IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, MUNICIPAL DIVISION

IFC Credit Corporation
Assignee of NorVergence, Inc.

Plaintiff,

v.

Terry Streng, individually and
d/b/a/ Mountain Insurance Agency

Defendant.

NO. 04-M3-002657

MEMORANDUM OPINION AND ORDER

This cause coming before the Court upon Defendants Terry Streng individually and d/b/a/ Mountain Insurance Agency's Motion to Dismiss based upon their objections to jurisdiction over the person pursuant to 735 ILCS 5/2-301, the court having reviewed the pleadings and documents on file as well as the affidavits submitted by the parties and the evidence adduced at the hearing and having heard the oral arguments of counsel FINDS:

I. BACKGROUND

Plaintiff IFC Credit Corporation {hereinafter "Plaintiff" or "IFC"}, an Illinois corporation with its principal place of business in Morton Grove, Illinois, is a financing company which acquires equipment leases by assignment from third parties. From at least 2002 until shortly before its bankruptcy filing in July, 2004, Plaintiff's alleged assignor, NorVergence, Inc. {hereinafter "NorVergence"}, a nonparty to this action, was a New Jersey corporation with its principal place of business in Newark, New Jersey. NorVergence was in the business of renting/leasing telecommunications equipment and reselling telecommunications services purchased from common carriers to small businesses. Defendant Mountain Insurance Agency {hereinafter "Mountain Insurance"} is a Pennsylvania business located in Somerset, Pennsylvania. Defendant Streng, owner of Mountain Insurance, is a Pennsylvania resident.

On February 9, 2004, Defendant Streng signed an equipment rental agreement {"Equipment Rental Agreement No. 22056701"} on behalf of "Terry Streng individual DBA Mountain Insurance Company." The agreement provided for the rental of one (1) "Matrix 2003" from NorVergence for a term of sixty months at $245.76 per month (plus applicable taxes). [1]

On March 5, 2004, Terry Streng executed a "Delivery and Acceptance Certificate" {hereinafter "D&A certificate"} evidencing that the "Matrix 2003" box had been delivered to and accepted by him. The D&A certificate included language that the equipment "conforms with our requirements" and that Defendants' first payment under the lease would be due in 60 days, and "shall continue thereafter for the full length of the stated initial term of the {lease}."

On that same date, Edward Lucas, signed the Equipment Rental Agreement on behalf of NorVergence, Inc. ("Rentor: NorVergence, Inc. By: Edward Lucas, V.P. accepted on behalf of Rentor on: March 5th, 2004").

The Equipment Rental Agreement allowed an assignment of the agreement. The applicable provision provides in relevant part: "Assignment: We may assign or transfer all or any part of this Rental and/or the Equipment without notifying you. The new owner will have the same rights that we have, but not our obligations. You agree that you will not assert against the new owner any claims, defenses or set-offs that you may have against us."

Significantly on October 10, 2003, four months prior to Defendant Streng's execution of the Equipment Rental Agreement, Plaintiff IFC entered into a master program agreement {hereinafter "Master Program Agreement" or "MPA"} with NorVergence wherein NorVergence agreed that it would assign to IFC NorVergence's rights, title and interest in certain rental agreements to be executed in the future, subject to IFC's approval of the individual rental agreements.

---

[1] The United States District Court of New Jersey in Federal Trade Commission v. NorVergence, Inc., CIV 04-5415 (DRD) (June 25, 2005) (J. Debevoise) in its judgment relative to the underlying transactions between NorVergence and small businesses determined that the Matrix boxes were "standard routers or firewalls that cost between $200 and $1,550. The total cost to the customer was $7,000 to $340,000, with an average cost of $29,291. The price of the rental agreement had nothing to do with the cost of the Matrix, which itself was an incidental part of the promised services. The rental agreements on their face, however, purported to cover only the Matrix box." (Finding 8) The federal district court found: "{t}he telecommunications services NorVergence promised to consumers have not been provided at least since August, 2004, and, in some cases, have never been provided." (Finding 9)

The MPA states in pertinent portion: "2. ASSIGNMENT OF RENTAL AGREEMENTS: Upon IFC's approval of a Rental Agreement, NorVergence hereby assigns to IFC all its rights, title and interest in and to the Rental Agreement and Equipment including all monies due and to become due under the Rental Agreement, but none of its obligations under the Renal Agreement ("Assigned Rental Agreement")." (MPA @ pg. 1) The assignment of rental agreements provision further states: "NorVergence hereby grants power of attorney to IFC and appoints IFC as NorVergence's agent to execute the Rental Agreement Assignment on behalf of NorVergence as to any Assigned Rental Agreement." (MPA @ pg. 2)

Prior to accepting assignment of the Agreement, IFC contacted Terry Streng's representative, who confirmed verbally to IFC that it had in fact received delivery of the Equipment. (Plaintiff's complaint paragraph 9) Plaintiff further states: "{b}ased upon Terry Streng's representation during that telephone conversation, IFC accepted assignment of the Agreement, and paid NorVergence the purchase price of the Agreement." (Plaintiff's complaint paragraph 10).

Although NorVergence purportedly assigned Equipment Rental Agreement No. 22056701 to IFC, no rental assignment agreement between NorVergence and IFC evidencing such an assignment is attached to Plaintiff's complaint in this cause.

On a date not identified in any pleading or document on file before this court, Defendants received an undated "Notice of Assignment" from NorVergence informing them that "Agreement No. 22056701 dated February 9, 2004" had been "transferred" to Plaintiff, IFC Credit Corporation.

