

LEXSEE 2005 U.S. DIST. LEXIS 31897

UNISYS CORPORATION, Petitioner, v. ACCESS CO., LTD., Respondent.

NO. C05-3378 TEH

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

2005 U.S. Dist. LEXIS 31897

November 23, 2005, Decided

November 23, 2005, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner Pennsylvania corporation filed an action against respondent Japanese corporation, seeking an order requiring the Japanese corporation to arbitrate disputes it set forth in a complaint it filed in a district court in Tokyo (Japan). The Japanese corporation filed a motion to transfer venue, pursuant to *28 U.S.C.S. § 1404(a)*.

OVERVIEW: The parties entered into a licensing agreement which required them to arbitrate disputes under the agreement, provided that Pennsylvania law would govern interpretation of the agreement, and specified that the parties could use state and federal courts in Pennsylvania to resolve their disputes. The Pennsylvania corporation subsequently claimed that the Japanese corporation owed fees under the agreement, and it demanded payment. In response to that demand, the Japanese corporation filed a lawsuit in Japan, claiming that the Pennsylvania corporation's demand violated Japanese law. The Pennsylvania corporation initiated arbitration in Pennsylvania and filed suit in federal district court in California, seeking an order requiring the Japanese corporation to arbitrate claims contained in the complaint it filed in Japan. The Japanese corporation filed a motion for a transfer of venue to federal court in Pennsylvania. The court held that transfer of venue was appropriate, even though the Japanese corporation's offices were located in California, because none of the facts underlying the dispute occurred in California and practical issues in trying the case weighed in favor of transfer.

OUTCOME: The court granted the Japanese corporation's motion to transfer venue, vacated the Pennsylvania's corporation's motion for a preliminary injunction, and ordered the clerk of court to transfer the case to the Eastern District of Pennsylvania.

LexisNexis(R) Headnotes

*Civil Procedure > Venue > Federal Venue Transfers > Convenience Transfers
Evidence > Procedural Considerations > Burdens of Proof > Allocation*

[HN1] *28 U.S.C.S. § 1404(a)* provides that, for the convenience of the parties and witnesses, in the interest of justice, a federal district court may transfer any civil action to any other district or division where it might have been brought. To successfully move for transfer under *§ 1404(a)*, the moving party must establish that the action could originally have been brought in the district to which transfer is sought. The moving party also bears the burden of establishing that an action should be transferred.

Civil Procedure > Venue > Federal Venue Transfers > Convenience Transfers

[HN2] In ruling on a motion to transfer, a federal district court must consider each of the factors enumerated in *28 U.S.C.S. § 1404(a)*, i.e., convenience of the parties, convenience of the witnesses, and the interests of justice. Other relevant factors include the plaintiff's choice of forum, the local interest in the issue, the relative ease of

access to evidence, the availability of compulsory process for unwilling witnesses and the cost involved in securing willing witnesses, and practical issues that make a case easier or more difficult to try in a given forum, such as familiarity of each forum with applicable law and the relative court congestion in each forum.

Civil Procedure > Venue > Motions to Transfer > Choice of Forum

[HN3] Generally, a defendant must make a strong showing of inconvenience to warrant upsetting a plaintiff's choice of forum.

Civil Procedure > Venue > Motions to Transfer > Choice of Forum

[HN4] A plaintiff's choice of forum will be accorded little deference where it is apparent that the plaintiff is engaged in forum shopping, especially where the plaintiff is offered an equally convenient forum.

International Law > Dispute Resolution > Comity Doctrine > General Overview

[HN5] The Fifth, Seventh, and Ninth Circuits follow the liberal or lax standard by which a court will issue an injunction where the policy in the enjoining forum is frustrated, the foreign proceeding would be vexatious or would threaten a domestic court's in rem or quasi in rem jurisdiction or other equitable considerations, and finally, where allowing the foreign proceedings to continue would result in delay. By contrast, the Second, Third, Sixth, and District of Columbia Circuits use a more restrictive approach, rarely permitting injunctions against foreign proceedings.

Civil Procedure > Venue > Motions to Transfer > Convenience of Parties

[HN6] Convenience of counsel is not a consideration in determining whether to transfer an action.

Civil Procedure > Venue > Motions to Transfer > Convenience of Witnesses

[HN7] To demonstrate an inconvenience to witnesses if venue is transferred, a moving party must identify relevant witnesses, state their location, and describe their testimony and its relevance.

Civil Procedure > Venue > Motions to Transfer > Choice of Forum

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN8] Whether a forum selection clause is mandatory or permissive is a matter of contract interpretation reviewed de novo.

