



The Evolution of Forum-Selection-Clause Enforcement in Texas

By Paul Yetter and Richard Farrer

Almost 20 years ago, the Dallas Court of Appeals's opinion in *Barnette v. United Research Co.*¹ signaled Texas' somewhat belated recognition of a nationwide shift from overt hostility to acceptance of forum-selection clauses, which are contractual agreements to sue or be sued only in a specific preselected locale.² That shift provided the impetus for a number of articles on forum selection in Texas, including one, "Forum Selection Clauses in Texas: An Evaluation of Their Validity," published in the *Texas Bar Journal* in 1993.³ In the years since, Texas forum-selection-clause jurisprudence has continued to evolve, and new issues have emerged. This article recaps the evolution of Texas forum-selection jurisprudence as it led up to, and then continued beyond, Texas's initial move to general enforcement that was first signaled by *Barnette*. The article then highlights some emerging and unresolved forum-selection issues that are likely to arise in Texas courts going forward.





THE EVOLUTION OF THE ENFORCEABILITY OF FORUM-SELECTION-CLAUSES IN TEXAS

Early Enforcement

At the turn of the last century, Texas courts did not balk at enforcing parties' agreements to sue or be sued only in a particular locale. *Fort Worth Board of Trade v. Cooke*⁴ provides an early example of an appellate court reversing a district court and enforcing a contractual preselection of a litigation *situs*.⁵ Other Texas courts of appeals decisions from around the same time reached a similar result.⁶ Those early cases all involved the parties' preselection of a particular Texas county; they did not involve agreements to sue or be sued only in other states or countries.

A Shift to Hostility

In 1919, the Texas Supreme Court's decision in *International Travelers' Association v. Branum*⁷ signaled a sharp attitude shift. The Court refused to enforce a contractual clause preselecting Dallas county as the litigation *situs*, justifying its decision with reference to the "ouster doctrine" — the notion that such agreements oust courts of their jurisdiction.⁸ *Branum* also cited concerns that the clause violated public policy and usurped a legislative prerogative to set where suit may be brought.⁹ Over the course of the next 60 years or so, the Texas Supreme Court explicitly reaffirmed *Branum* at least three times.¹⁰ Like *Branum*, those decisions each addressed agreements preselecting a particular Texas county.¹¹

Branum set the tone for subsequent refusals to enforce contractual preselections of in-state¹² and out-of-state locales for suit.¹³ Those refusals continued unabated through the Texas Supreme Court's 1972 decision in *Fidelity Union Life Insurance Co. v. Evans*, which held that "the fixing of venue by contract ... is invalid and cannot be the subject of private contract."¹⁴ *Evans* cited and invoked *Branum*, noting that "venue is a matter of general convenience and expediency, whereas contracts which change the venue rules disturb the symmetry of the law."¹⁵ *Evans* also noted that "a citizen is entitled to the protections which all the law affords him, including his right to be sued at the place fixed by the general law" and that "other policy reasons" support enforcing the State's venue rules over private agreements fixing a locale for suit.¹⁶

The Transition to Full Enforcement

Meanwhile, other jurisdictions were recognizing the utility of enforcing contractual forum selections. In the middle of the 20th century, many jurisdictions began adopting the view that such agreements "should be enforced" unless "unreasonable under the circumstances."¹⁷ Only a few months after the Texas Supreme Court decided *Evans*, the U.S. Supreme Court decided *M/S Bremen v. Zapata Off-Shore Co.*,¹⁸ holding that forum-selection clauses, at least in federal court, are "*prima facie* valid" and should be "specifically" enforced to give them "full effect."¹⁹ The Court repudiated the ouster doctrine, labeling it a "vestigial legal fiction" that "has little place" in modern

jurisprudence.²⁰ Courts across the country — but not in Texas — swiftly recognized the change signaled by *M/S Bremen* and began enforcing contractual forum selections.²¹ The U.S. Supreme Court later reaffirmed and clarified *M/S Bremen* with its decision in *Carnival Cruise Lines, Inc. v. Shute*.²²

Texas's recognition of *M/S Bremen's* impact was more measured. As late as 1979, at least one Texas court of appeals relied on *Branum*, *Evans*, and their progeny — not *M/S Bremen*, which the appellate court's opinion does not mention — to support a refusal to enforce a contract clause designating two parishes in Louisiana as the exclusive locales for suit.²³ Indeed, it appears that initial enforcement of forum-selection clauses in Texas first occurred almost 20 years after *M/S Bremen*.²⁴ Once enforcement in Texas started, consistent enforcement soon followed and continued into the new century.²⁵

Hostility to Agreements Fixing an In-State Locale Continues

Although contractual preselections of out-of-state litigation locales are now generally enforced in Texas, the state's courts have remained hostile to preselections of in-state locales for suit. As recently as 1983, in *Leonard v. Paxson*,²⁶ the Texas Supreme Court declined to enforce an agreement selecting a specific in-state county as the locale for suit. Indeed, *Leonard* embraced *Evans*, noting, "Our holding in *Fidelity Union [Evans]* controls

