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Forum Selection Agreements in the Federal Courts after *Carnival Cruise*: A Proposal for Congressional Reform

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FORUM SELECTION AGREEMENTS IN THE FEDERAL COURTS AFTER *CARNIVAL CRUISE*: A PROPOSAL FOR CONGRESSIONAL REFORM

Patrick J. Borchers*

Abstract: Once the object of American judicial loathing, forum selection agreements recently have enjoyed a far more favored status. Forum selection agreements promote certainty in commercial relationships and reduce transaction costs arising from litigation of threshold issues such as personal jurisdiction and venue. In 1988, in *Stewart Organization, Inc. v. Ricoh*, the Supreme Court confused several central issues, including whether state or federal law governs enforcement in diversity actions, the mechanism for enforcing forum selection agreements, and the consequences of seeking to enforce an agreement by transferring the matter from one federal court to another. More recently, in *Carnival Cruise Lines, Inc. v. Shute*, the Court enforced a clearly adhesive forum selection agreement, raising the specter that such agreements will be enforced routinely against economically disadvantaged parties. Lower courts are now in disarray because of these sharp turns and convoluted doctrine. As a solution, Professor Borchers proposes a comprehensive federal statute that would limit enforcement of forum selection agreements to transactions of \$50,000 or more and would unify the enforcement standards and procedures.

I. INTRODUCTION	56
II. FORUM SELECTION AGREEMENTS IN AMERICAN COURTS.....	60
A. <i>The Fall of the "Ouster" Doctrine</i>	60
B. <i>After Bremen</i>	65
1. <i>Extension of the Federal Arbitration Act's Reach</i>	65
2. <i>Federal Court Forum Selection Clauses</i>	67
a. <i>The Stewart Decision</i>	68
b. <i>The Carnival Cruise Case</i>	71
3. <i>The Troubling Nature of Carnival Cruise</i>	74
III. CONUNDRUMS.....	78
A. <i>Choice of Law</i>	78
B. <i>Interpretive Issues</i>	81
C. <i>Transfer Issues</i>	86
D. <i>Subject Matter Jurisdiction Issues</i>	88
E. <i>The Reasonableness Test</i>	89
IV. CONGRESSIONAL REFORM	93

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A. <i>The Need for Congressional Reform</i>	93
B. <i>A Proposal for Congressional Action</i>	95
1. <i>The Scope</i>	95
2. <i>Issues of Interpretation</i>	98
3. <i>Enforcement</i>	99
4. <i>Exceptions to Enforcement</i>	101
5. <i>Procedural Matters</i>	104
V. CONCLUSION	105
APPENDIX	107

I. INTRODUCTION

The history of forum selection agreements¹ in the United States is an uneven one. In the last century, American courts were considerably out of step with most other nations² in their comprehensive refusal

1. A word on terminology seems appropriate at the outset. When referring to a contract that affects the forum in which a civil action may be brought, this Article generally uses the term "forum selection agreement." Usually, of course, the agreement is part of a larger agreement, and thus the term "forum selection clause" is very common. See, e.g., Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49 (1972). Thus, this Article uses the terms "forum selection clause" or "forum clause" and "forum selection agreement" or "forum agreement" interchangeably. Other terms, such as "choice of forum clause," "choice of forum agreement" and "choice of court clause" are also in common usage. See, e.g., Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 3 INT'L LAW. 83 (1974); Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124 (1973).

This Article uses "exclusive forum agreement" to describe an agreement to litigate only in a forum or fora, to the exclusion of any other fora. "Non-exclusive forum selection agreement" describes an agreement to litigate in the agreed forum or fora, but not to the exclusion of any other fora that have jurisdiction and venue. Some civilian commentators use the term "derogation agreement" to describe exclusive forum agreements, "prorogation agreement" to describe non-exclusive forum agreements. See, e.g., Perillo, *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L. 162, 162-65 (1964).

American courts generally employ the exclusive/non-exclusive terminology. See, e.g., *Sterling Forest Assoc. v. Barnett-Range Corp.*, 673 F. Supp. 1394 (E.D.N.C. 1987), *rev'd*, 840 F.2d 249 (4th Cir. 1988). However, a baffling array of confusing terms are also in use. See, e.g., *ASM Communications, Inc. v. Allen*, 656 F. Supp. 838 (S.D.N.Y. 1987) ("mandatory" forum agreement means an exclusive forum selection agreement; "permissive" forum agreement means a non-exclusive forum selection agreement); *Friedman v. World Transp., Inc.*, 636 F. Supp. 685 (N.D. Ill. 1986) ("forum selection clause" means an exclusive forum selection agreement; "venue waiver clause" means a non-exclusive forum selection agreement).

2. See, e.g., *Law v. Garrett*, 8 Ch. D. 26 (C.A. 1878); *Glenor v. Meyer*, 2 H. Bl. 603 (C.P. 1796); see also Aballi, *Comparative Developments in the Law of Choice of Forum*, 1 N.Y.U. J. INT'L L. & POL. 178, 205 (1968) (civilian tradition of party autonomy allowed for enforcement of forum selection clauses); Cutler, *Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum*, 20 TEX. INT'L L.J. 97, 113, 122 (1985) (noting historical French and English acceptance of forum selection clauses); Farquharson, *supra* note 1, at 38, 90 (civil law concept of party autonomy lead to general acceptance of forum selection agreements; noting early English acceptance of forum selection agreements); Lenhoff, *The Parties' Choice of a Forum*:

to enforce forum selection agreements.³ In the middle part of this century, however, the attitude of the federal courts, and other United States courts, began to change dramatically. The United States Supreme Court first recognized the right to enter into non-exclusive forum selection agreements⁴ and then, in the landmark case of *The Bremen v. Zapata Off-Shore Co.*,⁵ a circumscribed right to enter into "reasonable" exclusive forum agreements. Most state courts,⁶ with some notable holdouts,⁷ followed suit.

