71420-1

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No. 71420-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MICROSOFT CORPORATION,

Petitioner,

v.

BELLA ACHARYA,

Respondent.

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This is a case about allegedly wrongful conduct that took place in Europe. The key allegation in the complaint is that plaintiff Bella Acharya's supervisor, Olivier van Duüren, subjected her to discriminatory and retaliatory treatment. But van Duüren lives and works in Europe, and he supervised Acharya only while she too was living and working there. Nearly all of the witnesses to the key events—Acharya's and van Duüren's co-workers—are also in Europe. And most importantly, while Acharya was working in Europe, her employment was governed by a contract in which she agreed to resolve any disputes in a European forum.

Acharya is now attempting to sue Microsoft Corporation in Washington State for the discriminatory treatment that she allegedly suffered in Europe. But although she tries to recharacterize her claims as somehow relating to Washington, she cannot escape the reality that the critical alleged events occurred in Europe, where Acharya was employed not by Microsoft Corporation, but by Microsoft Global Resources (MGR), a Swiss Corporation. None of the allegations in the complaint states a claim against Microsoft Corporation, which was not Acharya's employer at any relevant time.

As explained in the opening brief, the Superior Court erred in refusing to give effect to the forum-selection clause in Acharya's

employment contract, which requires adjudication in Switzerland. Such clauses have long been entitled to a presumption of validity in Washington State, and a recent, unanimous decision of the United States Supreme Court instructs that they are entitled to "controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581, 187 L. Ed. 2d 487 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988) (Kennedy, J., concurring)).

Acharya's principal response is to argue that the forum-selection clause is unconscionable. That argument was forfeited below, and it lacks merit in any event. Acharya was a sophisticated and highly compensated manager who had the contract to review for a month before signing it. The forum-selection clause was not buried in fine print but was clearly identified. And there is nothing shocking or unfair about agreeing that claims arising from employment in Europe will be resolved in Europe.

To say that the clause is nevertheless unconscionable would effectively be to say that forum-selection clauses in employment agreements are per se invalid, a result that is directly contrary to Washington law. In attempting to justify that conclusion, Acharya repeatedly points out that Microsoft Corporation is a large corporation that has greater financial resources than she does. That fact, however, is not

relevant to the unconscionability analysis, and Acharya's discussion of it represents an inappropriate appeal for sympathy.

Even apart from the forum-selection clause, the Superior Court erred in failing to dismiss the case on the basis of forum non conveniens. Acharya does not dispute that Switzerland is an adequate forum to resolve contract and tort claims arising from an employment relationship. And the balance of private and public interests overwhelmingly favors hearing Acharya's case in a European forum, when the important witnesses and evidence are located in Europe. Washington State has no interest in adjudicating a dispute arising from employment in a foreign country, especially where, as here, the parties have agreed for the dispute to be governed by foreign law.

ARGUMENT

A. This case involves alleged discrimination and retaliation in Europe

In an effort to justify litigating in Washington, Acharya attempts to turn her case into something completely different from what she pleaded in the complaint. A central theme in her brief is that the dispute arose in Washington. She describes Microsoft Corporation as "her longtime employer" and says that her claims are based on various alleged "failures by its management, Human Resources Department, and Legal and Corporate Affairs Group ('LCA')—all located in Redmond, Washington."

(Br. 1) She contends that the witnesses she will need to call to establish her claims "are current and former Microsoft Corp. managers . . . located in King County," that "the bulk of the documents relevant to [her] claims are documents in the control of and accessible to Microsoft Corp. in King County," and that she "does not intend to call or depose Mr. van Duüren, or anyone else located in Europe." (Br. 43) Acharya's current description of the case is inaccurate, and it is contradicted by her own complaint and by the undisputed facts that have been developed in the litigation.