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the instant case.²⁷ To this day, some Texas courts of appeals decisions continue to rely on the somewhat awkward distinction between contractual agreements selecting an in-state locale, which Texas courts continue to refuse to enforce,²⁸ and those that select an out-of-state locale, which are widely enforced. In drawing a distinction between these types of agreements, some recent court of appeals decisions have labeled clauses selecting in-state locales “venue-selection clause[s].”²⁹

It remains to be seen whether Texas’s hostility to “venue selection” will continue.³⁰ One of the main rationales supporting Texas’s hostility to venue selection — the ouster doctrine — has been resoundingly repudiated.³¹ Also, retaining the venue-selection versus forum-selection distinction causes uncertainty for contracting parties. If a given suit were filed out of state, it is almost certain a clause preselecting a Texas county would be enforced by any court across the country. But if a virtually identical suit were filed in Texas involving essentially the same clause, that clause would likely not be enforced by a Texas court. Consequently, the enforceability of a given clause rests to a large degree on the happenstance of where suit is filed. As a result, contracting parties cannot know pre-litigation whether a given clause will be enforced.

Texas’s Evolving Standard for Enforceability

In adapting to the new post-*M/S Bremen* regime, Texas courts initially espoused a rule for enforceability that differed somewhat from the federal rule; it was only recently that the Texas Supreme Court addressed and resolved that difference. Most Texas courts initially held that a forum-selection clause was enforceable if: (1) the parties had contractually consented to submit to the exclusive jurisdiction of the chosen locale, (2) the chosen jurisdiction generally recognized the validity of forum selections, and (3) the interests of the witnesses and public policy strongly favored that the suit be entertained in the contractually chosen forum.³² This rule essentially placed the burden on the party *seeking* enforcement because it required showing that the parties consented to the jurisdiction of the chosen locale and the chosen locale recognized the validity of forum selections.

The federal rule, in contrast, provided that a forum selection is “*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”³³ Thus the party *opposing* enforcement, under the federal rule, carried a “heavy burden” requiring a “strong showing ... clearly” demonstrating that enforcement would be improper.³⁴ In short, the opponent of the clause was required to show that: (1) the clause was “invalid for such reasons as fraud or overreaching,” (2) “enforcement would contravene a strong public policy of the forum in which suit [wa]s brought,” or (3) “the contractual forum w[ould] be so gravely difficult and inconvenient” as to deprive the party seeking to avoid the clause “of his day in court.”³⁵

In 2004, the Texas Supreme Court significantly clarified Texas’ rule, at least as to those clauses selecting an out-of-state locale for suit, by adopting the federal standard. In *In re AIU*

Insurance Company,³⁶ the Court invoked *M/S Bremen* to announce that forum-selection clauses should be given full effect “absent fraud, undue influence, or overweening bargaining power.”³⁷ The Court recognized that, as with the federal standard, a “heavy burden” to show that the clause should not be enforced rested on the party opposing the clause.³⁸ And the Court reaffirmed those principles soon thereafter in *In re Automated Collection Technologies, Inc.*³⁹ and *Michiana Easy Livin’ Country, Inc. v. Holten*.⁴⁰ At least two Texas courts of appeals have since expressly acknowledged that “Texas state courts employ the federal standard for analyzing forum selection clauses.”⁴¹

Evolving Avenues of Appellate Review

The manner in which an aggrieved party may obtain appellate review of a district court’s refusal to enforce a forum-selection clause has also recently changed. In 2004, the Texas Supreme Court clarified that a refusal to enforce a valid, applicable forum-selection clause warrants mandamus relief. The Court held that forcing a party to wait until after final judgment to enforce its contractual right to sue or be sued only in a chosen locale is a clear abuse of discretion that eliminates any adequate appellate remedy:

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 is clear harassment. There is no benefit to either the individual case or the judicial system as a whole.⁴²

Since *In re AIU*, the Texas Supreme Court has reaffirmed on several occasions that mandamus is available as an immediate remedy for a district court’s refusal to enforce a valid forum-selection clause.⁴³ Appeal following final judgment also remains an option.⁴⁴

CONTINUING ISSUES AFFECTING ENFORCEMENT IN INDIVIDUAL CASES

Although there is no longer much room for debate over whether forum-selection clauses are generally enforceable in Texas (at least as to out-of-state forum selections), a host of issues remain, and a few new issues have emerged that may nonetheless affect whether and if a particular clause will be enforced in a given case.

Do the Claims Fall Within the Scope of the Clause?

To be enforceable, a clause must encompass the claim or claims at issue.⁴⁵ Because forum-selection clauses are, at their heart, “creature[s] of contract,” principles of contract construction apply to determine the scope of the clause.⁴⁶ Texas courts typically recognize broad contract language stating that, for instance, “any and all claims relating to or arising out of” a particular contract generally encompass all claims asserted by the parties.⁴⁷ In contrast, a clause that explicitly limits its scope to



certain claims or classes of claims will typically not be extended to cover claims falling outside the enumerated class of claims.⁴⁸

There are exceptions, however, which caution that Texas' transition away from hostility to forum selection may not entirely be a thing of the past. For instance, *Hooks Industrial, Inc. v. Fairmont Supply Co.*⁴⁹ involved a clause that applied to "[a]ny and all actions ... for any breach of ... this contract," where the contract at issue governed the purchase and sale of products. The court held that claims alleging a failure to sell and purchase products were not subject to the clause because they were not claims for breach of the contract.⁵⁰

