ARBITRATION, INCORPORATION, AND FORUM SELECTION: RECENT DEVELOPMENTS IN WEST VIRGINIA COMMON LAW ON CONTRACTS

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I. INTRODUCTION

West Virginia's economy is growing, and faster than the national rate.[1] To support the increased business activity and encourage additional commerce, West Virginia's highest court, the Supreme Court of Appeals of West Virginia, has been proactively improving the state's common law regarding contracts. In the past couple of years, the court has clarified its position on arbitration clauses, incorporation by reference of auxiliary documents, and forum selection clauses. Further, these decrees have conformed to federal authority and helped establish "a predictable, uniform, and reasonable set of legal standards under which individuals and businesses may

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1 W. VA. UNIV. COLL. OF BUS. & ECON., WEST VIRGINIA ECONOMIC OUTLOOK 2014, at 1 (2014), *available at* http://www.be.wvu.edu/bber/outlook_pdfs/WV-Economic-Outlook-2014.pdf ("West Virginia's economy continues to improve, and the pace of improvement has exceeded that of the United States by several measures," including real gross domestic product, exports, and unemployment.).

commercially flourish."[2] West Virginia's common law on contracts is now more predictable, equitable, and valuable.

This Essay explores three areas of contract law that have been recently developed by the West Virginia Supreme Court. Part II surveys the current jurisprudence on arbitration clauses in West Virginia following the United States Supreme Court's ruling in *Marmet Health Care Center v. Brown*.[3] Part III analyzes *State ex rel. U-Haul Co. of West Virginia v. Zakaib*,[4] which announced the requirements for an accessory document to be incorporated by reference into a contract. Part IV reviews *Caperton v. A.T. Massey Coal Co*.[5] and the West Virginia Supreme Court's adoption of an intricate four-part test for enforceability of a forum selection clause. Each section concludes with practical advice on how to achieve a desired outcome—whether judicial enforcement of an arbitration clause, incorporation of an auxiliary document, or enforcement of a forum selection clause—through contract drafting and contemporaneous behavior.

II. ARBITRATION CLAUSES

An arbitration clause is contract term that indicates that the parties have agreed that any disputes arising from their contract will be settled exclusively by arbitration.[6] Arbitration is an alternative dispute resolution process that mimics the government judicial system but is touted as being quicker, cheaper, and more adaptable to the parties' needs.[7] The Federal Arbitration Act[8] dictates that arbitration clauses are "valid, irrevocable, and enforceable" as long as the contract itself is lawful.[9] Further, the Act

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2 J. Zak Ritchie, Note, *A Tie that Binds: Forum Selection Clause Enforceability in West Virginia*, 113 W. VA. L. REV. 95, 132 (2010); *see also* Stephanie Zwerner, Note, *Better for Business, Better for Justice: Why West Virginia Needs an Intermediate Appellate Court*, 117 W. VA. L. REV. 429, 446–52 (2014) (explaining how the West Virginia Supreme Court's recent pro-business decisions have made the state "better for business").

3 132 S. Ct. 1201, 1202 (2012) (per curiam).

4 752 S.E.2d 586 (W. Va. 2013).

5 690 S.E.2d 322 (W. Va. 2009).

6 Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 695 (2001). Arbitration decisions are subject to judicial review only in very limited circumstances. *See* Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91 (2000).

7 Cheryl H. Agris et al., *The Benefits of Mediation and Arbitration for Dispute Resolution in Intellectual Property Law*, 4 N.Y. DISP. RESOL. LAW. 61 (2011).

8 9 U.S.C. §§ 1–16 (2013).