1. The key events giving rise to this case occurred in Europe

Until 2008, Acharya worked for Microsoft Corporation in Redmond, Washington. (CP 79) As described in the complaint, Acharya encountered no problems in her employment at that time—in her words, she had a "superlative performance record." (CP 5) In 2008, Acharya resigned her employment with Microsoft Corporation in Washington and accepted a position with a different company, MGR, in the United Kingdom. To do so, she signed a contract in which she agreed to become "a MGR employee to work . . . at Microsoft Limited," and in which she acknowledged that, "[a]t the end of this assignment in the United Kingdom, ... [t]here is no guarantee that you will obtain another

assignment with MGR or a new position with another Microsoft affiliate." (CP 195, 197)

The complaint does not identify the location of the events that it describes, but there is no dispute that Acharya was working in the United Kingdom at all times after October 2008. She was in the United Kingdom when, as she alleges, she was assigned a "new white male manager [who] suddenly gave her discriminatory performance reviews." (CP 5) Although the complaint does not use his name, it is undisputed that the "white male manager" was van Duüren. Significantly, he is the *only* identifiable individual whom the complaint accuses of any wrongful conduct. The complaint alleges that van Duüren "could not tolerate having a strong woman stand up to him," that he "taunted" Acharya, that he drove "[a]ll the women (except for his administrative assistant)" out of his group, and that he gave Acharya an unfairly low performance rating. (CP 7-8) The complaint also alleges that van Duüren retaliated against Acharya when she complained about his conduct, speaking to her "in a belligerent tone," engaging in "a temper tantrum," and "bull[ying] and intimidate[ing] her in a discriminatory and/or retaliatory manner in a variety of other ways." (CP 8-9) It alleges that the effect of his conduct was to "destroy her long and exceptional career at Microsoft." (CP 9)

Of course, van Duüren denies Acharya's allegations; he will testify that Acharya received appropriate evaluations that took into account her team's poor sales performance and the negative feedback she received from the employees who reported to her. (CP 199-200) But regardless of whose view is correct, it is undisputed that the events that underlie the dispute occurred in London while Acharya reported to van Duüren. With the exception of Acharya herself, nearly all of the witnesses to their workplace relationship are in Europe. (CP 230) For that reason, Acharya's assertion (Br. 43) that she does not "intend to call or depose Mr. van Duüren, or anyone else located in Europe, to support her claims" is beside the point. Whether or not she intends to call them, they are plainly relevant to the case. Nor is Acharya correct when she suggests (*id.*) that "the bulk of the documents relevant to [her] claims are . . . accessible to Microsoft Corp. in King County." To the contrary, as explained in the opening brief (at 28-29), the discovery requests that Acharya has already made involve documents relating to numerous MGR employees located in Europe—documents that cannot easily be exported to the United States due to the EU's strict data privacy rules. Acharya's discovery requests, like the allegations in her complaint, confirm that the key events at issue in this litigation have little or nothing to do with Washington State.

2. The complaint does not state a claim for any conduct occurring in Washington

Although Acharya now attempts to describe her case as one centered in Washington, the complaint does not state a claim for anything that took place in Washington (or anywhere else in the United States). Acharya contends that van Duüren's supervisors, some of whom were based in Redmond, did a poor job of supervising him and monitoring his activities, and that investigators employed by Microsoft Corporation failed to conduct an adequate investigation into her complaints. (CP 10-12) But as a factual matter, determining whether that contention is correct will still require assessing what happened in Europe. One cannot evaluate whether van Duüren was adequately supervised, or whether Acharya's complaints were adequately investigated, without assessing van Duüren's conduct, which formed the basis for those complaints. And that conduct took place almost entirely within Europe.

More importantly, as a legal matter, inadequate supervision or investigation is not a basis for a claim under the WLAD. As explained in the opening brief (at 15), the WLAD does not make it unlawful to fail to conduct an investigation or to fail to prevent someone else from engaging in discriminatory conduct. Acharya cites no contrary authority.[1]

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[1] In a footnote (Br. 11 n.4), Acharya argues that her complaint alleges that Washington-based employees of Microsoft Corporation discriminated

Acharya also observes (Br. 11-12) that Microsoft Corporation did not hire her when she returned to the United States. But the complaint does not allege that the decision not to hire her reflected discrimination or retaliation by anyone at Microsoft Corporation. To the contrary, she alleges that "there was virtually no chance that she was going to be able to find a suitable position" because van Duüren had already "poison[ed] the well." (CP 11) For that reason, even if she had articulated a failure-to-hire claim against Microsoft Corporation, it would be derivative of her claims about van Duüren, which are centered in Europe.