Another important aspect of the scope-of-the-clause inquiry is whether the nature of the claims or causes of action precludes enforcement of the forum selection. This issue receives particular attention when the asserted claims do not sound in contract. The Texas Supreme Court has noted that courts ought to look to "federal law for guidance" on this issue⁵¹ and should engage in "a common-sense examination of the claims and the forum-selection clause to determine if the clause covers the claims."⁵² The Court has expressed hostility to "slavish adherence to a contract/tort distinction" and warned against "allow[ing] ... litigant[s] to avoid a forum-selection clause with artful pleading."⁵³

Fraudulent-inducement and fraud claims appear to give the courts of appeals the most pause. For instance, the Austin Court of Appeals in *Southwest Intelecom, Inc. v. Hotel Networks Corp.*,⁵⁴ concluded, some would argue incorrectly, that "Texas courts will not apply forum selection clauses to tort actions alleging fraud in the inducement." Indeed, more recent decisions from the Texas Supreme Court clarify that fraudulent-inducement claims are not exempt from a forum selection merely by nature of being fraudulent-inducement claims; to fall outside the reach of a forum-selection clause, a fraudulent-inducement claim must specifically allege inducement to enter into the forum-selection clause itself, not merely allege fraudulent inducement to enter into the contract.⁵⁵

Some courts of appeals have invoked different rationales than simply the nature of the cause of action when declining to enforce forum selections with respect to noncontract claims. In *Busse v. Pacific Cattle Feeding Fund No. 1, Ltd.*,⁵⁶ for instance, the court of appeals balked at enforcing the forum-selection clause against fraudulent-inducement claims on the basis that the claims did not fall within the scope of the clause because they did not implicate the terms of the contract.⁵⁷ The clause at issue stated:

This agreement and the rights and obligations of the parties arising hereto shall be construed in accordance with the laws of the State of Iowa, with venue in [certain Iowa counties].⁵⁸

Is the Chosen Forum Mandatory and Exclusive?

Forum-selection clauses are typically mandatory or permissive and either exclusive or nonexclusive. Permissive nonexclusive clauses merely consent to suit in a particular locale and usually do not require dismissal because they do not necessarily reflect an agreement to sue or be sued *only* in the chosen

locale.⁵⁹ Mandatory exclusive forum selections, however, require dismissal for refile in the chosen locale.⁶⁰

The permissive-mandatory and exclusive-nonexclusive distinctions can be difficult to draw in practice. The court in *Ramsay v. Texas Trading Co.*,⁶¹ for instance, concluded that a clause providing that "all actions or proceedings ... may, at the discretion and election of ADM, be litigated in a court ... within Illinois" was enforceable and required dismissal for refile in an Illinois court. In contrast, a clause stating that "[t]he Parties stipulate to jurisdiction and venue in Ramsey County, Minnesota, as if this Agreement were executed in Minnesota" was held by the Austin Court of Appeals, in *Southwest Intelecom, Inc.*, not to entail a mandatory forum selection.⁶²

Is the Chosen Forum's Law Adequate?

The purported inadequacy of the selected forum's law is a relatively unexplored issue that may also pose a potential roadblock to forum-selection-clause enforcement. In short, if the chosen forum's law is deemed inadequate or somehow violative of an important right, the parties' forum selection could be seen as violating Texas public policy and, hence, be held unenforceable. The Texas courts do not appear to have squarely addressed this kind of argument in the forum-selection context,⁶³ although the Ninth Circuit recently did.⁶⁴ The chosen forum's choice-of-law principles, and in particular whether the chosen forum would apply Texas law to the dispute, could play a significant role in whether a court ultimately is persuaded to invalidate a forum selection due to the inadequacy of a chosen forum's law. If Texas law applies to the dispute, even in an out-of-state jurisdiction, a Texas court may not be as inclined to refuse enforcement of the clause.

Can the Clause Be Enforced By or Against a Nonsignatory?

Enforcement of forum-selection clauses by or against nonsignatories to the contract containing the clause is another relatively new area likely to receive attention in future cases. Although Texas has only a few appellate court cases on point, federal courts have addressed the issue and likely signal how Texas courts may eventually handle the issue.

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Federal courts have recognized that there is “a range of transaction participants, parties and nonparties” who “should benefit from and be subject to forum selection clauses.”⁶⁵ Specifically, federal courts have enforced clauses in a nonsignatory context under agency,⁶⁶ third-party-beneficiary,⁶⁷ and alter-ego principles.⁶⁸ Courts have also invoked equitable estoppel principles to foreclose a signatory from escaping application of a clause to particular claims.⁶⁹ Enforcement by some federal courts has also extended beyond these specific types of cases to include situations in which it was foreseeable to the contracting parties that the clause would apply and the party against whom the clause applied bore a close relationship to the contract containing the clause.⁷⁰