9 *Id.* § 2.

preempts any conflicting state laws and mandates that any issue regarding arbitrability[10] must be resolved "with a healthy regard for the federal policy favoring arbitration."[11]

Until quite recently, the West Virginia Supreme Court was reluctant to honor arbitration clauses with the same enthusiasm as the rest of the nation.[12] The court held numerous arbitration clauses to be unconscionable[13] and therefore unenforceable.[14] The conflict between federal and West Virginia law reached a climax in 2011, when the United States Supreme Court reversed a West Virginia Supreme Court case categorically prohibiting "predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes."[15] Since then, West Virginia has exhibited a "change of heart" and issued several decisions upholding the contested arbitration clause.[16]

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[10] That is, whether the dispute will be resolved through arbitration or through the traditional judicial system.

[11] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[12] In 2013, "you [c]ould have reasonably thought that West Virginia was one of the most anti-arbitration states in the country." Liz Kramer, *West Virginia Has a Change of Heart About Arbitration*, ARB. NATION (Nov. 24, 2013), http://arbitrationnation.com/west-virginia-has-a-change-of-heart-about-arbitration/. The court's opinions allude to several possible reasons behind this position: the constitutional right to a jury trial, bias from arbitrators, and the vague but powerful "public policy" argument. Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 271–73 (W. Va. 2011), *overruled by* Marmet Health Care Ctr. v. Brown, 132 S. Ct. 1201, 1202 (2012) (per curiam) ("In essence, our *Constitution* recognizes that factual disputes should be decided by juries of lay citizens rather than paid, professional fact-finders (arbitrators) who may be more interested in their fees than the disputes at hand.") Many scholars have criticized the use of arbitration clauses as essentially involuntary and altogether unfair to consumers. *See* Drahozal, *supra* note 6, at 697.

[13] Unconscionability is an equitable principle that invalidates a contract or certain provision of a contract if it is wholly unfair both procedurally and substantively. *See* State *ex rel.* Richmond Am. Homes of W. Va., 717 S.E.2d 909, 918–22 (W. Va. 2011); *see also infra* notes 28–40 and accompanying text.

[14] *See, e.g.*, *Richmond*, 717 S.E.2d at 918–22; State *ex rel.* Saylor v. Wilkes, 613 S.E.2d 914 (W. Va. 2005); Arnold v. United Cos. Lending Corp., 511 S.E.2d 854 (W. Va. 1998), *overruled by* Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550 (W. Va. 2012). "There was not an unconscionability argument that the state didn't seem to buy with respect to arbitration clauses." Kramer, *supra* note 12.

[15] Marmet Health Care Ctr. v. Brown, 132 S. Ct. 1201, 1202 (2012) (per curiam), *overruling* Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011); *see also* Ronald Mann, *Opinion Analysis: Court Rebukes West Virginia Court Over Arbitration Stance*, SCOTUSBLOG (Feb. 22, 2012, 9:21 AM), http://www.scotusblog.com/2012/02/opinion-analysis-court-rebukes-west-virginia-court-over-arbitration-stance/. On remand, the West Virginia Supreme Court sent the case back to the circuit court to analyze the unconscionability of the contested arbitration clauses. Brown v. Genesis Healthcare Corp., 729 S.E.2d 217 (W. Va. 2012).

[16] Kramer, *supra* note 12. For a thorough discussion on the enforceability of arbitration clauses in West Virginia oil and gas leases, see Phillip T. Glyptis, *Viability of Arbitration Leases in West Virginia Oil and Gas Leases: It Is All About the Lease!!!*, 115 W. VA. L. REV. 1005 (2013).

A. Recent Case Law

The following cases demonstrate that the West Virginia Supreme Court is now respecting the federal initiative to strongly favor arbitration. In *State ex rel. Johnson Controls, Inc. v. Tucker*, the court reversed the trial court's finding that the arbitration clauses at issue were unconscionable and that compelling arbitration would lead to an inefficient "'waste of judicial resources'" because the multiple-defendant lawsuit would be severed into two arbitration proceedings and one judicial proceeding.[17] The West Virginia Supreme Court complimented the trial court's efficiency argument, but concluded that all claims subject to an arbitration agreement "must be sent to arbitration—even if this will lead to piecemeal litigation."[18]

