No. 92338-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 71420-1)

MICROSOFT CORPORATION,

Petitioner,

v.

BELLA ACHARYA,

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiff Bella Acharya is attempting to sue Microsoft Corporation in Washington State for discriminatory treatment that she allegedly suffered while working for a Swiss corporation in Europe. Before she accepted that job, she signed an employment agreement in which she agreed to resolve any employment-related disputes in Swiss courts. When Acharya nevertheless brought suit in King County Superior Court, Microsoft attempted to enforce the forum-selection clause. The Superior Court denied Microsoft's motion to dismiss, and the Court of Appeals affirmed. Even though the undisputed evidence showed that Acharya was not employed in Washington—or by a Washington corporation—at any relevant time, the Court of Appeals believed that it was required to presume that Acharya was a Microsoft employee working in Washington because that was what she alleged in the complaint.

The published decision of the Court of Appeals is directly contrary to this Court's decision in *Dix v. ICT Grp., Inc.*, which held that "[i]n assessing a forum selection clause for enforceability, the court does *not* accept the pleadings as true." 160 Wn.2d 826, 835, 161 P.3d 1016 (2007) (emphasis added). The conflict with *Dix*—and with numerous Court of Appeals decisions applying the same rule—is significant because the decision below relieves plaintiffs of their obligation to present evidence

justifying the non-enforcement of forum-selection clauses and instead allows them to escape their contractual obligations through artful pleading. Given the importance of forum-selection clauses to contractual predictability, the court's error raises an issue of substantial public interest, and it warrants review and correction by this Court.

IDENTITY OF THE PETITIONER

The petitioner is Defendant Microsoft Corporation.

COURT OF APPEALS DECISION

On June 22, 2015, the Court of Appeals, Division I, issued a decision affirming the trial court's denial of Microsoft Corporation's motion to dismiss the complaint. (App. 1-17) On August 12, 2015, the Court of Appeals ordered that its decision be published. (App. 18-19)

ISSUE PRESENTED FOR REVIEW

Whether, in ruling on a motion to enforce a forum-selection clause, a court must accept allegations in the pleadings as true when they are contrary to undisputed evidence properly considered on the motion.

STATEMENT OF THE CASE

A. Acharya becomes an employee of Microsoft Global Resources GmbH in Europe

Until 2008, Acharya worked as an advertising sales manager for Microsoft Corporation in Redmond, Washington. (CP 79) In that year, she developed the idea of leading her own international sales team. (CP 79,

145, 162) To that end, she voluntarily resigned her employment with Microsoft Corporation and accepted a job in the United Kingdom, where Microsoft Global Resources GmbH (MGR), a Swiss company, employed her as an International Sales Manager. (CP 80) MGR assigned Acharya to work in the United Kingdom for Microsoft Ltd., a British company. (CP 80)

Before resigning her Microsoft Corporation employment and accepting the job with MGR in Europe, Acharya signed a new employment agreement with MGR. (CP 187-93) That agreement was seven pages long, and Acharya reviewed it for a month before she signed. (*Id.*) It contained a choice-of-law provision specifying that the agreement was to be "governed in all respects by the laws of Switzerland." (CP 192) It also contained a forum-selection clause requiring the resolution of all disputes in Swiss courts. (*Id.*) That clause, identified by the boldface heading "Place of Jurisdiction" in the margin, stated: "Any dispute, controversy or claim arising under, out of or in relation to this Employment Agreement, its valid conclusion, binding effects, interpretation, including tort claims, shall be referred and finally determined by the ordinary courts at the domicile of MGR in Switzerland." (*Id.*)

The agreement contained an integration clause specifying that it reflects "the complete agreement between the parties," except that the

"International Offer Letter of Assignment" constitutes "an integral part" of the agreement. (CP 191-92) That letter informed Acharya that her employment was "anticipated to be for two years," and that "[t]hroughout the term of this agreement, you will remain an employee of MGR." (CP 195) The letter further stated that, upon the conclusion of the assignment, "[t]here is no guarantee that you will obtain another assignment with MGR or a new position with another Microsoft affiliate." (CP 197)

Acharya extended her employment agreement with MGR several times, and as a result she worked for MGR continuously in Europe for four years, until 2012. (CP 81) While at MGR, she held a highly compensated managerial position, and she led a team located throughout the European Union. (CP 182) Shortly before her MGR employment concluded, she applied for several jobs with Microsoft Corporation in the United States, but she was not hired for any of those positions. (CP 80)

B. Acharya sues Microsoft Corporation in King County

In July 2013, Acharya brought this lawsuit against Microsoft Corporation, alleging that it had violated the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW. (CP 1-22) Specifically, she alleged that her London-based manager, Olivier van Duüren, an employee of Microsoft NV assigned to work for Microsoft Ltd. in the United

Kingdom, gave her unfairly low performance evaluations in 2011 and 2012 on account of her sex and age. (CP 5-12)

Acharya contended that van Duüren's supervisors, some of whom were based in Redmond, had failed to supervise him adequately and monitor his activities, and that investigators employed by Microsoft Corporation had failed to conduct an adequate investigation of her complaints. (CP 10-11) She did not allege, however, that any of those Microsoft Corporation employees themselves engaged in any discriminatory or retaliatory conduct. She also did not allege that Microsoft Corporation's failure to hire her in 2012 was based on discrimination or retaliation—the Washington hiring managers for those positions knew her personally and had worked with her before. (CP 145-46) Instead, she asserted that "there was virtually no chance that she was going to be able to find a suitable position" at Microsoft Corporation because van Duüren, who lived in Belgium and worked with her in London, had "poison[ed] the well." (CP 11)

C. Microsoft moves to enforce Acharya's forum-selection clause and dismiss her Washington lawsuit in favor of a European forum

Microsoft Corporation moved to dismiss the lawsuit without prejudice so that Acharya could bring her action in Switzerland. (CP 71-99) It offered two independent grounds for dismissal: the forum-selection

clause and the doctrine of forum non conveniens, since most of the relevant witnesses and sources of proof were in Europe. (CP 85-97) Acharya opposed the motion. (CP 248-78)

Following a hearing, the Superior Court entered an order denying the motion without opinion. (CP 733-35) Microsoft Corporation filed a timely notice of discretionary review. (CP 746-47)

D. The Court of Appeals grants discretionary review

The Court of Appeals granted discretionary review. (App. 20-31) The Commissioner explained that "[a] forum selection clause is 'presumptively valid and enforceable,' and the party resisting it . . . has the burden of demonstrating otherwise." *Id.* at 26 (quoting *Dix v. ICT Grp. Inc.*, 160 Wn.2d 826, 834, 161 P.3d 1016 (2007)). "In assessing a forum selection clause for enforceability," the Commissioner observed, "a court does not accept the pleadings as true." *Id.* Instead, the party seeking to avoid enforcement of the clause must "present evidence to justify nonenforcement." *Id.* (quoting *Dix*, 160 Wn.2d at 835). Noting that the Superior Court had "made no finding or conclusion to explain why the clause is not enforceable," the Commissioner concluded that "[t]he trial court's decision appears to be in error." *Id.* at 28.

E. The Court of Appeals affirms the Superior Court's denial of the motion to dismiss

The Court of Appeals affirmed. (App. 1-17) The court acknowledged the rule that a "forum-selection clause is presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable." *Id.* at 10 (quoting *Dix*, 160 Wn.2d at 833-34). But it held that Acharya demonstrated the clause was unreasonable because enforcing it would contravene public policy. *Id.* at 11.

