

News & Types: Commercial, Competition & Trade Update

Forum Selection Clause Enforces "Home Court" Advantage

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As playoff season approaches in professional football, basketball and other sports, teams will compete for "home court" advantage. Most teams will work very hard for home court advantage. Certainly teams can win away games, but most players would prefer their home court or home field.

Just as in sports, in litigation, the "home court" advantage can be a significant benefit to a litigant. Unlike sports, litigants don't earn home court by winning games. Rather, they gain home court advantage in their agreements. So an agreement that may have been concluded without a thought to litigation becomes very critical in creating an advantage to a party in litigation. A recent New Hampshire federal court case illustrates this. (*Summa Humma Enterprises, LLC d/b/a MB Tractor & Equipment v. Fisher Engineering*, U.S. District Court, D. New Hampshire, Civil No. 12-cv-367-LM, January 3, 2013)

Fisher Engineering sold snowplows to MB Tractor for about four years under two documents. The first was called "Purchase & Security Agreement for Snowplow Units, Accessories and Equipment" (which the court referred to as the "P&S Agreement"). The second was captioned "Fisher Engineering Terms of Sale" (which the court referred to as the "Terms of Sale").

In the fall of 2011, MB Tractor began to promote and sell a line of snowplows and snowplow equipment manufactured by BOSS, which Fisher Equipment considered to be a competitor. On May 10, 2012, Fisher Engineering sent a letter to MB Tractor notifying MB Tractor of Fisher Engineering's intent to terminate its relationship with MB Tractor effective September 10, 2012. The reason for termination was Fisher Engineering's belief that "MB Tractor was not fully committed to the promotion and sale of Fisher Products." MB Tractor quickly commenced litigation seeking reinstatement of the agreements and also seeking damages under three New Hampshire statutes.

But, before deciding the merits of MB Tractor's claims, the court had to decide "home court" (pun intended). This is where the documents that created the parties' relationship became important.

Both documents contained a forum selection clause, basically a provision under which the parties' agree where their dispute will be heard. Not surprisingly, since both documents were prepared by Fisher Engineering, both documents favored Fisher Engineering and provided that disputes would be heard in Maine. But there was a critical difference in the two documents. Here is the language from the P&S Agreement:

"All of the aspects of this transaction shall be governed by the laws of the State of Maine. This Agreement shall be considered to have been executed in the State of Maine. Buyer [MB Tractor]

consents to personal jurisdiction in the State of Maine, and voluntarily submits to the jurisdiction of the courts of Maine in any action or proceeding relating to or in connection with this Agreement."

Here is the language from the Terms of Sale:

"You [MB Tractor] hereby irrevocably consent and submit to the exclusive jurisdiction of the state and federal courts located in the State of Maine for the resolution of any dispute concerning any Products or these Terms and Conditions of Sale."

What was the difference between the two forum selection clauses? The forum selection clause in the P&S Agreement was "permissive", meaning that, while MB Tractor consented to jurisdiction in Maine, MB Tractor was not prohibited from filing in another jurisdiction. This is exactly what MB Tractor did in this case, filing in New Hampshire. In contrast, the forum selection clause in the Terms of Sale was "mandatory", requiring all disputes to be resolved exclusively in the federal or state courts of Maine.

Of course, both documents contained an integration clause under which each would be the "sole" and "entire" agreement between the parties. The P&S Agreement also said that the P&S Agreement controlled in the event of any inconsistency with "Fisher's Distributor Sales Policy and Terms and Conditions." The Terms of Sale went on to state that they superseded "all prior written and oral agreements, understandings and undertakings.. ." Neither document was dated and the P&S Agreement was only partially executed. But the parties agreed that both were in effect at the time the dispute arose. So which document controls?

Faced with a lawsuit by MB Tractor, Fisher Engineering's first defense was to dismiss the lawsuit and require MB Tractor to file in Fisher Engineering's home forum, the courts of Maine. So the New Hampshire federal court had to decide if the case could stay in New Hampshire or had to be dismissed.

"In MB Tractor's view, the permissive forum-selection clause in the P&S Agreement conflicts with, and therefore displaces, the mandatory forum-selection clause in the Terms of Sale. Fisher, on the other hand, characterizes the two clauses as complimentary rather than contradictory, which would allow the court to enforce the forum-selection clause in the Terms of Sale without violating the term in the P&S Agreement requiring that document to control when one of its terms conflicts with a term in the Terms of Sale. Fisher has the better argument." (emphasis added)

To determine for Fisher Engineering, the court used a principle of construing two documents in a way that, if possible, no provision in either document would be meaningless. The court acknowledged that the mandatory forum selection clause in the Terms of Sale and the permissive forum selection clause in the P&S Agreement were not identical. But by requiring MB Tractor to bring its claim in Maine, the court could give meaning to the forum selection clause in both documents. In this way, the two documents would be harmonized so that the provisions would not be meaningless. A different result, permitting MB Tractor to continue its claim in New Hampshire, would render meaningless the forum selection clause in the Terms of Sale.

Based on the court's analysis, MB Tractor's efforts to remain in New Hampshire failed and its claims were dismissed. The dismissal was without prejudice, so MB Tractor had the option of re-filing its claims in Maine, as provided in both documents. Whether it did so or not is unknown. In either case, the documents that Fisher

Engineering used in its dealings with MB Tractor, were a great advantage to Fisher Engineering, even if the inconsistency between the two created an opening for MB Tractor which the court quickly closed.