Texas, consistent with past practice, has taken a more cautious approach to nonsignatory issues. Texas courts have recognized estoppel, alter-ego, and third-party-beneficiary principles as allowing enforcement of either arbitration⁷¹ or forum-selection clauses⁷² in nonsignatory cases, but it is unclear how far Texas will go in putting those theories into effect. Texas may be slow to embrace as wide an array of justifications for enforcement in nonsignatory contexts as do many federal courts. For instance, although the Dallas Court of Appeals has recognized that a clause may be enforced against “transaction participants” to the original contract, that court has to this point limited its definition of transaction participants to “employee[s] of one of the contracting parties who [are] individually named by another contracting party in a suit arising out of the contract containing the forum selection clause.”⁷³ Many federal courts, in contrast, take a far broader view of what constitutes a transaction participant, holding that subcontractors, vendors, insurers, and banks, for example, all may qualify as nonparty transaction participants entitled to invoke a forum-selection clause.⁷⁴

CONCLUSION

Texas’s forum-selection-clause jurisprudence has come a long way since the early days of *Fort Worth Board of Trade v. Cooke* and even *Barnette*. But continuing and new issues like the distinction between forum and venue selection, the scope of forum clauses, the types of claims subject to forum selection, and the parties or nonparties to contracts that may be subject to a forum selection provide ample opportunity for continued development and evolution.

Notes

- 823 S.W.2d 368 (Tex. App. — Dallas 1991, writ denied).
- A forum-selection clause, which preselects a specific locale in which any future litigation between the parties must take place — is related to, and often mistaken for, two other similar contractual clauses intended to provide certainty to the contracting parties ahead of any future litigation: the choice of law clause and the consent to jurisdiction. A choice-of-law clause fixes the particular substantive law the parties wish to apply to a given future dispute. A consent to jurisdiction merely provides that the contracting parties submit to the personal jurisdiction of a given court or courts. Unlike a forum-selection clause, a consent to jurisdiction does not require that suit *must* occur only in the selected court.
- R. Paul Yetter & Cynthia D. Vreeland, *Forum-Selection Clauses in Texas: An*

- Evaluation of Their Validity*, 56 Tex. Bar J. 554 (1993).
- 6 Tex. Civ. App. 324, 25 S.W. 330 (Fort Worth 1894, no writ).
 - The contract stated that “in case they [the contractor or the sureties] shall be sued on [the surety] bond, said suit may be instituted and maintained in any court in Tarrant County, Texas.” *Id.* at 325, 25 S.W. at 330.
 - E.g., Howard v. Barthold & Casey, Inc.*, 206 S.W. 378, 379 (Tex. Civ. App. — San Antonio 1918, no writ) (clause selecting Duval County enforced); *Merchants’ Reciprocal Underwriters of Dallas v. First Nat’l Bank*, 192 S.W. 1098, 1102 (Tex. Civ. App. — Amarillo 1917, no writ) (clause selecting Dallas County enforced); *Int’l Travelers’ Ass’n v. Votaw*, 197 S.W. 237, 239 (Tex. Civ. App. — Texarkana 1917, writ ref’d) (“[A]ppellant ... had a right to contract as it did that it should be sued only in Dallas County on certificates it issued.”); *Tex. Moline Plow Co. v. Biggerstaff*, 185 S.W. 341, 342 (Tex. Civ. App. — Amarillo 1916, no writ) (clause selecting Dallas County enforced); *Whisenant v. Schawe*, 141 S.W. 146, 147 (Tex. Civ. App. — Fort Worth 1911, no writ) (clause selecting Parker County enforced); *but see Eaton v. Int’l Travelers’ Ass’n of Dallas*, 136 S.W. 817, 818 (Tex. Civ. App. — San Antonio 1911, no writ) (refusing to enforce clause selecting Dallas County when venue statutes provided for venue in Bexar County in suits relating to life and accident insurance companies).
 - 109 Tex. 543, 212 S.W. 630 (1919).
 - Id.* at 543, 212 S.W. at 630.
 - Id.* at 548, 212 S.W. at 632 (“[I]t is utterly against public policy to permit bargaining in this state about depriving courts of jurisdiction.”).
 - See Leonard v. Paxson*, 654 S.W.2d 440 (Tex. 1983); *Fid. Union Life Ins. Co. v. Evans*, 477 S.W.2d 535 (Tex. 1972); *Ziegelmeier v. Pelphrey*, 133 Tex. 73, 125 S.W.2d 1038 (1939).
 - See Leonard*, 654 S.W.2d at 441 (involving agreement selecting El Paso County and requiring transfer of the case in accordance with a mandatory venue provision in Family Code); *Evans*, 477 S.W.2d at 537 (affirming order granting plea of privilege to be sued in county of residence rather than in county selected in parties’ agreement); *Ziegelmeier*, 133 Tex. at 76, 125 S.W.2d at 1040 (involving a dispute about venue and stating the *Branum* “is still the rule of decision in this court”).
 - See McGinn v. Fid. Union Life Ins. Co.*, 474 S.W.2d 320, 320–21 (Tex. Civ. App. — Texarkana 1971, writ ref’d n.r.e.); *Jeter-Millar Co. v. Kasch Bros.*, 466 S.W.2d 598, 599 (Tex. Civ. App. — Eastland 1971, no writ); *GMAC v. Hunsaker*, 50 S.W.2d 367, 368 (Tex. Civ. App. — Amarillo 1932, writ dismissed); *Smith v. Watson*, 44 S.W.2d 815, 817 (Tex. Civ. App. — Eastland 1931, no writ); *Pfeifer v. E.J. Herrmann Sales Co.*, 43 S.W.2d 484, 485 (Tex. Civ. App. — San Antonio 1931, no writ); *Smith v. Hartt & Cole*, 13 S.W.2d 408, 409 (Tex. Civ. App. — Eastland 1929, no writ); *GMAC v. Christian*, 11 S.W.2d 620, 621 (Tex. Civ. App. — El Paso 1928, no writ); *La Salle County Water Improvement Dist. No. 1 v. Arlitt*, 297 S.W. 344, 345 (Tex. Civ. App. — Austin 1927, writ dismissed w.o.j.); *Ross-Carter Grain Co. v. H.H. Watson Co.*, 288 S.W. 239, 240 (Tex. Civ. App. — Austin 1926, no writ); *C.P. Ray & Co. v. La Rue & Barron Co.*, 237 S.W. 336, 338 (Tex. Civ. App. — Dallas 1922, no writ);
 - Dowling v. NADW Mktg., Inc.*, 578 S.W.2d 475, 475 (Tex. Civ. App. — Eastland 1979, writ ref’d n.r.e.) (“If the trial court has founded its order on that portion of the cited provision which attempts to set venue in the Parishes of Orleans or Jefferson in the State of Louisiana, such a dismissal would be error. Like provisions have been declared invalid in Texas.”).
 - 477 S.W.2d at 537.
 - Id.*
 - Id.*
 - M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 & n.11, 92 S.Ct. 1907, 1913 (1972) (citing *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966)); *see also Anastasiadis v. S.S. Little John*, 346 F.2d 281, 284 (5th Cir. 1965); *Cent. Contracting Co. v. C. E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965); *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 808 (2d Cir. 1955); *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990, 991 (2d Cir. 1951).
 - 407 U.S. at 1.
 - M/S Bremen*, 407 U.S. at 10, 13, 15, 92 S.Ct. at 1913, 1915, 1916. The Court later reaffirmed and further clarified *M/S Bremen* in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–96, 111 S.Ct. 1522, 1528–29 (1991).
 - Id.* at 12.
 - E.g., Calanca v. D & S Mfg. Co.*, 510 N.E.2d 21, 23–24 (Ill. App. Ct. 1987); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696