In reaching that conclusion, the court acknowledged Microsoft's argument that "there is nothing unreasonable about an agreement that employees working in Europe for a European company will settle their disputes in a European forum." (App. 10) But the court rejected that argument because it believed that, "for purposes of the motion under review," it was required to "presume that Microsoft, a Washington corporation, was Acharya's employer at the time of the alleged wrongful conduct." *Id.* Although the irrefutable evidence submitted showed that MGR, not Microsoft Corporation, was Acharya's employer at all times relevant to the case, the court stated that "Acharya is the nonmoving party, and she asserted that Microsoft was her employer when she suffered the alleged discrimination." *Id.* at 6. For that reason, the court concluded, it

was bound to "operate with the inference that Microsoft was Acharya's employer at the time of the alleged discriminatory actions." *Id.*

ARGUMENT

This Court has held that "[i]n assessing a forum selection clause for enforceability, the court does not accept the pleadings as true" but instead requires the party opposing enforcement to present evidence that the clause should not be enforced. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 835, 161 P.3d 1016 (2007). The Court of Appeals has repeatedly applied the same rule, which is consistent with that applied by federal courts. *See, e.g.*, *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 239, 122 P.3d 729 (2005); *Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001); *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 618, 937 P.2d 1158 (1997).

In this case, however, the Court of Appeals created a conflict with all of those decisions. In a published opinion, it affirmed the trial court's denial of a motion to enforce a forum-selection clause in Acharya's employment agreement. It did so on the basis of its erroneous presumption that Acharya was an employee of a Washington corporation who had alleged misconduct in Washington. But that assumption was contrary to the undisputed evidence submitted with the motion, which established that Acharya was an employee of a Swiss corporation. The Court of Appeals

disregarded that evidence and held, contrary to *Dix*, that it was required to "presume that Microsoft, a Washington corporation, was Acharya's employer" because that was what she had "asserted" in her complaint. (App. 6, 10)

The conflict created by the Court of Appeals is itself sufficient to make its decision worthy of review under RAP 13.4(b)(1) and (2). But the case also warrants review because ensuring the proper standard for evaluating the enforceability of a forum-selection clause is a matter of substantial public interest. RAP 13.4(b)(4). This Court has recognized that the enforceability of forum-selection clauses is important to contractual predictability. *Dix*, 160 Wn.2d at 835. The decision below undermines that predictability by allowing any plaintiff to avoid enforcement of a valid forum-selection clause through artful pleading. That result warrants this Court's review and correction.

A. In ruling on a motion to enforce a forum-selection clause, a court must not accept the plaintiff's allegations as true when the undisputed facts contradict them

This Court has held that a court evaluating a motion to dismiss for improper venue—including a motion to dismiss on the basis of a forum-selection clause—must apply a different standard than it would apply to a motion to dismiss for failure to state a claim. In ruling on a motion to dismiss for failure to state a claim, a plaintiff's allegations are taken as

true, and the court may consider hypothetical facts not included in the record. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29, 34 (2014). That approach, however, is inappropriate in ruling on a motion to dismiss based on a forum-selection clause. If the court accepted the pleadings as true, a plaintiff could use artful pleading to avoid even the most obvious venue problems and escape the obligations of a forum-selection clause to which it had agreed. For that reason, this Court has held that "[i]n assessing a forum selection clause for enforceability, the court does *not* accept the pleadings as true." *Dix*, 160 Wn.2d at 835 (emphasis added). Instead, the party resisting a forum-selection clause "must present evidence to justify nonenforcement." *Id.*

The Court of Appeals has repeatedly applied the same rule: a court ruling on a motion to dismiss for improper venue must evaluate the evidence and may not simply assume the truth of the pleadings. *See, e.g.*, *Bank of Am.*, 108 Wn. App. at 748 ("In deciding whether to dismiss a lawsuit because of a forum selection clause, the court does not accept the pleadings as true."); *Voicelink*, 86 Wn. App. at 618 (same). Those cases establish that a "heavy burden of proof" attaches to "the party opposing enforcement of a forum selection clause." *Voicelink*, 86 Wn. App. at 619. *See also Wilcox*, 130 Wn. App. at 239 ("Because the court does not accept

the pleadings as true, the party challenging a forum selection provision bears a heavy burden to show it should not be enforced."). If the plaintiff "fail[s] to provide any evidence in opposition to the motion to dismiss," it fails to defeat its contractual obligation to litigate elsewhere. *Voicelink*, 86 Wn. App. at 619.

An appellate court reviewing a trial court's ruling applies the same standard: "[T]he question is whether [the plaintiffs] met their burden of proving that the forum selection clause should not be enforced." *Bank of Am.*, 108 Wn. App. at 748. *See also Wilcox*, 130 Wn. App. at 238 (same). It does not matter whether the trial judge denied the motion to dismiss, nor does it matter whether the appellate court reviews that decision de novo or for abuse of discretion. *See Bank of Am.;* 108 Wn. App. at 748 (reversing decision to set aside a forum-selection clause because, "[r]egardless of whether we review this de novo or for an abuse of discretion, the [plaintiffs] failed to carry their burden."); *Wilcox*, 130 Wn. App. at 238-39 (affirming decision to enforce a forum-selection clause because the plaintiff "failed to meet her burden under either a de novo or an abuse of discretion standard").

The long-settled practice of Washington courts under CR 12(b)(3) is consistent with that of federal courts ruling on similar motions under Fed. R. Civ. P. 12(b)(3). *See Gillett v. Conner*, 132 Wn. App. 818, 823,

133 P.3d 960 (2006) ("When the language of a Washington rule and its federal counterpart are the same, courts look to decisions interpreting the federal rule for guidance."). A federal district court "may examine facts outside the complaint to determine whether its venue is proper," and the plaintiff's allegations are not to be taken as true if they are "contradicted by the defendant's affidavits." 5B Charles A. Wright et al., *Federal Practice and Procedure* § 1352, at 324 (3d ed. 2004); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (in considering a motion to enforce a forum-selection clause, "pleadings need not be accepted as true"). *See also Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996) (same). As the Eleventh Circuit has explained, a motion to enforce a forum-selection clause "is a somewhat unique context of dismissal in which we consciously look beyond the mere allegations of a complaint, and, although we continue to favor the plaintiff's facts in the context of any actual evidentiary dispute, we do not view the allegations of the complaint as the exclusive basis for decision." *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1239 (11th Cir. 2012).

"Broad and conclusory allegations . . . without specific factual allegations or evidentiary support" are insufficient to defeat the enforcement of a forum-selection clause. *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 868-69 (9th Cir. 1991). Instead, defeating

enforcement requires consideration of "evidence submitted by the party opposing enforcement of the clause." *Pelleport Inv'rs, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984).

B. The decision of the Court of Appeals conflicts with decisions of this Court and of the Court of Appeals

Here, however, the Court of Appeals did not apply the standard articulated in *Dix* and followed in other Washington cases. As the court saw it, the enforceability of the forum-selection clause turned on the identity of Acharya's employer and the location of the alleged misconduct. According to the court, if Acharya's claims involved *alleged* discrimination by a European corporation in Europe, then there would be nothing unreasonable about enforcing a forum-selection clause requiring that those claims be litigated in Europe. But if her claims involved *alleged* discrimination by a Washington employer against a Washington resident occurring in Washington, the court reasoned, enforcement of the clause would be contrary to public policy because it would "prevent[] a Washington plaintiff from enforcing Washington law." (App. 11)

In assessing these key factual questions, the Court of Appeals mistakenly deemed itself bound to "presume that Microsoft, a Washington corporation, was Acharya's employer at the time of the alleged wrongful conduct." (App. 10) It applied that "presumption" not because Acharya

produced any *evidence* that Microsoft Corporation was her employer—as explained below, the undisputed evidence showed just the opposite. Instead, relying on a case involving a motion to dismiss for failure to state a claim, the court concluded it was bound to accept the assertion in Acharya's complaint that she was an employee of Microsoft Corporation. *Id.* (citing *Tyner v. State*, 92 Wn. App. 504, 514, 963 P.2d 215 (1998), *rev'd*, 141 Wn.2d 68, 1 P.3d 1148 (2000)); *see* CP 4 (allegation in complaint that "Acharya was an employee of Microsoft until September 30, 2012"). Indeed, earlier in its opinion, the court emphasized that "Acharya is the nonmoving party, and she *asserted* that Microsoft was her employer when she suffered the alleged discrimination." (App. 6 (emphasis added)) For that reason, the court concluded, it was required to "operate with the inference that Microsoft was Acharya's employer at the time of the alleged discriminatory actions." *Id.* In other words, contrary to *Dix*, the Court of Appeals relied on the mistaken proposition that a court must assume the truth of the allegations in the complaint in ruling on a motion to enforce a forum-selection clause. In doing so, the court erred in a fundamental way that this Court should correct before the error gains currency based on this now-published decision.

