# NUMBER 13-20-00122-CV

## COURT OF APPEALS

## THIRTEENTH DISTRICT OF TEXAS

## CORPUS CHRISTI – EDINBURG

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## IN RE FIRST SPECIALTY INSURANCE CORPORATION

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## On Petition for Writ of Mandamus.

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# MEMORANDUM OPINION

### Before Justices Benavides, Hinojosa, and Tijerina
### Memorandum Opinion by Justice Benavides[1]

Relator First Specialty Insurance Corporation (First Specialty) filed a petition for writ of mandamus in the above cause on February 28, 2020. Through this original proceeding, First Specialty contends that the trial court[2] erred in refusing to dismiss the

[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so," but "[w]hen granting relief, the court must hand down an opinion as in any other case"); *see also id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] This petition for writ of mandamus arises from trial court cause number S-19-5836-CV-B in the 156th District Court of San Patricio County, Texas, and the respondent is the Honorable Patrick Flanigan. *See id.* R. 52.2.

underlying lawsuit based on a forum-selection clause contained in its insurance policy. We conditionally grant the petition for writ of mandamus.

## I. BACKGROUND

On August 27, 2019, Gregory-Portland Independent School District (GPISD) brought suit against multiple insurance companies, including First Specialty, alleging that it sustained extensive damage to its properties due to Hurricane Harvey in August 2017, but the insurers failed to properly compensate it pursuant to the relevant insurance policies. GPISD alleged that it sustained more than $10,000,000 in property damage, but the insurers valued its damages at only $840,000.

In its original petition, which is the live pleading at issue, GPISD sued Axis Surplus Insurance Company (Axis), Westchester Surplus Lines Ins. Co. (Westchester), Velocity Risk Under Writers, LLC (Velocity), United Specialty Ins. Co. (United), Interstate Fire & Casualty Company (Interstate), Underwriters at Lloyd's London f/k/a Certain Underwriters at Lloyd's London (Underwriters), Rockhill Insurance Co. (Rockhill), RSUI Indemnity Co. (RSUI), and First Specialty for declaratory judgment, breach of contract, and violations of the Texas Insurance Code. GPISD's petition asserted that Axis, Westchester, Velocity, United, Interstate, Underwriters, and Rockhill participated in GPISD's primary $10,000,000 layer of coverage under the insurance policies "through a contractual allocation of the risk." GPISD asserted that Rockhill, RSUI, and First Specialty provided insurance coverage in excess of the primary layer. GPISD alleged that the wind and water damages to its property, specifically, losses caused by Hurricane Harvey, were covered by the insurance policies issued by the insurers named in its suit.

On October 7, 2019, First Specialty filed a motion to dismiss GPISD's complaint against it on forum non conveniens grounds. According to First Specialty's motion to dismiss, a forum-selection clause in its insurance contract specifically required that any dispute against First Specialty "be exclusively brought in New York State Court and be governed by New York Law." First Specialty attached a copy of the relevant insurance policy, which includes the following forum-selection clause in an endorsement:

> APPLICABLE LAW AND COURT JURISDICTION
>
> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY
>
> **Applicable Law; Court Jurisdiction**
>
> The laws of the State of New York, without regard to any conflict of laws rules that would cause the application of the laws of any other jurisdiction, shall govern the construction, effect, and interpretation of this insurance agreement.
>
> The parties irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction. Nothing herein contained shall vary, alter or extend any agreement, provision, general condition or declaration of this Policy other than as above stated.
>
> ALL OTHER TERMS AND CONDITIONS OF THIS POLICY SHALL REMAIN UNCHANGED.

On December 10, 2019, GPISD filed a response to First Specialty's Motion to Dismiss. It argued:

> First Specialty is not entitled to dismissal based on the endorsement because (1) Plaintiff did [not] agree to enter a contract containing the Applicable Law and Court Jurisdiction Endorsement, (2) Plaintiff did not receive the First Specialty policy until after the Hurricane Harvey loss made the subject of this lawsuit, and (3) the endorsement is an attempt to circumvent the public policy principles inherent in the insurance law of the State of Texas. Considering the foregoing, the interest of justice is not

> served by litigating this case in New York, and Defendant's Motion to Dismiss should be denied.