- F.2d 315, 317 (4th Cir. 1982); *Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294, 1297–98 (1st Cir. 1974); *Roach v. Hapag-Lloyd, A.G.*, 358 F.Supp. 481, 483–84 (N.D. Cal. 1973); *Societe Jean Nicolas Et Fils v. Mousseux*, 597 P.2d 541, 542–43 (Ariz. 1979); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal.3d 491, 495 (Cal. 1976); see also *Edge Telecom, Inc. v. Sterling Bank*, 143 P.3d 1155, 1158 (Colo. Ct. App. 2006) (“Colorado, like every other jurisdiction of which we are aware, follows the general rule first set forth by the Restatement (Second) of Conflict of Laws in 1971 and adopted one year later by the United States Supreme Court in *M/S Bremen*.”); *Travel Country RV Ctr., Inc. v. Baxter*, 932 So.2d 547, 548 (Fla. Dist. Ct. App. 2006); *Kennebec Mortgage Brokers, Inc. v. Country Club Convalescent Hosp., Inc.*, 610 N.E.2d 987, 989 (Ohio 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1358–61 (2d Cir. 1993); *British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg*, 567 N.Y.S.2d 731, 732 (N.Y. App. Div. 1991) (“It is well-accepted policy that forum-selection clauses are *prima facie* valid.”); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991).
22. 499 U.S. at 585.
 23. *Dowling*, 578 S.W.2d at 476 (citing *Branum* and *Evans* and concluding that “the fixing of venue by contract, except in such instances as permitted by ... [the venue statutes], is invalid and cannot be the subject of private contract.”).
 24. *E.g.*, *Sarieddine v. Moussa*, 820 S.W.2d 837 (Tex. App. — Dallas 1991, writ denied); *Barnette v. United Research Co.*, 823 S.W.2d at 370.
 25. *E.g.*, *My Café-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 865–67 (Tex. App. — Dallas 2003, no pet.); *CMS Partners, Ltd. v. Plumrose USA, Inc.*, 101 S.W.3d 730, 734–36 (Tex. App. — Texarkana 2003, no pet.); *Holeman v. Nat'l Bus. Inst., Inc.*, 94 S.W.3d 91, 101–03 (Tex. App. — Houston [14th Dist.] 2002, pet. denied); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203–05 (Tex. App. — Eastland 2001, pet. denied); *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.); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 71–75 (Tex. App. — Dallas 1996, no writ); *Greenwood v. Tillamook Country Smoker, Inc.*, 857 S.W.2d 654, 657 (Tex. App. — Houston [1st Dist.] 1993, no writ); *Bellair, Inc. v. Aviall of Tex., Inc.*, 819 S.W.2d 895, 898 (Tex. App. — Dallas 1991, writ denied); see also *Monesson v. Nat'l Equip. Rental, Ltd.*, 594 S.W.2d 780, 781 (Tex. Civ. App. — Dallas, writ ref'd n.r.e.).
 26. 654 S.W.2d at 441–42.
 27. *Id.*
 28. See *Ramsay v. Tex. Trading Co.*, 254 S.W.3d 620, 627 (Tex. App.—Texarkana 2008, pet. denied) (“[A] ‘forum’-selection agreement is one that chooses another state or sovereign as the location for trial, whereas a ‘venue’-selection agreement chooses a particular county or court within that state or sovereign.”); *In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 77–78 (Tex. App. — Corpus Christi, 2008, orig. proceeding); *Fleming v. Ahumada*, 193 S.W.3d 704, 712–13 (Tex. App. — Corpus Christi 2006, no pet.); *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 674 (Tex. App. — Fort Worth 1997, pet. denied) (“Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy.”); *In re Med. Carbon Research Inst., L.L.C.*, No. 14-07-00935-CV, 2008 WL 220366, at * 1 (Tex. App. — Houston [14th Dist.] Jan. 29, 2008, orig. proceeding) (per curiam); *Liu v. CiCi Enters., LP*, No. 14-05-00827-CV, 2007 WL 43816, at *21 (Tex. App. — Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.).
 29. See, e.g., *Ramsay*, 254 S.W.3d at 626; *In re Med. Carbon Research Inst.*, 2008 WL 220366, at * 1.