The reasons for this shift were laudatory. The right to litigate in one forum or another has an economic value that parties can estimate with reasonable accuracy.⁸ Unlike, for instance, a price fixing agreement, an agreement to litigate in a set forum has no palpably undesirable effects on non-parties to the agreement;⁹ instead it has the desirable consequence of simplifying the jurisdictional inquiry for courts and litigants.¹⁰ Thus, "ancient concepts of freedom of contract"¹¹ suggest that forum selection—like price, place of delivery and quality of goods—should be the subject of bargaining in commercial transactions. Similar considerations led the Supreme Court to validate

"Prorogation Agreements," 15 RUTGERS L. REV. 414 (noting early civil law acceptance of forum selection agreements); Perillo, *supra* note 1, at 164–65 (non-exclusive forum agreements have widespread acceptance in Western Europe; most countries also allow non-exclusive forum agreements under some circumstances, but exclusive forum agreements are void in a minority of jurisdictions). But see Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 309 (1988) (noting that enforcement is not universally granted). See generally von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045 (1986) (noting civilian roots of the party autonomy principle).

3. See, e.g., *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874).

4. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

5. 407 U.S. 1 (1972).

6. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1095 (1989) (clear majority of states follow *Bremen* as a matter of state law); see also Annotation, *Validity of a Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4TH 404 (1984) (majority of states follow a reasonableness approach).

7. Freer, *supra* note 6, at 1096 n.31 (approximately 12 states adhere to a rule of presumptive invalidity).

8. See *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990); see also Juenger, *supra* note 1, at 50 ("[A] quid pro quo can be exacted for the willingness to meet the other party on its home ground.").

9. *Northwestern Nat'l*, 916 F.2d at 375–76 (but noting that in certain hypothetical cases the courts of a certain jurisdiction could become overloaded by a large number of such agreements).

10. See Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 101–03 (1990) (noting confused and complex jurisdictional doctrine); Juenger, *supra* note 1, at 50.

11. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972).

a negotiated exclusive forum selection agreement between commercial traders in *Bremen*.¹²

The desirability of an unrestrained market, however, is limited. Contract law has long recognized that certain classes of contracting parties, because of unequal bargaining power, lack of information and resources, or other factors, ought not be subjected to the full load that an unrestrained market would have them bear.¹³ But the *Bremen* rule, like rules followed in many other countries,¹⁴ seemed to take that into account. *Bremen*, for instance, recognized that forum selection agreements wrought at the hands of "overweening bargaining power" would not be enforced.¹⁵

All was not perfect, of course, in a post-*Bremen* world. Because *Bremen* was an admiralty case, there was a serious question as to whether its standards were limited to that context, or were applicable to federal question and diversity actions as well.¹⁶ Moreover, the *Bremen* rule's inherent uncertainty as to what constituted a reasonable agreement led to uneven application and enforcement, thereby relinquishing some of the gain made towards determinacy in allowing forum selection to become a subject of bargaining.¹⁷ Additionally, vestiges of judicial hostility towards forum selection agreements led courts to interpret some statutes to preclude such agreements for certain contracts.¹⁸

12. *Id.* at 1.

13. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971) (form contract purporting to require an unsophisticated filling station operator to indemnify and hold harmless a large oil company for the oil company's negligence is unenforceable); RESTATEMENT (SECOND) OF CONTRACTS § 208 comments a, c, d, illustrations 1, 2 (1981).

14. See generally Perillo, *supra* note 1.

15. *Bremen*, 407 U.S. at 12.

16. See Juenger, *supra* note 1, at 58-59; Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 387 (1973).

17. See *infra* notes 280-93 and accompanying text.

18. See, e.g., *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (Carriage of Goods by Sea Act's (COGSA) limitation of liability provision voids forum selection agreements); *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) (same); *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981) (same); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc) (COGSA voids forum selection agreement if designated forum is foreign); cf. *North River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (COGSA does not void forum selection agreements if COGSA is incorporated into the contract voluntarily); *Fireman's Fund Am. Ins. Co. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974) (COGSA voids forum selection agreement if designated forum is foreign or is unreasonable); *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973) (COGSA does not void forum selection clause). See generally Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L L. 365 (1973); Waters, *The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update*, 15 TUL. MAR. L.J. 29 (1990);

On two recent occasions the Supreme Court has revisited this topic. In *Stewart Organization, Inc. v. Ricoh Corp.*,¹⁹ the Court had an opportunity to decide whether the *Bremen* rule applied in all federal court cases. The Court instead confused the choice-of-law issue and created a whole new set of unresolved problems.²⁰ Even more recently, in *Carnival Cruise Lines, Inc. v. Shute*,²¹ the Court completely reversed direction from the pre-*Bremen* days and enforced an apparent²² forum selection agreement that would have been void as adhesive even under the laws of nations with a long history of favor towards such agreements.²³ Thus, instead of becoming more clear in recent years, the American law of forum selection agreements is becoming more muddy. Worse yet, the Court's most recent pronouncement holds the promise of turning forum selection agreements from instruments of freedom to instruments of economic oppression. Clearly, something must be done.

