, and that the assignee's state did not have any relationship to the original transaction.¹⁴⁸ Moreover, there was no "meeting of the minds" as to applicable law because the clause "embodies no election at all."¹⁴⁹

Contracting Through the Internet

Many businesses and consumers enter into contracts via the internet. The Uniform Electronic Transactions Act ("UETA") facilitates contracting electronically, and applies to sales of goods and equipment leases.¹⁵⁰ This act became effective in Texas

¹⁴³ *E.g. Copelco Capital, Inc. v. St. Marks Presbyterian Church*, No. 77633, 2001 WL 1066328 (Ohio App. 8th Dist., Feb. 1, 2001). In *St. Marks*, the actual name and identity of the assignee apparently was not revealed until it filed suit. *Id.* Some equipment leasing companies use "private label" programs due to perception that their lessees prefer to deal with one entity for both the provision and financing of the equipment. However, these practices may create fact issues as to what party is the lessor and preclude summary judgment, and may be a DTPA "laundry list" violation by creating confusion as to who the lessor is. Tex. Bus. & Com. Code §17.46(b)(2)(Vernon 200_).

¹⁴⁴ Tex. Bus. & Com. Code §35.53(a)(1), (b)(Vernon 2004); *see infra* n. _.

¹⁴⁵ Tex. Bus. & Com. Code §35.53(a)(1), (b)(Vernon 2004); *see infra* n. _.

¹⁴⁶ 9 Misc.3d 1118(A), 2005 WL 2464167*3 (N.Y.City Civ. Ct., 2005 N.Y. Slip Op. 51604(U)(Oct. 6, 2005).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *E.g.* USC §1701 et seq; Tex. Bus. & Com. Code §43.001 et seq (Vernon 200_); §43.001 43.002(b)(2)(Vernon 200_).

on January 1, 2002.¹⁵¹ Typically the terms and conditions are presented through a "click-through" agreement in which the customer is instructed to click on a button which states "I agree" or "I accept."

Contracts presented and entered into online often include forum selection, choice of law, and arbitration clauses. The District of Columbia Court of Appeals dismissed a class action case has been dismissed on the basis of a mandatory forum selection clause contained in a "click-through" agreement.¹⁵² The court discussed whether or not the plaintiff had notice of the clause, and found that the plaintiff did indeed have notice.¹⁵³

The notice issue which arises in "floating" forum selection and choice of law provisions may also exist with contractual provisions contained in "click-through" agreements. Courts have generally enforced such provisions when the terms are fairly presented and the customer affirmatively consents.¹⁵⁴

The Second Circuit refused to enforce an arbitration clause in a software license agreement "click-through" agreement because the customer was not provided with adequate notice of the terms and conditions.¹⁵⁵ The customer had to scroll down past the first screen in order to read the terms and conditions, but could download the subject software by clicking a button which appeared on the first screen which appeared before the terms and conditions.¹⁵⁶

Section 35.531(c) of the Texas Business and Commerce Code imposes a vague notice requirement for choice of law provisions in interstate Internet transactions.¹⁵⁷ This section applies to contracts "made solely over the Internet between a person located in Texas and a person located outside of [Texas] provides that who does not maintain an office or agent in [Texas] for doing business in [Texas]."¹⁵⁸ Section 35.531(c) simply provides that Texas law applies unless each party to the contract who is a Texas contract "is given notice that the law of the state in which another party to the contract is located applies to the contract ... agrees to the application of that state's law."¹⁵⁹ Section 35.3519e) provides that Section 35.53 (which imposes more specific conspicuousness requirements) and Section 1.105 (the former UCC choice of law provision, which is now Section 1.301) do not apply to Internet contracts within the scope of Section 35.351.¹⁶⁰

¹⁵¹ Donald M. Crawford and Stephen L. Tupper, *Making Electronic Signa Stick - Creating Electronic Contracts in the Electronic Age*, Michigan Bar J., March 2003.

¹⁵² *Forest v. Verizon Communications, Inc.*, Case No. 01-CV-1101 (D.C.Cir. 2002).

¹⁵³ *Id.*

¹⁵⁴ See e.g. *Caspi v. Microsoft Network, LLC*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Pollstar v. Gigmania Ltd.*, No. CIV-F-00-5671 RECMS, 2000 WL 33266437 (E.D. Cal. 2000).