 30. It is worth noting that in 1999, the Texas Legislature adopted Civil Practice & Remedies Code §15.020, which provides that if parties to a major transaction agree that lawsuits must be brought only in a certain Texas county, that county constitutes a mandatory venue. The statute defines a major transaction as “a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than \$1 million.” *Id.* Moreover, Civil Practice & Remedies Code §15.0642 provides that mandamus relief is available “to enforce the mandatory venue provisions,” which together with §15.020 provides for mandamus relief for district court refusals to enforce at least some agreements fixing a specific Texas county as the exclusive locale for suit. Enforcement of this provision has been somewhat mixed. Compare, *In re Tex. Ass'n of School Boards, Inc.*, 169 S.W.3d 653 (Tex. 2005); *In re Togs Energy, Inc.*, No. 05-09-01018-CV, 2009 WL 3260910, at *1 (Tex. App. — Dallas Oct. 13, 2009, no pet.) (mem. op.); *with Spin Doctor Golf, Inc. v. Paymentech, L.P.*, 296 S.W.3d 354, 359 (Tex. App. — Dallas 2009, pet. struck); *In Re R.R. Repair & Maint., Inc.*, No. 05-09-01035-CV, 2009 WL 3531636, at *3 (Tex. App. — Dallas Nov. 2, 2009, no pet.) (mem. op.).
 31. *E.g.*, *M/S Bremen*, 407 U.S. at 7.
 32. *E.g.*, *My Café-CCC, Ltd.*, 107 S.W.3d at 864–65; *Su. Intelcom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324 (Tex. App. — Austin 1999, pet. denied); *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 70; *Greenwood*, 857 S.W.2d at 656; see also *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611–14 (Tex. App. — Houston [1st Dist.] 2005, no pet.).
 33. *M/S Bremen*, 407 U.S. at 10.
 34. *Id.* at 15, 17.
 35. *Id.* at 15, 18.
 36. 148 S.W.3d 109, 110 (Tex. 2004) (orig. proceeding).
 37. *Id.* at 111.
 38. *Id.* at 111–116.
 39. 156 S.W.3d 557, 559 (Tex. 2004) (“In *In re AIU Ins. Co.*, we held that enforcement of forum-selection clauses is mandatory unless the party opposing enforcement ‘clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.’” (internal quotation marks omitted)).
 40. 168 S.W.3d 777, 793 (Tex. 2005); see also *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (stating that to avoid enforcement, “the party opposing enforcement” must “clearly show that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial”); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228 (Tex. 2008) (orig. proceeding) (per curiam); *In re AutoNation, Inc.*, 228 S.W.3d 663 (Tex. 2007).
 41. *In re Omega Protein, Inc.*, 288 S.W.3d 17, 20 (Tex. App. — Houston [1st Dist.] 2009, orig. proceeding); *Phoenix Network Techs.*, 177 S.W.3d at 611–14.
 42. *In re AIU*, 148 S.W.3d at 117.
 43. *E.g.*, *In re ADM Investor Servs., Inc.*, No. 08-0570, 2010 WL 571971, at *4 (Tex. Feb. 19, 2010); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 231; *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding); *In re AutoNation*, 228 S.W.3d at 667; *In re Automated Collection Techs., Inc.*, 156 S.W.3d at 558 (per curiam).
- Similarly, mandamus relief is available to remedy a refusal to compel arbitration pursuant to an arbitration clause. *E.g.*, *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 551 (Tex. 2002); *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 128 (Tex. 1999); *In re La. Pac. Corp.*, 972 S.W.2d 63, 65 (Tex. 1998); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272–73 (Tex. 1992).
44. *Id.* at 112; *My Café-CCC, Ltd.*, 107 S.W.3d at 865–67; *CMS Partners, Ltd.*, 101 S.W.3d at 734–36; *Holeman*, 94 S.W.3d at 101–03; *Barnett*, 38 S.W.3d at 203–05; *Abacan Technical Servs. Ltd.*, 994 S.W.2d at 843–45; *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 71–75; *Barnette*, 823 S.W.2d at 370; *Bellair, Inc.*, 819 S.W.2d at 898.
 45. Texas courts typically begin an analysis of a forum-selection clause with an examination of whether the claims at issue fall within the scope of the clause. See, e.g., *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. — Houston [14th Dist.] 2007, pet. denied) (explaining that when determining whether to enforce a mandatory forum-selection clause, courts first must determine whether the asserted claims fall within the clause’s scope).
 46. *Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d at 611; *Su. Intelcom, Inc.*, 997 S.W.2d at 324–25.
 47. *E.g.*, *In re AIU*, 148 S.W.3d at 111 (enforcing clause addressing “all litigation, arbitration or other form of dispute resolution shall take place ...”).
 48. See *Associated Air Freight, Inc. v. Meeke*, Nos. 01-00-00994-CV, 01-00-00843-CV, 2001 WL 225516 (Tex. App. — Houston [1st Dist.] Mar. 8, 2001, no pet.); *Belmont Constructors, Inc. v. Lyondell Petrochem. Co.*, 896 S.W.2d 352, 355 (Tex. App. — Houston [1st Dist.] 1995, orig. proceeding).
 49. No. 14-00-00062-CV, 2001 WL 395341, at *9–10 (Tex. App. — Houston