Dan Ryan Builders, Inc. v. Nelson was a certified question from the United States Court of Appeals for the Fourth Circuit that asked: "Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?"[19] The West Virginia Supreme Court answered in the negative.[20] An arbitration clause does not require separate consideration to be binding.[21] As long as the agreement as a whole includes valuable consideration from both parties, all of its terms are enforceable.[22]

In *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, the court declined to retroactively apply the Dodd-Frank Act's prohibition of arbitration clauses in residential mortgage loans[23] and compelled arbitration of the parties' mortgage dispute.[24] Lastly, in *New v. GameStop, Inc.*, the court interpreted a portion of GameStop's employee handbook to be a binding and enforceable arbitration agreement, even though GameStop could unilaterally modify the agreement after giving thirty days notice.[25]

The vast majority of arbitrability disputes before the West Virginia Supreme Court in the last several years have resulted in enforcement of the parties' preexisting agreement to arbitrate.[26] However, the court will still invalidate an arbitration clause if the clause or entire contract is truly unconscionable.[27]

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17 729 S.E.2d 808, 814 (W. Va. 2012) (quoting the circuit court's orders).

18 *Id.* at 819.

19 682 F.3d 327, 327 (4th Cir. 2012).

20 Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550 (W. Va. 2012).

21 *Id.* at 560.

22 *Id.*

23 15 U.S.C. § 1639c(e)(1) (2013).

24 752 S.E.2d 372 (W. Va. 2013).

25 753 S.E.2d 62 (W. Va. 2013).

26 *See supra* notes 17–25 and accompanying text; *see also, e.g.*, Credit Acceptance Corp. v. Front, 745 S.E.2d 556 (W. Va. 2013) (enforcing an arbitration clause because one of the forums listed in the agreement was still available, but noting that if none of the forums were available, the clause may be unenforceable);

B. Unconscionability

A finding of unconscionability allows the court to refuse to enforce the contract or a particular provision within the contract, such as an arbitration clause, if the parties' agreement is unjustly one-sided and excessively unfair.[28] West Virginia courts consider the totality of the facts and circumstances surrounding the agreement.[29] The inquiry includes both procedure and substance.[30] If the agreement or arbitration clause is both procedurally and substantively unconscionable, the court can refuse to enforce its terms.[31]

Procedural unconscionability focuses on how the parties reached their agreement.[32] The court looks for "unfairness in the bargaining process and formation of the contract . . . that results in the lack of a real and voluntary meeting of the minds."[33] An example is when a company gives its customers a long, complicated, prefabricated contract and no opportunity to review, comprehend, or negotiate its terms. Adhesion contracts[34] with "hidden or unduly complex contract terms" that do not allow for any bargaining are inherently problematic.[35] When the drafting party is a sophisticated corporation and the other party is a young or uneducated individual that is not given a reasonable opportunity to read and understand the contract's terms, the court may find procedural unconscionability.[36]

Toney v. EQT Corp., No. 13–1101, 2014 WL 2681091 (W. Va. June 13, 2014) (memorandum decision) (compelling arbitration of an employment discrimination claim); CDS Family Trust, LLC v. ICG, Inc., No. 13–0375, 2014 WL 184441 (W. Va. Jan. 15, 2014) (memorandum decision) (upholding an arbitration award); Shorts v. AT&T Mobility, No. 11–1649, 2013 WL 2995944 (W. Va. June 17, 2013) (memorandum decision) (affirming an order compelling arbitration of a consumer protection claim); Price v. Morgan Fin. Grp., No. 12–1026, 2013 WL 3184671 (W. Va. June 24, 2013) (memorandum decision) (compelling arbitration of an employee benefits dispute); Green Tree Servicing, LLC v. Figgatt, No. 12–1143, 2013 WL 5730431 (W. Va. Oct. 22, 2013) (memorandum decision) (compelling arbitration of an unlawful debt collection claim).