The Notice of Assignment states in relevant portion:

"We appreciate serving you as a valued NorVergence customer and would like to advise you that the above referenced agreement has been transferred to IFC Credit Corporation ("IFC"). All the terms and conditions remain unchanged with the exception that beginning with your first rental payment due you are to make your contract payments to IFC. . ."

The "Notice of Assignment" failed to disclose the date of the purported assignment from NorVergence to IFC.

On June 30, 2004 certain of NorVergence's creditors, including telecommunications service providers, filed an involuntary Chapter 11 bankruptcy petition against it in the United States Bankruptcy Court for the District of New Jersey (Newark), Case No. 04-32079-RG. NorVergence

ceased to provide telecommunications services thereafter. On July 14, 2004, the bankruptcy court entered an order for relief and converted the bankruptcy from a Chapter 11 restructuring to a Chapter 7 liquidation. A trustee was appointed.

On August 24, 2004 Plaintiff filed this breach of contract action against Defendants asserting that they defaulted on the monthly payment obligations under the terms of the Equipment Rental Agreement. Plaintiff seeks to recover the total sum of $14,514 for rental payments due under the lease together with interest at the highest rate permitted by law from the date of default until such sum is paid in full, as well as attorneys fees, collection costs and court costs (Count I). The count for detinue seeks immediate possession of the leased equipment, i.e. the Matrix box. (Count III). (Plaintiff's complaint lacks a second count or a count based upon the personal guaranty.)

Plaintiff asserts jurisdiction in Illinois pursuant to the forum selection clause in the Equipment Rental Agreement which states in relevant part:

"APPLICABLE LAW: This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which the 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 states choice of law considerations and all legal actions relating to this lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at the Rentor or Rentor's assignee's sole option."

The Equipment Rental Agreement also contained a guaranty on the bottom of the first page which states in relevant part in capital letters: "The same state law as the rental will govern this guaranty. You agree to jurisdiction and venue as stated in the paragraph titled applicable law of the rental."

Defendants seek dismissal of Plaintiff's complaint for lack of personal jurisdiction. They contend that the forum selection clause is unenforceable because it fails to specify a specific forum. Plaintiff responds that the forum selection clause in the Equipment Rental Agreement is valid and enforceable.

II. ANALYSIS

A. Enforceability of the Forum Selection Clause

1. Standard of Law

Generally, if a non-resident defendant challenges personal jurisdiction, the plaintiff has the burden of demonstrating that the defendant has the requisite minimum contacts with the forum state. However, a "variety of legal arrangements" exist wherein a party may give "express or implied consent to the personal jurisdiction of the court." Insurance Corp. of Ireland Limited v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982). For example, parties may contractually agree in advance by way of a forum selection clause to submit to jurisdiction in a given forum. "Especially in the commercial context, a party can contractually agree to resolution of a dispute in a particular forum thereby waiving its right to assert a defense of lack of personal jurisdiction." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n. 14. (1985). Courts generally find that forum selection clauses satisfy due process requirements. Burger King at 472. The court must evaluate the validity and enforceability of the forum selection clause in order to determine if there has been consent to jurisdiction.

Where such forum selection clauses have been obtained "through freely negotiated" agreements, they are prima facie valid and should be enforced unless the opposing party can "clearly show that enforcement would be unreasonable and unjust or that the clause was invalid for reasons as fraud or overreaching." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9, 15 (1972). Any party challenging such clause bears a "heavy burden to show that it should be set aside." Bremen at 15. Thus, the threshold question is whether the forum selection clause in the instant case is enforceable or whether enforcement is inappropriate because the clause is unreasonable, unjust or invalid.

Enforceability of a forum selection clause is affected by three touchstones of analysis: (1) contract formation-whether the inclusion and incorporation of the clause into the agreement was the result of fraud, overreaching, or unequal bargaining power and whether the choice of forum agreement is one of adhesion; (2) convenience of the chosen forum-whether it is so gravely inconvenient as to deny a party his day in court and (3) public policy concerns of the forum in which the suit is brought-whether enforcement of the clause would contravene a strong public policy of the forum state. Bremen at 12-13, 15, 18.

Following the general rule set forth in Bremen, Illinois courts regard forum selection clauses as prima facie valid and enforceable. Rubino v. Circuit City Stores, Inc., 324 Ill. App. 3d 931, 944 (1st Dist. 2001); Calanca v. D&S Manufacturing Company, 157 Ill. App. 3d 85, 88 (1st Dist. 1987); Yamada Corporation v. Yasuda Fire & Marine Insurance, 305 Ill. App. 3d 362, 367 (2nd Dist. 1999); English Company v. Northwest Envirocon, Inc., 278 Ill. App. 3d 406, 410 (2nd Dist. 1996). A party opposing a forum selection clause in an Illinois court must establish that litigation would be so burdensome and seriously inconvenient that proceeding on the issues would be unfair and enforcement would be a deprivation of access to the courts. Whirlpool Corporation v. Certain Underwriters at Lloyd's London, 278 Ill. App. 3d 175, 179 (1st Dist. 1996) (Whirlpool I), appeal denied 167 Ill. 2d 571, appeal after remand 295 Ill. App. 3d 828 (1st Dist. 1998); Calanca at 87-88; Yamada at 367; or enforcement would contravene a strong public policy of the State in which the case is brought. Calanca at 88; Maher and Associates, Inc. v. Quality Cabinets, 267 Ill. App. 3d 69, 74 (2nd Dist. 1994).