This Article proposes a comprehensive federal statute applicable in all federal court cases. This proposed statute, set forth in full as an appendix to this Article, aims both to clarify the law of forum selection agreements in the federal courts and to strike a fair balance by drawing on other legislative efforts. Part I of this Article traces the historical origins of the law relating to forum selection agreements and discusses the Supreme Court's recent case law and its implications.

Williams, *Forum Selection Clauses: Where They Are—Where They Are Going*, 6 HOUS. J. INT'L L. 1, 13–14 (1983) (criticizing the *Indussa* rule); Note, *Forum Selection in Maritime Bills of Lading Under COGSA*, 12 FORDHAM INT'L L.J. 459 (1989); Annotation, *Validity or Enforceability, Under Carriage of Goods by Sea Act, of Clauses in Bill of Lading or Shipping Contract as to Jurisdiction of Foreign Courts or Applicability of Foreign Law*, 2 A.L.R. FED. 963 (1969).

19. 487 U.S. 22 (1988).

20. See Mullenix, *supra* note 2, at 334–55 (discussing issues left in the wake of *Stewart*).

21. 111 S. Ct. 1522 (1991).

22. See *infra* notes 180–89 and accompanying text.

23. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989) (clauses enforceable if transaction is more than one million dollars); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 15, 15 O.J. EUR. COMM. (No. L 299) 32 (1972), reprinted in 8 I.L.M. 229 (1972), amended by The Convention on Accession to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Oct. 9, 1978, 21 O.J. EUR. COMM. (No. L 304) (1978), reprinted in 18 I.L.M. 8 (1979) [hereinafter Brussels Convention] (clauses unenforceable in consumer contracts); Perillo, *supra* note 1, at 165 (Italian civil code would not allow for enforcement of an exclusive forum agreement in a contract of adhesion without separate acknowledgement of the clause); Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193, 197 (1966) (noting general refusal of U.S. courts to enforce adhesive forum selection agreements); Schwind, *Derogation Clauses in Latin-American Law*, 13 AM. J. COMP. L. 167, 169 (1964) (noting reluctance of Brazilian courts to enforce clauses in relatively small contracts selecting a forum a long distance from that of the economically weaker party).

Part II catalogues the areas of uncertainty left in the wake of current doctrine. Part III discusses the desirability of legislative action, the various legislative efforts, and how the proposed statute will promote the goals of certainty and fairness.

II. FORUM SELECTION AGREEMENTS IN AMERICAN COURTS

A. *The Fall of the "Ouster" Doctrine*

The history of forum selection agreements has been told extensively elsewhere,²⁴ and need not be retold at length here. As of 1950 a commentator could report that "[w]ith almost boring unanimity American courts have refused to enforce contractual provisions conferring exclusive jurisdiction in advance on a court or courts of a particular sister state or foreign country."²⁵ The rhetorical device used to justify this rule was that such agreements effect an invalid "ouster" of the court's jurisdiction.²⁶ Although Robert Leflar listed ouster among the "traditional thought-precluding sets of senseless words,"²⁷ he also recognized that it had a practical origin in times when judges were paid by the case.²⁸

Although a much more extensive listing is possible, a few citations suffice to make the point that American hostility towards forum selection agreements was ubiquitous. The United States Supreme Court case most often cited to reflect this hostility, *Insurance Co. v. Morse*,²⁹ did not involve a traditional forum selection agreement. At issue in *Morse* was the validity of a Wisconsin statute that purported to require insurance companies to agree not to remove cases to federal court as a condition of doing business in the state.³⁰ Although the Court stated

24. See, e.g., Farquharson, *supra* note 1, at 88-95; Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 24 (1976); Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 140-41; Juenger, *supra* note 1, at 50-56; Nadelmann, *supra* note 1, at 127-32.

25. Note, *Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts*, 10 LA. L. REV. 293, 293 (1950) [hereinafter Note, *Agreements in Advance*]; see also Note, *Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State*, 45 YALE L.J. 1150, 1152 (1936) (noting American refusal to enforce exclusive forum selection agreements but urging a "frank recognition that such stipulations are no longer contrary to public policy").

26. See Juenger, *supra* note 1, at 53.

27. Leflar, *The Bremen and the Model Choice of Forum Act*, 6 VAND. J. TRANSNAT'L L. 375, 376 (1973).

28. *Id.* at 384; see also Juenger, *supra* note 1, at 51 ("It has been surmised that judicial hostility directed at private agreements waiving jurisdiction can be traced to England, where financial considerations might have inspired the courts to insist on their prerogatives.").

29. 87 U.S. (20 Wall.) 445 (1874).

