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## Albemarle Corp. v. AstraZeneca UK Ltd.

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*ALBEMARLE CORP. V. ASTRAZENECA UK LTD.*

Historically, “[m]any courts, federal and state, have declined to enforce [forum selection] clauses on the ground that they were ‘contrary to public policy’ or that their effect was to ‘oust the jurisdiction’ of the court.”<sup>1</sup> However, the United States Supreme Court has upheld forum selection clauses several times,<sup>2</sup> producing the majority rule that “such clauses are prima facie valid and should be enforced unless [unreasonable].”<sup>3</sup>

Last year, in *Albemarle Corp. v. AstraZeneca UK Ltd.*,<sup>4</sup> the United States Court of Appeals for the Fourth Circuit applied English law pursuant to the parties’ choice of law provision to construe the parties’ forum selection clause, and held that all litigation concerning the breach of contract claim had to be pursued in the English High Court.<sup>5</sup> The court found that enforcing the forum selection clause was not unreasonable in light of *Bremen v. Zapata Off-Shore Co.*,<sup>6</sup> and concluded that South Carolina Code Section 15-7-120(A) disfavoring forum selection clauses did not represent strong South Carolina public policy.<sup>7</sup> Consequently, it concluded that enforcement of the forum selection clause was not an unreasonable violation of public policy.<sup>8</sup> The court supported its holding by analyzing South Carolina choice of law rules.<sup>9</sup>

On April 11, 2005, AstraZeneca UK Ltd., a United Kingdom corporation, entered into a purchase contract with Albemarle International Corporation, a Virginia corporation, for at least 80% of AstraZeneca’s di-isopropyl-phenol (“DIP”) needed for production of its fast-acting anesthetic, Diprivan, at its England plant.<sup>10</sup> Albemarle International provided marketing services for Albemarle Corporation, a Virginia corporation, which manufactured DIP in South Carolina.<sup>11</sup>

Significantly, the contract provided that if AstraZeneca replaced its DIP consumption with propofol, a DIP derivative, Albemarle retained the right of first refusal to provide AstraZeneca’s supply.<sup>12</sup> In June 2006, AstraZeneca notified Albemarle that it would begin purchasing propofol from a third party.<sup>13</sup> Albemarle commenced this action for breach of contract in the Court of

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1. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

2. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (“[W]e conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.”); *Bremen*, 407 U.S. at 15 (“[I]n the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.”).

3. *Bremen*, 407 U.S. at 10.

4. 628 F.3d 643 (4th Cir. 2010).

5. *Id.* at 646.

6. *Id.* (citing *Bremen*, 407 U.S. at 15–18).

7. *Id.* at 652.

8. *Id.*

9. *Id.* at 652–53.

10. *Id.* at 646.

11. *Id.* at 645.

12. *Id.* at 646.

13. *Id.*

Common Pleas in Orangeburg, South Carolina after AstraZeneca rejected Albemarle's competing offer to sell propofol to AstraZeneca.<sup>14</sup>

In response, AstraZeneca invoked diversity jurisdiction and removed the case to federal court.<sup>15</sup> AstraZeneca moved to dismiss for improper venue in light of the 2005 contract's forum selection and choice of law clauses, which stated that the contract was "subject to English Law and the jurisdiction of the English High Court."<sup>16</sup> Meanwhile, AstraZeneca agreed to purchase 9,253 kilograms of DIP from Albemarle in a one-time purchase contract on June 23, 2008.<sup>17</sup>

In March 2009, the district court denied AstraZeneca's motion to dismiss and enjoined AstraZeneca from filing claims on the 2005 contract in England.<sup>18</sup> Additionally, the district court held that federal law applied in construing forum selection clauses and that the 2005 forum selection clause at issue was merely permissive.<sup>19</sup> Six months later, however, the district court granted AstraZeneca's motion to reconsider, noting its failure to consider the application of English law in denying AstraZeneca's motion to dismiss.<sup>20</sup> The district court granted the defendant's motion to dismiss, lifted its injunction, and concluded that English law demanded enforcement of the forum selection clause.<sup>21</sup> Further, the district court held that the forum selection clause did not violate South Carolina public policy and that the 2008 contract did not supersede the parties' 2005 contract.<sup>22</sup>

On appeal, Albemarle first argued that the 2008 purchase contract superseded the 2005 contract, claiming that the 2008 contract's integration and forum selection clauses terminated the parties' rights under the 2005 contract.<sup>23</sup> In pertinent part, the integration clause stated, "All prior agreements between the parties relating to this product, if any are currently in force or effect, shall have no further force or effect, except to the extent relied upon by Seller."<sup>24</sup> Additionally, the 2008 contract's forum selection clause provided that all disputes arising under the 2008 contract would be submitted to federal or state court in Orangeburg, South Carolina, "which court will have exclusive jurisdiction and venue over such dispute."<sup>25</sup>

The Fourth Circuit held that Albemarle's argument was illogical. First, Albemarle essentially asked the court to deny AstraZeneca the conditions of the

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 646–47.

19. *Id.* at 647.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (emphasis omitted).

25. *Id.* at 647–48 (emphasis omitted).