¹⁵⁵ *Specht v. Netscape Communications Corp.*, Docket No. 01-7860(l)(2nd Cir. 2002).

¹⁵⁶ *Id.*

¹⁵⁷ Tex. Bus. & Com. Code §35.531(c)(Vernon 2004).

¹⁵⁸ Tex. Bus. & Com. Code §35.531(b)(Vernon 2004).

¹⁵⁹ Tex. Bus. & Com. Code §35.531(c)(1), (2)(Vernon 2004).

¹⁶⁰ Tex. Bus. & Com. Code §35.531(e)(Vernon 2004).

Section 35.351 does not suggest how notice of a choice of law provision is to be given. Perhaps the best way to provide notice is for the interactive website to have a specific click-through next to or beneath the provision. A "floating" forum selection provision may be held to be insufficient to provide notice that the law of another state is to apply.

Possible Solutions

Litigation in the Assignor's Forum

The *CMS Partners* decision instructs that the floating forum selection is a problem only when there is an assignment and a party attempts to invoke that clause.¹⁶¹ When there is no assignment, the original party (which could made an assignment) may litigate and compel litigation in the forum in which it is located, so long as the documentation indicates the location of that party. Further, it appears that even when there is an assignment, the assignee could enforce a "floating" forum selection clause so has to have litigation take place in the original "non-floating" forum, provided that the clause either complies with or is not within the scope of the conspicuous requirements of Section 35.53.

Documentation

The best means of accomplishing the goal of having litigation occur in the assignee's home state is by simply placing listing the preferred forum in the agreement or related documentation. Some equipment leasing companies, for example, have already been providing their lease documentation to their vendors and assignors in electronic form and having the vendors and assignors complete variables such as the identity of the lessee and payment information. Often the assignee actually reviews credit information and decides if it will take the assignment at the inception of the agreement itself. The forum selection and choice of law provisions could be modified electronically at that time. Alternatively, an addendum executed at the same time of the agreement itself could specify the chosen forum. Such action would not be properly accomplished when the identity of the prospective assignee is truly unknown at the time the agreement is entered into.

Parties presenting transactions through "click-through" agreements can more readily provide adequate notice. The customer should be presented with buttons to either accept or reject the terms of the agreement. Ideally, a separate button can be inserted adjacent to forum selection, choice of law and other important provisions, so that agreement to each provision must be indicated before accessing the button for entering into and agreeing to the transaction in its entirety. There should be notice that the customer is entering into a binding agreement. The notice problems with "floating" forum selection and choice of law provisions, of course, will remain.

¹⁶¹ *CMS Partners*, 101 S.W.3d at 735.

Special Appearance

A party which does not wish to litigate on the merits in Texas may still assert general principles of personal jurisdiction. A non-Texas resident which takes assignments of transactions with Texas residents but is generally not an original party to those transactions may be able to defeat personal jurisdiction. In *Old Kent Leasing Services Corporation v. McEwen*,¹⁶² a Michigan entity which took an assignment of an equipment lease with a Texas resident prevailed in a petition for mandamus on the denial of its special appearance.

In *Old Kent*, a lessee sued the assignee of an equipment lease along with the original lessor and the supplier of the leased equipment.¹⁶³ As specifically stated in the lease, the equipment was supplied by the third party supplier, and the lessor's role was confined to purchasing the equipment from the supplier.¹⁶⁴ No provision of the lease required anything to be provided by the lessor in Texas.¹⁶⁵ The supplier of the equipment was not a party to and did not execute the lease,¹⁶⁶ and that the supplier's obligation to provide services was independent of the lessee's duty to purchase and finance the equipment.

The court of appeals reversed the denial of the assignee's special appearance, noting that "[w]hile there is some connection between the forum and the business transaction at issue . . . , that link is insufficient to subject Old Kent to the jurisdiction of Texas courts."¹⁶⁷ The court pointed to the lack of connection directly between the supplier and the assignee.¹⁶⁸ The lessee was not permitted to use its own contacts or the contacts of the original lessee and the supplier of the equipment with Texas as a basis for the exercise of personal jurisdiction over the nonresident assignee.¹⁶⁹

Old Kent has not been revisited. It is not nearly as likely that an assignee which itself also originates multiple transactions in Texas and, in the case of "finance leases", purchases equipment from suppliers located in Texas could prevail upon a special appearance, as these activities may subject it to personal jurisdiction under the concept of general jurisdiction.