[27] Kirby v. Lion Enters., 756 S.E.2d 493 (W. Va. 2014) (remanding because the circuit court did not adequately examine the unconscionability of the parties' arbitration clause).

[28] Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 226–27 (W. Va. 2012).

[29] *Id.* at 226.

[30] *Id.* at 227.

[31] *Id.*

[32] *Id.*

[33] *Id.* (citing Syl. Pt. 17, Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011), *overruled on other grounds by* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam)).

[34] An adhesion contract is a standardized form that is offered to the customer with no opportunity for negotiation. Customers often do not read, and rarely understand, the entirety of its terms. State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 273–75 (W. Va. 2002).

[35] *Brown*, 729 S.E.2d at 227–28.

[36] *Id.* at 227.

Along with procedural unconscionability, West Virginia courts examine the terms of the agreement itself for substantive unconscionability.[37] This analysis focuses on the overall reasonableness of the agreement, including the purpose and effect of each term.[38] An agreement that results in an "overly harsh effect on the disadvantaged party" or violates public policy concerns of decency and equity may be substantively unconscionable.[39] In 2011, the West Virginia Supreme Court found an arbitration clause to be unconscionable and unenforceable because it was "unduly oppressive in that it exculpated [the corporate drafting party] from its misconduct, and substantially impaired the plaintiffs' right to pursue remedies" for radon gas leaking into their new home.[40] If the agreement is so incredibly unfair—both in how it was formed and the effect of its terms—the court will disregard the doctrine of freedom of contract and invalidate the agreement for unconscionability.

C. Lessons Learned

To ensure that an arbitration clause or separate arbitration agreement is enforceable in West Virginia, avoid any indicia of unconscionability. An obvious way to prevent procedural unconscionability[41] is to negotiate the terms of each transaction instead of using an adhesion contract.[42] For many companies, however, this approach is not economically feasible. Instead, the company could provide customers with different options instead of a single set of terms. For example, car rental companies can allow the consumer to decline insurance or prepaid gasoline; cell phone service providers can offer several plans with varying allotments for data and messaging; and banks can offer various types of checking accounts or mortgage loans. If negotiation is impractical, the choice of several different options can alleviate inherently unequal bargaining positions.[43]

Effective notice is also very important.[44] Ensure that customers are truly given an opportunity to read the terms of the contract and train employees to adequately answer their questions.[45] Straightforward language, common vocabulary, and explanations of

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37 *Id.* at 228.

38 *Id.*

39 *Id.*

40 State *ex rel.* Richmond Am. Homes of W. Va., 717 S.E.2d 909, 922 (W. Va. 2011).

41 *See supra* notes 32–36 and accompanying text.

42 *See supra* note 34.

43 *Cf.* Cory S. Winter, *The Rap on Clickwrap: How Procedural Unconscionability Is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249, 278–81 (2008) (explaining that different options within the marketplace, i.e. competitors offering a comparable good or service, often defeats a claim of procedural unconscionability).

44 *Id.* at 282–83.

45 Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 227 (W. Va. 2012).

important terms are helpful.[46] Lastly, it is wise to draw attention to an arbitration clause because of its significance and impact on the parties' legal rights. Use of all capitalized letters, enlarged or bold font, and clear cautionary language—Agreement To Resolve All Disputes By Arbitration. Please Read This Carefully. It Affects Your Legal Rights.—will weaken a claim of procedural unconscionability.[47]

To avoid substantive unconscionability,[48] draft the arbitration clause in a reasonably fair manner. Do not impose excessive costs or other burdens that may deter an unsophisticated party from pursuing a valid claim.[49] Also, ensure that the agreement to arbitrate contains "at least a modicum of bilaterality": that the same rules apply to both parties.[50] For example, the court may find substantive unconscionability if the weaker party must submit all claims to arbitration but the drafting party can choose between arbitration and judicial resolution.[51]

Following the foregoing advice—coupled with the recent jurisprudential shift toward broad enforcement of arbitration clauses—will ensure that disputes in West Virginia are properly arbitrated as agreed. Another area of West Virginia contract law that has recently evolved is the doctrine of incorporation by reference.