30. *Id.* at 453.

that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void,"³¹ the traditional "non-discrimination" justification for diversity jurisdiction was heavy on the Court's mind.³²

Some of the cases that *Morse* cited did, however, involve traditional forum selection agreements. For instance, in *Nute v. Hamilton Mutual Insurance Co.*,³³ the Supreme Judicial Court of Massachusetts invalidated a provision in an insurance contract designating the Massachusetts courts to hear any disputes between the parties. By the turn of the century, ouster had become a regular incantation for United States courts.³⁴

Exactly when the first cracks in the ouster edifice appeared is hard to pinpoint. The appearance of arbitration statutes, the major prop for English acceptance of forum selection agreements,³⁵ cut the conceptual legs out from underneath the ouster doctrine; like forum selection agreements, arbitration agreements oust the jurisdiction of regular tribunals.³⁶ What the Supreme Court saw as a boggling conceptual matter in *Morse*, Congress saw as a straightforward matter in 1925 when it passed the Federal Arbitration Act (FAA).³⁷ Instead of worrying about theoretical constructs like ouster, the FAA simply provided that "[a] written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable . . ."³⁸

Some further crumbling occurred in the Second Circuit's opinion in *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*³⁹ and *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*⁴⁰ In both of these cases the Second Circuit gave effect to exclusive forum selection agreements; although the court purported to adhere to the ouster doctrine, the import of both decisions was to give effect to reasonable agreements. The Fifth Circuit held steady, however, refusing to give effect to forum

31. *Id.* at 451.

32. *See id.* at 454-55.

33. 72 Mass. (6 Gray) 174 (1856).

34. Juenger, *supra* note 1, at 52.

35. *See* Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COM. 17, 19 (1970); Note, *Agreements in Advance*, *supra* note 25, at 293.

36. Juenger, *supra* note 1, at 53 ("If a court would yield to a private agreement requiring the parties to seek justice before the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission . . . why not defer to the courts of a sister state?").

37. The current version is at 9 U.S.C. §§ 1-208 (1988).

38. 9 U.S.C. § 2 (1988).

39. 187 F.2d 990 (2d Cir. 1951); *see also* *Krenger v. Pennsylvania R.R.*, 174 F.2d 556, 561 (2d Cir.) (Hand, J., concurring), *cert. denied*, 338 U.S. 866 (1949) (reasonable forum selection agreements are enforceable).

40. 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955).

selection clauses under any circumstances in *Carbon Black Export, Inc. v. The S.S. Monroa*.⁴¹ The Supreme Court granted certiorari in *Carbon Black*, presumably to resolve the conflict between the Second and Fifth Circuits. But, over dissent, the Court dismissed the writ, concluding that the clause at issue was not broad enough to cover an in rem action.⁴² Several years later in *Indussa Corp. v. S.S. Ranborg*⁴³ the Second Circuit went en banc to overrule *Müller*, at least in the context of actions governed by the Carriage of Goods by Sea Act (COGSA), reasoning that COGSA's "limitation of liability" provision⁴⁴ precluded forum selection agreements in contracts governed by that Act. Whether *Indussa* overruled *Müller* for all purposes, or just in the COGSA context, was an uncertain matter.⁴⁵

Despite this fitful start at the circuit level, real change was not far off. In *National Equipment Rental, Ltd. v. Szukhent*,⁴⁶ the Supreme Court held that a contract entered into by Michigan farmers to appoint a New York agent for service of process was valid and had the effect of conferring jurisdiction on the New York federal district court.⁴⁷ In effect, the Court recognized the validity of non-exclusive forum selection agreements, concluding that it was "settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court."⁴⁸

Although some commentators read *National Equipment* as a wholesale rejection of prior American practice,⁴⁹ lower courts were not so sure. In *Bremen*, the Fifth Circuit, first in a panel decision,⁵⁰ and then en banc,⁵¹ adhered to the *Carbon Black* rule of per se invalidity of exclusive forum selection agreements.

41. 254 F.2d 297 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959).

42. *Carbon Black Export, Inc. v. The S.S. Monroa*, 359 U.S. 180, 184-86 (1959) (Harlan, J., dissenting).

43. 377 F.2d 200 (2d Cir. 1967) (en banc).

44. 46 U.S.C. § 1303(8) (1988).

45. *In re Unterweser Reederei, GmbH*, 446 F.2d 907, 910 n.7 (5th Cir. 1971) (en banc) (Wisdom, J., dissenting) (arguing that the general rationale of *Müller* survived *Indussa*), vacated sub nom. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

46. 375 U.S. 311 (1964).

47. *Id.* at 315-16.

48. *Id.*

49. See, e.g., Reese, *supra* note 23, at 194. But see Mullenix, *supra* note 2, at 307 (*National Equipment* is dubious support for this proposition).

50. *In re Unterweser Reederei, GmbH*, 428 F.2d 888 (5th Cir. 1970), aff'd on rehearing, 446 F.2d 907 (5th Cir. 1971), vacated sub nom. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

51. *In re Unterweser Reederei, GmbH*, 446 F.2d 907, 908 (5th Cir. 1971) (en banc) (although over the dissent of six judges led by John Minor Wisdom), vacated sub nom. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

In an opinion notable not only for its result, but also its refreshingly cosmopolitan tone,⁵² Chief Justice Burger, writing for eight Justices of the Supreme Court, reversed.⁵³ *Bremen* involved a contract between Zapata, a Texas corporation, and Unterweser, a German company.⁵⁴ The contract called for Unterweser to tow Zapata's oil rig, the *Chaparral*, from the Gulf of Mexico to the Adriatic Sea.⁵⁵ Using the deep sea tug *The Bremen*, Unterweser began the towing operation, but soon hit heavy weather and rough seas.⁵⁶ With the *Chaparral* severely damaged, Unterweser asked Zapata for instructions and complied with the response by towing the rig to Tampa, Florida, the nearest port of refuge, and, unfortunately for Unterweser, located in the Fifth Circuit.⁵⁷