2. Contract Formation

a. Fraud

The inquiry on this issue is whether the forum selection clause itself is the product of fraud in the inducement during negotiations or whether its inclusion in the contract was fraudulent.

Courts have refused to invalidate forum selection clauses unless the "inclusion of that clause in the contract was the product of fraud or coercion." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n. 14 (1974). "The movant must show not merely a fraudulent transaction but fraud which goes to the selection of the venue." Rouse Woodstock, Inc. v. Surety Federal Savings & Loan Association, 630 F. Supp. 1004, 1009 (N.D. Ill. 1986). It is insufficient to allege that one was induced generally to enter into the contract itself as a result of fraud.

The defendants in Lyon Financial Services, Inc. v. Will H. Hall & Sons Builders, Inc., 2005 U.S Dist. LEXIS 3379, (U.S. Dist. D. Minn. March 4, 2005), failed to convince the federal district court of the same position in another NorVergence equipment lease assignment case. The court commented:

> "Defendants contend that NorVergence fraudulently induced Defendants into signing the contract on the substantive portions of the agreement. Because the allegations do not address the forum selection clause and no authority or facts have

been proffered to suggest the clause is unreasonable, Defendants' argument fails." Lyon.

"Defendants do not specifically allege the forum selection clause was obtained through fraud; rather, Defendants rely on their allegation that the entire lease was obtained by fraud." Lyon.

However, what appears to this Court to be a common thread pervading the NorVergence related cases is that NorVergence and possibly its purported assignees appear to have harbored knowledge as to which state would be designated as the particular forum for future litigation; while it equally appears to this Court that such information may have been "shielded" from the lessees by NorVergence and the alleged assignees. Thus, the situs of any future suit, if known at the time of the execution of the equipment rental agreements and purported assignments, would raise a crucial and determinative question as to any material misrepresentation which ultimately impacted upon Defendants' ability to agree to the language of the forum selection clause.

The federal district court in Ohio raised a similar inquiry in Preferred Capital, Inc. v. Sarasota Kennel Club, 2005 U.S. Dist. LEXIS 15238 (N.D. Ohio July 27, 2005), wherein the court held an identical forum selection clause as in the instant action invalid based upon fraud and overreaching. The court found that NorVergence knew by virtue of a master program agreement with the plaintiff assignee that the forum would be Ohio courts; however, it failed to disclose this "critical fact" to the defendants until after the execution of the rental agreement. The federal court opined: "{t}he Defendants were deprived of any opportunity to object to Ohio jurisdiction despite NorVergence's and the Plaintiff's prior knowledge of the assignment, thereby giving the Plaintiff's non-negotiated advantage in any subsequent suit. At the very least, these circumstances constitute overreaching, even if not outright fraud, sufficient to invalidate the forum selection clause."

This Court finds persuasive the conclusion reached by the Sarasota Kennel court in rejecting the position urged by the plaintiff assignee: "{t}the Plaintiff attempts to distance itself from NorVergence's conduct. The Plaintiff argues that it had no involvement in the negotiations between NorVergence and its lessees, and therefore should not be held accountable for any alleged fraud by NorVergence. However, when analyzing the validity of a forum selection clause, the focus is on how the clause was procured. Here, the Plaintiff seeks the benefit of NorVergence's overreaching, even assuming the Plaintiff was not directly involved. That is sufficient to invalidate the provision."

b. Adhesion Contracts

A forum-selection clause may be held unenforceable because of its inclusion in an adhesion contract. A contract of adhesion is drafted unilaterally by a business and forced upon an unwilling and unknowing public for services that cannot readily be obtained elsewhere. It is a contract generally not bargained for. Instead it is imposed on a "take it or leave it" basis and is the product of the parties' unequal bargaining power. See generally, 3 Arthur Corbin, Corbin on Contracts at 559C, at 335 (Supp. 1991).

Illinois courts have described a contract of adhesion as "'a standardized contract prepared entirely by one party, and which due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a take it or leave it basis without opportunity for bargaining and under such conditions, that the second party or adherer cannot obtain the desired agreement.'" Abbott v. Amoco Oil Company, 249 Ill. App. 3d 774 (2nd Dist. 1993); Boatmen's National Bank of Belleville v. Ivadell Benton, 219 Ill. App. 3d 117 (5th Dist. 1991) citing Star Finance Corp. v. McGee, 27 Ill. App. 3d 421, 426 (1975) quoting Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co., 228 Cal. App. 2d 820 (1964).

The record in the instant case lacks sufficient evidence that the equipment rental agreement at issue is an adhesion contract. Although finding that the terms of the identical lease agreement at issue here were "dictated solely by NorVergence," the court in IFC Credit Corporation v. Warner Robbins Supply Company, Inc., No. 04 C 6093 at 3 (N.D. Ill. Feb. 3, 2005) (J. Manning) noted that the defendant "always had the option to reject NorVergence's contract." Warner Robbins at 4; See also Heller Financial, Inc. v. Midwhey Powder Company, Inc., 883 F. 2d 1289 (7th Cir. 1989) (finding nothing in the record to show the lease agreement "deal" was presented as a take it or leave it proposition). Here, Defendant Streng has not attested in his affidavits that Defendants lacked the ability or were somehow prevented from selecting another telecommunications equipment leasing company.

The inclusion of boilerplate language is only one factor tending to indicate an adhesion contract. Even though a contract is on a printed form with boilerplate language and offered on a "take it or leave it" basis does not, without more, cause it to be an adhesion contract.