III. INCORPORATION BY REFERENCE

The doctrine of incorporation by reference allows for multiple documents to be incorporated into a single agreement if certain requirements are met.[52] The West Virginia Supreme Court spelled out West Virginia's version of incorporation by reference in the 2013 case *State ex rel. U-Haul Co. of West Virginia v. Zakaib*.[53]

A. State *ex rel.* U-Haul Co. of West Virginia v. Zakaib

U-Haul involved an arbitration agreement that the appellant sought to incorporate by reference into the parties' contract.[54] The requirements to incorporate a separate document into a contract by reference was an issue of first impression for the West

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46 Winter, *supra* note 43, at 290–91.

47 *Id.* at 289–90.

48 *See supra* notes 37–40 and accompanying text.

49 *Brown*, 729 S.E.2d at 229.

50 *Id.* at 228 (internal quotation omitted).

51 "Substantive unconscionability may manifest itself in the form of an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." *Id.* (internal quotation omitted).

52 State *ex rel.* U-Haul Co. of W. Va. v. Zakaib, 752 S.E.2d 586, 595 (W. Va. 2013).

53 *Id.* at 598.

54 *Id.* at 589.

Virginia Supreme Court.[55] The court considered persuasive authority from scholars and other jurisdictions, then proclaimed a new rule of law for incorporation by reference in West Virginia.[56]

The appellant, U-Haul Co. of West Virginia ("U-Haul"), leases trucks and trailers for short-term use throughout West Virginia.[57] U-Haul requires customers to sign a single-page adhesion contract[58] entitled "Rental Contract" that includes a term stating that the customer has received and agrees to both the Rental Contract and the "Rental Contract Addendum."[59] The addendum contains a provision that all disputes arising from the contract would be resolved by binding arbitration.[60] The Rental Contract did not include or mention the arbitration clause.[61] Some U-Haul locations used printed contracts.[62] The customers would not receive the addendum until after they had signed the Rental Contract.[63] Other locations utilized an interactive computer program that displayed the terms of the Rental Contract on consecutive screens.[64] The final screen read: "By clicking Accept, I agree to the terms and conditions of this Rental Contract and Rental Contract Addendum."[65] Notably, none of the screens revealed the arbitration clause.[66] After the customer accepted and signed the contract electronically, the computer would print a copy of the Rental Contract and the addendum.[67] The addendum was folded and included in a pamphlet that displayed advertisements and information about returning the equipment.[68] The only mention of the arbitration clause was printed inside the addendum, folded inside the pamphlet.[69]

Three previous U-Haul customers sued U-Haul for overcharging them in violation of the Rental Contract and consumer protection laws.[70] U-Haul filed a motion to

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55 *Id.* at 596 ("This Court has recognized that separate writings, including agreements to arbitrate, may be incorporated by reference into a contract. However, there are no cases in West Virginia discussing what is required for a document to be properly incorporated into a contract by reference." (citations omitted)).

56 *Id.* at 595–98.

57 *Id.* at 590.

58 *See supra* note 34

59 *U-Haul*, 752 S.E.2d at 591.

60 *Id.* at 590.

61 *See id.* at 591.

62 *Id.* at 590.

63 *Id.* at 591.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.* at 590.

compel arbitration of the plaintiffs' claims on the basis of the arbitration clause in the Rental Contract Addendum.[71] U-Haul argued that the parties' contract consisted of both the Rental Contract and the Rental Contract Addendum.[72] The circuit court denied the motion to compel arbitration because "the parties never mutually agreed to arbitrate their disputes."[73] U-Haul sought a writ of prohibition from the West Virginia Supreme Court.[74]

The court began by emphasizing that agreements to arbitrate are binding only if evidenced by a "clear and unmistakable writing [that the parties] have agreed to arbitrate."[75] Without manifest mutual assent, the arbitration agreement is invalid.[76] The plaintiffs had clearly consented to the terms of the Rental Contract. The case hinged on whether the parties' agreement also included the Rental Contract Addendum and its arbitration clause.