Civil Procedure > Venue > Motions to Transfer > Choice of Forum

Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN9] While courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue, and plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum.

Civil Procedure > Venue > Federal Venue Transfers

[HN10] Federal district courts regularly apply the law of states other than the forum state, and this factor alone does not require the transfer of an action, pursuant to 28 U.S.C.S. § 1404(a).

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN11] 9 U.S.C.S. § 207 provides that any party to an arbitration may apply to any court having jurisdiction under U.S. Code tit. 9, ch. 2 for an order confirming the award as against any other party to the arbitration.

Civil Procedure > Venue > Motions to Transfer > General Overview

[HN12] The fact that litigation has scarcely begun weighs in favor of transferring an action.

COUNSEL: [*1] For Unisys Corporation, Plaintiff: Eric Kraeutler, John V. Gorman, William W. Friedman, Morgan Lewis & Bockius LLP, Philadelphia, PA.

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Westfield, NJ.

JUDGES: THELTON E. HENDERSON, JUDGE.

OPINION BY: THELTON E. HENDERSON

OPINION

ORDER GRANTING RESPONDENT ACCESS' MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

This matter came before the Court on Monday, October 24, 2005, on a motion to transfer venue under 28 U.S.C. § 1404(a) filed by Respondent ACCESS Co. ("ACCESS"). After carefully considering the parties' written and oral arguments, the Court now GRANTS the motion for the reasons set forth below.

BACKGROUND

ACCESS Co., Ltd. ("ACCESS") is a Japanese corporation that provides mobile content and delivery of Internet access technologies. Unisys is an information technology services and solutions company with a principal place of business just outside Philadelphia, [*2] Pennsylvania. In December 2000, the parties entered into a license agreement ("Agreement"), which contained an arbitration clause.

The parties' dispute arises out of a demand by Unisys for payment by ACCESS of license fees allegedly owed under the Agreement. In response, ACCESS brought suit in a District Court in Tokyo, Japan ("Japan action"), alleging that Unisys' demand for payment by ACCESS is in violation of the Japanese Antimonopoly Act.¹ Unisys subsequently initiated arbitration in Philadelphia, pursuant to the Agreement's arbitration clause, seeking damages for ACCESS' alleged breach of the Agreement. On August 19, 2005, Unisys initiated this action requesting an order compelling ACCESS to arbitrate the disputes set forth in ACCESS' Japanese complaint, compelling ACCESS to dismiss its Japanese action, and awarding Unisys its costs.

¹ The parties stipulated to suspending the Japan action until a final, non-appealable decision is reached in the U.S. action.

LEGAL STANDARD

[HN1] Section 1404(a) provides [*3] that, "[f]or the

convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). To successfully move for transfer under this section, the moving party must establish that the action could originally have been brought in the district to which transfer is sought. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). The moving party also bears the burden of "establishing that an action should be transferred." *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 497, 499 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

[HN2] In ruling on a motion to transfer, a district court must consider each of the factors enumerated in § 1404(a) -- i.e., convenience of the parties, convenience of the witnesses, and the interests of justice. 28 U.S.C. § 1404(a). Other relevant factors include: the plaintiffs choice of forum; the local interest in the issue; the relative ease of access to evidence; the availability [*4] of compulsory process for unwilling witnesses and the cost involved in securing willing witnesses; and the practical issues that make a case easier or more difficult to try in a given forum, such as familiarity of each forum with applicable law and the relative court congestion in each forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986); *Royal Queentex Enterprises, Inc. v. Sara Lee Corp.*, No. C-99-4787 MJJ, 2000 U.S. Dist. LEXIS 10139, at *2 (N.D. Cal. Mar. 1, 2000).

DISCUSSION

Unisys and ACCESS do not dispute that this case could have been brought either here or in a district court in Pennsylvania. Thus, ACCESS' motion to transfer venue turns on whether the Court finds it appropriate to transfer the case to Pennsylvania "[f]or the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

1. Local Interest in the Action

ACCESS argues that Unisys' choice of forum should be accorded only minimal consideration because Unisys does not have its principal place of business in the Northern District of California, the operative facts did not occur [*5] in the Northern District, and the Northern District does not have a particular interest in the action. *See Meyers v. Ciano*, No. C 01-3955 TEH, 2002 U.S.

*Dist. LEXIS 2556, *8-9 (N.D. Cal. Feb. 12, 2002)* (holding that a plaintiff's choice of forum should only be afforded minimal consideration where "she is not a resident of the district where she instituted suit, the operative facts have not occurred within the forum, and the forum has no particular interest in the parties or the subject matter").