More specifically, "boilerplate" clauses in standard form contracts necessitate that the court meticulously scrutinizes the equities with regard to "contracting" and "enforcement." Rouse

Woodstock. Thus, other factors that courts consider in determining whether such clauses are agreements of adhesion are whether an opportunity for negotiation existed and if so, whether the contract was the result of an arm's length negotiation, whether the parties were experienced or sophisticated businessmen, whether there existed unequal disparity in the bargaining power between the parties and whether the services could not be obtained elsewhere.

The federal district court in IFC v. Kay Automotive Distributors, Inc., No. 04 C 5907 (N.D. Ill. Dec.13, 2004) (J. Kennelly), denied the defendant's motion to dismiss for lack of personal jurisdiction, opining that notwithstanding the defendant's lack of sophistication relative to telephone equipment, "it is a commercial business, not an unsophisticated individual, and it surely has some background in making contracts."

The court in Kay found "no indication of 'unequal bargaining power'" between the plaintiff IFC Credit and the defendant distributor of automotive parts under the same or similar equipment rental agreement with the identical forum selection clause.

Likewise, in Lyon Financial Services, Inc. v. Will H. Hall & Son Builders, Inc., 2005 U.S. Dist. LEXIS 3379, No. Cir. 04-4383 ADM/AJB (D. Minn. March 4, 2005), another case involving an assigned NorVergence telecommunications rental agreement with a small business, the federal district court found no showing of a great disparity in bargaining power between the parties. The court noted that the defendants were a "small but sophisticated company" that was "ably represented."

Interestingly, in Heller Financial, Inc. v. Midwhey Power Co., Inc., 883 F.2d 1286 (7th Cir. 1989), the defendants maintained that they were mere "dairy farmers, not sophisticated businessmen; thus they should not be held to the standards announced in Burger King and The Bremen regarding the enforceability of forum selection clauses." The Seventh Circuit commented:

> "{e}ven if we were to make an exception as to big versus little, or acumen versus naiveté in such circumstances we would need a great deal more than the bare assertion Midwhey makes. Beyond that, we note that two of the defendant 'dairy farmers' are incorporated in the State of Wisconsin, thus indicating they are a little more worldly than Midwhey's brief implies." Midwhey Power at 1291.

Even a small company with only twenty employees, notwithstanding its size, has been found to be a "fairly sophisticated business with experience in negotiating complex government and private contracts." International Software Systems, Inc. v. Amplicon, Inc., 77 F.3d 112 (5th Cir. 1996). The

choice of forum made in an arm's length negotiations by experienced and sophisticated businessmen, absent some compelling and countervailing reason, should be enforced. Calanca v. D&S Manufacturing Co., 157 Ill. App. 3d 85, 88 (1987); Maher and Associates v. Quality Cabinets, 267 Ill. App. 3d 69, 75 (2nd Dist. 1994); Yamada at 367.

As a matter of law, a signatory to a contract is presumed to have read, understood and agreed to be bound by all terms, which would include the forum selection clause in the agreements signed. See Insurance Corp. of Ireland v. Campagnie Des Bauxites De Guinee, 456 U.S. 694, 704 (1982). "If they make a practice of signing contracts without reading them, they must bear the consequences." Northwestern National Insurance Company v. Donovan, 916 F.2d 373, 378 (7th Cir. 1990). Notwithstanding the aforementioned principles, form contracts have been distinguished from freely negotiated contracts particularly drafted by the parties to focus upon their concerns. Karlberg European Tanspa, Inc. v. JK Josef Kratz Vertriebscresellschaf t MBH, 618 F. Supp. 344 (N.D. Ill. 1985); See also Calamari & Perillo, Law of Contracts, sec. 9-44 (1977). ("There has been a tendency . . . to treat contracts of adhesion or standard form contracts differently from other contracts. This is particularly true with respect to the duty to read.") (The "duty to read" may not be enforced where it would be "unfair under the circumstances" or would cause "great hardship".) The fact that a party felt hurried into signing an agreement is of no significance. Midwhey Power at 1292. (where a complaining party fails to request additional time to review a lease and nothing indicates that the lease had to be signed on a particular day. Id.)

However, the Seventh Circuit in Midwhey Power refused to apply this distinction to the facts before it. The court noted there was nothing in the record indicating (1) that the plaintiff had requested the defendant not to read the lease or prevented him from doing so; (2) that the lease-agreement deal was presented on a take it or leave it basis; and (3) that the defendant ever consulted with an attorney. Midwhey Power at 1292.

As Justice Posner commented in Northwestern National Insurance Company v. Donovan, 916 F.2d 372 (7th Cir, 1990), which involved a forum selection clause in a contract between individual investors and an insurance company,

> "standard clauses are commonly incorporated in the final contract, without separate negotiation of each of them. Form contracts, and standard clauses in individually negotiated contracts, enable enormous savings in transaction costs, and the abuses to which they occasionally give rise can be controlled without altering traditional

doctrines, provided those doctrines are interpreted flexibly, realistically. If a clause really is buried in illegible 'fine print' or if . . . it plainly is neither intended nor likely to be read by the other party -this circumstance may support an inference of fraud, and fraud is a defense to a contract. " Donovan at 377.

Justice Posner found in Donovan that while the print in a contract containing a forum selection clause was small; it was not fine-it was large enough. He suggested that while the clause could be made more conspicuous; if highlighted it would send the other contract clauses into "shadow" and their validity would then be called into question. Donovan at 378.