The court noted that separate documents can be incorporated into a single agreement if certain requirements are met.[77] After consulting secondary sources[78] and outside jurisdictions,[79] the court announced the following rule of law for incorporation by reference in West Virginia:

> [P]arties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakably; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.[80]

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71 *Id.*

72 *Id.*

73 *Id.* at 591.

74 *Id.* at 592.

75 *Id.* at 593 (citing Syl. pt. 10, Brown ex rel. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011), *overruled on other grounds by* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam)).

76 *Id.*

77 *Id.* at 596.

78 *See id.* at 595–97.

79 *See id.* at 596–97.

80 *Id.* at 598.

Applying the new rule to the facts at hand, the court found that the addendum was not adequately incorporated by reference into the parties' agreement.[81] The Rental Contract briefly mentioned the addendum, but it lacked the requisite detail and was provided to the customers only after they had signed the contract.[82] "Under these circumstances, there simply is no basis upon which to conclude that a U-Haul customer executing the Rental Agreement possessed the requisite knowledge of the contents of the Addendum to establish the customer's consent to be bound by its terms."[83] Because the arbitration clause was present only in the addendum and not the Rental Contract, the court affirmed the circuit court's decision to deny arbitration of the plaintiffs' claims.[84]

B. Lessons Learned

The West Virginia Supreme Court has not yet applied the three-factor test from *U-Haul* to a subsequent case, but the Fourth Circuit Court of Appeals did so in *Covol Fuels No. 4, LLC v. Pinnacle Mining Co*.[85] In *Covol*, two coal companies had a contractual arrangement whereby one collected and cleaned the refuse material from the other's mine.[86] Their operating agreement referenced mining plans and permits, but did not identify specific documents or describe them in any detail.[87] The Fourth Circuit declined to incorporate the mining plans into the parties' agreement because they were not "clearly reference[d]" and the parties did not expressly indicate an intention for them to be included as part of the contract.[88] The court stated that mere awareness of secondary documents "is not, by itself, sufficient to incorporate the terms of those [documents]" into the parties' agreement."[89]

The holdings in *U-Haul* and *Covol* are extremely helpful to parties who want to combine multiple writings into a single agreement. Be aware that the burden for incorporation by reference is considerable. To ensure that a subsidiary document is properly incorporated into the contract, (1) make clear and unmistakable reference to it, (2) give a detailed description of the secondary document and its terms, and (3) ensure that all parties have full knowledge of and undoubtedly assent to the incorporation.[90]

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81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 No. 14-1395, 2015 WL 877427 (4th Cir. Mar. 3, 2015).

86 *Id.* at 1.

87 *Id.* at 7.

88 *Id.*

89 *Id.*

90 *See* Syl. pt. 2, State *ex rel.* U-Haul Co. of W. Va. v. Zakaib, 752 S.E.2d 586 (W. Va. 2013).

IV. FORUM SELECTION CLAUSES

The third recent notable development in West Virginia common law on contracts regards forum selection clauses. A forum selection clause antecedently assigns a particular state or court with exclusive jurisdiction over disputes arising from the parties' contract.[91] In simple terms, it is an agreement beforehand as to where the parties will litigate any contract-based dispute.[92] The seminal case of *Caperton v. A.T. Massey Coal Co.*[93] established the standard for enforceability of forum selection clauses in West Virginia.[94]

A. Caperton v. A.T. Massey Coal Co.

The dispute in *Caperton* involved a coal supply agreement between Harman Mining and A.T. Massey Coal Company ("Massey").[95] The parties' contract contained a clear forum selection clause: "All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia."[96] After the parties' relationship deteriorated, Harman Mining sued Massey's subsidiary, Wellmore Coal Corporation, for breach of contract in Buchanan County, Virginia.[97] Harman Mining was successful and was awarded several million dollars in damages.[98]