The contract between Unterweser and Zapata contained an exclusive forum selection clause providing that "[a]ny dispute arising must be treated before the London Court of Justice."⁵⁸ Apparently confident that the Fifth Circuit courts would ignore the clause and follow *Carbon Black*, Zapata attached *The Bremen*, and proceeded against the tug in rem, and Unterweser in personam, in the United States District Court for the Middle District of Florida.⁵⁹ Invoking the forum clause, Unterweser and *The Bremen* moved to dismiss on forum non conveniens grounds, and initiated a parallel action in the English courts.⁶⁰

The English court refused to grant Zapata's motion to dismiss, reasoning that the forum clause gave it jurisdiction.⁶¹ Back in the United States, however, the district court refused to enforce the forum clause on the authority of *Carbon Black*, and, as noted above, the Fifth Circuit followed suit.⁶² The approach of the lower courts, according to the Supreme Court, was far too parochial. The Chief Justice reasoned that "[t]he expansion of American business . . . will hardly be encouraged if, notwithstanding solemn contracts, we insist . . . that all

52. Becker, *The Chaparral/Bremen Litigation: Two Commentaries: Forum Selection Clauses and Anglo-American Unity*, 22 INT'L & COMP. L.Q. 329, 329 (1973) (*Bremen* is "a remarkable internationalist declaration").

53. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

54. *Id.* at 2.

55. *Id.*

56. *Id.* at 3.

57. *Id.* at 4. Florida is now, of course, in the Eleventh Circuit, but this was before the split of the Fifth Circuit.

58. *Id.* at 2.

59. *Id.* at 4.

60. *Id.*

61. *Id.* at 4 n.4.

62. *Id.* at 6-7.

disputes must be resolved under our laws and in our courts.”⁶³ Taking special issue with the Fifth Circuit authority, the Court noted that “the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans.”⁶⁴

Turning to more abstract matters, the Court held that exclusive forum agreements were “merely the other side of the” non-exclusive forum agreements approved in *National Equipment*.⁶⁵ As for the ouster doctrine, the Court relegated it to the status of “vestigial legal fiction.”⁶⁶ Forum selection agreements accord with “ancient concepts of freedom of contract” and had obtained scholarly acceptance and a qualified endorsement from the *Restatement (Second) of Conflict of Laws*.⁶⁷

To be sure, the Court did not say that every forum selection agreement merited enforcement. An agreement affected by “fraud, undue influence, or overweening bargaining power” should be voided.⁶⁸ In a more general sense, an agreement might be “unreasonable and unjust,”⁶⁹ for instance “an agreement between two Americans to resolve their essentially local disputes in a remote alien forum.”⁷⁰ Any successful attack on a forum selection clause, however, the Court cautioned, would require a “strong showing.”⁷¹

In remanding to the district court for further consideration, the Court noted that it could find nothing to suggest that the forum selection agreement before it did not merit enforcement.⁷² The contract was between sophisticated entities and was “freely negotiated.”⁷³ The English courts were neutral and English admiralty justice enjoys a favorable international reputation.⁷⁴ Any “inconvenience” was nothing that Zapata could not have anticipated at the time that it entered into the contract, and certainly was not enough to deprive Zapata of its day in court.⁷⁵

63. *Id.* at 9.

64. *Id.*

65. *Id.* at 10.

66. *Id.* at 12.

67. *Id.* at 11.

68. *Id.* at 12, 15.

69. *Id.* at 15.

70. *Id.* at 17.

71. *Id.* at 15.

72. *Id.* at 15–17.

73. *Id.* at 17.

74. *Id.*

75. *Id.* at 18.

Of course, *Bremen* did not answer all conceivable questions on American acceptance of forum selection agreements. Whether it applied only in international admiralty cases, or whether it had application in other cases in federal courts, remained in doubt.⁷⁶ What would suffice for a strong showing of unreasonableness was necessarily an open question. Whether the Supreme Court's reasoning would carry the moral force to persuade state courts to follow its lead was unclear. But for all of this, *Bremen* was clearly the major stepping stone towards a more enlightened American approach.

B. After Bremen

The most obvious effect of *Bremen* was on lower courts. Federal courts were, of course, required to adhere to its principles, at least where they applied. Moreover, state courts generally followed the Supreme Court's lead and reversed their hostility to forum selection agreements.⁷⁷ But, before turning to these matters, *Bremen*'s effect on the further development of "consensual adjudicatory procedure"⁷⁸ on two different fronts requires examination.

1. Extension of the Federal Arbitration Act's Reach

One front was the expansion of the reach of the Federal Arbitration Act (FAA). In *Scherk v. Alberto-Culver Co.*,⁷⁹ the Supreme Court held that an agreement requiring arbitration before a French panel could be enforced in an action alleging violations of section 10(b) of the Securities Exchange Act of 1934.⁸⁰ Referring to arbitration agreements as "a specialized kind of forum-selection clause,"⁸¹ and relying on *Bremen*,⁸² the Supreme Court held the agreement enforceable. In so doing, the Court severely confined *Wilko v. Swan*,⁸³ thought until then to prohibit arbitration of securities matters.⁸⁴

76. See *infra* notes 198-221 and accompanying text.

77. See, e.g., *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976) (adopting *Bremen* principles as a matter of state law).