3. Acharya was not an employee of Microsoft Corporation while working in Europe

According to Acharya (Br. 15), Microsoft Corporation "was clearly Ms. Acharya's exclusive or joint employer while she was temporarily assigned to London." That is incorrect. Acharya's employment agreement explicitly stated that she was employed by MGR, not Microsoft Corporation. (CP 187-193)

Below, Acharya argued that Microsoft Corporation and its subsidiaries constitute a single employer under the "integrated enterprise"

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against her. The cited allegations are conclusory and do not identify any specific discriminatory conduct. (*E.g.*, CP 44 ("By and through the acts and omissions alleged herein, Microsoft discriminated against Acharya, particularly because she is an older woman.")) In any event, such allegations would be contrary to Acharya's own contention that van Duüren, by himself, was responsible for "destroy[ing] her long and exceptional career at Microsoft." (CP 9)

theory. (CP 267-69) As explained in the opening brief (at 16), however, that analysis is used only to determine whether a defendant employs enough people to be subject to Title VII, and it does not determine whether a parent corporation can be treated as the employer of a subsidiary's employee. Instead, that question is governed by the test for piercing the corporate veil.

Apparently recognizing that she cannot satisfy the test for corporate veil-piercing, Acharya now relies (Br. 15) on a theory of joint employment. That theory has been forfeited because Acharya did not present it below. (CP 266-269 (Acharya argued, in opposing dismissal, that "Microsoft Corporation and its wholly-owned subsidiaries . . . constitute an 'integrated enterprise,'" but without relying on joint-employment concepts.)) But even if it were properly before this Court, it should be rejected on the merits. Acharya cites no cases in which Washington courts have applied a theory of joint employment in assessing liability under the WLAD, and we are aware of none. Where that theory does apply, courts use an "economic reality" test to determine whether a joint employment relationship exists. *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415, 421 (2014). One of the key factors in that test is "[t]he degree of supervision, direct or indirect, of the work." *Id.* at 421 (internal quotation marks and citation omitted). But contrary to

Acharya's assertions (Br. 16), that factor is entirely absent here because van Duüren, Acharya's supervisor, did not work for Microsoft Corporation, but for Microsoft Limited.

In any event, even if Microsoft Corporation could be deemed Acharya's employer, that would not alter the analysis of venue in this case. The alleged events giving rise to Acharya's claims occurred in Europe, and as shown below, all of those claims are governed by the forum-selection clause to which Acharya agreed.

B. Acharya's claims should be dismissed on the basis of the forum-selection clause in her contract

1. The forum-selection clause applies to Acharya's claims

The forum-selection clause in Acharya's employment agreement applies to "[a]ny dispute, controversy or claim arising under, out of or in relation" to the contract *and* its "conclusion" or termination. (CP 192) The clause thus governs all of Acharya's claims in this litigation.

Acharya argues (Br. 15) that the forum-selection clause does not apply because her claims are against Microsoft Corporation, while her employment agreement was with MGR. As explained above, however, Acharya's allegations do not state a claim against Microsoft Corporation, which was not her employer during the relevant period. But even if she could state a claim against Microsoft Corporation, that claim would be covered by the forum-selection clause, which applies without limitation to

any "dispute . . . arising under, out of, or in relation" to the contract, whether or not that dispute is with MGR. Although Microsoft Corporation was not a party to the employment agreement, it easily qualifies as a third-party beneficiary of Acharya's promise to sue only in Europe. *See Key Dev. Inv., LLC v. Port of Tacoma*, 173 Wn. App. 1, 29, 292 P.3d 833 (2013) (status as a third-party beneficiary requires that the benefit "be a direct result of performance within the parties' contemplation"). If, as Acharya contends (Br. 15), Microsoft Corporation was her true employer while she was in Europe, then it would make no sense to read the broadly worded forum-selection clause in her employment agreement not to apply to employment claims asserted against Microsoft Corporation.