Soon thereafter, Harman Mining sued Massey again, this time alleging tortious interference with existing and prospective contractual relations and various other tort claims.[99] This second lawsuit was filed in the Circuit Court of Boone County, West Virginia.[100] Massey moved to dismiss the action on the basis of the forum selection clause in the parties' contract.[101] The circuit court denied the motion and Harman Mining again prevailed at trial.[102] Massey then filed several post-judgment motions, the circuit

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91 Ritchie, *supra* note 2, at 96.

92 This differs from a choice of law provision, which identifies which jurisdiction's laws will apply to the contract. *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (2003). For example, a contract may include Delaware as the choice of law and the Southern District of West Virginia as the forum selection. This means that a claim relating to the contract will be heard by a federal district court in the Southern District of West Virginia, which will apply Delaware law.

93 690 S.E.2d 322 (W. Va. 2009).

94 *Id.* at 335; Ritchie, *supra* note 2, at 101.

95 *Caperton*, 690 S.E.2d at 331.

96 *Id.* at 329 (alterations in original).

97 *Id.* at 330, 332.

98 *Id.* at 331.

99 *Id.* at 331–32.

100 *Id.* at 331.

101 *Id.* at 332.

102 *Id.*

court denied them, and Massey appealed.[103] After lengthy litigation regarding judicial recusal and disqualification that was ultimately decided by the United States Supreme Court,[104] the West Virginia Supreme Court "finally addressed the issue of forum selection clause enforcement as appealed by the Massey defendants."[105]

The court acknowledged that the substantive issues involving forum selection clauses were an issue of first impression in West Virginia.[106] To begin, the court noted that forum selection clauses are not contrary to public policy[107] and most courts will enforce them "so long as the clause is fair and reasonable."[108]

The West Virginia Supreme Court then adopted a four-part test used by the United States Court of Appeals for the Second Circuit: (1) Was the clause reasonably communicated? (2) Was the forum selection expressly mandatory or merely permissive?[109] (3) Does the forum selection clause apply to the claims and parties at issue? (4) Has the resisting party "rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable[,] unjust, or that the clause was invalid for such reasons as fraud or overreaching"?[110]

The court applied the new test retroactively to the tort claims filed by Harman Mining.[111] First, the forum selection clause was clearly communicated to Harman Mining by virtue of its overt inclusion in the parties' contract.[112] Second, the clause was mandatory: the language of the contract stated that all disputes "shall" be heard by a specific court.[113] A permissive forum selection clause, on the other hand, does not contain "mandatory or exclusive language" and therefore would allow for litigation in other forums.[114] The court clarified that "to be enforced as mandatory, a forum-selection clause

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103 *Id.*

104 *See* Kevin C. Newsom & Marc James Ayers, *A Brave New World of Judicial Recusal?*, 70 ALA. LAW. 369 (2009), *available at* http://www.babc.com/files/Publication/ff550b61-5d0f-46f6-8d62-359aec8fdd5a/Presentation/PublicationAttachment/3de779ee-eb07-4e5e-ab25-526f6cba3081/01.pdf.

105 Ritchie, *supra* note 2, at 104.

106 *Caperton*, 690 S.E.2d at 335.

107 *Id.* at 336.

108 *Id.* at 335.

109 [D]etermination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as "shall," or exclusive terms such as "sole," "only," or "exclusive," the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

Id. at 339.

110 *Id.* at 336 (quoting Phillips v. Audio Active Ltd., 494 F.3d 378, 383–84 (2d Cir. 2007)).

111 *Id.* at 352.

112 *Id.* at 337.

113 *Id.* at 339–40.