The clause at issue here is one of twenty-one paragraphs and is located on the reverse side of the equipment rental agreement. See IFC Credit Corporation v. Century Realty Funds, Inc., No. 04C5908 at 3 (N.D.Ill. March 4, 2005) (J. Hart). The clause is in small print and is the same size as the other paragraphs on the back of the agreement. However, it is in slightly bolder print. Century Realty Funds at 3.

The final factor showing a contract is one of adhesion is that the services could not be obtained elsewhere. Lyon Financial. In Lyon, the defendants asserted that the telephone and internet services offered by NorVergence at a 25 percent savings were unavailable elsewhere. The court was unpersuaded by this argument: "{w}hile Defendants may not have been able to acquire the services NorVergence offered for the same price, no allegation is made that the telephone and internet services were not available."

In Mellon First United Leasing v. Hansen, 301 Ill. App 3d 1041 (2nd Dist. 1998) the court refused to exercise jurisdiction over an out of state defendant based on a forum selection clause. Mellon involved an equipment lease (for a postage meter machine) with a forum selection clause on the back page of a preprinted form in small typeface. The defendant, a California resident and CPA in a newly formed business, argued that the subject clause did not supply the requisite contacts with Illinois to establish jurisdiction in this forum. The defendant's affidavit in Mellon stated that she did not read or was not made aware of the forum selection clause which provided that litigation should occur in Lake County, Illinois. She was not provided a copy of the lease agreement until 2 1/2 years later.

Based upon the facts in the limited record before it and acknowledging the lack of any affidavit or contradictory evidence by the plaintiff, the Second District found that the agreement was more akin to an-adhesion contract. The court noted that the forum selection clause was not reached

through arm's length negotiation between experienced businesspersons on the same parity, but was instead part of boilerplate language in small print on the back of a preprinted form the plaintiff used in its lease agreements. The court explained: "it appears that defendant is more akin to an ordinary consumer involved in a small transaction than a sophisticated businessperson of stature equal to the leasing company. Defendant apparently had a newly organized proprietary business where she functioned as a certified public accountant. She is not in the office equipment business, and there is no indication that we would have particular expertise or equivalent bargaining power with respect to this type of office equipment business." Mellon at 1046.

Notwithstanding the defendant's certified accounting background, the Mellon court did not characterize her as a sophisticated businessperson; instead the court viewed her more like a consumer lacking parity of bargaining power.

Mellon sets forth additional factors that courts have considered in determining whether a forum selection clause is unreasonable: (1) which law governs the formation and construction of the contract; (2) the residency of the parties; (3) the place of execution and/or performance of the contract; (4) the location of the parties and witnesses participating in the litigation; (5) the inconvenience to the parties of any particular location Mellon at 1046 and (6) whether the clause was equally bargained for. Another factor the Mellon court suggested may be considered is "whether the contract involves an unsophisticated consumer in a small transaction in the marketplace." Mellon at 1046. See also Yamada at 368. Those factors were first employed by the First District in Calanca v. D&S Manufacturing Co., 157 Ill. App. 3d 85, 88 (1st Dist. 1987). However the Calanca court ultimately followed the standard enunciated in Bremen: "when parties sign a contract which selects a mandatory forum for litigation, and no unequal bargaining power exists at the signing of the contract, then the parties must carry out their bargain as long as the inconvenience to one party is not so great as to deprive him of his day in court." Calanca at 90.

Employing the Mellon factors to the facts set forth in Defendant Streng's motion and affidavit, this Court finds that Defendant Mountain Insurance's principal place of business is located in a jurisdiction other than Illinois. It is not registered to do business in Illinois. It is not doing or transacting business in Illinois. Defendant has no agents for service of process in Illinois. Defendant Streng resides in a state other than Illinois. NorVergence was a New Jersey corporation with its principal place of business located in Newark, New Jersey. The equipment rental agreement was

executed in a state other than Illinois. The subject agreement was to be performed where the telecommunications equipment was located at Defendant business in a State other than Illinois.

3. Seriously Inconvenient Forum

The next inquiry in a challenge to the forum selection clause is whether enforcement of the clause would be unreasonable on the basis that the forum would be seriously inconvenient for the trial of an action. "Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties . . . contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable." Bremen at 16. See also Maher at 74-75 ("If both parties freely enter into an agreement contemplating such inconvenience should there be a dispute, one party cannot successfully argue inconvenience as the reason for voiding the forum clause.").

"Where there is a valid forum selection clause, the movant has a 'heavy burden of proof' with respect to the question of inconvenience of the forum'" Linc Scientific Leasing v. Garwyn Radiology Associates Limited Partnership, 1996 U.S. Dist. Lexis 19496 (N.D. Ill. 1996) citing Bremen at 17. The Bremen court instructed that the party arguing serious inconvenience must demonstrate "that trial in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." Bremen at 18-19.

Location and convenience of witnesses are not generally considered a serious inconvenience. In IFC Credit Corporation v. Kay Automotive Distributors, Inc., 04 C 5907 (N.D. Ill. December 13, 2004) (J. Kennelly), the federal district court denied the defendant's motion to dismiss finding that a California defendant failed to establish that it would be inconvenient to travel to Illinois to defend an identical breach of contract action as in the instant case. The court noted that the defendant identified only "the obvious (the distance)" between California and Illinois but did not identify any key witnesses that would not appear if the case was litigated in Illinois. The court concluded: "Kay has provided nothing to indicate that it will be 'effectively deprive{d} .. of {its} day in court if it has to litigate here."

The Kay Distributors court commented: "{w}hen it signed the contract, Kay was on notice that it would have to litigate somewhere other than California; indeed, absent the assignment, Kay would have to face suit in New Jersey." Similarly, in the case at bar, Defendants must have known that at the very least they would face litigation in New Jersey.