Litigation in the Adverse Party's Forum

It is also axiomatic that the assignee could simply litigate in the forum in which the other party is located. Texas law on many subjects – such as deceptive trade practices and usury – is now far less favorable to consumers. For over the last ten years Texas courts have been enforcing contractual provisions to negate both

¹⁶² 38 3d 220 (Tex. App. – Houston [14th Dist.] 2001, no pet.).

¹⁶³ *Id.* at 225.

¹⁶⁴ *Old Kent*, 38 S.W.3d at 228-29.

¹⁶⁵ *Old Kent*, 38 S.W.3d at 228.

¹⁶⁶ *Old Kent*, 38 S.W.3d at 230.

¹⁶⁷ *Old Kent*, 38 S.W.3d at 230.

¹⁶⁸ *Old Kent*, 38 S.W.3d at 231.

¹⁶⁹ *Id.*

substantive and procedural remedies.¹⁷⁰ Appellate and trial courts in many areas in Texas – particularly Dallas – Fort Worth and Houston – are routinely enforcing contractual provisions, by summary judgment and otherwise. Statutory amendments and case law have considerably lessened the effect of Texas usury and deceptive trade practices laws.¹⁷¹ Certainly there should be less fear by nonresident businesses of Texas courts.

Conclusion

"Floating" forum selection clauses are, thus far, not enforceable in Texas in cases commenced in Texas because they do not provide fair notice at the time of the agreement of where litigation is to take place. Proper forum selection clauses afford certainty as to where litigation is to occur, whereas "floating" clauses enhance uncertainty by purporting to change the forum any time the subject agreement is assigned. Further, with sales and leases of goods for less than \$50,000.00, these clauses are subject to the conspicuousness requirements under Section 35.53(b) of the Texas Business and Commerce Code, as are "floating" choice of law provisions.

Prospective assignors and assignees should discard any reliance upon "floating" forum selection and choice of law provisions, and should instead use proper clauses. Texas courts are enforcing proper forum selection clauses. Parties who continue to use defective "floating" forum selection clauses are squandering an opportunity to avert litigation on the merits in Texas through properly drafted forum selection clauses. Similarly, use of unenforceable choice of law provisions squanders an opportunity to defuse adverse litigation through favorable laws of another state.

Enforcement of the "floating choice of law provision in the Rental Agreement so as to allow the state whose law was to apply to change would be unreasonable due to lack of notice of which state's law would apply. Further, as with forum selection clauses, the purpose of contractual choice of law provisions is to provide certainty as to what law will apply. Enforcement of the "floating" choice of law provision in the Rental Agreement would lead to the absurd result of mandating uncertainty through application of the law of a different state each time there is an assignment.

¹⁷⁰ *AIU*, 148 S.W.3d at 112 (forum selection clause); *In re Prudential Ins.*, 148 S.W.3d 124, 135 (Tex. 1994)(jury waiver clause); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992)(arbitration clause); *In re Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600, 611-12 (Tex. App. – Houston [14th Dist.] 2003, orig. proceeding [mandamus denied])(jury waiver clause).

¹⁷¹ Texas usury penalties are now limited to usurious interest actually collected or, when twice the applicable rate is charged, the principal amount on which interest was charged and received. Tex. Fin. Code §§305.002(a), 305.004(a), (Vernon 200_). Further, a creditor which charges or receives interest in excess of the contract rate but less than the maximum applicable rate is not liable for usury. Tex. Fin. Code §305.001(Vernon 200_). Previously, merely contracting for or charging usurious interest could bring liability. ___. Further, charging more than twice the applicable rate had resulted in forfeiture of the entire principal balance. ___. Gross disparity between consideration paid and value received was eliminated as part of the DTPA unconscionability definition in 1995. "As is" provisions are effective not only against breach of warranty claims but also against fraud, negligent misrepresentation and DTPA claims. *Prudential Ins. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 160-61 (Tex. 1995).

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