Almost 20 years ago, the Dallas Court of Appeals’s opinion in *Barnette v. United Research Co.* 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. 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. 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


courts did not balk at enforcing parties’ agreements to sue or be sued only in a particular locale. 
For example, in 
Appellate court decisions reversing a district court and enforcing a contractual preselection of a litigation situs. Other Texas courts of appeals decisions from around the same time reached a similar result. 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 
Travelers’ Association v. Branum 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. Branum also cited concerns that the clause violated public policy and usurped a legislative prerogative to set where suit may be brought. Over the course of the next 60 years or so, the Texas Supreme Court explicitly reaffirmed Branum at least three times. Like Branum, those decisions each addressed agreements preselecting a particular Texas county.

Branum set the tone for subsequent refusals to enforce contractual preselections of in-state and out-of-state locales for suit. 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.” 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.” 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.

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.” 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., holding that forum-selection clauses, at least in federal court, are “prima facie valid” and should be “specifically” enforced to give them “full effect.” The Court repudiated the ouster doctrine, labeling it a “vestigial legal fiction” that “has little place” in modern jurisprudence. Courts across the country — but not in Texas — swiftly recognized the change signaled by 
M/S Bremen and began enforcing contractual forum selections. The U.S. Supreme Court later reaffirmed and clarified 
M/S Bremen with its decision in Carnival Cruise Lines, Inc. v. Shute.

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. Indeed, it appears that initial enforcement of forum-selection clauses in Texas first occurred almost 20 years after 
M/S Bremen. Once enforcement in Texas started, consistent enforcement soon followed and continued into the new century.

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, 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
the instant case.” 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,34 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].”35

It remains to be seen whether Texas’s hostility to “venue selection” will continue.36 One of the main rationales supporting Texas’s hostility to venue selection — the ouster doctrine — has been resoundingly repudiated.37 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-MIS 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.38 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 clause “of his day in court.”39 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.40 And the Court reaffirmed those principles soon thereafter in In re Automated Collection Technologies, Inc.41 and Michiana Easy Livin’ Country, Inc. v. Holten.42 At least two Texas courts of appeals have since expressly acknowledged that “Texas state courts employ the federal standard for analyzing forum selection clauses.”43

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:

Subecting 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.44

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.45 Appeal following final judgment also remains an option.46

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.47 Because forum-selection clauses are, at their heart, “creature[s] of contract,” principles of contract construction apply to determine the scope of the clause.48 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.49 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.\textsuperscript{43}

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, \textit{Hooks Industrial, Inc. v. Fairmont Supply Co.}\textsuperscript{40} 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.\textsuperscript{49}

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 issue\textsuperscript{44} and should engage in “a common-sense examination of the claims and the forum-selection clause to determine if the clause covers the claims.”\textsuperscript{5}\textsuperscript{5}

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.”\textsuperscript{53}

Fraudulent-inducement and fraud claims appear to give the courts of appeals the most pause. For instance, the Austin Court of Appeals in \textit{Southwest Intelecom, Inc. v. Hotel Networks Corp.},\textsuperscript{51} 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.\textsuperscript{53}

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 \textit{Buse v. Pacific Cattle Feeding Fund No. 1, Ltd.},\textsuperscript{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.\textsuperscript{7} The clause at issue stated:

This agreement and the rights and obligations of the parties arising hereunder shall be construed in accordance with the laws of the State of Iowa, with venue in [certain Iowa counties].\textsuperscript{44}

\textbf{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 \textit{only} in the chosen locale.\textsuperscript{59} Mandatory exclusive forum selections, however, require dismissal for refiling in the chosen locale.\textsuperscript{60}

The permissive-mandatory and exclusive-nonexclusive distinctions can be difficult to draw in practice. The court in \textit{Ramsey v. Texas Trading Co.},\textsuperscript{41} 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 refiling 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 \textit{Southwest Intelecom, Inc.}, not to entail a mandatory forum selection.\textsuperscript{52}

\textbf{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,\textsuperscript{63} although the Ninth Circuit recently did.\textsuperscript{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.