Moreover, travel expenses, trial time and financial difficulties parties might have in the selected forum are not adequate basis for refusal to enforce a valid forum selection clause. See Bonny v. Society of Lloyd's, 3 F.3d 156, 160 n. 11 (7th Cir. 1993); See also LFC Lessors v. Pearson, 585 F. Supp. 1362, 1365 (N.D. Ill. 1984). Courts have noted that deposition testimony can be taken without disadvantaging or significantly burdening the parties. "The mere loss of live testimony by non-party witnesses ordinarily does not constitute such serious inconvenience so as to warrant setting aside a freely negotiated forum selection clause. Linc Scientific.

Notably, in two NorVergence equipment lease assignment cases, federal courts refused to rule that the defendants would be deprived of a meaningful day in court. Most recently, in Lyon Financial, the court commented:

> "Defendants aver that, in comparison to Plaintiff, they are a very small company likely to incur significant costs from travel and business disruptions if the case remains in Minnesota. However, no allegation is made that, should venue remain in Minnesota, Defendants will be unable to adequately defend their rights, much less be deprived of their day in court."

In another NorVergence case, the federal district court in Pennsylvania, determined it had personal jurisdiction over the defendant based on the enforceability of the same forum selection clause. In citing Bremen, the court reasoned that the defendant failed to make a strong showing that enforcement of the forum selection clause would be "'so gravely difficult and inconvenient'" as to deprive the defendant of its day in court. Commerce Commercial Leasing, LLC v. Jay's Fabric Center, 2004 U.S. Dist. LEXIS 22262 (November 2, 2004).

A party will be deprived of a meaningful day in court when no real opportunity exists to litigate the issues in a fair manner. Dace International, Inc. v. Apple Computer, Inc., 275 Ill. App. 3d 234 (1st Dist. 1995). "The court should only ensure that the opposing party will be treated fairly and have an adequate chance of presenting his case." Karlsberg European Tanspa, Inc. v. JK-Joseph Kratz Vertriebsgesellschaft MBH, 618 F. Supp. 344, 348 (N.D. Ill. 1985).

Applying the above principles to the instant case, Defendants have not shown how enforcement of the forum selection clause will deprive them of a meaningful day in court. Even assuming Defendants here had submitted evidence of the nature and extent of the inconvenience and/or expense they would suffer, the Bremen standard of deprivation of a meaningful day in court still would not have been met.

Consequently, having failed to establish that an Illinois forum would treat them unfairly or deny them an opportunity to defend the action against them because Illinois is Plaintiff's state of incorporation and the location of Plaintiff's principal place of business, Defendants have failed to establish how the Circuit Court of Cook County, Third Municipal District is a seriously inconvenient venue for trial.

3. Policy Considerations

Defendants correctly assert that the forum selection clause at issue is unenforceable because it is premised upon a failure of the lease agreement to identify a specific jurisdiction in which Defendants have consented to be sued, and allows the "rentor" or "assignee" to bring an action in any forum. Specifically, Defendants assert that Defendant "Streng did not know that NorVergence would assign the lease to IFC when he signed the lease with NorVergence." Moreover, Defendants maintain that "the lease does not identify IFC as the assignee of NorVergence." Finally, Defendants contend "the lease does not identify Illinois as the forum state in which an assignee of NorVergence would bring suit against Streng. Streng had no way of knowing when he signed the lease that any potential claims could be litigated against him in Illinois because when Streng signed the contract, it did not specify which state, whether Illinois or another state, an assignee of NorVergence could have their claims heard. Streng's affidavit in support of this paragraph "(Defendants' Motion to Dismiss, Para. 12.) Thus, the inquiry is whether a seemingly open-ended forum selection clause that gave NorVergence the right to assign the lease agreement to any assignee and failed to fix jurisdiction in a particular forum is unenforceable.

A forum selection clause is otherwise unreasonable if enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought. Calanca v. D&S Manufacturing Company, 157 Ill. App 3d 85, 88 (1st Dist 1987). Courts interpreting the language of forum selection clauses, which lack the same specificity as the clause in this case, have addressed the policy implications involved.

The First District in Whirlpool I, found the language in a "service of suit clause," "will submit to the jurisdiction of any Court of competent jurisdiction within the United States..." lacked the specificity and clarity of a true forum selection clause. The court noted: "{t}here is no mention here of any specific forum." Whirlpool at 179. The court opined: {g}ood policy dictates that a true forum selection clause should be clear and specific. This clause is not." Whirlpool at 180.

Two federal district courts in the Northern District of Illinois found the language in Whirlpool persuasive. In IFC Credit Corporation v. Aliano Brothers General Contractors, Inc., 2005 U.S. Dist. LEXIS 22961 (N.D. Ill. February 16, 2005) (J. Darrah) a breach of contract action based upon the identical language in a "NorVergence" lease agreement, the court determined that enforcement of the same forum selection clause would contravene "Illinois' public policy requiring the identification of a clear and specific forum" in such a clause. The court reasoned:

> "{t}he purported forum selection clause does not designate a specific state to which the parties will litigate any issues once the lease is assigned and confers upon the lessor the right to assign to any creditor in any state. Defendants had no way of knowing, at the time the lease was executed, what state in the union they would be required to litigate. As such, Defendants cannot be found to have consented to jurisdiction in Illinois."