GPISD alleged that its insurance agent summarized GPISD's total insurance coverage, only identified Axis as the lead primary insurance carrier, and did not inform GPISD that its coverage plan included several insurance policies issued by multiple carriers. GPISD specifically asserted that it was unaware it was being insured by First Specialty.

In support of its response, GPISD filed the affidavit of Brigitte Clark, the Chief Financial Officer of GPISD, who testified that she had conducted "a diligent search" of GPISD's records and it had "no record of the receipt of the policies of insurance issued to [it] by [First Specialty]" during the relevant period of time. GPISD also included the declaration of Tracie G. Conner, an employee of GPISD's counsel, who stated that she had requested "documentation that full copies of the policies of insurance issued to [GPISD] by [First Specialty]" for the relevant time periods "were mailed to, or otherwise provided to, [GPISD]," but she had not received the requested documentation.

The trial court held a non-evidentiary hearing on First Specialty's motion to dismiss on December 17, 2019. On February 5, 2020, the trial court signed an order denying First Specialty's motion to dismiss. The order states that "[t]he [c]ourt specifically rules that enforcing the forum-selection clause and requiring [GPISD] to litigate this matter in the state of New York is unconscionable and significantly inconvenient, and is contrary to [the] public policy of the state of Texas."

This original proceeding ensued. First Specialty raises two issues contending that: (1) the trial court abused its discretion by denying First Specialty's motion to dismiss because the forum-selection clause was exclusive and mandatory; and (2) mandamus is available to review this abuse of discretion. This Court granted First Specialty's request

for temporary relief and ordered the trial court proceedings to be stayed. *See* TEX. R. APP. P. 52.10. We further requested that GPISD, or any others whose interest would be directly affected by the relief sought, file a response to the petition for writ of mandamus. *See id.* R. 52.2, 52.4, 52.8.

On March 12, 2020, GPISD filed a response to the petition for writ of mandamus. First Specialty and GPISD also provided the Court with a substantial amount of supplemental briefing: on March 19, 2020, First Specialty filed a reply to GPISD's response; on March 26, 2020, GPISD filed a sur-reply; and finally, on April 14, 2020, First Specialty filed a brief in response to GPISD's sur-reply. None of the other parties to the underlying lawsuit filed a response to First Specialty's petition for writ of mandamus.

## II. MANDAMUS

Mandamus is an extraordinary remedy issued at the discretion of the court. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding) (per curiam). To obtain relief by writ of mandamus, a relator must establish that an underlying order is void or is a clear abuse of discretion and there is no adequate appellate remedy. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *see In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding).

An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d at 712; *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Essex Ins.*

*Co*., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding) (per curiam); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136.

The Texas Supreme Court has repeatedly held that mandamus relief is available to enforce a forum-selection clause in a contract. *See, e.g., In re Fisher*, 433 S.W.3d 523, 535 (Tex. 2014) (orig. proceeding); *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding) (per curiam); *In re Laibe Corp*., 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); *In re ADM Inv'r Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (orig. proceeding); *In re Int'l Profit Assocs*., 274 S.W.3d 672, 674 (Tex. 2009) (orig. proceeding) (per curiam); *In re AIU Ins. Co*., 148 S.W.3d 109, 115–19 (Tex. 2004) (orig. proceeding). A trial court abuses its discretion when it fails to properly interpret or apply a forum-selection clause. *In re Lisa Laser USA, Inc.*, 310 S.W.3d at 883; *In re Laibe Corp*., 307 S.W.3d at 316. Further, "an appellate remedy is inadequate when a trial court improperly refuses to enforce a forum-selection clause because allowing the trial to go forward will vitiate and render illusory the subject matter of an appeal, i.e., trial in the proper forum." *In re Lisa Laser USA, Inc*., 310 S.W.3d at 883 (internal quotations omitted); *In re Laibe Corp*., 307 S.W.3d at 316; *In re AIU Ins. Co*., 148 S.W.3d at 115.

