IN THE SUPREME COURT OF TEXAS

NO. 02-0648

IN RE AIU INSURANCE COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 3, 2003

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting.

Because mandamus is an extraordinary remedy which undermines the normal appellate process, courts reserve its use for very special circumstances. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). The writ issues when necessary to "correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

The Court reasons that we should grant mandamus relief here to enforce this forum selection clause because we routinely grant mandamus relief to enforce arbitration agreements not governed by the Texas Arbitration Act, which the Court characterizes as just "another type of forum selection clause." ___ S.W.3d at ___. But there are important differences between arbitration agreements governed by federal law and forum selection clauses. While Texas public policy has always encouraged arbitration, it has not always favored the forum selection clause.

The right to arbitration has been guaranteed in every Texas constitution.[1] *See* TEX. CONST. art. XVI, § 13 (repealed 1969); TEX. CONST. of 1869, art. XII, § 11; TEX. CONST. of 1866, art. VII, § 15; TEX. CONST. of 1861, art. VII, § 15; TEX. CONST. of 1845, art. VII, § 15. Forum selection clauses, on the other hand, were initially disfavored by American courts because they were perceived to tamper with or "oust" a court's rightful jurisdiction. *See* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R.4th 404, 409-14 (1984); R. D. Hursh, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 56 A.L.R.2d 300, 306-320 (1957). Under this "ouster doctrine," forum selection clauses were often described as void on public policy grounds. As the Supreme Court said in *Ins. Co. v. Morse*:

> Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*, 18 New York 1287, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*
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> That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that *agreements in*

[1] Each constitution provided that it is "the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial." TEX. CONST. 1876, art. XVI, § 13 (repealed 1969). This section was repealed by the voters in 1969 as one of the "obsolete, superfluous and unnecessary sections of the Constitution." Tex. H.J.R. No.3, 6lst Leg., R.S., 1969 Tex. Gen. Laws 3230. The House Joint Resolution stated that the repealer was not intended to "make any substantive changes in our present constitution." *Id*.

advance to oust the courts of the jurisdiction conferred by law are illegal and void.

Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (emphasis added) (citations omitted). Twenty years before that, the Massachusetts Supreme Court explained the "ouster doctrine" in the following oft-quoted passage:

> The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience.

Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856). This Court applied the "ouster doctrine" in 1919 to reject enforcement of a forum selection provision in an insurance contract which attempted to fix venue for suits against an insurance company in Dallas County. *Int'l Travelers' Ass'n v. Branum*, 212 S.W. 630, 631 (Tex. 1919). Incorporating quotes from *Morse* and *Nute*, this Court concluded that such a clause was "utterly against public policy." *Id*. at 632. We subsequently followed *International Travelers* to hold that parties could not contract to avoid a mandatory venue statute. *Leonard v. Paxson*, 654 S.W.2d 440, 441-42 (Tex. 1983); *Fid. Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 536 (Tex. 1972); *see also Ziegelmeyer v. Pelphrey*, 125 S.W.2d 1038, 1040 (Tex. 1939) ("venue is fixed by law and any [agreement] to change the law with reference thereto is void"). Based on these decisions, at least one court has concluded that Texas "treats forum-selection clauses as unenforceable per se." *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497, 497 n.3 (Mo. 1992).

Forum selection clauses have gained much wider acceptance since the Supreme Court replaced the "ouster doctrine" with a more favorable view of them as a relevant commercial tool.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13, 15 (1972). Moreover, a number of Texas intermediate appellate courts have joined this trend,[2] *International Travelers* notwithstanding. *See* James T. Brittain, Jr., *A Practitioner's Guide to Forum Selection Clauses in Texas*, 1 HOUS. BUS. & TAX L.J. 79, 89-99 (2001).

But even were I to agree that the forum selection clause is now presumptively valid in Texas and that the trial court abused its discretion in failing to apply the parties' agreement in the underlying case, it does not follow that mandamus relief is appropriate. As a rule, we do not specifically enforce contractual rights by mandamus. We have done so in arbitration cases not just because it effectuated the parties agreement, but because of other special circumstances. In *Jack B. Anglin Co. v. Tipps*, we identified the procedural anomaly that permitted an interlocutory appeal from the denial of arbitration under the state act, but not the federal act. 842 S.W.2d 266, 272 (Tex. 1992); *see also In re Prudential*, ___ S.W.3d ___, ___ (Tex. 2004) (Phillips, C.J. dissenting) (discussing arbitration mandamus cases).

The Court suggests that we must grant mandamus relief here to conserve judicial resources, concluding that any trial in Texas will be a waste of time and money. But the cost or delay of having to go through a trial and an appeal to correct an error does not make the remedy at law inadequate. *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991). Instead, the relator must show that the trial court's ruling will "permanently deprive [it] of substantial rights." *Polaris*

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[2] This trend to enforce forum selection clauses has not been without its detractors. *See, e.g.*, David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1095, 1161 (2002) (noting that *The Bremen* was a "sea-change in the way private agreement is viewed in relation to procedure" and describing the judicially created doctrine for enforcement of forum selection clauses as a "mess").

Inv. Mgmt. Corp. v. Abascal, 892 S.W.2d 860, 862 (Tex. 1995) (per curiam). The law provides remedies other than mandamus to assure that contracting parties receive the benefit of their bargains. Thus, it is not inevitable that AIU will suffer irreparable loss if we do not intervene at this stage of the litigation. The United States Supreme Court has expressed a similar view, holding that a party's rights under a forum selection clause are not destroyed if vindication is postponed until a final, appealable judgment is rendered in the case. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 501 (1989). Justice Scalia, concurring separately, explained that a party's right to the immediate enforcement of a forum selection clause was simply not as important as the policy reasons for circumscribing interlocutory appeals:

> While it is true, therefore, that the "right not to be sued elsewhere than in [the selected forum]" is not fully vindicated – indeed, to be utterly frank, is positively destroyed – by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals.

Id. at 502-03.

Nor do I believe that our action today, if indicative of things to come, will save judicial resources over the long term. The writ of mandamus should not be an alternative to appeal, available whenever an appellate court decides that trial court errors demanded swift correction. *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (per curiam); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969). It instead should be an extraordinary remedy reserved to correct clear errors for which no other adequate remedy exists. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d at 916, 917 (Tex. 1985). A disciplined adherence to this latter limitation has generally been thought necessary to preserve

"orderly" trial proceedings and to prevent the "constant interruption of the trial process by appellate courts." *Pope,* 445 S.W.2d at 954.

The law clearly provides a remedy other than mandamus to assure that contracting parties receive the benefit of their bargains. Because AIU has not shown that this remedy is inadequate, as that term has been generally understood in this state, I would deny the writ.

Thomas R. Phillips
Chief Justice

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