In IFC Credit Corporation v. Eastcom, Inc., 2005 U.S. Dist. LEXIS 279 (N.D. Ill. January 6, 2005) (J. Gettleman), another case closely analogous to the situation here, the federal district court, although denying the defendant's motion to dismiss for lack of personal jurisdiction and notwithstanding a transfer based on the federal venue statute, discussed Whirlpool with approval and commented: "{i}t is not all clear . . . that Illinois would enforce any such provision that fails to identify a specific jurisdiction." Eastcom at 3.

As in the case before this Court, IFC argued in Eastcom that the forum selection clause conferred both personal jurisdiction and venue. The Eastcom court rejected IFC's argument noting:

> " . . . the failure to specify a particular jurisdiction renders the lessee incapable of knowing where an assignee might file suit and is akin to the clause rejected by the Whirlpool court. As such the contract lacks an essential element regarding forum selection. Put simply, no selected forum is identified in the agreement." Eastcom at 3.

Courts in other jurisdictions have held unenforceable similar forum selection clauses which fail to identify a specific forum. Noteworthy, a court in New Jersey, the state of NorVergence's incorporation, held a forum selection clause in an assigned office equipment lease unenforceable. Copelco Capital, Inc. v. Alvin D. Shapiro, 331 N.J. Super. 1, 8 (N.J. Super. Ct. App. Div. 2000). The provision provided in relevant part: "You consent to the jurisdiction of any local, state or federal court located within our or our assignee's state, and waive an objection relating to improper venue." The New Jersey court reasoned:

> "From the 'four corners of the instrument' a prospective lessee cannot identify the jurisdiction in which an action will be brought, as the contract states in the most

general terms that the proper forum is contingent upon the location of an unnamed assignee's principal office. On the face of the provision itself, it is fair to assume that the assignee's identity may be unknown even to the lessor at the time the contract is created."

The court continued:

"Enforcing a clause such as the one at issue here is also inconsistent with the doctrinal underpinnings of the majority rule that forum selection clauses should be given effect. The rule rests, at least in part, on the idea that in a realm of free contract the parties should be allowed to agree in advance to a mutually satisfactory forum, thus insuring a predictable and neutral locus for the resolution of any dispute. M/S Bremen, 407 U.S. at 10-16. We fail to see how the instant clause furthers these objectives. The fact that the forum selection clause before us could easily have resulted in a 'proper forum' anywhere in the entire country-a forum that would not be identifiable until sometime after the agreement was entered into-violates the notice requirement of Caspi/Shelter Systems and militates in favor of a finding that the clause is both unfair and unreasonable as measured by Restatement standards." See Restatement (Second) of Conflict of Laws at 80 (1988)".

Because the forum selection clause was ruled unenforceable, the New Jersey court was deprived of jurisdiction.

Similarly, an Ohio appellate court held that enforcement of a forum selection clause between a local church and the assignee of an equipment leasing company would be unreasonable because of a failure to specify the jurisdiction of a particular court. Copelco Capital, Inc. v. St. Mark's Presbyterian Church, 2001 Ohio App. LEXIS 315 (Ohio. App. 2001). The forum selection clause at issue stated:

"Law: If this lease is assigned by the lessor then lessee agrees that the rights and remedies of the parties shall be interpreted, construed and enforced in accordance with the laws and public policies of the State of incorporation of the assignee. In any legal action hereunder Lessee hereby consents to personal jurisdiction and venue in either the United States District Court or appropriate State court in the state of assignee's corporate headquarters."

The Court of Common Pleas, Cuyahoga County, Ohio in a series of cases involving NorVergence rental agreements ruled that enforcement of the forum selection clause at issue would be unreasonable and unjust for failure "to specify the jurisdiction of a particular court." Therefore, according to the court, at the time Defendant and NorVergence entered into the lease agreement for equipment and services, Defendants "could not have reasonably anticipated being haled into a court in Ohio." Preferred Capital, Inc. v. Interscience Engineering Inc., Court of Common Pleas, Cuyahoga County, Case No. CV-04-542159 at 2, (December 9, 2004) (J. Friedman); see also Preferred

Capital v. Flexo, Cuyahoga County, Case No. CV-04-54010 (December 10, 2004) (J. Friedman); Preferred Capital v. Maple Lane Pest Control, Cuyahoga County, Case No. CV-04-544566 (December 10, 2004) (J. Friedman); and Preferred Capital v. Control International Sales, Cuyahoga County, Case No. CV-04-542101 (December 10, 2004) (J. Friedman). C.f. Preferred Capital, Inc. v. Power Engineering Group, Inc., 2005 Ohio 5113, 2005 Ohio. App. LEXIS 4615 (September 28, 2005) (reversing and remanding Summit County, Ohio court's dismissal for lack of jurisdiction in consolidated NorVergence cases).

