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Forum Selection Flaws: New York Court Finds Forum Selection Clause Was Permissive, Not Mandatory

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Client Advisory
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Contractual provisions mandating the forum for litigation, i.e., forum selection clauses, are valuable tools that create certainty and predictability should a dispute between the parties arise. A recent New York State court decision is a useful reminder of the need to carefully draft these clauses to mandate — rather than merely permit — litigation in the desired forum. *See Duncan-Watt et al. v, Rockefeller et al.*, No. 655538/20 16 (Sup. Ct., N.Y. Cty. Apr. 13, 2018).

FACTS

Plaintiff Thomas Duncan-Watt (the "Plaintiff/Co-Creator") and Defendant Jonathan Rockefeller co-created a Golden Girls puppet parody show called *Thank You for Being a Friend* ("TYFBAF"). Following the initial success of the show in Australia, the Plaintiff/Co-Creator and Rockefeller entered into a license agreement (the "Agreement") with Plaintiffs Neil Gooding Productions Pty Ltd. and Matthew Henderson Trading (the "Plaintiff/Producers") granting the Plaintiffs/Producers a five-year world-wide license to produce TYFBAF. The Agreement contained an Australian choice of law provision and provided that in the event of a dispute, the parties agreed to "submit to the jurisdiction of the Courts of New South Wales, Australia."[1]

The parties began exploring avenues to bring the show to the United States and Canada. The Plaintiff/Producers consented to Rockefeller providing a license to a different producer for a one-time production of TYFBAF in Toronto. Unbeknownst to the Plaintiffs, however, the Defendants actually granted a three-year license covering all of Canada. The Plaintiffs later learned that Rockefeller had also planned to produce a similar show on his own in New York.[2]

The Plaintiffs commenced an action in New York County's Commercial Division against Rockefeller and certain companies owned by him (the "Defendants") asserting claims for, among other things, breach of contract, fraud and unjust enrichment. The Defendants moved to dismiss citing, among other things, the forum selection clause in the Agreement.[3]

DECISION

The Defendants argued that the case should be dismissed because the Agreement was governed by Australian law and prohibited litigation in any forum other than Australia. The Court rejected this argument.[4]

Relying on the Court of Appeals' decision in *Brooke Group v. JCH Syndicate 488*, 97 N.Y.2d 530 (1996), the Court stated that a mandatory forum selection clause must "bind[] the parties to a particular forum." Where the clause merely allows an action to be brought in a forum, such as by stating that the parties "consent" or "submit" to jurisdiction in that forum, the forum selection clause is permissive, not mandatory.[5]

The Court found that the forum selection clause in the Agreement, whereby the parties agreed to "submit" to litigation in Australia, was permissive. The clause did not mandate litigation in Australia, nor did it exclude litigation in other jurisdictions. As such, the Court found that it did not prohibit commencing an action in New York.[6]

The Defendants also argued that even if litigation could be pursued in New York, the New York action should be dismissed pursuant to the doctrine of *forum non conveniens* because "in the interest of substantial justice" the claims were more properly litigated in Australia. In support, the Defendants argued that "the parties [were] residents and citizens of Australia, that the TYFBAF was conceived of and produced in Australia, and the License Agreement [was] governed by Australian law." The Court rejected the Defendants' argument. The Court found that New York was an appropriate forum because the Defendants were residents of New York (or controlled by a party who was a resident of New York), certain acts underlying the Plaintiffs' claims had occurred in New York and New York courts routinely adjudicate complex commercial cases involving domestic and international parties.[7]

CONCLUSION

The lesson of this case in clear: as with any contractual provision, parties must pay careful attention to a forum selection clause. To the extent that a party seeks to ensure litigation in a particular forum, it is not enough that the agreement states that the parties "submit," "consent" or "agree" to litigation in that forum. Instead, the agreement must employ mandatory language that excludes litigation in any forum other than the parties' desired forum, such as by including language stating "all disputes arising under or related to this agreement shall exclusively be brought in the courts of. . ." Failure to use such language may engender the unpredictability and litigation costs that a *forum non conveniens* analysis entails and that a properly drafted forum selection clause would avoid.

For more information concerning the matters discussed in this publication, please contact the author Leonardo Trivigno (212-238-8724, trivigno@clm.com), or your regular Carter Ledyard attorney.

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[1] *Duncan-Watt et al. v. Rockefeller et al.*, No. 655538/20 16 (Sup. Ct., N.Y. Cty. Apr. 13, 2018) [NYSECF Doc. No. 64], pp. 1-2, 8.

[2] *Id.* at pp. 2-5.

[3] *Id.* at p. 7.

[4] *Id.* at pp. 7-8.

[5] *Id.*

[6] *Id.* at p. 8.

[7] *Id.* at pp. 9-11.

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