The conflict with *Dix* is apparent not just from the Court of Appeals' language but also from its disposition of the case. Had the court

applied the proper standard—under which Acharya would have to "present evidence to justify nonenforcement" of the forum-selection clause—it could not have reached the same result. *Dix*, 160 Wn.2d at 835. That is because, as Microsoft explained in a sworn declaration, Acharya's employment agreement explicitly stated that she was employed by MGR, not Microsoft Corporation. (CP 187-193)

Acharya presented no contrary evidence. In the Superior Court, she argued that Microsoft could be liable as an "integrated enterprise" with her European employer. (CP 267-69) But she abandoned that argument after Microsoft pointed out that courts use the "integrated enterprise" analysis *only* to determine whether a defendant employs enough people to be subject to Title VII. *Anderson v. Pac. Maritime Ass'n*, 336 F.3d 924, 928-29 (9th Cir. 2003). On appeal, she presented the new argument that Microsoft and MGR were joint employers. But she cited no case in which Washington courts applied a theory of joint employment in assessing liability under the WLAD, and the Court of Appeals did not rely on that doctrine.

The Court of Appeals noted that "Acharya asserts that Microsoft violated Washington law by committing discriminatory actions in Washington," but it did not point to any evidence of legally relevant actions in Washington, and none exists. (App. 10) Acharya contends that

van Duüren's supervisors, some of whom were based in Redmond, did a poor job of monitoring his activities, and that investigators employed by Microsoft Corporation failed to conduct an adequate investigation into her complaints. (CP 10-11) She does not allege, however, that any of those Microsoft Corporation employees engaged in discriminatory or retaliatory conduct. Her allegations therefore do not state claims under the WLAD, and they do not shift the locus of her claims from London to Redmond. The WLAD makes it unlawful "[t]o discriminate against any person in compensation or in other terms or conditions of employment" on account of a prohibited ground. RCW 49.60.180(3). It does not make it unlawful to fail to prevent someone else from discriminating. Nor does the WLAD create a requirement that internal human-resources investigations be conducted to some particular standard or that they always reach the "correct" result. In short, Acharya has not stated a claim for anything occurring in Washington.

At bottom, Acharya's opposition to the forum-selection clause amounted to nothing more than mere "allegations of fact without support in the record," coupled with legal conclusions that are contrary to settled Washington law. *Voicelink*, 86 Wn. App. at 618-19. Because Acharya failed to provide any evidence beyond her unsupported allegations, she did not carry her "heavy burden of proof as the party opposing enforcement of

a forum selection clause." *Id.* at 619. In holding otherwise, the Court of Appeals erred, created a conflict with *Dix*, and established precedent likely to lead to erroneous resolution of motions to enforce forum-selection clauses in Washington.

C. The question presented is important, and this case is an appropriate vehicle for considering it

This Court has recognized that the "enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability." *Dix*, 160 Wn.2d at 834 (internal quotation marks, citation, and alteration omitted). That predictability will be lost, however, if a party cannot be certain that such a clause is enforceable. The rule adopted by the Court of Appeals in its published opinion will undermine the enforceability of forum-selection clauses by giving plaintiffs a roadmap to defeat any motion to dismiss on the basis of such a clause. Under the decision below, a plaintiff need only summarily allege that she filed in a proper venue, perhaps adding that the events at issue occurred in Washington (even if the irrefutable evidence shows otherwise), or that the forum-selection clause was obtained by fraud (again, regardless of whether the evidence supports that allegation), in order to sidestep her forum-selection clause. Traditionally, Washington courts have rejected these sorts of unsupported, conclusory allegations. *See, e.g.*, *Voicelink*, 86

Wn. App. at 618-19 ("[S]ummarily alleg[ing] that enforcement would be 'unreasonable'" is insufficient to defeat a motion to dismiss absent any supporting evidence in the record.). But if plaintiffs may now rely on presumptions and assertions, rather than facts, to oppose a forum-selection clause, the enforceability of those clauses will be at the mercy of plaintiffs' creative pleading. In light of the importance of forum-selection clauses to contractual predictability, the court's error raises an issue of substantial public interest that warrants review. RAP 13.4(b)(4).

This case is a good vehicle for considering the question presented and correcting the erroneous rule adopted by the Court of Appeals. The parties fully briefed the issue below, and it was outcome determinative. As explained above, had the Court of Appeals looked beyond the pleadings, as Washington law requires, it would have seen that the undisputed facts support enforcement of the forum-selection clause. Acharya was a sophisticated managerial employee who worked four years in Europe, for a European company, and under an employment agreement she carefully reviewed, which provided for a European forum for the type of dispute she brings here. If her employment agreement and its forum-selection clause cannot be enforced under these circumstances, the presumption in favor of enforcing forum selection clauses will have lost all meaning in the

employment context. That result warrants this Court's review and correction.

CONCLUSION

The petition for review should be granted.

DATED: September 11, 2015

Respectfully submitted,

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: September 11, 2015, at Seattle, Washington.

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APPENDIX

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CONTENTS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BELLA ACHARYA, Respondent, v. MICROSOFT CORPORATION, a Washington corporation, Appellant.	No. 71420-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 22, 2015

APPELWICK, J. — Microsoft seeks dismissal of Acharya's WLAD suit, based on a forum selection clause in the employment contract between Acharya and a Microsoft subsidiary in London, or based on the doctrine of forum non conveniens. Acharya alleges violations by Microsoft occurring in Washington. The trial court did not err in denying the motion to dismiss. We affirm.

FACTS

Bella Acharya was a longtime employee of Microsoft Corporation, working at the company in various positions for roughly 16 years. In 2008, Acharya served as a business development manager in Microsoft's Advertising Business Group (ABG) in Redmond. Acharya worked with her supervisor to create a new position for her on an international team. According to Acharya, the position was initially conceived as Redmond-based and not associated with any foreign subsidiary. But, for "practical business reasons," it was decided that Acharya would relocate to London and manage the team from there.

As a term of her new position, Acharya resigned from her job at Microsoft and joined Microsoft Global Resources GmbH (MGR), a foreign subsidiary of Microsoft. According to Microsoft, this is a "common business practice among multinational employers and is the optimum way to structure international employment for taxation and administration purposes."

On July 21, 2008, a Human Resources (HR) employee from Microsoft e-mailed Acharya her MGR employment contract. The e-mail said, "It is a pleasure to confirm the terms and conditions of your MGR (Microsoft Global Resources) international assignment offer of ABG International Sales Manager based in London." The contract provided that the "terms of this agreement shall be construed in accordance with and governed in all respects by the laws of Switzerland (without giving effect to principles of conflicts of laws)." It further stated that "[a]ny dispute, controversy or claim arising under, out of or in relation to this Employment Agreement, its valid conclusion, binding effects, interpretation, including tort claims, shall be referred and finally determined by the ordinary courts at the domicile of MGR in Switzerland." Acharya signed the contract on August 26, 2008.

Accompanying the contract was an international offer letter of assignment, which stated, "Throughout the term of this assignment, you will remain an employee of MGR." The letter provided that Acharya's assignment was anticipated to be for two years. It further stated that at the end of her assignment there was "no guarantee that [Acharya] will obtain another assignment with MGR or a new position with another Microsoft affiliate."