## III. FORUM-SELECTION CLAUSES

Forum-selection clauses are contractual arrangements whereby parties agree in advance to submit their disputes for resolution within a particular jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985); *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 436 (Tex. 2017); *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 700 (Tex. App.—Dallas 2010, no pet.); *Phoenix Network Techs. (Eur.) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The

enforcement of valid forum-selection clauses, bargained for by the parties, protects the parties' "legitimate expectations" and furthers "the vital interests of the justice system," such as sparing litigants the time and expense of pretrial motions to determine the proper forum for disputes. *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991); *RSR Corp*., 309 S.W.3d at 700; *Phoenix Network Techs*., 177 S.W.3d at 611.

We use the federal analysis for determining the enforceability of forum-selection clauses. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005); *In re Automated Collection Techs., Inc*., 156 S.W.3d 557, 558–59 (Tex. 2004) (orig. proceeding) (per curiam); *In re AIU Ins. Co*., 148 S.W.3d at 111–14; *Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355 S.W.3d 842, 846 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Enforcement of these clauses depends on the contract's language because courts are required to "give effect to the parties' intent as expressed in the four corners of the [agreement]." *Pinto Tech*. *Ventures*, 526 S.W.3d at 432.

"Forum-selection clauses are generally enforceable and presumptively valid." *In re Laibe Corp*., 307 S.W.3d at 316; *see Pinto Tech. Ventures*, 526 S.W.3d at 436; *In re Nationwide Ins. Co. of Am*., 494 S.W.3d at 712; *HMT Tank Serv. LLC v. Am. Tank & Vessel, Inc*., 565 S.W.3d 799, 810 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *In re Bloom Bus. Jets, LLC*, 522 S.W.3d 764, 768 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding); *In re Cornerstone Healthcare Holding Grp., Inc.*, 348 S.W.3d 538, 540 (Tex. App.—Dallas 2011, orig. proceeding); *Young v. Valt.X Holdings, Inc.*, 336 S.W.3d 258, 262 (Tex. App.—Austin 2010, pet. dism'd); *Phoenix Network Techs*., 177 S.W.3d at 618. The party seeking to enforce a contractual forum-selection provision has the initial burden

of establishing that the parties entered into an agreement to an exclusive forum and that the agreement applies to the claims involved. *HMT Tank Serv. LLC*, 565 S.W.3d at 805; *Young*, 336 S.W.3d at 262; *Phoenix Network Techs*., 177 S.W.3d at 611–12 & n.6. Assuming the party seeking enforcement establishes these prerequisites, the burden then shifts to the party opposing enforcement to make a strong showing overcoming the prima facie validity of the forum-selection clause. *HMT Tank Serv. LLC*, 565 S.W.3d at 805; *Phoenix Network Techs*., 177 S.W.3d at 611. "The burden of proof is heavy for the party challenging enforcement." *In re ADM Inv'r Servs., Inc*., 304 S.W.3d at 375; *see In re AIU Ins. Co*., 148 S.W.3d at 113; *Young*, 336 S.W.3d at 262.

Under this framework, a forum-selection clause must be enforced unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d at 712; *In re Laibe Corp*., 307 S.W.3d at 316; *In re ADM Inv'r Servs., Inc*., 304 S.W.3d at 375; *In re W. Dairy Transp., L.L.C.,* 574 S.W.3d 537, 551 (Tex. App.—El Paso 2019, orig. proceeding [mand. denied]). The Texas Supreme Court has explained that any scenario in which a court declines to enforce a forum-selection clause must involve "extreme" or "exceptional" circumstances. *In re ADM Inv'r Servs., Inc*., 304 S.W.3d at 376 (following *M/S Bremen v. Zapata Off–Shore Co*., 407 U.S. 1, 18 (1972)). Absent these circumstances, a trial court should enforce a mandatory forum-selection clause by granting a motion to dismiss. *In re Nationwide Ins. Co. of Am*., 494 S.W.3d at 712.

We review the trial court's ruling on a motion to dismiss for abuse of discretion. *See In re Lyon Fin. Servs*., 257 S.W.3d 228, 231–32 (Tex. 2008) (orig. proceeding) (per curiam); *Chandler Mgmt. Corp. v. First Specialty Ins. Corp*., 452 S.W.3d 887, 891 (Tex. App.—Dallas 2014, no pet.). However, to the extent that our review involves the construction or interpretation of an unambiguous contract, the standard of review is de novo. *Ramsay v. Tex. Trading Co., Inc*., 254 S.W.3d 620, 626 (Tex. App.—Texarkana 2008, pet. denied); *Phoenix Network Techs.*, 177 S.W.3d at 610; *see also W. Tex. Hospitality, Inc. v. Enercon Int'l, Inc.*, No. 07-09-0213-CV, 2010 WL 3417845, at *4 (Tex. App.—Amarillo Aug. 31, 2010, no pet.) (mem. op.).