2. Acharya's employment contract is valid

Acharya devotes much of her brief to arguing (Br. 17-31) that the forum-selection clause in her employment agreement is unconscionable. Acharya forfeited that argument by failing to present it below. Although she now contends (Br. 17 n.5) that she "raised the argument repeatedly in her opposition to Microsoft Corp.'s motion to dismiss," the cited portions of her opposition are simply footnotes that contain passing references to the doctrine of unconscionability. That is inadequate to preserve an argument. *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). Certainly,

Acharya did not present anything that would satisfy her burden of demonstrating unconscionability. *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.").

In any event, Acharya's argument lacks merit. The unconscionability doctrine has two components: procedural and substantive. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004). Acharya has not satisfied either standard.

Acharya concedes (Br. 27) that a contract is procedurally unconscionable only if it was agreed to under circumstances that failed to provide the party "a meaningful choice," taking account of "[t]he manner in which the contract was entered, whether the party had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print." *Id.* at 345 (internal quotation marks and citations omitted). The contract in this case does not come close to meeting that standard. Acharya is a sophisticated managerial employee who had ample opportunity to review the contract before signing it. Although she quibbles (Br. 29 n.8) about whether she actually reviewed the contract, she does not dispute that she had a copy of it for a month before she signed, so she could have reviewed it at her convenience. Nor can she contend that the contract's terms were somehow

hidden from her, for they were not—the contract is only seven pages long, and that the forum-selection clause is clearly indicated with boldface text in the margin reading "Place of Jurisdiction." (CP 192) *See Torgerson v. One Lincoln Tower LLC*, 166 Wn.2d 510, 519, 210 P.3d 318 (2009) (finding no procedural unconscionability where the challenged provision was not "hiding in a maze of fine print" but was in a labeled paragraph "in the same size font as other key provisions"); *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 442, 47 P.3d 940 (2002) (finding a contract provision not unconscionable, in part because of "the conspicuousness of the clause").

Instead, Acharya complains (Br. 30) that Microsoft did not provide her with legal advice about the effect of those terms. But to establish unconscionability, an employee must show, at a minimum, "some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, [or] that the terms of the agreement were set forth in such a way that an average person could not understand them." *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 306-07, 103 P.3d 753 (2004). The unconscionability doctrine does not require that a prospective employee be provided with the

equivalent of a *Miranda* warning before she may be bound by the terms of an employment agreement.

The forum-selection clause is also not substantively unconscionable. To be substantively unconscionable, a contract must have terms that are "[s]hocking to the conscience, monstrously harsh, and exceedingly calloused." *Adler*, 153 Wn.2d at 344-45 (internal quotation marks and citations omitted); *Torgerson*, 166 Wn.2d at 519 ("[S]uch unfairness must truly stand out."). In attempting to demonstrate substantive unconscionability, Acharya relies (Br. 18-19) on cases declining to enforce arbitration clauses in which disputes involving plaintiffs within Washington were to be resolved outside the state. This case is different because, while Acharya happens to be in Washington now, her claims arise out of her four-year-long employment in Europe. There is nothing "harsh" or "[s]hocking to the conscience" about an agreement that employees working in Europe for a European company will settle their disputes in a European forum. *Adler*, 153 Wn.2d at 344-45 (internal quotation marks and citation omitted). Thus, even if Acharya had attempted to demonstrate that the contract was unconscionable, she would be unable to do so.