78. See Mullenix, *supra* note 2, at 308 (adopting the term "consensual adjudicatory procedure" to encompass both arbitration and forum selection agreements).

79. 417 U.S. 506 (1974).

80. *Id.* at 509 (citing 15 U.S.C. § 78j(b) (1988) and 17 C.F.R. § 240.10b-5).

81. *Id.* at 519.

82. *Id.* at 518 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

83. 346 U.S. 427 (1953).

84. See, e.g., Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 516-21 (1981).

A decade later, in *Mitsubishi Motors Corp. v. Scler Chrysler-Plymouth, Inc.*,⁸⁵ the Court extended the reach of the FAA to international antitrust matters, which, like securities matters, were once thought to be a "forbidden zone" for arbitration.⁸⁶ Relying again on *Bremen*, the Court recited the formula recognizing a "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."⁸⁷ Also important to the Court was the United States' accession in 1970 to the Convention on the International Recognition and Enforcement of Foreign Arbitral Awards.⁸⁸ The Court's holding was also based on a strong sense of the importance of party autonomy. Rejecting arguments that external policies inherent in antitrust laws made such disputes inappropriate for arbitration, the Court reasoned that "the antitrust cause of action remains at all times under the control of the individual litigant; no citizen is under an obligation to bring an antitrust suit, and the private antitrust plaintiff needs no executive or judicial approval before settling one."⁸⁹

In *Shearson/American Express, Inc. v. McMahon*,⁹⁰ the Court expanded the FAA's domain to include domestic securities disputes as well as actions arising under the Racketeer Influenced and Corrupt Organizations Act (RICO).⁹¹ In light of the Court's earlier pronouncements, the extension to RICO matters and purely domestic securities disputes was not surprising. The more telling development in *McMahon*, however, was the Court's unflinching willingness to enforce an arbitration agreement contained in a form agreement signed by two individual customers.⁹² Such a form agreement between an individual investor and a large investment broker was a far cry from the "freely negotiated" agreements hailed in *Bremen*, *Scherk* and *Mitsubishi*. Even so, the Court declined to ascribe much importance

85. 473 U.S. 614 (1985).

86. See, e.g., *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

87. *Mitsubishi*, 473 U.S. at 631.

88. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (implemented in the United States by 9 U.S.C. §§ 201-08 (1988)). See generally Note, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031, 1032 (1990) (New York Convention adopted by at least 82 countries).

89. *Mitsubishi*, 473 U.S. at 636 (citation omitted).

90. 482 U.S. 220 (1987).

91. *Id.* at 222.

92. *Id.* at 223.

to the inequality of bargaining power, reasoning tersely that “[t]he voluntariness of the agreement is irrelevant to this inquiry.”⁹³

The Court’s increasingly broad acceptance of arbitration clauses has continued steadily. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,⁹⁴ the Court finally overruled *Wilko* expressly, and enforced yet another form agreement signed by individual customers of a large securities broker. In *Gilmer v. Interstate/Johnson Lane Corp.*,⁹⁵ the Court enforced a form agreement signed by an employee of a securities broker requiring arbitration of a claim under the Age Discrimination in Employment Act.⁹⁶

Viewed from a broader perspective, the interplay between arbitration agreements and traditional forum selection clauses seems inverted. In England, for instance, it was the passage of arbitration statutes that reversed the hostility towards traditional forum selection clauses.⁹⁷ In the United States, on the other hand, the FAA antedated acceptance of traditional forum selection clauses by nearly half a century, and that acceptance then spurred on an expanded reading of the FAA. Even so, the significant interrelationship between arbitration and traditional forum selection is apparent both in the United States and in other countries.

2. Federal Court Forum Selection Clauses

The other front on which *Bremen* battles have been fought in the Supreme Court is traditional forum selection clauses. As noted above,⁹⁸ *Bremen* left many important questions unanswered. On two recent occasions, in *Stewart Organization, Inc. v. Ricoh Corp.*⁹⁹ and *Carnival Cruise Lines, Inc. v. Shute*,¹⁰⁰ the Court has addressed federal court forum selection clauses. In both cases, however, the Court has been more forthcoming with questions than answers.

93. *Id.* at 230.

94. 490 U.S. 477 (1989).

95. 111 S. Ct. 1647 (1991).

96. In order to get to this result, the Court was required to give an extraordinarily narrow interpretation to the FAA’s categorical exclusion for agreements in “contracts of employment.” *Id.* at 1651 n.2 (discussing 9 U.S.C. § 1 (1988)); see also *infra* note 331.

97. See Denning, *supra* note 35, at 19; Note, *Agreements in Advance*, *supra* note 25, at 293.

98. See *supra* note 76 and accompanying text.

99. 487 U.S. 22 (1988).

100. 111 S. Ct. 1522 (1991).

a. *The Stewart Decision*

Stewart was a diversity case brought in the United States District Court for the Northern District of Alabama.¹⁰¹ The defendant, a New York manufacturer of copiers, and the plaintiff, an Alabama marketer of the copiers, were parties to an exclusive forum selection agreement that pointed to either the Southern District of New York or the New York state court sitting in Manhattan.¹⁰² The plaintiff filed a multiple claim action against the defendant in the Northern District of Alabama, and the defendant responded with a motion to enforce the agreement by transferring the action to the Southern District of New York.¹⁰³ The district court denied the motion, concluding that under *Erie Railroad v. Tompkins*¹⁰⁴ it was required to apply Alabama state law to determine the enforceability of the agreement.¹⁰⁵ Because Alabama is one of the few states to adhere to the ouster doctrine,¹⁰⁶ the district court denied the motion.¹⁰⁷

The Eleventh Circuit, first in a panel decision¹⁰⁸ and then en banc,¹⁰⁹ reversed. The Eleventh Circuit concluded that the *Bremen* principles trumped state law in diversity cases.¹¹⁰ The Supreme Court granted certiorari, apparently to settle the question of *Bremen*'s applicability outside of the admiralty context.