For the first 20 months of Acharya's assignment in London, she reported to Shawn McMichael, the same Microsoft manager to whom she previously reported in Redmond. In July 2010, Acharya began reporting to a Belgium-based supervisor, Olivier van Duüren. Van Duüren was employed by Microsoft NV, another Microsoft subsidiary. At that time, van Duüren reported to a France-based manager, who in turn reported to the Vice President of Microsoft in Redmond.

While working with van Duüren, Acharya experienced hostile gender-based conduct. For example, van Duüren told Acharya that "'there's a word for women like you,'" accused her of being a "queen sitting on a throne," and "taunted her for appearing 'emotional.'" When van Duüren reviewed Acharya's performance in 2011, he gave her a very poor rating. This varied greatly from Acharya's performance reviews in the past, when she had been rated very positively. Acharya perceived van Duüren's ratings as unfair and motivated by gender-based discrimination.

Acharya reported this to van Duüren's supervisor, who worked at Microsoft headquarters in Redmond. Her concerns were transferred to the HR and legal departments of Microsoft in Redmond. Acharya was then contacted by the Employee Relations Investigation Team (ERIT), which consisted of Microsoft employees in Redmond. On this record, it appears that ERIT member Yong Lee was investigating Acharya's claim as early as May 11, 2012. In July, Lee informed Acharya that he found no violation of Microsoft policy. Acharya challenged this finding on August 2. On September 7, ERIT member Judy Mims told Acharya that she would review Lee's findings. On September 26, Mims issued a memo to Acharya informing her that Lee's

findings were warranted and that there were no policy violations. No disciplinary action was taken against van Duüren.

Acharya attempted to leave her position at MGR and applied for jobs at Microsoft in King County. She was not hired for any of the positions. Acharya discovered that van Duüren had been "poisoning the well" about her by making negative comments to potential hiring managers in Redmond. Acharya also learned that she was turned down for a job due to "the concerns [she] had raised about Olivier van Duüren." Acharya ultimately returned to King County. She has been unable to find fulltime work since.

On July 5, 2013, Acharya brought an employment discrimination suit against Microsoft in King County Superior Court. Citing the Washington Law Against Discrimination (WLAD),[1] she asserted that Microsoft, as her employer, discriminated against her because she is an older woman; failed to prevent, stop, or remedy the discrimination against her; retaliated against her for reporting discrimination; negligently failed to hire, retain, monitor, and supervise its HR and ERIT departments; and negligently failed to mentor, supervise, and properly discipline van Duüren. She asserted that Microsoft's discriminatory decisions were made in Washington.

Microsoft denied Acharya's claims. It also denied that it was Acharya's employer at the time of the alleged discrimination. As affirmative defenses, it asserted that the Washington court was an improper venue and that Acharya's claims were governed by Swiss and United Kingdom law.

On October 15, 2013, Microsoft moved to dismiss Acharya's suit. Microsoft argued that the court should enforce the forum selection clause in Acharya's employment

[1] Chapter 49.60 RCW.

contract with MGR, "which identifies Switzerland as the required forum for resolving any dispute, claim, or tort related to her MGR employment." Microsoft further argued that the suit should be dismissed on forum non conveniens grounds. In addition, Microsoft maintained that Acharya had no legitimate legal claims against Microsoft and that MGR was the proper defendant in the case.

Acharya opposed the motion. She asserted that Microsoft was the proper defendant, because Microsoft and MGR constituted an "'integrated enterprise.'" She further asserted that Washington was the proper forum, because her claims did not "'arise' under" or otherwise concern her employment with MGR. She maintained that enforcing the forum selection clause would deprive her the ability to vindicate her rights, because she could not afford to litigate in Switzerland and would be unable to bring her WLAD claims there.

At the motion hearing, Microsoft cited a newly decided United States Supreme Court case, Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas, ___ U.S. ___, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013). In Atlantic Marine, the Court established a new standard for evaluating forum selection clauses, requiring enforcement of the clause unless extraordinary circumstances unrelated to the convenience of the parties dictated otherwise. Id. at 581-82. Microsoft argued that the trial court should apply Atlantic Marine and dismiss Acharya's suit.

The trial court denied Microsoft's motion to dismiss.

Microsoft moved for discretionary review of the denial. We granted review.

DISCUSSION

Microsoft argues that the trial court erred in denying its motion to dismiss Acharya's complaint on the basis of the forum selection clause.[2] Microsoft further asserts that the trial court erred in denying its motion on the basis of forum non conveniens.

At the heart of this dispute is whether Microsoft was Acharya's employer-in-fact and could therefore enforce the contract terms agreed to between Acharya and MGR, specifically the forum selection clause. In reviewing the denial of a motion to dismiss, we apply the same standard as the trial court: the nonmoving party's evidence, together with all reasonable inferences that may be drawn therefrom, must be accepted as true. Tyner v. Dep't of Soc. & Health Servs., 92 Wn. App. 504, 514, 963 P.2d 215 (1998), reversed on other grounds, 141 Wn.2d 68, 1 P.3d 1148 (2000). Acharya is the nonmoving party, and she asserted that Microsoft was her employer when she suffered the alleged discrimination. Accordingly, we operate with the inference that Microsoft was Acharya's employer at the time of the alleged discriminatory actions. Microsoft is thus entitled to invoke the provisions of the employment contract. Acharya's claims against Microsoft stem from the discrimination she allegedly suffered while performing the employment contemplated by the contract. The forum selection clause applies to "[a]ny dispute, controversy or claim arising under, out of or in relation to" the contract. Therefore, Microsoft was entitled to assert a defense based on that forum selection clause.

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[2] As part of its argument that the forum selection clause controls, Microsoft asserts that Acharya's "allegations do not state claims under the WLAD." But, whether Acharya raised proper claims under WLAD and whether Washington is the proper forum to litigate her claims are two distinct questions. The latter is the claim Microsoft makes on appeal. The former Microsoft raised separately below but does not renew.

I. Forum Selection Under Atlantic Marine

Microsoft argues that this court should adopt the Atlantic Marine test in favor of our traditional analysis. Our Supreme Court has not yet considered this question.

In Atlantic Marine, a Virginia corporation and a Texas corporation entered into a construction contract that contained a forum selection clause stating that all disputes between the parties shall be litigated in Virginia. 134 S. Ct. at 575. However, when a dispute about payment arose, the Texas corporation brought suit in the Western District of Texas. Id. at 576. The Virginia corporation moved to transfer the case to the Eastern District of Virginia under 28 U.S.C. § 1404(a), a codification of the doctrine of forum non conveniens. Id. at 576, 580. The district court denied the motion. Id. at 576. The court considered a list of public and private interest factors, including the forum selection clause. Id. It concluded that the Virginia corporation failed to meet its burden of showing that transfer "'would be in the interest of justice or increase the convenience to the parties and their witnesses.'" Id. The Fifth Circuit affirmed, reasoning that the district court did not abuse its discretion in denying the transfer. Id.

The Supreme Court reversed. Id. at 584. The Court recognized that, under federal law, "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens." Id. at 580. Ordinarily, a forum non conveniens analysis implicates both private and public interests. Id. at 581. However, the Court held that where the parties' contract contains a valid forum selection clause, the clause preempts the consideration of private interests:

> When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court

> accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum.

Id. at 582. In such a scenario, the court "may consider arguments about public-interest factors only. Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." Id. (citation omitted). The Court concluded by reasoning:

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

Id. at 583.