## IV. ANALYSIS

As noted previously, the trial court's order denying First Specialty's motion to dismiss states that "[t]he [c]ourt specifically rules that enforcing the forum-selection clause and requiring [GPISD] to litigate this matter in the state of New York is unconscionable and significantly inconvenient, and is contrary to [the] public policy of the state of Texas." In this proceeding, GPISD contends primarily that enforcement of the forum-selection clause would be unreasonable and unjust. GPISD argues that it was unaware of First Specialty's role in its insurance configuration or that First Specialty's insurance policy contained a forum-selection clause. GPISD asserts that it is unreasonable and unjust to enforce a contract provision "against a party that never agreed to it, never saw it, and had no knowledge of either the provision or the other party." GPISD specifically contends that:

> The circumstances presented here—an undisclosed excess insurer's attempt to enforce a forum-selection clause against an insured that had no knowledge of either the insurer or the clause (actual, constructive, or implied)—fall far beyond where any such line would reasonably be drawn and constitute the exceptional circumstances under which it would be unjust

> to enforce the clause to compel GPISD to litigate its claims in a faraway forum under foreign law.

GPISD does not dispute that the forum-selection clause is mandatory in nature and does not argue that its claims against First Specialty fall outside of the scope of the forum-selection clause.[3]

### A. Unreasonable or Unjust

The trial court's order concluded that enforcement of the forum-selection clause would be "unconscionable" and GPISD asserted in the trial court and in this proceeding that enforcement would be "unreasonable and unjust." We conclude that this differing terminology presents the same basic issue based on the underlying arguments made by GPISD. *See In re Lyon Fin. Servs., Inc*., 257 S.W.3d at 233 (discussing whether a forum-selection clause is unconscionable in the context of arguments made regarding fraud or overreaching); *Brand FX, LLC v. Rhine*, 458 S.W.3d 195, 205 (Tex. App.—Fort Worth 2015, no pet.) (discussing whether a forum-selection clause is unconscionable based on arguments that the selected forum would be seriously inconvenient for trial). The gravamen of the arguments presented by GPISD is that it did not know it was being insured by First Specialty or that First Specialty's insurance policy contained a forum-selection clause.

Here, GPISD has failed to meet its heavy burden to clearly show that enforcement would be unreasonable or unjust. The Texas Supreme Court has held that a party's lack

[3] First Specialty notes that the forum-selection clause at issue here in this case has been found to be enforceable by other courts. *See*, *e.g.*, *Chandler Mgmt. Corp. v. First Specialty Ins. Corp*., 452 S.W.3d 887, 897 (Tex. App.—Dallas 2014, no pet.); *see also Al Copeland Invs., L.L.C. v. First Specialty Ins. Corp*., 884 F.3d 540, 545 (5th Cir. 2018); *Deeba v. First Specialty Ins. Corp*., No. CIV-14-00038-M, 2014 WL 4852268 (W.D. Okla. Sept. 29, 2014); *Saye v. First Specialty Ins. Corp.*, No. 3:14-CV-202-M, 2014 WL 1386565, at *3 (N.D. Tex. Apr. 9, 2014).

of awareness of a forum-selection clause will not invalidate it. *See In re Int'l Profit Assocs., Inc.*, 286 S.W.3d at 923; *In re Lyon Fin. Servs., Inc*., 257 S.W.3d at 233. And, this Court has specifically considered and rejected similar arguments. *See In re Prime Ins. Co*., No. 13-14-00490-CV, 2014 WL 5314514, at *8–9 (Tex. App.—Corpus Christi–Edinburg Oct. 16, 2014, orig. proceeding [mand. denied]) (mem. op.). In *Prime*, several insureds brought suit against Prime Insurance Company (Prime), for failing to pay their commercial property insurance claims after their medical facility was damaged in a storm. *Id.* at *1. Prime filed a motion to dismiss the lawsuit based on a forum-selection clause in its insurance policy. *Id.* The insureds contended, inter alia, that the forum-selection clause was unenforceable because they failed to receive any notice that Prime's insurance policy contained such a forum-selection clause. *Id.* at *8. The insureds alleged that they were not given a copy of the insurance policy, which contained the forum-selection clause, and were only provided with the insurance quote and the insurance binder, neither of which included or referenced the forum selection clause. *Id.* The insureds thus argued that the "legal effect of a forum-selection clause depends upon whether its existence was reasonably communicated" to the insured. *Id.* at *8. We rejected this argument:

> The Texas Supreme Court has rejected the argument that the failure to provide a copy of an agreement containing a forum-selection clause to a claimant constitutes the type of fundamental unfairness that precludes enforcement of the forum-selection clause. *See In re Int'l Profit Assocs., Inc.*, 286 S.W.3d at 924. In that case, the claimant argued that it would be fundamentally unfair to enforce a forum-selection clause that his representative was never shown when he signed the contract. *Id.* at 923. The Texas Supreme Court agreed with the claimant that we examine forum-selection clauses for fundamental unfairness, but stated that this analysis applies to determine whether "the clause itself [is] fundamentally unfair" and does not apply to the argument that the "forum-selection clause is unfair because its representative was never given the first page of the agreement that included the forum-selection clause." *Id.* at 924.

> Moreover, and more to the point, simply being unaware of a forum-selection clause does not make it invalid. *Id*.; *In re Lyon Fin. Servs., Inc*., 257 S.W.3d at 233; *Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equip., Inc*., 317 S.W.3d 523, 529 (Tex. App.—Dallas 2010, no pet.). The Texas Supreme Court explained in *Lyon Financial Services* that "parties to a contract have an obligation to protect themselves by reading what they sign and, absent a showing of fraud, cannot excuse themselves from the consequences of failing to meet that obligation." *In re Lyon Fin. Servs., Inc*., 257 S.W.3d at 233; *see In re Int'l Profit Assocs., Inc*., 286 S.W .3d at 924; *Falk & Fish, L.L.P*., 317 S.W.3d at 529. "If we were to determine otherwise, it would require a party seeking to enforce a forum-selection clause to prove that the opposing party was separately shown each provision of every contract sought to be enforced and was subjectively aware of each clause." *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d at 924. And, specifically applicable to this case, an insured is charged with knowledge of the provisions of the insurance policy, that is, it will be deemed to know the contents of the contract it makes. *See*, *e.g.*, *Howard v. Burlington Ins. Co*., 347 S.W.3d 783, 792 (Tex. App.—Dallas 2011, no pet.); *Jeffries v. Pat A. Madison, Inc*., 269 S.W.3d 689, 692 (Tex. App.—Eastland 2008, no pet.); *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co*., 137 S.W.3d 311, 317 (Tex. App.—Beaumont 2004, no pet.); *Pankow v. Colonial Life Ins. Co. of Tex*., 932 S.W.2d 271, 277 (Tex. App.—Amarillo 1996, writ denied); *Shindler v. Mid–Continent Life Ins. Co.*, 768 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1989, no writ); *Standard Accident Ins. Co. v. Employers Cas. Co*., 419 S.W.2d 429, 432 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.); *see also In re Prime Ins. Co.,* No. 09–11–00349–CV, 2011 WL 3505143, at *3 (Tex. App.-Beaumont Aug. 11, 2011, orig. proceeding) (mem. op.). In the instant case, although the quote and binder did not reference the forum-selection clause, it is clear that the quote and binder did not constitute the parties' entire agreement. *See Howard*, 347 S.W.3d at 789–90; *cf. In re Lyon*, 257 S.W.3d at 232 ("[a] party who signs a document is presumed to know its contents" including "documents specifically incorporated by reference"). There is no evidence in the record that Prime concealed the forum-selection clause or evidence proving Prime concealed the clause with an intent to defraud RZQ, thus RZQ's allegations that it was unaware of the forum-selection clause are insufficient as a matter of law to prove fraud or overreaching. *See In re Int'l Profit Assocs., Inc*., 286 S.W.3d at 923; *In re Lyon*, 257 S.W.3d at 231–32. Accordingly, we reject RZQ's contention that Prime's alleged failure to notify RZQ that the policy contained a forum-selection clause rendered enforcement of the forum-selection clause fundamentally unfair.