\textbf{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." Specifically, federal courts have enforced clauses in a nonsignatory context under agency, third-party-beneficiary, and alter-ego principles. Courts have also invoked equitable estoppel principles to foreclose a signatory from escaping application of a clause to particular claims. 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.

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 arbitration or forum-selection clauses 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." 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.

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

2. 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 certainly 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.
5. 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.
7. 109 Tex. 543, 212 S.W. 630 (1919).
8. Id. at 543, 212 S.W. at 630.
9. 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.").
11. 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); Ziegelmeyer, 133 Tex. at 76, 125 S.W.2d at 1040 (involving a dispute about venue and stating the "Brannon is still the rule of decision in this court").
13. Dowling v. NADW Mfg., 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.
14. Id.
15. Id.
16. Id.
18. 407 U.S. at 1.


32. E.g., My Cafe-CCC, Ltd., 107 S.W.3d at 864-65; Sw. Intelcom, Inc. v. Hotel Networks Corp., 979 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. Neov Sys., Inc., 177 S.W.3d 605, 611–14 (Tex. App. — Houston [1st Dist. 2005], no pet.).


34. Id. at 15, 17.

35. Id. at 15, 18.


37. Id. at 111.

38. Id. at 111–116.

39. 156 S.W.3d 557, 559 (Tex. 2004) ("In In re ALU 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 Intl 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).


42. In re ALU, 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).

44. 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. & J. 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).

45. Id. at 112; My Cafe-CCC, Ltd., 107 S.W.3d at 865-67; CMS Partners, Ltd., 101 S.W.3d at 734–36; Hohman, 94 S.W.2d at 101–03; Barnett, 38 S.W.3d at 203–05; Abacan Technical Servs. Ltd. v. Global Marine Inr. Servs., Inc., 583 S.W.2d 943, 486–487 (Tex. App. — Houston [1st Dist.] 1979, writ denied); see also Almen v. Nat'l Equip. Rental, Ltd., 823 S.W.2d at 973 (Tex. App. — Dallas 1991, no pet.) (mem. op.).

46. Phoenix Network Techs. (Europe) Ltd., 177 S.W.3d at 611; Sw. Intelcom, Inc., 997 S.W.2d at 324–25.
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YETTER AND FARRER

47. E.g., In re ALU, 148 S.W.3d at 111 (enforcing clause addressing "all litigation, arbitration, or other form of dispute resolution shall take place ... ").


50. Id. at *2; see also Busse v. Pat’s Castle Feeding Fund No. 1, 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”).


52. In re Infl’nt Profit Ass’ns., Inc., 274 S.W.3d at 677.

53. Id. (internal quotation marks omitted).

54. 997 S.W.2d 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 severable from the remainder of the agreement, however, and it ultimately enforced the arbitration agreement after severing the offending provisions. Id.

55. See also Lu v. Dryclean-U.S.A. of Calif., Inc., 148 F.Supp.2d 1202–03; McNair v. Monsanto Co., 279 F.3d 1290, 1306–07 (M.D. Ga. 2003); First Specialty Ins. Corp. v. Admiral Ins. Co., No. 07-CV-180, 2007 WL 2466283 (E.D. Tenn. Aug. 27, 2007) (claim 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).

56. See also 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-GP, 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”);

57. Deep Water Slender Wells, Ltd., 234 S.W.3d at 623 (discussing two theories of estoppel applicable in the arbitration context).

58. In re Wilmer Cutler, 2008 WL 5413097, at *2; see also Accelerated Christi-


60. See, e.g., Ramsay, 254 S.W.3d at 629-30 (discussing the issue in detail); see also In re ALU, 148 S.W.3d at 111–15.

61. 254 S.W.3d at 629–30.

62. 997 S.W.2d at 324.

63. 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 severable from the remainder of the agreement, however, and it ultimately enforced the arbitration agreement after severing the offending provisions. Id.