The Court, however, charted quite a different course. The Court began with the surprising assertion that *Bremen* had no central place in resolving the issue before it.¹¹¹ Instead, the majority reasoned, *Bremen* was merely "instructive" as to a general federal policy favoring forum selection clauses.¹¹² The correct approach, by the Court's reckoning, was to begin with 28 U.S.C. § 1404,¹¹³ one of the statutes

101. *Stewart*, 487 U.S. at 24.

102. *Id.* at 24 n.1.

103. *Id.* at 24.

104. 304 U.S. 64 (1938).

105. *Stewart*, 487 U.S. at 24.

106. See, e.g., *Keelean v. Central Bank*, 544 So. 2d 153 (Ala. 1989); *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554, 556 (Ala. 1980); see also *supra* notes 25-34.

107. *Stewart*, 487 U.S. at 24.

108. *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, *reh'g granted, vacated*, 785 F.2d 896 (11th Cir. 1986).

109. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (en banc), *aff'd* 487 U.S. 22 (1988).

110. *Id.*

111. *Stewart*, 487 U.S. at 28-29.

112. *Id.* at 28.

113. 28 U.S.C. § 1404 (1988) provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

giving transfer authority to district courts.¹¹⁴ In making a transfer decision, section 1404 calls on district courts to evaluate a large number of factors, including party convenience, witness convenience and access to crucial evidence.¹¹⁵ The section 1404 balance, the Court concluded, must also take account of “the parties’ private expression of their venue preferences.”¹¹⁶ This, however, was a much different approach than *Bremen*, which required enforcement absent substantial countervailing considerations.¹¹⁷ In the transfer context after *Stewart*, although a forum selection agreement is “a significant factor”¹¹⁸ in the district court’s decision, it is only one of many factors and may be overcome by other considerations.¹¹⁹ Because section 1404 is undoubtedly constitutional, concluded the Court, it overrides state law.¹²⁰ Justice Kennedy, joined by Justice O’Connor “concur[red] in full,” but wrote separately to say that *Bremen*’s “reasoning applies with much force to federal courts sitting in diversity.”¹²¹

Justice Scalia dissented, disagreeing with the majority on two points.¹²² First, Scalia concluded that section 1404 is not broad enough to take account of forum selection clauses.¹²³ According to Scalia, had Congress meant to preempt “state contract law,” Congress would have done so explicitly, as it did in the FAA.¹²⁴ Second, because in Scalia’s view section 1404 was not broad enough to regulate the issue of forum selection agreement validity, the Rules of Decision

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- (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.
 - (c) A district court may order any civil action to be tried at any place within the division in which it is pending.
 - (d) As used in this section, “district court” includes the United States District Court for the District of the Canal Zone; and “district” includes the territorial jurisdiction of that court.

114. *Stewart*, 487 U.S. at 29.

115. *Id.* at 29–30.

116. *Id.* at 30.

117. *See supra* notes 68–75 and accompanying text.

118. *Stewart*, 487 U.S. at 29.

119. *Id.* at 29–30.

120. *Id.* at 31–32.

121. *Id.* at 33 (Kennedy, J., concurring).

122. *Id.* (Scalia, J., dissenting).

123. *Id.* at 36–37.

124. *Id.* at 36.

Act¹²⁵ as interpreted in *Erie*¹²⁶ must govern the choice of whether to apply state or federal law.¹²⁷ *Erie*, Scalia concluded, required application of state law because of the potential for intrastate forum shopping engendered by application of different rules in the state and federal courts.¹²⁸ Thus, Scalia would have affirmed the district court's denial of the transfer motion.

In several respects, *Stewart* failed to clarify the Court's position on forum selection agreements.¹²⁹ First, *Stewart* did not settle the question of whether state or federal law applies if a party in a non-admiralty case attempts to enforce the forum selection agreement by some means other than a transfer motion under section 1404. Once the *Stewart* majority concluded that section 1404 was broad enough to take account of forum selection agreements, its conclusion that section 1404 does not overstep congressional authority was so unexceptional that it shed little light on the choice between state and federal law outside this context.

Second, *Stewart* left unanswered the correct route to enforcement of a forum selection clause. In *Bremen*, Unterweser made a forum non conveniens motion.¹³⁰ *Stewart*, by allowing a section 1404 motion, appeared to endorse the position that such agreements are a matter of venue. Other courts have considered, and continue to consider, such agreements as regulating jurisdiction.¹³¹ Although this may seem to be a trivial point, it is not without its practical consequences.¹³²

Third, *Stewart* created the bizarre dichotomy that if an agreement is enforced by a transfer motion—the most efficient and sensible route if

125. 28 U.S.C. § 1652 (1988).

126. *Stewart*, 487 U.S. at 38 (Scalia, J., dissenting) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

127. *Id.*

128. *Id.* at 39.