2005 forum selection clause while allowing Albemarle's breach of contract claim to go forward under the 2005 contract.<sup>26</sup> Second, although the 2008 contract stated that prior contracts between the parties would have "no further force or effect," the court reasoned that the word "further" was forward-looking and could not nullify the sales, warranties, obligations, claims, and pending litigation arising from the parties' earlier contract.<sup>27</sup> Third, no language in the 2008 contract expressly limited the rights and obligations arising under the 2005 contract.<sup>28</sup>

Albemarle's central argument was that the 2005 contract's forum selection clause did not exclude other jurisdictions and forums, but was merely permissive according to federal law.<sup>29</sup> The court, on the other hand, addressed the contract in light of both the forum selection clause and the choice of law clause. The court began by noting the general rule that federal common law favors enforcement of agreements that confer jurisdiction and venue on a particular court.<sup>30</sup> Because proper venue "is a procedural matter that is governed by federal rule and statutes," courts apply federal law when "analyzing a forum selection clause [that] changes the default venue rules."<sup>31</sup> Therefore, the court concluded that a court interpreting a forum selection clause must apply federal law.<sup>32</sup>

Federal courts interpreting a forum selection clause focus on the clause's language to determine whether it confers absolute or alternative jurisdiction.<sup>33</sup> "[A]n agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion."<sup>34</sup> Here, although the 2005 forum selection clause on its face appeared to designate the English court as permissive, in the context of the English choice of law provision, the forum selection clause conclusively provided language of exclusion.<sup>35</sup> According to English law, agreements that designate the English High Court as an appropriate forum are "mandatory and exclusive."<sup>36</sup> In addition, Albemarle conceded that English law would consider the clause to be mandatory.<sup>37</sup> Further, speaking to the contract at issue, the English High Court stated: "As a matter of English law, which is the applicable

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26. *See id.* at 648.

27. *Id.* (emphasis omitted).

28. *Id.*

29. *Id.*

30. *Id.* at 649.

31. *Id.* at 650.

32. *Id.*

33. *Id.*

34. *Id.* at 651 (quoting *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007)) (internal quotation marks omitted).

35. *Id.*

36. *Id.*

37. *Id.*

law, that clause [in the 2005 contract] would be construed as being an exclusive jurisdiction clause, as was conceded by Albemarle . . . .”<sup>38</sup>

Finding that English law mandated the enforcement of the parties’ 2005 forum selection clause, the court next addressed whether an English forum would be unreasonable. Specifically, the court provided that a forum selection clause may be held unreasonable if:

- (1) [its] formation was induced by fraud or over-reaching;
- (2) the complaining party “will for all practical purposes be deprived of his day in court” because of the grave inconvenience or unfairness of the selected forum;
- (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or
- (4) [its] enforcement would contravene a strong public policy of the forum state.<sup>39</sup>

Here, Albemarle argued that the 2005 forum selection clause was unreasonable because it violated a strong South Carolina public policy as evidenced by South Carolina’s reluctance to enforce forum selection clauses under Section 15-7-120(A) of the Code.<sup>40</sup> The court rejected Albemarle’s argument for four reasons.

First, the court held that federal law would preempt South Carolina’s procedural rules in a federal court because federal law alone regulates the appropriate venue and change of venue in federal cases.<sup>41</sup> Second, in *Bremen* the Supreme Court directly addressed and countered states’ unwillingness to enforce forum selection clauses.<sup>42</sup> Therefore, “contrary to judicial disfavor of forum selection clauses such as that manifested in the South Carolina statute, in federal court, forum selection clauses enjoy a presumption of enforceability.”<sup>43</sup> Third, not only did the court find no evidence demonstrating Section 15-7-120(A) as strong public policy, it also noted a number of South Carolina state and federal court cases enforcing forum selection clauses.<sup>44</sup> Fourth, characterizing South Carolina’s statute as representing a “strong public policy” would simply facilitate the “provincial attitude” that the Supreme Court sought to subvert in

38. *Id.* (quoting *AstraZeneca UK Ltd. v. Albemarle Int’l Corp.*, [2010] EWHC (Comm) 1028, [43]) (internal quotation marks omitted).

39. *Id.* (alterations in original) (quoting *Allen v. Lloyd’s of London*, 94 F.3d 923, 928 (4th Cir. 1996)).

40. *Id.* (citing S.C. CODE ANN. § 15-7-120(A) (2005)). The statute provides:

Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

S.C. CODE ANN. § 15-7-120(A) (2005).

41. *Albemarle*, 628 F.3d at 652.

42. *Id.* (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 12 (1972)).

43. *Id.*

44. *Id.*

*Bremen* when it emphasized “the federal policy of favoring a contractual choice of forum.”<sup>45</sup>

Finally, the court applied a conflict of laws analysis to affirm the district court and held that the parties agreed to litigate under English law, making the forum selection clause mandatory. The court stated that the “conflict of laws rules to be applied by [a] federal court . . . must conform to those prevailing in [the] state courts.”<sup>46</sup> Because the action was filed in South Carolina, “South Carolina law would be consulted for its choice of law rules,” under which the parties’ contractual choice of law would prevail.<sup>47</sup> Here, the parties’ agreement to use English law made the English forum exclusive, overriding Section 15-7-120(A), unless that statute embodied a strong public policy.<sup>48</sup> A state law establishing “that the South Carolina venue rules trump any contractual agreement selecting an exclusive forum outside of South Carolina is not the type of provision that South Carolina courts have recognized as establishing a strong public policy of the State that would overrule the [parties’] choice of law outside South Carolina.”<sup>49</sup>

In *Albemarle*, the Fourth Circuit departed from the historical derision of forum selection clauses and applied the majority rule in international diversity cases. Ultimately, the Fourth Circuit’s decision in *Albemarle* suggests that the court supports negotiated forum selection agreements between parties and recognizes that “[t]he elimination of . . . uncertainties [through such agreements] is an indispensable element in international trade, commerce, and contracting.”<sup>50</sup>

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45. *Id.* (internal quotation marks omitted).

46. *Id.* at 653 (alterations in original) (quoting *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)) (internal quotation marks omitted).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 654 (first alteration in original) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972)).