Unisys counters that the Northern District of California has an interest in this action because it is the only district where ACCESS, a Japanese corporation, has a U.S. office.² Furthermore, Unisys has two offices in this district, employs approximately 2,000 persons in California and leases and/or owns substantial real and personal property in California.

2 Additionally, ACCESS recently announced its agreement to purchase PalmSource, Inc., which is located within this district (Sunnyvale).

It is true that both [*6] parties have a presence in this district. However, ACCESS' arguments as to the lack of connection between the parties' presence in this district and the underlying dispute are persuasive. Specifically, none of the events underlying Unisys' petition to compel arbitration occurred in the Northern District of California and Unisys' activities within this district are unrelated to the petition to compel arbitration.

This factor, therefore, weighs in favor of venue transfer.

2. Plaintiff's Choice of Forum

[HN3] Generally, "[t]he defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co., 805 F.2d at 843*. ACCESS disputes the degree of deference owed to Unisys' choice of forum and argues that Unisys' choice is entitled to only "minimal consideration" because the operative facts have not occurred within the forum, the forum has no interest in the parties or the subject matter, and Unisys is forum shopping. *Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)* (holding that a plaintiff's choice of forum "commands only minimal consideration where she is not a resident of the district where she [*7] instituted suit, the operative facts have not occurred within the forum, and the forum has no particular interest in the parties or the subject matter"); *see also Alltrade Inc. v. Uniweld Products, Inc., 946 F.2d 622, 628 (9th Cir. 1991)* (finding that courts should disregard the

plaintiff's forum choice if the suit is a result of forum shopping).

For the following reasons, the Court agrees with ACCESS that the appropriate degree of deference owed to Unisys' forum choice is minimal. First, as noted above, none of the facts underlying the dispute occurred in the Northern District of California. Second, while it is true that both parties have a presence within this district and this is the only U.S. district where ACCESS has a presence, Unisys has failed to demonstrate that the forum has a substantial interest in the parties or the subject matter. Third, one could rationally infer that Unisys was forum shopping based on (a) the inability of Unisys' counsel to provide a persuasive reason for bringing suit in the Northern District of California, (b) the lack of connection between the action and this district, (c) the delay in time between the filing of the Japan action [*8] (September 22, 2004) and the petition to compel arbitration (August 19, 2005), (d) the fact that Unisys rejected ACCESS' offer to stipulate to transfer this action to the Eastern District of Pennsylvania even though Unisys and counsel are located in Pennsylvania, and (e) the fact that the Ninth Circuit provides a more favorable rule of decision.³ *See Reiffin v. Microsoft, 104 F. Supp. 2d 48, 54 n.12 (D.D.C. 2000)* (finding that [HN4] a plaintiff's choice of forum will be accorded little deference where it is apparent that plaintiff is engaged in forum shopping, especially where the plaintiff is offered an equally convenient forum); *see also Royal Queentex Enterprises v. Sara Lee Corp., 2000 U.S. Dist. LEXIS 10139, *10 (N.D. Cal. Mar. 1, 2000)*; *Italian Colors Rest. v. Am. Express Corp., No. C 03-3719 SI, 2003 U.S. Dist. LEXIS 20338, at *11-12 (N.D. Cal. Nov. 7, 2003)*.

3 ACCESS points out that the Third Circuit's standard for enjoining foreign proceedings is more restrictive than the Ninth Circuit's standard. [HN5] The Fifth, Seventh, and Ninth Circuits follow the liberal or lax standard by which a court "will issue an injunction where the policy in the enjoining forum is frustrated, the foreign proceeding would be vexatious or would threaten a domestic court's in rem or quasi in rem jurisdiction or other equitable considerations, and finally, where allowing the foreign proceedings to continue would result in delay." *General Elec. Co. v. Deutz AG, 270 F.3d 144, 160-61 (3d Cir. 2001)*. By contrast, the Second, Third, Sixth, and District of Columbia Circuits use a more

restrictive approach, rarely permitting injunctions against foreign proceedings. *Id.*

[*9] Accordingly, this factor weighs in favor of venue transfer.

3. Convenience of the Parties

In support of their argument that the Eastern District of Pennsylvania is a more convenient forum than the Northern District of California, ACCESS primarily points to the convenience of counsel. However, [HN6] "convenience of counsel is not a consideration" in determining whether to transfer an action. *E & J Gallo Winery v. F. & P. S.P.A.*, 899 F. Supp. 465, 466 (N.D. Cal. 1994).