Ultimately, Acharya's argument for unconscionability rests on her observations that "Microsoft Corp. is one of the largest companies in the

world" (Br. 20), and that "[t]he financial disparity between the parties is enormous" (Br. 20 n.7). Her (presumably unintended) implication is that the forum-selection clause would be valid if only the defendant were a smaller or less profitable company. But the unconscionability doctrine does not turn on the relative financial resources of the parties. *See Zuver*, 153 Wn.2d at 307 ("[I]f a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding 'could potentially apply to [invalidate] every contract of employment in our contemporary economy.'") (quoting *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002)). Acharya's discussion of that issue is nothing more than an inappropriate appeal for sympathy.

3. A forum-selection clause contained in a valid contract must be given effect in all but the most exceptional cases

The Washington Supreme Court has held that "[f]orum selection clauses are prima facie valid." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 834, 161 P.3d 1016 (2007). The party challenging the enforcement of the clause has the burden of showing its invalidity, which requires establishing not simply that the forum is distant or inconvenient, but "that trial in the chosen forum would be so seriously inconvenient as to deprive the party of a meaningful day in court." *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). "[I]nconvenience contemplated by the parties at the time they entered the contract should not render a forum selection clause unenforceable." *Bank of Am.*, 108 Wn. App. at 748-49.

As shown below, the application of that standard would be sufficient to reject Acharya's claim. But as explained in the opening brief (at 9-12), this Court should follow the unanimous decision of the United States Supreme Court in *Atlantic Marine*, which applied an even higher standard, holding that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." 134 S. Ct. at 581 (quoting *Stewart Org.*, 487 U.S. at 33 (Kennedy, J., concurring)).

In an attempt to resist the application of *Atlantic Marine*, Acharya points out (Br. 36) that this case involves an employment dispute, while that case involved a commercial dispute. But nothing in the Court's opinion suggests that the distinction is significant. To the contrary, the Court described its holding as a general rule applicable to any "defendant in a civil case who seeks to enforce a forum selection clause." *Atl. Marine*, 134 S. Ct. at 575; *see Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 867 (9th Cir. 1991) ("There is nothing in the case law . . . to suggest that a different analysis applies to forum selection clauses in employment contracts than generally applies to commercial contracts."). And the two

cases Acharya cites (Br. 38) for the proposition that *Atlantic Marine* "is inapposite in a case like this" do not so hold: one involved a clause that, by its terms, was permissive, not mandatory, *RELCO Locomotives, Inc. v. AllRail, Inc.*, 4 F. Supp. 3d 1073, 1085 (S.D. Iowa 2014), while the other held that the forum-selection clause was preempted by a specific provision of federal law regulating venue in cases involving household shippers, *Stewart v. Am. Van Lines*, No. 4:12CV394, 2014 WL 243509, at *5 (E.D. Tex. Jan. 21, 2014).

Acharya also notes (Br. 33-34) that *Atlantic Marine* involved a forum-selection clause prescribing venue in a different federal district court, not in a foreign country. But the Court anticipated precisely that distinction and stated that "the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums." 134 S. Ct. at 583 n.8; *see also id.* at 580.

As Acharya points out (Br. 36-39), *Atlantic Marine* is not binding on Washington courts. But Washington courts generally follow federal law governing the enforcement of forum-selection clauses. *Voicelink*, 86 Wn. App. at 618 (noting that the Washington test "is consistent with the test set forth by the U.S. Supreme Court"); *see Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 415, 854 P.2d 1087 (1993) (When a state law is

similar to a parallel federal law, "Washington courts look to federal law" for guidance.). And there is good reason for Washington courts to follow the Supreme Court's persuasive analysis. As the Supreme Court explained, when the parties have signed a "contractually valid forum selection clause," the "plaintiff's choice of forum," which would ordinarily be dispositive, "merits no weight," because "the plaintiff has effectively exercised its 'venue privilege' before a dispute arises." *Atl. Marine*, 134 S. Ct. at 581 n.5, 581-82. On the other hand, enforcing forum-selection clauses serves important interests of predictability and protection of "parties' settled expectations." *Id.* at 583. That is because a forum-selection clause "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." *Id.* For that reason, "[i]n all but the most unusual cases, . . . 'the interest of justice' is served by holding parties to their bargain." *Id.*

4. Acharya cannot overcome the presumption in favor of enforcing the forum-selection clause

Acharya argues that the forum-selection clause should not be enforced because it would be difficult for her to litigate in Europe (Br. 20-

21, 25-27) and because enforcement would offend Washington public policy (Br. 21-25). Neither argument has merit.