A Massachusetts court, likewise, held an unenforceable forum/venue selection clause in an assigned equipment lease, which failed to specifically identify a forum or venue. AT&T Capital Leasing Services v. CJP, 1997 Mass. Super. LEXIS 181 (1997). The clause contained the following language in capital letters:

"CHOICE OF LAW: THIS RENTAL AND EACH SCHEDULE SHALL BE GOVERNED BY THE INTERNAL LAWS FOR THE STATE IN WHICH OUR OR OUR ASSIGNEE'S PRINCIPAL CORPORATE OFFICES ARE LOCATED. YOU CONSENT TO THE JURISDICTION OF ANY LOCAL, STATE OR FEDERAL COURT LOCATED WITHIN OUR OR OUR ASSIGNEE'S STATE, AND WAIVE OBJECTION RELATING TO IMPROPER VENUE." The Massachusetts court opined:

> "Unlike most forum selection clauses, the clause at issue in the present case did not identify any particular court or state in which CJP was agreeing to be sued. The contract did not actually 'select' a particular forum in advance. Rather, it left identity of the forum (and even the choice of law) up to the shifting vagaries of assignment. What CJP ostensibly agreed to was to be sued anywhere that ABCC happened to assign the agreement. CJP had also given ABCC unfettered discretion to assign the contract, thus leaving it entirely up to ABCC what assignee would own the contract and what state would have jurisdiction in the future. Moreover, as the contract could be reassigned indefinitely, both the governing law and the selected forum could change again and again."
>
> The court added:
>
> "Enforcement of the clause in this particular case would not be 'fair and reasonable.' The court is disturbed by the far-reaching nature of a clause that forces one side to waive jurisdictional defenses as to a forum that has not even been identified. The defendant here is not a large company doing business in many locations, where such a clause might be eminently reasonable. {For such a corporation, there would be personal jurisdiction in many different places in any event, and the open-ended forum selection clause would not dramatically expand the number of different courts where the company would be sued.} CJP is a small business, and it only does business locally in Arizona. Requiring it to defend itself in any court in the nation, depending on where ABCC happens to assign the contract, is not fair or reasonable."

Further, the appellate court in Georgia found unenforceable a forum selection clause which stated: "Alco Capital has the option of pursuing any action under this agreement in any court of competent jurisdiction and the customer {Central} consents to jurisdiction in the state of our choice." Central Ohio Graphics, Inc. v. Alco Capital Resource, Inc., 221 Ga. App. 434, 436 (1996). The court held that enforcement of such an overbroad and unspecific clause was unreasonable and unjust. "Having provided no intimation of the forum contemplated, the clause failed to reflect a meeting of the minds sufficient to show the parties reached an agreement on the forum." Moreover, according to the court, its unspecificity contravenes a fundamental goal of such clauses to "eliminate uncertainties by agreeing in advance on a forum acceptable to both parties." The Georgia court concluded:

> "The forum selection clause as written would permit Alco to bring this action in any state in the country. This is unreasonable. Because the forum selection clause at issue is overbroad and so lacking in specificity that it fails to provide any indicia of the parties' intent, enforcing it would be unreasonable and unjust."

A New York county court, citing several of the decisions discussed herein, granted the defendants' motions to dismiss a complaint for breach of contract and breach of personal guarantee filed against them by an assignee of NorVergence. In finding the same "NorVergence" forum selection clause at issue here unenforceable, the New York court reasoned:

> "{f}irst, the floating forum selection clause here does not satisfy the purpose of providing certainty and predictability to the parties. The "selected" forum, as it is described in the Agreement, could be anywhere in the United States and, because it permits the selection of the forum by an unknown, not yet identified, assignee, the forum is unknowable at the time the parties entered the Agreement. Thus, in reality no forum is selected at the time the parties enter into the Agreement.
>
> Moreover, the floating forum selection clause in the Agreement is so lacking is specificity that it fails to provide any indicia of the parties' intent to be bound by it." Sterling National Bank v. Borger, Jones & Keeley-Cain, (Index 58826CV, 2004, April 25, 2005) (J. Scarpulla).

In another New York case based upon a breach of a NorVergence rental agreement, the court inquired: "the Court has questions as to whether a forum selection clause that does not identify a specific jurisdiction is enforceable." Sterling National Bank v. Kenneth H. Chang, P.S., Civil Court of the City of New York, County of New York, Part 34, Index No.; 54751/04 (March 22, 2005) (J. Gesmer). See also Sterling National Bank v. Kings Manor Estates, LLC., 2005 N.Y. Slip. Op. 51604U, 2005 N.Y. Misc. LEXIS 2191 (Sup.Ct.N.Y. October 6, 2005).

A federal district court in Ohio, in granting the defendant's motion to dismiss for lack of personal jurisdiction in Preferred Capital, Inc. v. Aetna Maintenance, Inc., 2005 WL 1398549 (N.D.Ohio June 14, 2004), rearg. denied 2005 WL 1683867 (N.D.Ohio 2005) a Norvergence related case, commented: "the major flaw in the forum selection clause in the rental agreement, because there is no specific forum designated, there is no certainty as to site for litigation. Aetna could have been required to litigate in Alaska, Mexico or Timbuktu, depending upon NorVergence's choice of an assignee. The uncertainty was unreasonable and unnecessary here." (also finding NorVergence could have disclosed to Aetna its master program agreement with Preferred Capital)

This Court finds the above cited decisions persuasive in its determination that a forum selection clause with an indefinite jurisdictional situs is unreasonable and against public policy and thus unenforceable. In this case one party enjoys the benefit of the knowledge of the situs of jurisdiction - the other does not. Therefore, upholding the threshold of jurisdiction to our courts clearly rises to the level at which public policy becomes paramount and accordingly it should be invoked.

III. CONCLUSION

Based upon the foregoing, the Court finds that the forum selection clause contained in the equipment rental agreement at issue is invalid, and enforcement of the clause in this case would be unreasonable and unjust.

WHEREFORE, the Court finds that it lacks personal jurisdiction over Defendants in this action. Accordingly, Defendants' Motion to Dismiss is hereby granted. The Court finds there is no just reason to delay enforcement or appeal of this order.

ENTERED
OCT 20 2005
DOROTHY BROWN
CLERK OF CIRCUIT COURT

10/20/05

ENTER:

Judge **Judge's No.**