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New Case Demonstrates the Importance of Forum Selection Clauses

By Eric A. Savage and Morgan J. Matson

On November 4, 2013, the U.S. District Court for the Northern District of California denied a motion filed by a company to dismiss a lawsuit brought by a former Libya-based employee. This decision ended the company's unsuccessful attempts to remove to the Libyan judicial system a complaint filed in U.S. federal courts. The ruling, and a companion decision issued two months earlier, serves as a reminder of the need to include well-crafted forum selection clauses in employment agreements, particularly in the international context.

Factual Background

In February 2010, the company entered into an employment agreement ("2010 employment agreement") with a U.S. citizen of Libyan national origin to work as a marketing lead for its Libyan entity. The February 2010 agreement contained both a forum selection clause designating Libyan courts as having jurisdiction, and a choice of law provision selecting Libyan law as governing. The individual and the company entered into a second employment agreement effective January 1, 2011 ("2011 employment agreement"). Unlike the first employment agreement, the 2011 employment agreement contained a choice of law provision but was silent about a forum for disputes.

The employee worked for the company in Tripoli from February 1, 2010 until February 27, 2011 when he was evacuated following the eruption of the Libyan revolution. In March 2011 the company attempted to reassign the employee to Dubai, but he refused to go. Alleging that he had been traumatized by the violence he observed during the Libyan revolution, the employee sought a postponement or modification of his work duties on the grounds that he suffered from post-traumatic stress disorder. On December 1, 2011, the company terminated the employee for failure to find a new job within the organization for which he was qualified.

Procedural History

On January 10, 2013, the former employee filed a complaint in the U.S. District Court for the Northern District of California ("Complaint")[1] alleging violations of the Americans with Disabilities Act, the Family and Medical Leave Act, California's Fair Employment and Housing Act, the

1 *Kedkad v. Microsoft Corporation, Inc., et al.*, Case No. 3:13-cv-00141-TEH (N.D. Ca. Jan. 10, 2013) (complaint filed).

California Family Rights Act and for breach of his 2011 employment agreement. The company moved to dismiss the Complaint on the basis of improper venue due to a purported implied forum selection clause and for *forum non conveniens*. In September 2013, the court denied the company's motion to dismiss as to improper venue and ordered additional briefing on the issue of *forum non conveniens*.

The Opinions

Implied Forum Selection Clause

In its motion to dismiss, the company claimed that the selection of Libyan law as governing the 2011 employment agreement implicitly granted Libyan courts jurisdiction over any disputes arising out of the employment relationship. Nevertheless, the 2011 employment agreement contained no explicit language regarding forum, providing only that:

> This Agreement is subject to the provisions of the Labor Law No. (58) for the year 1970 Gregorian and its amendments and the law on Social Solidarity No. (13) for the year 1980 Gregorian and its amendments and all other decision, decree or regulation which have not been specifically mentioned in this Agreement.

The company argued that under the Libyan Labor Law, "all labor and employment disputes are subject to a mandatory and exclusive conciliation, arbitration, and litigation process." It contended that by subjecting the employment relationship to, and incorporating provisions of, Libyan Labor Law, the parties had automatically, albeit not explicitly, selected Libya as the proper forum.

The court denied the motion based on the supposed implied forum selection clause. It held that as a threshold issue, there was no basis to find that the parties had agreed to a forum selection clause, either (i) on the face of the 2011 employment agreement or (ii) through the incorporation of Libyan Labor Law. Further undercutting the employer's argument was the fact that the parties had included a forum selection clause in the 2010 employment agreement, but failed to do so one year later. Article 14 of the 2010 employment agreement explicitly provided that "Libyan courts shall have jurisdiction to decide any dispute that may arise in the future between the parties involved in this agreement." The omission of this or similar language from the 2011 employment agreement was confirmation that, on its face, the 2011 employment agreement did not contain a forum selection clause.

On the argument about an alleged implied forum selection clause, the court looked to the language of Libyan Labor Law to determine whether it mandated the exclusive jurisdiction of Libyan courts over the employment relationship. It held:

> [T]he purported forum selection mechanism in sections 101-109, however, does not contain the word "mandatory" or "exclusive." Notwithstanding [the company's] legal conclusions that sections 101-109 amount to a forum selection clause, the plain language of sections 101-109 is inconsistent with the clear and unequivocal language typical of forum selection clauses in agreements that have been evaluated for enforceability…in controlling Ninth Circuit cases.

Thus, the court found that there was no forum selection clause to enforce and denied the motion to dismiss on that regard.