Under *Atlantic Marine*, Acharya's private interest in litigating in Washington rather than Europe is not relevant in evaluating whether to enforce the clause. 134 S. Ct. at 582. But even under pre–*Atlantic Marine* Washington cases, "inconvenience foreseeable by the parties at the time they entered the contract" is not a basis for refusing to enforce a forum-selection clause. *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 934, 147 P.3d 610 (2006). At the time Acharya signed the contract, it was foreseeable—indeed, it was knowable with certainty—that Swiss law differs from Washington law in various respects. It was also foreseeable that Acharya might choose to return to the United States after her employment ended, making it inconvenient for her to litigate in Europe.

Moreover, because Acharya is able to litigate her claims in Switzerland, she has not come close to showing that enforcement of the forum-selection clause "would be so seriously inconvenient as to deprive [her] of a meaningful day in court." *Bank of Am.*, 108 Wn. App. at 748. Acharya complains about various aspects of Swiss law (Br. 25-27), but she does not dispute that Swiss courts hear cases brought by employees alleging sex discrimination, and they award damages and injunctive relief.

(CP 129-31) Acharya asserts (Br. 25) that she would be unable to afford a Swiss lawyer and that contingent-fee arrangements are rare in Switzerland, but she ignores the evidence in the record that Switzerland provides free legal representation for parties of limited means, which she now claims to be, and also allows a "success fee" or "incentive payment" similar to a contingent-fee arrangement. (CP 442)[2] Acharya also repeats her incorrect assertion (Br. 26) that her claims would be barred by the Swiss statute of limitations. In fact, the Swiss statute of limitations for employment-related claims is five years. (CP 125).

To the extent that Acharya identifies differences between Swiss law and Washington law (Br. 26), such as the unavailability of fee-shifting or civil juries, those differences do not mean that litigating in Switzerland would deprive her of a day in court. To the contrary, her arguments on those points demonstrate that enforcement of forum-selection clauses helps to promote international comity by respecting the integrity and competence of foreign tribunals. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Switzerland is a democratic country that respects human

[2] Acharya attempts (Br. 25) to supplement her trial-court submissions by citing a 40-year-old law review article on Swiss law. The attempt is misplaced because foreign law is a question of fact that must be pleaded and proved in the trial court. *See In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

rights and the rule of law, and it would be astonishing for a Washington court to declare that its judicial system is so deficient that a discrimination plaintiff cannot have a meaningful day in court there.

Acharya also has not shown that this is one of the "rare[]" cases in which the public interest, unrelated to the private interests of the parties, can defeat enforcement of the parties' agreement. *Atl. Marine*, 134 S. Ct. at 582. Her arguments on that point (Br. 21-25) rest on Washington's supposed policy interest in applying Washington law to the events giving rise to the litigation. But the choice-of-law clause in Acharya's employment agreement provides that her employment relationship is governed by Swiss law, not Washington law. (CP 192) Acharya argues (Br. 25-27) that the choice-of-law provision is unconscionable, but her arguments on that point suffer from the same flaws as her argument that the forum-selection clause is unconscionable.

Even in the absence of the choice-of-law clause, Washington law would not apply to employment claims made by an employee of a Swiss company for events occurring in Europe. Under Washington choice-of-law principles, the governing law is decided "by determining which jurisdiction has the most significant relationship to a given issue." *Seizer v. Sessions*, 132 Wn. 2d 642, 650, 940 P.2d 261 (1997) (internal quotation marks and citation omitted). Here, the allegedly unlawful conduct

occurred in Europe, where both Acharya and van Duüren, were employed and domiciled. Moreover, Acharya and van Duüren worked for European companies, and their respective employers were at all relevant times located and doing business in Europe, not Washington.