Unisys argues that despite the fact that counsel representing ACCESS and Unisys in the Philadelphia arbitration are in New Jersey and Pennsylvania, respectively, all counsel of record have been admitted *pro hac vice* by this Court and each party has retained counsel in San Francisco. Further, Unisys accepts any arguable inconvenience that might arise from its choice of forum. Accordingly, the Court should not give weight to ACCESS' arguments of the inconvenience to Unisys, which brought suit in this district.

Given that ACCESS failed to identify any real inconvenience as a result of the current venue and Unisys accepted any arguable inconvenience, this factor does not weigh strongly in either party's [*10] favor.

4. Convenience of the Witnesses and Access to Evidence

[HN7] "To demonstrate an inconvenience to witnesses, the moving party must identify relevant witnesses, state their location and describe their testimony and its relevance." *Sec. & Exch. Comm'n v. Rose Fund, LLC*, 2004 U.S. Dist. LEXIS 22491, No. C 03-04593 WHA, 2004 WL 2445242, at *3 (N.D. Cal. Jan. 9, 2004); see also *Royal QueenTex*, 2000 WL 246599 at *6. ACCESS was not able to identify relevant witnesses and point to specific evidence because the parties stipulated that no discovery will be required and "the U.S. Action can be resolved based only on the papers submitted and oral argument by counsel, and without testimony by live witnesses." Decl. of Jeffrey S. Dickey Ex. 4. Therefore, ACCESS' speculative arguments pursuant to the Federal Arbitration Act with regard to a

district court's powers "to enforce subpoenas, compel attendance of witnesses, and punish non-compliant witnesses in arbitration proceedings" are not relevant to this transfer analysis. Mot. to Transfer Venue at 6.

Since the parties stipulated that discovery and witnesses are not relevant to this case, this factor does not weigh in favor of either party.

[*11] 5. Deference Owed to the Forum Selection Clause

The license agreement states that, "[t]he validity and interpretation of this Agreement shall be governed by Pennsylvania law without regard to conflict of laws principles. The parties further consent to jurisdiction of the state and federal courts sitting in the Commonwealth of Pennsylvania." Decl. of Jeffrey S. Dickey Ex. 2, P 14(e). ACCESS argues that it would be in line with the orderly and efficient administration of the underlying arbitration, as well as the license agreement, to transfer this action to the Eastern District of Pennsylvania. Unisys counters that since the forum selection clause is permissive, not mandatory, it does not prohibit suit in this forum. Further, at oral argument, Unisys argued that because the forum selection clause does not specify the Eastern District of Pennsylvania, but rather merely Pennsylvania, a clear preference for the Eastern District of Pennsylvania is not articulated.

[HN8] Whether a forum selection clause is mandatory or permissive is a matter of contract interpretation reviewed de novo. *N. Cal. Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1036 (9th Cir. 1995). [*12] While the clause in this case is clearly permissive, the parties disagree as to the weight that the Court should give the clause. Unisys posits that absent language in the forum selection clause providing that the Eastern District of Pennsylvania is the *exclusive* forum, the clause authorizes jurisdiction in the Eastern District of Pennsylvania, but does not prohibit litigation elsewhere. See *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (holding that a forum selection clause that says nothing about exclusive jurisdiction is permissive rather than mandatory).

ACCESS argues that, "although a permissive forum clause is entitled to less weight than a mandatory one, the fact that both parties initially accepted the jurisdiction of the courts of [a certain jurisdiction] must count. A forum

selection clause is determinative of the convenience to the parties" and is entitled to "substantial consideration." (*MK Sys. v. Schmidt*, No. 04 Civ. 8106 RWS), 2005 U.S. Dist. LEXIS 3877, at *15 (S.D.N.Y. Mar. 16, 2005); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3rd Cir. 1995) (giving substantial, yet not dispositive, [*13] weight to "the parties' agreement as to the most proper forum"). Thus, ACCESS argues that even though the forum selection clause is permissive, it should still be given some deference.

The Court finds that, although the forum selection clause is permissive, the fact that the parties contemplated Pennsylvania as a possible forum is entitled to "substantial consideration" in this analysis. *Id.* at 880. Further, [HN9] "[w]hile courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue. . . . [Thus,] the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995). Here, after providing Unisys the opportunity at oral argument to explain "why they should not be bound by their contractual choice of forum," Unisys failed to provide the Court with a salient reason why deference to the choice of forum in the forum selection clause is inappropriate. Further, the Court does not give weight to Unisys' overly technical argument that a clear preference [*14] is not articulated in the forum selection clause because it does not specify the Eastern District of Pennsylvania.