In the past, Washington courts have adopted federal analyses regarding forum selection clauses. For example, in Dix, the Washington Supreme Court agreed with the federal test for whether a forum selection clause was enforceable and recognized that the test was generally in agreement with other Washington appellate decisions. Dix v. ICT Group, Inc., 160 Wn.2d 826, 834-35, 161 P.3d 1016 (2007). The federal test at that time—like the current Washington test—focused on whether it would be "unreasonable" to enforce a forum selection clause. See id. at 834. In addition, the Court of Appeals recognized that the Washington standard requiring submission of evidence by the party challenging a clause's enforceability is "consistent with the standard articulated by the U.S. Supreme Court." Voicelink Data Servs., Inc. v. Datapulse, Inc., 86 Wn. App. 613, 624, 937 P.2d 1158 (1997). We note, however, that Dix and Voicelink did not drastically

change Washington law—rather, they recognized consistencies between state and federal tests. 160 Wn.2d at 835; 86 Wn. App. at 624.

But, Washington courts follow federal analysis "only if we find its reasoning persuasive." Washburn v. City of Federal Way, 178 Wn.2d 732, 750, 310 P.3d 1275 (2013). The Atlantic Marine Court's conclusion rested largely on effecting justice by respecting the parties' right to contract. See 134 S. Ct. at 583. The contract in that case was between two corporations on equal footing. Id. at 575. Accordingly, it made sense to consider their contract the product of thoughtful, purposeful bargaining that should not be open to renegotiation. See id. at 583. That is not the case here. The parties here are not two corporations, but an individual and a powerful corporation (or its subsidiary). The record does not otherwise suggest equal bargaining positions and does not document any actual negotiations as to this term. Therefore, the Atlantic Marine Court's reasoning that a forum selection clause "may have affected . . . contractual terms [or the] agreement to do business together in the first place" does not stand here. See id. Unlike the arm's length transactions conducted between corporations, the employer-employee relationship has a clear hierarchy. To apply a presumption otherwise does not serve "'the interest of justice.'" See id.

We decline to adopt Atlantic Marine on these facts.

II. Forum Selection Under Traditional Analysis

When reviewing decisions on enforceability of forum selection clauses, we generally apply the abuse of discretion standard. Dix, 160 Wn.2d at 833. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, or if its ruling is based on an erroneous view of the law or involves application

of an incorrect legal analysis. Id. Therefore, "the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied." Id. But, if a pure question of law is presented—such as whether public policy precludes giving effect to a forum selection clause in particular circumstances—we apply a de novo standard of review. Id. at 833-34.

When evaluating the enforceability of a forum selection clause, Washington courts generally ask whether enforcement would be unreasonable:

> "(1) [A] forum-selection clause is presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable, (2) a court may deny enforcement of such a clause upon a clear showing that, in the particular circumstance, enforcement would be unreasonable, and (3) the clause may be found to be unreasonable if (i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the State where the action is filed."

Id. (alteration in original) (quoting Gilman v. Wheat, First Sec., Inc., 345 Md. 361, 378, 692 A.2d 454 (1997)).

Microsoft contends that there is nothing unreasonable about an agreement that employees working in Europe for a European company will settle their disputes in a European forum. But, for purposes of the motion under review, we presume that Microsoft, a Washington corporation, was Acharya's employer at the time of the alleged wrongful conduct. See Tyner, 92 Wn. App. at 514 (when reviewing the denial of a motion to dismiss, all facts and inferences are considered in light most favorable to nonmoving party). And, Acharya asserts that Microsoft violated Washington law by committing discriminatory actions in Washington.

Against this backdrop, Acharya argues that it would contravene public policy to require her to litigate in Switzerland, thus "relinquish[ing] the robust civil rights afforded to her under the WLAD."[3] Under Washington law, the right to be free from discrimination is nonnegotiable and cannot be waived in contract. Cf. Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d 120, 129, 131, 132, 839 P.2d 314 (1992) (holding that "nonnegotiable state law rights [including discrimination] . . . cannot be waived in contract" and are thus independent of collective bargaining agreements); see also Ware v. Mut. Materials Co., 93 Wn. App. 639, 644, 970 P.2d 332 (1999); Bruce v. Nw. Metal Prods. Co., 79 Wn. App. 505, 513, 903 P.2d 506 (1995). But, under the forum selection clause and the choice of law provision, Acharya's WLAD claim would not be cognizable. Preventing a Washington plaintiff from enforcing Washington law is contrary to public policy. See, e.g., Dix, 160 Wn.2d at 837 (finding that a forum selection clause violated public policy because it "seriously impair[ed] a plaintiff's ability to bring suit to enforce" the Washington Consumer Protection Act, ch. 19.86 RCW). It would be unreasonable to enforce the forum selection and choice of law clauses, thereby precluding Acharya from pursuing her WLAD claims.

Microsoft protests that foreseeable inconvenience is not a basis for refusing to enforce a forum selection clause. As support for this proposition, Microsoft cites Keystone Masonry, Inc. v. Garco Construction, Inc., 135 Wn. App. 927, 147 P.3d 610 (2006)). In Keystone, two corporations entered into a construction contract involving a school in Pierce County and setting venue in Spokane County. Id. at 930. Keystone sued Garco

[3] Acharya also argues that the clause is unconscionable. Because we conclude that on these facts the clause contravenes public policy, we need not reach this argument.

for breach of contract and filed suit in Pierce County Superior Court. Id. Garco, whose principal place of business was in Spokane, moved for change of venue. Id. at 930-31. Keystone opposed the motion under the doctrine of forum non conveniens, arguing that at least 19 witnesses were located in Pierce County. Id. at 931. The trial court denied the motion. Id. The Court of Appeals reversed, reasoning that where the parties have selected a forum, the forum non conveniens factors do not apply. Id. at 934. The court further stated that "inconvenience foreseeable by the parties at the time they entered the contract cannot render a forum selection unenforceable." Id. at 934.

In so holding, Keystone relied on Bank of America, N.A. v. Miller, 108 Wn. App. 745, 748-49, 33 P.3d 91 (2001). See 135 Wn. App. at 934. There, the Millers leased cattle for their Michigan farm from a Washington leasing company. 108 Wn. App. at 746. The lease provided that the parties would file any lawsuits in Washington. Id. When the leasing company became financially unstable, Bank of America purchased the lease. Id. The Millers sued the leasing company in Michigan, arguing that it failed to fully fund the lease. Id. The Bank then sued the Millers in Washington for failing to pay their rent. Id. The Millers moved to dismiss the Bank's case. Id. They argued that trial in Washington was "seriously inconvenient," because their witnesses lived in Michigan and their related lawsuit was pending there. Id. at 748. The trial court granted the motion to dismiss. Id. at 746. The Court of Appeals reversed, reasoning:

> The Millers have not specified the witnesses they intend to call, the issues the witnesses would testify about, the evidence they intend to offer, and why that evidence would not be available in Washington. Without more, the Millers have not shown that litigating in Washington is any more inconvenient now than it was when they signed the lease agreement.

Id. at 749.

Microsoft argues that here, it was likewise foreseeable that litigation in Europe could be inconvenient. However, in Keystone and Miller, the plaintiffs argued that litigation in the designated forum would be less convenient due to witness location—not that the designated forum would prevent them from seeking relief. See Keystone, 135 Wn. App. at 934; Miller, 108 Wn. App. at 748. In the present case, litigation in the designated forum, together with the choice of law clause, would foreclose Acharya's ability to pursue her claim for discrimination cognizable under WLAD. Public policy in Washington dictates that such WLAD rights may not be waived by contract. Keystone and Miller do not establish that foreseeable inconvenience outweighs the significant public policy interest present here.

The trial court did not err in declining to enforce the forum selection clause.

III. Forum Non Conveniens

Under the doctrine of forum non conveniens, a court may decline a proper assertion of its jurisdiction if the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. Sales v. Weyerhauser Co., 163 Wn.2d 14, 20, 177 P.3d 1122 (2008). "Courts generally do not interfere with the plaintiff's choice of forum where jurisdiction has been properly asserted." Id. at 19. The forum non conveniens doctrine exists to prevent the plaintiff from causing the defendant expense or trouble that is not necessary to the plaintiff's right to pursue a remedy. Id. at 20.

