Commercial Law

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Illinois Appellate Court Refuses to Enforce Boilerplate Forum Selection Clause Against California Accountant


Companies with out-of-state customers often use forum selection clauses in commercial contracts to add an element of certainty and convenience should litigation arise out of a transaction. Typically, these forum selection clauses are *prima facie* valid and are enforced unless the contesting party shows that enforcement would be unreasonable under the circumstances. *Dace Int’l, Inc. v. Apple Computer, Inc.*, 375 Ill. App. 3d 234, 655 N.E.2d 974 (1st Dist. 1995). However, courts will take a close look at such provisions where there appears to be disparate bargaining power between the parties. The Second District’s recent opinion in *Mellon First United Leasing v. Hansen*, 235 Ill. Dec 508, 705 N.E.2d 121 (2d Dist. 1998), is just such a case.

In *Hansen*, the Court held that it would be unreasonable to enforce a “boilerplate” forum selection clause against a small out-of-state defendant with little contacts with the forum state. Mellon First United Leasing (Mellon), an Illinois leasing company, brought a small claims action in Lake County, Illinois against a California resident, Eleanor Hansen (Hansen) for breach of a mailing equipment lease agreement, which Hansen entered in connection with her California accounting business. Mellon alleged that pursuant to the lease, Hansen consented to jurisdiction in Illinois. Hanson filed a special and limited appearance to contest jurisdiction alleging that there were insufficient minimum contacts with Illinois and that she would suffer extreme hardship if forced to defend the action in Illinois. The Court noted that forum selection provisions negotiated at arms length between experienced and sophisticated persons should be enforced absent compelling circumstances. The Court considered several factors in evaluating the reasonableness of the forum selection clause: (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 the witnesses participating in the litigation; (5) the inconvenience to the parties of any particular location; (6) whether the clause was equally bargained for; and (7) whether the contract involves an unsophisticated consumer with a small transaction.

The Court found that the proprietor of a small accounting firm, Hansen neither had any particular expertise in office equipment leases, nor did she have equal bargaining power with the plaintiff. Hansen negotiated the essentials of the agreement, such as the type of equipment, terms of the lease, and the amount of the payments, and went to Mellon’s San Francisco office to sign the document. The forum selection clause was part of boilerplate language found in small print on the back of a standardized contract. Therefore, the Court found the agreement more akin to a contract of adhesion than an agreement obtained through arms length negotiations among parties with equal bargaining power.

The Court relied heavily upon the fact that the entire contract was negotiated in California and Hansen did not know prior to signing the agreement that she was dealing with an Illinois corporation. Hansen attested that she never read the forum clause before signing the agreement. Hansen’s only contacts with Illinois were that the lease documents were sent to an Illinois office for approval after Hansen’s execution and that she mailed her monthly payments to Illinois. According to the Court, the residency factor favored Hansen as well as the location of the witnesses who would participate in the litigation. The inconvenience factor favored Hansen because it would be much more inconvenient for her to defend this small claims action in Illinois than to have the plaintiff pursue the action in California. Therefore, the Court held it unreasonable to enforce the forum clause and force Hansen to defend the action in Illinois.
Hansen demonstrates the willingness of Illinois courts to scrutinize the reasonableness of forum selection clauses for parties seeking to enforce them against out-of-state defendants. The case also provides some guidance for parties seeking to enforce these types of provisions. First, the company seeking to enforce a forum clause should always inform a customer prior to contract execution that it is dealing with an out-of-state entity. Second, the forum selection clause should be conspicuous on the face of the agreement, rather than hidden in obscure fine print. Third, when dealing with an unsophisticated customer, the forum selection clause should be explained to the customer prior to contract execution. These simple steps may aid in the enforceability of a forum selection clause.

About the Author
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