*In re Prime Ins. Co*., 2014 WL 5314514, at *9 (internal footnotes omitted).

Based on the foregoing, we reject GPISD's argument that enforcement of the forum-selection clause would be unreasonable or unjust because it was unaware of the forum-selection clause. *See In re Int'l Profit Assocs., Inc.*, 286 S.W.3d at 923 ("simply being unaware of a forum-selection clause does not make it invalid"); *Loya v. Loya*, 507 S.W.3d 871, 881 (Tex. App.—Houston [1st Dist.] 2016, no pet.) ("Her lack of awareness of the forum-selection clauses do[es] not invalidate them."); *In re Longoria*, 470 S.W.3d 616, 632–33 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (rejecting an argument that a party who was "discouraged" from reading the contract rendered the forum-selection clause in the contract unenforceable); *see also In re Prime Ins. Co*., 2014 WL 5314514, at *9; *In re Emex Holdings L.L.C*., No. 13-11-00145-CV, 2013 WL 1683614, at *8 (Tex. App.—Corpus Christi–Edinburg Apr. 18, 2013, orig. proceeding [mand. denied]) (mem. op.).[4] We conclude that GPISD has not met its burden to avoid enforcement of the forum-selection clause on grounds that it is unreasonable or unjust.

**B. Inconvenient Forum**

The trial court's order denying First Specialty's motion to dismiss states, in relevant part, that requiring GPISD to litigate this matter in New York is "significantly inconvenient." As stated previously, a party opposing enforcement of a forum-selection clause can avoid

[4] GPISD does not argue that the forum-selection clause was the product of fraud or overreaching. *See In re Int'l Profit Assocs., Inc*., 286 S.W.3d 921, 923 (Tex. 2009) (orig. proceeding) (per curiam) ("Evidence that a party concealed a forum-selection clause combined with evidence proving that concealment was part of an intent to defraud a party may be sufficient to invalidate the clause."); *In re Lyon Fin. Servs., Inc*., 257 S.W.3d 228, 232 (Tex. 2008) (per curiam) (orig. proceeding) (explaining that even fraudulent inducement will not bar enforcement of an arbitration or forum-selection clause "unless the specific clause was the product of fraud or coercion"); *In re Longoria*, 470 S.W.3d 616, 630 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) ("The fraud or overreaching in question must involve the negotiation of the forum-selection clause itself."); *see also Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 436 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

enforcement if it can clearly show that the selected forum would be seriously inconvenient for trial. *See In re AIU Ins. Co*., 148 S.W.3d at 112.

"By entering into an agreement with a forum-selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court, whether for cost or other reasons." *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 234; *see In re Laibe Corp*., 307 S.W.3d at 317. "Absent proof of special and unusual circumstances," trial in another forum is not "so gravely difficult and inconvenient" as to warrant disregarding the forum specified by contract. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 234 (quoting *In re AIU Ins. Co*., 148 S.W.3d at 113)); s*ee In re Laibe Corp*., 307 S.W.3d at 317. Otherwise, "[i]f merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses [would be] practically useless." *In re Lyon Fin. Servs., Inc*., 257 S.W.3d at 234.

Our review of GPISD's briefing and the record reveals no arguments or evidence indicating that special or unusual circumstances would effectively deprive GPISD of its day in court if litigation proceeds in New York. *See In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 233–34. Accordingly, we conclude that GPISD has not clearly shown that New York would be seriously inconvenient for trial so as to avoid enforcement of the forum-selection clause. *See In re AIU*, 148 S.W.3d at 112; *Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 438 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *see also Webb v. Diversegy, LLC*, No. 05-17-01258-CV, 2019 WL 1146707, at *6 (Tex. App.—Dallas Mar. 13, 2019, pet. denied) (mem. op.) (concluding that traveling further and difficulties in obtaining

witnesses in the distant court did not meet the heavy burden to establish that enforcement of a forum-selection clause would be unreasonable or unjust).