We review a decision on a motion to dismiss on forum non conveniens grounds for abuse of discretion. Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). Because the decision is within the trial court's discretion, courts have declined to set bright

line rules as to when to apply the doctrine. See id. Instead, a court must consider and balance certain private and public factors regarding the relative convenience of the forums. Id.; Sales, 163 Wn.2d at 20.

In deciding whether to dismiss for forum non conveniens, the trial court must first determine whether an adequate alternative forum exists. Klotz v. Dehkhoda, 134 Wn. App. 261, 265, 141 P.3d 67 (2006). "[A]n alternative forum is adequate so long as some relief, regardless how small, is available should the plaintiff prevail." Id. Microsoft presented an expert declaration demonstrating that Acharya will have some opportunity for recovery under Swiss law. Acharya presented a competing declaration suggesting that Switzerland is an inferior forum. However, this does not render Switzerland inadequate. See, e.g., id. at 268 ("[T]he fact that the damages recoverable in British Columbia are significantly less than in Washington does not, by itself, render British Columbia an inadequate forum.").

When determining whether to dismiss a case based on forum non conveniens, the private interest factors to be considered are as follows:

> "[T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

Myers, 115 Wn.2d at 128 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

The private interest factors do not compel Switzerland as a forum. None of the alleged discriminatory actions occurred in Switzerland. Although the parties dispute whether the crucial witnesses and documents are in Washington or Europe, none are

located in Switzerland. Rather, the record shows a roughly even balance between other European countries and Washington State.[4] Neither the ease of access to proof nor the ability of obtaining attendance of witnesses weighs in favor in Switzerland. Further, litigating in Switzerland poses a "practical problem" for Acharya. See id. According to Acharya's expert, Swiss law generally does not allow lawyers to take cases on a contingency fee basis. Thus, in addition to the distance she would have to travel, Acharya asserts that she would be unable to afford representation there. Acharya therefore has a strong private interest in litigating in Washington. And, because Microsoft is a Washington corporation, it too would benefit from the convenience of the Washington forum. Microsoft argues that litigating disputes in Switzerland promotes consistent interpretation and application of MGR's employment contracts and obligations. On balance, however, Acharya's financial inability to pursue a suit in Switzerland outweighs Microsoft's interest in maintaining consistent contract application, especially where Acharya's suit implicates actors and actions outside of MGR. The private interest factors weigh in favor of litigating in Washington.

Regarding the public interest factors:

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many

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[4] Acharya maintains that the crucial witnesses are her current and former Microsoft managers and Microsoft's HR and ERIT employees, all of whom are located in King County. She also asserts that she seeks documents located in, or at least accessible in, King County. Microsoft maintains that there are several important witnesses who worked alongside Acharya and van Duüren, most of whom are located in Europe—specifically, the United Kingdom, France, Ireland, Germany, and the Netherlands. Microsoft also asserts Acharya seeks documents "related to" employees located in Belgium, the United Kingdom, and France.

> persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

Myers, 115 Wn.2d at 129 (quoting Gulf Oil, 330 U.S. at 508-09).

These factors likewise weigh in favor of litigating in Washington. Acharya, a Washington employee, alleges discrimination by Microsoft, a prominent Washington employer, in violation of the WLAD, a Washington statute. Under the claims alleged, Washington is the origin of this case. Thus, Washington would be the proper forum to absorb the burdens of litigation, such as administrative tasks and jury duty. In addition, there would be a local interest in having this controversy, as alleged, decided here. And, Washington would be a forum "'at home with the state law that must govern the case.'"[5] See id. (quoting Gulf Oil, 300 U.S. at 508-09). The trial court did not abuse its discretion in denying the motion to dismiss on forum non conveniens grounds.

[5] Microsoft asserts that a Swiss forum would be better suited for applying the European data privacy laws implicated by this suit. It is conceivable that some of the requested discovery would be subject to such laws. However, the WLAD is the applicable law regarding the merits of this case. Microsoft has not shown that any difficulty in applying European data privacy laws—pertinent to accessing documents—would overcome the "'appropriateness'" of a Washington court trying a case involving its own laws. See Myers, 115 Wn.2d at 129 (quoting Gulf Oil, 300 U.S. at 508-09.). We recognize that, in addition to specifying the forum, the contract provided that the applicable law shall be Swiss law. But, as discussed above, granting a change of forum with that clause intact would displace application of WLAD and is against public policy in Washington. See supra section II. This provides additional public policy reason to find Washington the proper forum under the forum non conveniens analysis.

As pleaded, this case involves Washington parties, Washington law, and conduct that occurred in Washington. The trial court did not err in denying Microsoft's motion to dismiss. We affirm.

WE CONCUR:

No. 71420-1-I/1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BELLA ACHARYA, Respondent, v. MICROSOFT CORPORATION, a Washington corporation, Appellant.	)	No. 71420-1-I ORDER GRANTING MOTION TO PUBLISH

Nonparty Washington Employment Lawyers Association has filed a motion to appear as amicus curiae. A panel of the court has considered the motion and has determined that it should be granted.

The respondent Bella Acharya and Washington Employment Lawyers Association have filed a motion to publish the unpublished opinion filed in the above entitled matter on June 22, 2015. The appellant, Microsoft Corporation, has filed a response. A panel of the court has reconsidered its prior determination not to publish the opinion and finds that it is of precedential value and should be published. Now, therefore it is hereby

No. 71420-1-I/2

ORDERED that the motion to appear as amicus curiae by Washington Employment Lawyer Association is granted; it is further

ORDERED that Washington Employment Lawyer Association's motion to publish is granted; it is further

ORDERED that respondent's motion to publish is granted; and it is further

ORDERED that the written opinion filed June 22, 2015, shall be published and printed in the Washington Appellate Reports.

DATED this 12th day of August, 2015.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BELLA ACHARYA, Respondent, v. MICROSOFT CORPORATION, a Washington corporation, Petitioner.	)	No. 71420-1-I COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW

This employment discrimination case presents an issue as to the enforceability of a forum selection clause in an employment contract that points to a foreign forum (Switzerland), where the employment involved multiple European affiliates of Microsoft Corporation, a Washington company. Microsoft seeks discretionary review of the trial court's denial of its motion to dismiss for improper venue and forum non conveniens. Microsoft argues the trial court committed an obvious or probable error that merits discretionary review in refusing to enforce a forum selection clause contained in an employment contract between its Swiss affiliate and former international sales manager. A forum selection clause is presumptively enforceable. The trial court made no finding or conclusion to explain the basis of its ruling. Review is granted under RAP 2.3(b)(1).

FACTS

Bella Acharya worked for Microsoft in Redmond, Washington. In August 2008,

she signed an employment contract with Microsoft Global Resources (MGR).[1] The agreement was 7 pages long and stated that MGR, a Swiss company, offered her employment as ABG International Sales Manager under the terms and conditions of the agreement.[2] It stated that MGR employees were assigned to Microsoft affiliated companies in different countries based on the needs of MGR and the Microsoft group, and Acharya's first assignment was to Microsoft Limited in England.[3] The agreement contained choice of law and forum selection clauses, stating that Swiss laws govern the agreement and any dispute arising under, out of, or in relation to the agreement must be determined by the courts in Switzerland:

> **Applicable Law:** The terms of this agreement shall be construed in accordance with and governed in all respects by the laws of Switzerland (without giving effect to principles of conflicts of laws).
>
> **Place of Jurisdiction:** Any dispute, controversy or claim arising under, out of or in relation to this Employment Agreement, its valid conclusion, binding effects, interpretation, including tort claims, shall be referred and finally determined by the ordinary courts at the domicile of MGR in Switzerland.[4]

The agreement contained an integration clause stating it was the "complete agreement between the parties regarding its subject matter" and superseded "all prior oral and/or written agreements, representations and/or communications, concerning the subject matter hereof."[5] The agreement referred, as its "integral part," to "International

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[1] Appendix (App.) 4 to Motion for Discretionary Review at 66-72 ("Microsoft Global Resources (MGR) Employment Agreement").