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- [14th Dist.] Apr. 19, 2001, pet. denied) (not designated for publication).
50. *Id.* at *2; see also *Busse v. Pac. Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 813 (Tex. App. — Texarkana 1995, writ denied); *In re Wilmer Cutler Pickering Hale & Dorr LLP*, No. 05-08-01395-CV, at *4 (Tex. App. — Dallas Dec 31, 2008, orig. proceeding [mand. denied]) (holding that clause stating that “any action instituted under this Agreement shall be brought only in the state courts of the State of Delaware” did not cover fraud claims and that “an action is ‘instituted under’ the [relevant] agreement only if the claimant is relying on the terms and authority of the agreement as the basis for the rights sued upon”).
 51. See, e.g., *Aerus L.L.C. v. Pro Team, Inc.*, Civ. A. 304-CV-1985M, 2005 WL 1131093, at *2, *7–*9 (N.D. Tex. May 9, 2005) (where forum clause required litigation in Texas if the plaintiff “asserts a breach or default by [the defendant] under the terms of this Agreement,” the clause applied to claims for patent infringement, violation of the Lanham Act, infringement of common law trade dress rights, and unfair competition); *Tex. Source Group, Inc. v. CCH, Inc.*, 967 F.Supp. 234, 236, 237–38 (S.D. Tex. 1997) (clause applying to a “[s]uit under [the] Agreement” applied to plaintiff’s misrepresentation and fraud claims as well as its other claims).
 52. *In re Int’l Profit Assocs., Inc.*, 274 S.W.3d at 677.
 53. *Id.* (internal quotation marks omitted).
 54. 997 S.W.2d at 324; see also *Major Help Ctr., Inc. v. Ivy, Crews & Elliott, P.C.*, No. 03-99-00285-CV, 2000 WL 298282, at *3 (Tex. App. — Austin Mar. 23, 2000, no pet.); *Busse*, 896 S.W.2d at 813.
 55. *In re Bank of Am., N.A.*, 278 S.W.3d 342, 346 (Tex. 2009) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134-15 (Tex. 2004) (orig. proceeding); *In re GNC Franchising, Inc.*, 22 S.W.3d 929, 930 (Tex. 2000) (orig. proceeding).
 56. 896 S.W.2d at 813.
 57. *Id.*
 58. *Busse*, 896 S.W.2d at 812–13; see also *In re Wilmer Cutler*, 2008 WL 5413097. At least one subsequent court of appeals attempted to distinguish *Busse*’s holding, noting that:

the fraudulent inducement cause of action was against an individual who was not a party to the contract. Thus, when construction of the rights and liabilities of the parties under the contract is not involved, the court’s statement that a forum selection clause does not apply to a tort action alleging that the plaintiff was induced by misrepresentations to enter into the contract is made in the context of a provision that does not apply to related causes of action and an attempt to enforce the provision against a person who was not a party to the contract.
 59. *My Café-CCC, Ltd.*, 107 S.W.3d at 867.
 60. See, e.g., *Sv. Intelcom, Inc.*, 997 S.W.2d at 323–26 (involving clause in which parties “stipulate[d] to jurisdiction [in] Minnesota”); *In re Wilmer Cutler*, 2008 WL 5413097 at *4; *Ramsay v. Tex. Trading Co.*, 254 S.W.3d 620 (Tex. App. — Texarkana 2008, pet. denied) (involving clause in which parties “irrevocably consent[ed] to the jurisdiction of the courts of the State of Delaware”); *Apollo Prop. Partners, L.L.C. v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 WL 3017549 (Tex. App. — Houston [14th Dist.] Aug. 5, 2008, no pet.) (mem. op.); see also *Ramsay*, 254 S.W.3d at 629–30 (discussing the issue in detail).
 61. See, e.g., *Ramsay*, 254 S.W.3d at 629–30 (discussing the issue in detail); see also *In re AIU*, 148 S.W.3d at 111–15.
 62. 254 S.W.3d at 629–30.
 63. 997 S.W.2d at 324.
 64. The Texas Supreme Court’s recent opinion in *In re Poly-America, L.P.*, 262 S.W.3d 337, 361 (Tex. 2008) (orig. proceeding), comes fairly close to these issues, at least in an arbitration context. The Court invalidated a number of provisions in an arbitration agreement because they “inhibit[ed] effective vindication” of the plaintiff’s rights by limiting certain remedies. *Id.* The Court determined that those provisions were enforceable from the remainder of the agreement, however, and it ultimately enforced the arbitration agreement after severing the offending provisions. *Id.*
 65. See *Doe I v. AOL L.L.C.*, 552 F.3d 1077, 1084 (9th Cir. 2009) (per curiam).
 66. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988); see also *Lipcon v. Underwriters at Lloyd’s London*, 148 F.3d 1285, 1299 (11th Cir. 1998); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1353 (9th Cir. 1990).
 67. E.g., *Allianz Ins. Co. of Canada v. Cho Yang Shipping Co.*, 131 F.Supp.2d 787, 791 (E.D. Va. 2000).
 68. E.g., *Coastal Steel Corp. v. Tilgham Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983).
 69. E.g., *Capital Source Fin., L.L.C. v. Delco Oil, Inc.*, 625 F.Supp.2d 304, 318 (D. Md. 2007); see also *Deep Water Slender Wells, Ltd.*, 234 S.W.3d at _____.
 70. E.g., *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 518 (5th Cir. 2006) (discussion a direct-benefits theory of estoppel); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000); see also, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n. 9 (7th Cir. 1981).
 71. E.g., *Graham Tech. Solutions, Inc. v. Thinking Pictures, Inc.*, 949 F.Supp. 1427, 1434 (N.D. Cal. 1997) (clause applied against a consultant to a signatory because the conduct of the consultant was “closely related to the contractual relationship”); *Envtl Tectonics Corp. v. Royal Thai Air Force*, No. 93-5855, 1994 WL 82002, at *5 (E.D. Pa. Mar. 15, 1994) (clause applied in favor of a nonparty to the contract because “non-parties may utilize a forum selection clause if such party is ‘closely related’ to the dispute such that it becomes ‘foreseeable’ that it will be bound [by the clause]” (quoting *Hugel v. Corp. of Lloyd’s*, 999 F.2d 206, 209 (7th Cir. 1993)); *First Specialty Ins. Corp. v. Admiral Ins. Co.*, No. CV 07 408 MO, 2007 WL 1876516 (D. Or. June 22, 2007) (clause applied against signatories’ insurers, and noting that “[t]he fact that either one or both parties was not a signatory to the underlying contract is not dispositive” so long as “their conduct is closely related to the contractual relationship.” (internal quotation marks omitted)); *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, No. 1:06-CV-180, 2007 WL 2463283 (E.D. Tenn. Aug. 27, 2007) (clause applied by nonparty suppliers and subcontractors because clause’s application “was contemplated by the parties” prior to executing the contract and nonparties were sufficiently “closely related” to the contract to permit clause’s application).
 72. See *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131–35 (Tex. 2005) (orig. proceeding); see also *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191–95 (Tex. 2007) (orig. proceeding) (recognizing estoppel may bind a nonsignatory to an arbitration agreement but noting that “concerted misconduct estoppel” is not a recognized theory of estoppel under Texas law); *Meyer v. WMCO-GR, L.L.C.*, 211 S.W.3d 302, 306 (Tex. 2006); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding) (noting nonsignatories may be bound to arbitration agreement under “direct benefits estoppel”); *Phoenix Network*, 177 S.W.3d at 623 (discussing two theories of estoppel applicable in the arbitration context).
 73. *Deep Water Slender Wells, Ltd.*, 234 S.W.3d at 687 (estoppel); (same).
 74. *In re Wilmer Cutler*, 2008 WL 5413097, at * 2; see also *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 75.
- A similarly narrow approach to the doctrine of equitable estoppel is evident in *PCC Sterom, S.A. v. Yuma Exploration & Prod. Co.*, No. 01-06-00414-CV, 2006 WL 2864478, at *7 (Tex. App. — Houston [1st Dist.] Oct. 5, 2006, no pet. (mem. op.)).
75. See *Coastal Steel Corp.*, 709 F.2d at 202–03; *McNair v. Monsanto Co.*, 279 F.Supp.2d 1290, 1306–07 (M.D. Ga. 2003); *First Specialty Ins. Corp.*, 2007 WL 1876516, at *3; *Envtl. Tectonics Corp.*, 1994 WL 82002, at *5; see also *Lu v. Dryclean-U.S.A. of Cal., Inc.*, 14 Cal.Rptr.2d 906, 908 (Cal. Ct. App. 1992); *Manetti-Farrow, Inc.*, 858 F.2d at 514.

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