### C. Public Policy

The trial court's order denying First Specialty's motion to dismiss concludes that enforcement of the forum-selection clause would be "contrary to [the] public policy of the state of Texas." In its response to First Specialty's motion to dismiss, GPISD argued that enforcement of the forum-selection clause would contravene the interests of the State of Texas "in holding insurers to Texas law." In support of this issue, GPISD asserts that the Texas Insurance Code allows plaintiffs to recover additional damages that are not allowed by New York law and New York law imposes a higher burden of proof for a plaintiff prior to allowing recovery.

A trial court abuses its discretion in refusing to enforce a forum-selection clause unless, among other things, the party opposing enforcement clearly shows enforcement would contravene a strong public policy of the forum where the suit was brought. *In re Laibe Corp*., 307 S.W.3d at 316; *In re ADM Investor Servs*., 304 S.W.3d at 375. However, the supreme court has held that the inability to assert a claim recognized by Texas law in another state "does not create a public policy reason to deny enforcement of the forum-selection clause." *In re Lyon Fin. Servs*., 257 S.W.3d at 234 (stating that the inability to assert a claim for usury under Pennsylvania law did not create a public policy reason to deny enforcement of the forum-selection clause); *see In re Longoria*, 470 S.W.3d at 633 ("Not being able to bring certain causes of action in the designated forum is not a reason to avoid enforcement of a forum-selection clause."). Similarly, the Dallas Court of Appeals has rejected a claim that the Texas Insurance Code embodies a public policy that is

broadly intended to protect Texas residents from asserting legal rights under their insurance policies in foreign forums, noting that the "state's concerns apply only to residents doing business with 'insurers who are not authorized to do business in this state and who are not qualified as eligible surplus lines insurers.'" *Chandler Mgmt. Corp.*, 452 S.W.3d at 897 (discussing TEX. INS. CODE ANN. § 101.001(a)).

Based on the controlling precedent, GPISD has presented no persuasive authority for the proposition that a strong public policy would be contravened by enforcement of the forum-selection clause. *See In re Lyon Fin. Servs*., 257 S.W.3d at 234; *In re Longoria*, 470 S.W.3d at 633. We conclude that GPISD has not clearly shown enforcement would contravene a strong public policy of the forum where the suit was brought. *See In re Laibe Corp*., 307 S.W.3d at 316.

**D. Summary**

The evidence in the record demonstrates that GPISD's insurance policy contained a forum-selection clause which is presumptively valid. *See Pinto Tech. Ventures*, 526 S.W.3d at 436; *In re Nationwide Ins. Co. of Am*., 494 S.W.3d at 712; *In re Laibe Corp*., 307 S.W.3d at 316. As stated previously, GPISD does not contend that the clause is invalid or that its claims against First Specialty fall outside of the scope of the forum selection clause. Based on the foregoing analysis, we determine that GPISD has not met its heavy burden to clearly show that (1) enforcement of the forum-selection clause would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *See In re*

*Nationwide Ins. Co. of Am.*, 494 S.W.3d at 712; *In re Laibe Corp*., 307 S.W.3d at 316; *In re ADM Inv'r Servs., Inc*., 304 S.W.3d at 375.

We conclude that the trial court abused its discretion by denying First Specialty's motion to dismiss. *See In re Nationwide Ins. Co. of Am*., 494 S.W.3d at 712; *In re Laibe Corp*., 307 S.W.3d at 316. We likewise conclude that First Specialty lacks an adequate remedy by appeal to address this error because allowing the trial to go forward in an improper forum will "vitiate and render illusory" the subject matter of the appeal. *See In re Lisa Laser USA, Inc*., 310 S.W.3d at 883; *In re Laibe Corp*., 307 S.W.3d at 316; *In re AIU Ins. Co*., 148 S.W.3d at 115. Accordingly, we sustain both issues raised by First Specialty in this original proceeding.

## V. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, the supplemental briefing, and the applicable law, concludes that First Specialty has met its burden to obtain relief. Accordingly, we lift the stay previously imposed in this case. *See* TEX. R. APP. P. 52.10(b). We conditionally grant mandamus relief. We direct the trial court to vacate the February 5, 2020 order denying First Specialty's motion to dismiss and to conduct further proceedings in accordance with this opinion. We are confident that the trial court will comply, and the writ will issue only if it fails to do so.

GINA M. BENAVIDES,
Justice

Delivered and filed the
22nd day of May, 2020.