In light of all of the above, this factor weighs in favor of venue transfer.

6. Choice of Law

In its motion for preliminary injunction, Unisys argues that Pennsylvania law strongly supports arbitration. In response, ACCESS contends that the resolution of the petition to compel arbitration *may* involve interpretation of Pennsylvania law and, therefore, a Pennsylvania court should handle the case. However, [HN10] district courts regularly apply the law of states other than the forum state, and this factor alone does not require the transfer of an action pursuant to *section 1404(a)*. See *Noreiga v. Lever Bros. Co.*, 671 F. Supp. 991, 996 (S.D.N.Y. 1987); *Turrett Steel Corp v. Manuel Int'l Inc.*, 612 F. Supp. 387, 390 (W.D. Pa. 1985).

Because neither party pointed to any Pennsylvania law that necessarily applies to this case, and because this factor does not, in any event, have dispositive weight, this factor does not favor either party.

7. Practical Issues in Trying a Case

The action before this Court is related to the ongoing [*15] arbitration in Philadelphia, Pennsylvania, and counsel handling the arbitration are in Philadelphia, Pennsylvania (Unisys), and Westfield, New Jersey (ACCESS). Thus, it appears logical that the current action should also proceed in Pennsylvania.

Accordingly, this factor weighs in favor of venue transfer.

8. Interests of Justice

a. Judicial Enforcement

Unisys argues that if judicial enforcement becomes necessary, this district is the most appropriate to compel ACCESS, which has a presence in this district but none in Pennsylvania, to comply. ACCESS counters that should Unisys obtain a favorable decision in the arbitration in Pennsylvania, Unisys can seek confirmation of that award in any district. [HN11] 9 U.S.C. § 207 ("[A]ny party to the arbitration may apply to any court having jurisdiction under this chapter . . . for an order confirming the award as against any other party to the arbitration.").

Since any favorable decision that necessitates enforcement can be confirmed in any district, the Court does not give weight to Unisys' arguments that issues of enforcement make transfer inequitable.

b. Preliminary Stage of Proceedings

ACCESS also [*16] argues that transfer is appropriate because the Court is still at the preliminary stage of the proceedings. [HN12] The fact that litigation has scarcely begun weighs in favor of transferring the action. *Meyers*, 2002 U.S. Dist. LEXIS 2556, at *10 (finding it was within interests of justice to transfer the action because litigation had not progressed far).

c. Trial Efficiency

At oral argument, Unisys argued that denying the motion to transfer would promote efficiency.

Specifically, Unisys stated that the resources they expended in preparing the motion for preliminary injunction would be wasted if the transfer is granted. While it is true that both parties expended resources in preparing for the motion for preliminary injunction, the amount of resources expended was not inordinate and the Court does not find Unisys' argument to be persuasive.

9. Summary

The Court finds that ACCESS has met its burden of demonstrating that transfer of venue to the Eastern District of Pennsylvania is warranted. In particular, ACCESS has established that (1) there is a lack of local interest in the action and thus Unisys' choice of forum should only be accorded minimal consideration; [*17] (2) the choice of forum in the parties' forum selection clause is entitled to substantial consideration; (3) practical issues in trying the case, including the ongoing arbitration in Philadelphia and the location of counsel trying the case, weigh in favor of transfer; and (4) the fact that the case is still in the preliminary stages of the proceedings weighs in favor of transfer.

The Court finds the lack of local interest in the action and the choice of forum in the parties' forum selection clause to be the most persuasive factors supporting transfer of venue. Namely, given the inability of Unisys'

counsel to provide a persuasive reason for bringing suit in the Northern District of California and their inability to explain why they should not be bound by the forum selection clause, the Court finds transfer appropriate.

CONCLUSION

In short, for the reasons discussed above, ACCESS has met its burden of demonstrating that transfer is warranted under the factors enumerated in § 1404(a). Accordingly, with good cause appearing, **IT IS HEREBY ORDERED** that:

1. ACCESS' motion to transfer venue is **GRANTED**. The Clerk shall close the file and transfer this case to the Eastern District [*18] of Pennsylvania.

2. Unisys' motion for preliminary injunction is **VACATED**. Unisys may renew its motion in the Eastern District of Pennsylvania, if it so desires.

IT IS SO ORDERED.

Dated: November 23, 2005

THELTON E. HENDERSON, JUDGE

UNITED STATES DISTRICT COURT