Forum Non Conveniens

Once the argument about the forum selection clause was denied, the court granted the plaintiff an opportunity to submit supplemental briefing and evidence "addressing the adequacy of Libya as an alternative forum," indeed threatening to grant the motion to dismiss if the plaintiff did not do so. On November 4, 2013, the court denied the remainder of the company's motion to dismiss because it was unable to establish: (i) the adequacy of the alternative forum; and (ii) the balance of private and public interest factors favors dismissal.

On the issue of *forum non conveniens*, the employer argued that the plaintiff's choice of a United States court was "entitled to minimal deference" because the plaintiff:

> had every reason to expect that any litigation arising from his employment relationship would be conducted in Libya before the Libyan courts…Plaintiff's employment agreement was expressly made subject to the laws of Libya and he agreed to submit to the mandatory and exclusive adjudicative process for labor and employment disputes in Libya… [and] the record is clear that this action arises out of Plaintiff's employment in Libya by a Libyan entity.

The company went on to argue that litigating the Complaint in California posed a substantial burden because the plaintiff's direct supervisor, co-workers, and the relevant human resources personnel were all located either in Libya or elsewhere in North Africa and the Middle East.

The court agreed that Libya was an adequate forum because first, the company had agreed to accept process in Libya as a condition of the plaintiff dismissing the Complaint in California. Second, a satisfactory remedy was available in Libya because there was evidence that the judiciary was up and running despite the revolution, and the company had agreed to waive any statute of limitation defense if the Complaint were dismissed on the grounds of *forum non conveniens*.

However, the second prong of the analysis required the court to decide whether Libya was an adequate forum in this particular situation by balancing the private and public interests.[2] In performing its balancing act, the court made generalized determinations rather than providing a detailed analysis of the actual costs and burdens of litigating in either forum. For example, in considering the forum's convenience to the litigants, the court recognized that the plaintiff could not financially afford to travel to Libya. On the other hand, the company would have to cover the travel costs of witnesses, if any, traveling from Libya to California. Rather than reviewing the actual numbers to determine which party could anticipate the higher costs and higher financial inconvenience, alternative methods of obtaining discovery and the like, the court deemed that both parties would be inconvenienced, rendering the factor neutral. Broad presumptions of this sort were characteristic of the entire analysis.

As to the public factors, the court appeared reluctant to relinquish a case which turned primarily on alleged violations of U.S. federal and state law. The court did not find that the case would "impose costs so great as to…favor…dismissal to the Libyan forum for the mere sake of convenience when Plaintiff has alleged substantive violations of federal law."

Neither was the court swayed by the fact that, by contract, the employment relationship was purportedly governed by Libyan law.[3] When weighing this public interest factor, the court found that it could familiarize itself with Libyan law through translated documents and with the aid of declarations from Libyan counsel. Similarly, the court recognized that a Libyan court would be required to familiarize itself with federal and California law to address the plaintiff's full spectrum of claims. Thus, this public interest factor was considered neutral.

In the end, the court found that "the majority of private and public interest factors are neutral, and some tip in favor of Plaintiff's choice of forum." Thus, the company "failed to meet its burden of showing that Plaintiff's choice of forum…results in 'oppressiveness and vexation… out of all proportion'… such that Plaintiff's case should be dismissed on the basis of forum non conveniens."

The Implications

The lesson that employers should take from this decision is that explicit forum selection clauses are integral to a well-drafted employment agreement, and essential to international employment agreements. This is the case regardless of whether the company is hiring the employee in the first instance, renewing that agreement, or entering into a secondment agreement under which the employee will be working for a foreign subsidiary or affiliate. If the company wants to make sure that disputes are heard in a particular forum, it must designate that forum in the agreement and must do so explicitly. Here, omitting the forum selection clause from the 2011 employment agreement, for no reason explained on the record, caused the company to engage in extended motion practice in an ultimately unsuccessful effort to establish through implication what the 2010 agreement provided explicitly. However, had the employer included a forum selection clause in the 2011 employment agreement, it would likely have been able to control the location of the lawsuit and minimize the risk of defending the claim in California. Ultimately, straightforward and clear forum selection clauses allow employers to control the location of lawsuits and reduce the risk of defending a lawsuit in an "inconvenient forum."

Eric Savage is a Shareholder in Littler Mendelson's New York City office, and Morgan Matson is an Associate in the firm's Pittsburgh office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Savage at esavage@littler.com, or Ms. Matson at mmatson@littler.com.

2 The private interests considered by the court were: "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive." The public interest factors included: (1) local interest in the lawsuit; (2) the court's familiarity with governing law; (3) the burden on local courts and juries: (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum.

3 The discussion and finding were focused on familiarity with the law rather than applicability. The merits of whether Libyan, federal or California law actually applied was not at issue.