Acharya does not undertake a choice-of-law analysis but instead asserts (Br. 22) that "the Washington Supreme Court routinely enforces the WLAD extra-territorially." The only case she cites for that proposition is *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994), but the question in that case was whether to apply Washington law or California law—not whether to apply the law of a foreign country. Applying ordinary conflict-of-laws principles, the court decided to apply Washington law after determining that there was no "conflict between the purposes of Washington and California law." *Id.* at 101. The court did not suggest that the WLAD applies in circumstances where ordinary conflicts principles would dictate application of another state's law; still less did the court hold that the WLAD could displace the law of a foreign country. And while Acharya also analogizes this case to Title VII cases (Br. 23), she overlooks that Title VII, unlike the WLAD, expressly applies to conduct overseas. *See* 42 U.S.C. § 2000e-1. Had Acharya wished to take advantage of the extraterritorial scope of Title VII, she could have asserted a claim under that statute. She chose not to do so.

Even in the absence of the forum and choice-of-law provisions in Acharya's contract, Washington substantive law would not apply to this dispute. Washington has no public policy interest in resolving the dispute in the courts of this state. Certainly it has no interest compelling enough to override the choice of the parties to litigate in Europe.

C. The Superior Court erred in refusing to dismiss the complaint on the basis of forum non conveniens

Even if Acharya had not expressly agreed to a Swiss forum, the Superior Court should nevertheless have dismissed this action under the doctrine of forum non conveniens. Acharya does not appear to dispute that Switzerland is an available and adequate alternative forum. And as demonstrated in the opening brief (at 27-31), the balance of private and public interests factors overwhelmingly favors dismissal. Acharya's efforts to resist that conclusion are unavailing.

The private-interest factors relate primarily to the location of and access to the witnesses and evidence in the case. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 20, 177 P.3d 1122 (2008); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). Here, the principal factual dispute involves Acharya's allegations that Olivier van Duüren, her manager during most of her last two years in London, "could not tolerate having a strong woman stand up to him," that he "bullied and

intimidated her in a discriminatory and/or retaliatory manner in a variety of . . . ways," and that he gave her poor performance reviews in 2011 and 2012, thereby "destroying her long and exceptional career at Microsoft." (CP 9) As explained above, evaluating those allegations will require witnesses and documents located in Europe.

Acharya's document requests will therefore implicate Europe's complex data-privacy laws. Acharya points out (Br. 45) that some documents may be located in the United States, but others are indisputably located in Europe. (CP 449-50) And the European documents that Acharya has sought are protected by the different Data Protection Acts enacted in each of the EU countries where these documents are located. (CP 117-18, 131-32) Acharya suggests (Br. 45-46) that under her reading of European law, those documents could be transferred to the United States for this litigation.[3] The evidence in the record suggests otherwise. (CP 131-32) In any event, whatever forum decides this dispute will need to assess and apply privacy laws of various countries within Europe to ensure that any disclosures are lawful in the United States and Europe. A Swiss forum would be better suited to that task.

[3] That argument rests on Acharya's reading of an EU document that she has attached to her brief. It is inappropriate for parties to introduce new evidence of foreign law on appeal. *See* note 2, *supra*.

Acharya does not address the public-interest factors, but they also weigh in favor of Switzerland. Of particular relevance here, Swiss courts are better equipped to apply Swiss law—the governing law under both the contract and Washington choice-of-law principles. Washington has little or no interest in adjudicating competing claims about precisely what happened in a European workplace between an employee and a supervisor, both working in Europe.

CONCLUSION

This Court should reverse the Superior Court's decision denying Microsoft's motion to dismiss and direct entry of judgment for Microsoft.

Respectfully submitted.

DATED: November 13, 2014

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CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury under the laws of the State of Washington that on November 13, 2014, I caused the foregoing document to be served on the following counsel of record, via hand delivery:

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