114 *Id.* at 337–38.

must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive."[115]

For the third inquiry, the court interpreted "[a]ll actions brought in connection with this Agreement" to include both contract and tort claims.[116] The clause's broad language applied to all of Harman Mining's claims, which "flow[ed] directly" from the parties' agreement.[117] To determine if a party is subject to a forum selection clause, the court held that "a range of transaction participants, signatories and non-signatories, may benefit from and be subject to a forum selection clause."[118] Non-signatories are bound to the clause if they are "closely related to the dispute such that it becomes foreseeable that [they] may benefit from or be subject to the forum selection clause."[119] The court found that all of the parties were subject to the clause because of their close business relationships.[120]

Because the forum selection clause was reasonably communicated, mandatory, and applied to the parties and their claims, it is presumptively enforceable.[121] For the fourth and final part of the enforceability test, the court analyzed whether Harman Mining had rebutted this presumption by proving that the clause was unreasonable.[122] This may be achieved by a forum selection clause that is "induced by fraud or overreaching," would deny the party an opportunity to be heard or an adequate remedy due to "grave inconvenience or unfairness," or contravenes a "strong public policy."[123] The court found that Harman Mining had not overcome this "heavy burden."[124] Therefore, the clause was enforceable.[125] The court reversed the multi-million dollar judgment and dismissed the case against Massey with prejudice.[126]

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115 *Id.* at 338.

116 *Id.* at 341.

117 *Id.* at 341–42.

118 *Id.* at 347.

119 *Id.*

120 *Id.* at 348.

121 *Id.*

122 *Id.*

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

124 *Id.* at 348–49.

125 *Id.* at 349.

126 *Id.* at 357.

B. Lessons Learned

Since *Caperton*, the West Virginia Supreme Court has enforced both of the forum selection clauses challenged before it.[127] These decisions indicate that West Virginia courts will enforce a contractual forum selection clause as long as all four parts of the *Caperton* test are satisfied.[128] First, draft the forum selection clause in clear language and consider drawing attention to its importance.[129] Second, and perhaps most importantly, include strict language such as "shall," "must," "only," and "exclusively" to ensure that the clause is interpreted as mandatory rather than permissive.[130] Third, consider the desired scope of the provision and carefully draft it accordingly. Finally, avoid any fraud or fundamental unfairness, choose a forum that is not grossly inconvenient or burdensome to either party, and ensure that the clause does not violate any statute or other articulation of public policy.[131]

V. CONCLUSION

The aforementioned new rules of West Virginia contract law will aid parties in drafting their contracts and understanding and obtaining their legal rights. Through the holdings discussed above, the West Virginia Supreme Court has significantly developed the state's common law jurisprudence on contracts. Arbitration clauses will be enforced unless the provision or contract is truly unconscionable. Separate documents can be incorporated by reference into a contract as long as the three elements from *U-Haul* are satisfied. And lastly, *Caperton* outlined West Virginia courts' extensive analysis to determine whether a forum selection clause will be applied to a specific dispute. Any party to a contract governed by West Virginia law will benefit from these thorough, thoughtful, and equitable articulations of West Virginia contract law.

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[127] Commerce Ltd. P'ship #9213 v. Olivieri, Shousky and Kiss, P.A., No. 12–1421, 2013 WL 5418527 (W. Va. Sept. 27, 2013) (memorandum decision); Exploration Energy Partners, LLC v. Mountaineer Gas Transmission, Inc., No. 12–0706, 2013 WL 3242767 (W. Va. June 28, 2013) (memorandum decision).

[128] Ritchie, *supra* note 2, at 131 ("The Caperton decision illustrates that West Virginia now unquestionably reflects the current majority position in forum selection clause jurisprudence embedded in modern American law.").

[129] Spotlighting the clause may be unnecessary to satisfy the requirement of reasonable communication, especially amongst sophisticated parties. *See id.* at 108–09.

[130] *See supra* note 109 and text accompanying note 115.

[131] *See supra* text accompanying notes 110 and 123. For further discussion on conserving or rebutting the presumption of enforceability, see Ritchie, *supra* note 2, at 119–31.