[2] ABG stands for Advertising Business Group. App. 6 (Acharya declaration) at 134 ¶ 4.

[3] App. 4 at 66.

[4] App. 4 at 71.

[5] App. 4 at 70-71.

Offer Letter of Assignment"[6] The 3-page offer letter of assignment stated Acharya's initial assignment in England was anticipated to be for two years, and there was no guarantee of any further assignment with MGR or any new position with any Microsoft affiliate.[7] The letter stated that at the end of the initial assignment, MGR would arrange and pay for her relocation back to her home country in the United States or to the location of her next MGR assignment, if any.[8] Acharya signed this letter as well.[9]

Acharya worked in England for four years until 2012. Acharya later claimed her "employer-in-fact" remained Microsoft Corporation in Redmond, Washington. Shortly before her employment ended, she applied for several positions within Microsoft in the United States. She was not hired for any of those positions.

In July 2013, Acharya filed an employment discrimination lawsuit against Microsoft in King County Superior Court.[10] The crux of her complaint appears to be that her London-based, Belgium-resident supervisor Olivier van Duüren, employed by Microsoft NV, a Belgian company, gave her unfair performance evaluations for 2011 and 2012, and Microsoft in Redmond, Washington failed to prevent, stop, or remedy his discrimination when she reported it to his supervisor, who then forwarded her complaint to Microsoft's human resources (HR) in Redmond. Acharya alleged the HR did perfunctory investigation to conclude no violation occurred, and she was unable to obtain a suitable position at Microsoft for van Duüren's unfair evaluations and retaliatory conduct and Microsoft's failure to properly address her concerns. She alleged gender discrimination and retaliation under RCW 49.60, breach of contract, misrepresentation,

[6] App. 4 at 71, 74.
[7] App. 4 at 76.
[8] App. 4 at 76.
[9] App. 4 at 76.
[10] App. 2 at 1-22 (amended complaint).

promissory estoppel, and negligent supervision, hiring, and retention.

Microsoft filed a motion to dismiss Acharya's lawsuit without prejudice, arguing the lawsuit was controlled by the forum selection clause in Acharya's MGR employment contract she signed and had to be filed in Switzerland. Microsoft argued the case should be dismissed based also on forum non conveniens. Acharya countered that her claims were against Microsoft, a Washington company, for its acts or omissions as the employer-in-fact of both Acharya and her supervisor van Duüren. She argued the forum selection clause, if enforced, would effectively deny her day in court because she was financially unable to return to Europe to pursue any claim against MGR. She further argued enforcing the clause would contravene Washington's anti-discrimination policy.

Both parties presented declarations of Swiss attorneys. Acharya's expert stated that in Switzerland, termination claims must be asserted within 180 days, there is no jury system, contingency fee arrangements are disallowed, and the losing employee in an employment discrimination case generally must pay the costs of the prevailing employer.[11] Microsoft's expert stated that in Switzerland, the statute of limitations for employment-related claims is five years except for wrongful termination claims, parties who cannot afford a lawyer may receive free legal representation, prevailing party's costs are set by statute, party's costs in conciliation proceedings are never awarded and no court costs are charged in dispute relating to gender equality act or an employment contract up to an amount in dispute of 30,000 Swiss francs, and a party may negotiate a reduced fee or a fee cap supplemented by a "success fee," similar to a contingency fee arrangement.[12] Microsoft's expert stated a Swiss court is a suitable forum for Acharya's

[11] App. 6 at 189-92 (Gersbach declaration).
[12] App. 4 at 11-27 (Sommer declaration), 9 at 1-4 (Sommer supplemental declaration).

claims, and Swiss laws provide a wide range of remedies against discrimination.

Microsoft presented a declaration of van Duüren, who stated that with one or two exceptions, all of the people who observed his work relationship with Acharya were located in Europe.[13] Acharya presented her own declaration stating that, even after she worked in London, she continued to have access to Microsoft's employment policies through the company's intranet and the same log-in ID to access the Redmond domain.[14] Acharya stated she reported her concerns about van Duüren with his direct supervisor, who was then managing a team from Microsoft's Redmond headquarters.

The trial court denied Microsoft's motion to dismiss. The court made no findings or conclusions to explain the basis of its ruling.

DISCRETIONARY REVIEW CRITERIA

Discretionary review is available only on the narrow grounds set forth in RAP 2.3(b). Microsoft seeks review under RAP 2.3(b)(1) and (2), which provide:

> (1) The superior court has committed an obvious error which would render further proceedings useless [or]
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

Generally, interlocutory review is disfavored, and piecemeal appeals should be avoided in the interests of judicial economy.[15] A venue decision presents a unique consideration where a party seeking to challenge it is encouraged to seek interlocutory review, instead of waiting until the trial court issues a final order.[16] For the reasons

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[13] App. 4 at 29-33 (vam Duüren declaration).
[14] App. 6 at 133-46 (Acharya declaration).
[15] Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959).
[16] See Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978)

discussed below, discretionary review is warranted under RAP 2.3(b)(1).

DECISION

This case appears to turn on the enforceability of a forum selection clause. Although Acharya claims Microsoft in Redmond was the "employer-in-fact" of both she and her supervisor van Duüren during her employment in Europe, she does not explain how that fact, if true, would change the analysis as to the applicability or enforceability of the forum selection clause in the employment contract she signed. Acharya's argument appears to focus on the enforceability of the forum selection clause.[17]

A trial court's decision on the enforceability of a forum selection clause is subject to the abuse of discretion standard of review.[18] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.[19] This standard of review gives deference to the trial court's factual determination while permitting reversal where the court makes an error of law.[20] A de novo review applies to a pure question of

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(party who fails to seek discretionary review of a trial court's denial of a change of venue may not challenge the denial after the trial, unless the party shows it was prejudiced by the denial).

[17] Acharya's 21-page answer to the motion for discretionary review contains many lengthy footnotes containing arguments, including internal references to other footnotes and references to her own arguments made in her trial court brief. The footnotes are in small font, less than single spaced, and difficult to read. The text does not appear double spaced either. The footnotes and the spacing appear to be an attempt to circumvent the 20-page limit. Although I considered her answer in its entirety, including the footnotes, her excessive use of lengthy footnotes with arguments does not comply with RAP 10.4(a) and 17.4(g). Also, arguments raised in footnotes are inadequate. See State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993) (argument raised in footnote will not be addressed); State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (same); Multicare v. Dep't of Soc. & Health Servs., 173 Wn. App. 289, 299 P.3d 768 (2013) ("But Washington courts 'have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.'").

[18] Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). The federal circuit courts and other state courts are split over whether de novo or abuse of discretion standard applies when reviewing decisions on enforceability of forum selection clauses. See Dix, 160 Wn.2d at 832-33 (citing cases).

[19] Id. at 833 (citation omitted).

[20] Id. at 833.

law such as whether a public policy precludes enforcing a forum selection clause.[21]

A forum selection clause is "presumptively valid and enforceable," and the party resisting it (here, Acharya) has the burden of demonstrating otherwise.[22] A forum selection clause is generally enforceable even if it is in a standard form consumer contract not subject to negotiation.[23] In assessing a forum selection clause for enforceability, a court does not accept the pleadings as true.[24] Instead, Acharya had to "present evidence to justify nonenforcement."[25]

In a footnote, Acharya cites a Ninth Circuit case to argue all the evidence and inferences must be viewed in the light most favorable to her.[26] The Ninth Circuit applied that test under Rule 12(b)(3). But the United States Supreme Court in a recent and unanimous opinion, Atlantic Marine, held forum non conveniens, not Rule 12(b)(3), is the proper vehicle to address a forum selection clause that points to a state or foreign forum.[27] The Supreme Court noted the standard under Rule 12(b)(6) "may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise."[28] Also, the apparent rationale for the test (harsh remedy of dismissal) appears rejected by Atlantic Marine, which states such "caution is not warranted . . . when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection clause. In such a case, dismissal would

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[21] Dix, 160 Wn.2d at 833-34 (citations omitted).
[22] Id. at 834 (citation omitted).
[23] Id. (citation omitted).
[24] Id. at 835 (citation omitted).
[25] Id. (citation omitted).
[26] Answer at 1 n.2; Murphy v. Schneider Nat'l Inc., 362 F.3d 1133, 1137 (9th Cir. 2004).
[27] Atlantic Marine Constr. Co. v. U.S. Dist. Court, __ U.S. __, 134 S. Ct. 568, 580, 187 L. Ed. 2d 487 (2013).
[28] See Atlantic Marine, 134 S. Ct. at 580 n.4.

work no injustice on the plaintiff."[29] Our Supreme Court has yet to decide what standard applies in viewing the evidence on the enforceability of a forum selection clause.[30]

As Microsoft points out, Atlantic Marine changed or clarified the analysis for the enforceability of a forum selection clause, highlighting the difficulty to overcome the presumption of enforceability. Previously, the United States Supreme Court in Bremen and Carnival Cruise Lines delineated the analysis for evaluating a forum selection clause, which our Supreme Court has cited as consistent with Washington's law.[31] Under that analysis, a court may deny enforcement only upon a "clear showing" that enforcement would be unreasonable because (1) the forum selection clause was induced by fraud or overreaching, (2) the selected forum is so unfair and inconvenient as to practically deprive the plaintiff of a remedy or its day in court, or (3) enforcement would contravene a strong public policy of the State where the case is filed.[32]

Atlantic Marine held a forum selection clause pointing to a state or foreign forum should be analyzed under the doctrine of forum non conveniens.[33] The Court held the analysis under the doctrine requires an adjustment when the parties' contract contains a

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[29] See Atlantic Marine, 134 S. Ct. at 583 n.8.

[30] In the context of addressing a claim of a waiver of a venue defense, this Court has held CR 12(b)(3), as opposed to (b)(6), is the appropriate vehicle to challenge the venue based on a forum selection clause, stating, "determination of the enforceability of forum selection clauses under CR 12(b)(3) furthers judicial economy and efficiency by requiring assertion of the venue defense at a relatively early stage of the proceeding." Voicelink Data Servs., Inc. v. Datapulse, Inc., 86 Wn. App. 613, 624, 937 P.2d 1158 (1997). In a later case, our Supreme Court noted inconsistent federal approaches as to what rule governs a motion to dismiss under a forum selection clause but declined to address the issue as unnecessary to resolve the case. See Oltman v. Holland America Line USA, Inc., 163 Wn.2d 236, 244 n.5, 178 P.3d 981 (2008).

[31] See Dix, 160 Wn.2d at 834; M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-17, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-95, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).

[32] Dix, 160 Wn.2d at 834.

[33] Atlantic Marine, 134 S. Ct. at 580.

valid forum selection clause.[34] In such a case, a court may consider "public-interest factors only," because parties agreeing to a forum selection clause "waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation," and the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum."[35] A forum selection clause is thus given "controlling weight in all but the most exceptional cases."[36]

Here, Acharya signed the employment contract containing the forum selection clause. The forum selection clause is presumed valid and enforceable, and Acharya had a heavy burden of proving otherwise. The trial court made no finding or conclusion to explain why the clause is not enforceable. The trial court's decision appears to be in error. Although Atlantic Marine is not binding, Washington courts have looked to federal law on the enforceability of a forum selection clause. Also, even before Atlantic Marine, Washington courts have held "inconvenience foreseeable by the parties at the time they entered the contract cannot render a forum selection unenforceable."[37]

Acharya points out Atlantic Marine involved a commercial dispute over two federal districts, not an employment contract pointing to a foreign forum. But the Second Circuit opinion she cites appears to make no distinction between a commercial and employment contract in holding a forum selection clause in an employment agreement was enforceable.[38] The Second Circuit did recognize a foreign forum presents distinct challenges but declined to "reach the question whether a showing of

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[34] Atlantic Marine, 134 S. Ct. at 581.
[35] Id. at 582.
[36] Id. at 581 (citation omitted).
[37] Keystone Masonry, Inc. v. Garco Constr., Inc., 135 Wn. App. 927, 934, 147 P.3d 610 (2006) (citation omitted).
[38] See Martinez v. Bloomberg LP, 740 F.3d 211, 227-30 (2d Cir. 2014).

private hardships might be sufficient to invalidate a forum selection clause designating a foreign forum" because the plaintiff employee "failed to make such a showing."[39]

Acharya claims the forum selection clause is "plainly unconscionable under established Washington law."[40] She presents argument in a footnote. Acharya had the burden of proving the claimed unconscionability.[41] Acharya also argues enforcing the forum selection clause would contravene Washington's anti-discrimination policy by shortening the statute of limitations period and depriving her of her fee-shifting rights.

Our Supreme Court has held an employment arbitration agreement requiring an employee to deliver a written notice of intent to seek arbitration within 180 days after the event that first gives rise to the dispute was substantively unconscionable because it required a substantially shorter limitations period than the 3-year limitations under RCW 49.60.[42] This Court has held in the context of an employee's suit under RCW 49.60, under which only a prevailing employee may recover fees and costs, a "loser pays all" fees and costs provision in an arbitration clause was substantively unconscionable.[43] In a class action brought under the Consumer Protection Act, our Supreme Court has held a forum selection clause requiring venue in Virginia, where class suits were not available, was unenforceable as contrary to Washington's policy allowing class actions for small-value consumer claims.[44] On the other hand, this Court has held under the forum non conveniens doctrine, an alternative forum is "adequate so long as some

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[39] Martinez, 740 F.3d at 230.

[40] Answer at 3.

[41] See Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 898, 28 P.3d 823 (2001) ("The burden of proving that a contract or contract clause is unconscionable lies upon the party attacking it.").

[42] Adler v. Fred Lind Manor, 153 Wn.2d 331, 355-58, 103 P.3d 773 (2004).

[43] Walters v. A.A.A. Waterproofing, Inc., 151 Wn. App. 316, 321-25, 211 P.3d 454 (2009).

[44] Dix, 160 Wn.2d at 834.

relief, regardless how small, is available should the plaintiff prevail."[45] "Even the fact that a suit would no longer be economically viable due to the limited damages available does not render an alternative forum inadequate for forum non conveniens purposes."[46]

Here, the parties dispute over what statute of limitations would apply to Acharya's claims and whether the fee system she would face under Swiss laws in Switzerland would be fair. The trial court made no finding or conclusion on those issues.

The trial court's decision presents an obvious error that would render further proceedings useless under RAP 2.3(b)(1). If Microsoft is correct that the forum selection clause is enforceable (as it is presumptively so), the court in Switzerland is the appropriate forum. Microsoft points out Acharya has requested discovery of all documents that relate in any way to the qualifications, training, experience, criticisms, or performance of van Duüren (Belgium resident) as well as the computer hard drives of van Duüren and his former supervisor (France resident).[47] The alleged discrimination by van Duüren occurred in Europe, although Acharya alleges that Microsoft in Redmond failed to prevent, stop, and remedy that discrimination in accord with its policies.

Discretionary review is appropriate to address the enforceability of the forum selection clause before the parties litigate the case.

CONCLUSION

Microsoft satisfied the criteria for discretionary review under RAP 2.3(b)(1). Therefore, it is

[45] Klotz v. Dehkhoda, 134 Wn. App. 261, 265, 141 P.3d 67 (2006) (citations omitted).
[46] Klotz, 134 Wn. App. at 266 (citation omitted).
[47] App. 9 at 10-11 (declaration of counsel), 15-18 (Acharya's requests for production).

ORDERED that discretionary review is granted, and the clerk shall issue a perfection schedule.

Done this 3rd day of April, 2014.

Masako Hanagura
Court Commissioner