129. For a comprehensive analysis of *Stewart*, see, e.g., Freer, *supra* note 6, at 1113–20; Mullenix, *supra* note 2, at 332–39; Comment, *Stewart Organization, Inc. v. Ricoh Corp.: Judicial Discretion in Forum Selection*, 41 RUTGERS L. REV. 1379 (1989); Note, *The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation*, 6 ALASKA L. REV. 175 (1989); Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068 (1989); Note, *Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability in Diversity Cases? A Question Left Open by Stewart Organization, Inc. v. Ricoh Corp.*, 22 CORNELL INT'L L.J. 307 (1989); Note, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corp.*, 72 MINN. L. REV. 1090 (1988) (discussing Eleventh Circuit's en banc opinion in *Stewart*); Note, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?*—*Stewart Organization, Inc. v. Ricoh Corp.*, 64 WASH. L. REV. 439 (1989).

130. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

131. See Mullenix, *supra* note 2, at 322–27.

132. See *infra* notes 269–78 and accompanying text.

the selected forum is another federal court—the agreement is entitled to less weight than it would be if enforced in some other way. A corollary to this is that if the selected forum is a foreign court or a state court, *Stewart* does not apply at all because a transfer motion is unavailable. Thus, assuming that *Bremen* applies in all federal court cases, forum selection agreements have more force in international disputes than they do in most domestic matters.

b. The Carnival Cruise Case

Even more recently, in *Carnival Cruise Lines, Inc. v. Shute*,¹³³ the Court did nothing to help the confused state of affairs. The *Carnival Cruise* plaintiffs, Eulala and Russel Shute, purchased tickets for a seven-day cruise aboard *The Tropicale*, a passenger ship owned by defendant Carnival Cruise Lines, Inc. (Carnival).¹³⁴ The Shutes paid for their cruise through a travel agent in their home state of Washington.¹³⁵ The payment was forwarded to Carnival's offices in Miami, Florida; Carnival then prepared the tickets and mailed them to the Shutes' Washington address.¹³⁶

The Shutes boarded *The Tropicale* in Los Angeles.¹³⁷ During a ship-sponsored tour, while *The Tropicale* was in international waters, Mrs. Shute slipped and was injured.¹³⁸ The Shutes then filed suit in United States District Court for the Western District of Washington, invoking the court's admiralty jurisdiction.¹³⁹ The district court dismissed the case reasoning that jurisdiction over Carnival was unconstitutional because of the lack of contacts between Carnival and the State of Washington. The court did not reach the question of whether the exclusive forum selection clause on the back of the ticket pointing to the Florida state and federal courts was enforceable.¹⁴⁰

The Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit found sufficient contacts with Washington to allow for the exercise of personal jurisdiction and held that the clause was unenforceable.¹⁴¹ The court refused to extend *Bremen* to cover adhesive

133. 111 S. Ct. 1522 (1991).

134. *Id.* at 1524.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1524–25.

contracts.¹⁴² The Supreme Court granted certiorari on both issues, leading to confident speculation that *Carnival Cruise* would produce yet another "minimum contacts" opinion.¹⁴³

Such speculation, although not unfounded, turned out to be wrong. The Supreme Court confined itself to the issue of the validity of the forum selection agreement, refusing to address the minimum contacts issue.¹⁴⁴ The majority saw the validity of the forum selection agreement as turning on three separate issues. First, did the Shutes have "notice" of the provision?¹⁴⁵ Second, assuming that they had notice, was the agreement enforceable under the *Bremen* standards?¹⁴⁶ Third, did the forum selection agreement conflict with the Limitation of Vessel Owner's Liability Act?¹⁴⁷

The Court disposed of the first issue quickly. Justice Blackmun concluded that plaintiffs' brief had conceded the notice issue.¹⁴⁸ Thus, the majority turned immediately to the validity of the agreement under the *Bremen* standards.

On the question of enforceability, the Court rejected the position of the Shutes and the Ninth Circuit that *Bremen* applies only in cases in which the terms of the contract are the subject of actual negotiation.¹⁴⁹ "Routine" transactions such as the Shutes' purchase of the cruise, the Court reasoned, are not normally subject to give-and-take bargaining. Similarly, the parties do not bargain for forum selection clauses that spring from such routine transactions.¹⁵⁰ "Common sense," according to the majority, dictated that enforcement of form contracts must be possible without showing actual bargaining.¹⁵¹

142. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *modified*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991).

143. Woods, *Carnival Cruise Lines v. Shute: An Amicus Inquiry into the Future of "Purposeful Availment"*, 36 WAYNE L. REV. 1393, 1393, 1401 (1990) (predicting that *Carnival Cruise* would produce a watershed opinion "addressing the constitutional aspects of American civil procedure;" "It seems highly unlikely that the United States Supreme Court will decide [*Carnival Cruise*] on the ground that the Shutes voluntarily submitted themselves to the jurisdiction of the Florida Courts.").

144. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991).

145. *Id.* at 1525.

146. *Id.* at 1526.

147. *Id.* at 1528 (citing 46 U.S.C. app. § 183c (1988)).

148. *Id.* at 1525 (citing Brief for Respondent at 26) (Justice Blackmun's conclusion in *Carnival Cruise* is reminiscent of *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), a jurisdictional case in which the Court, led by Justice Blackmun, concluded that plaintiffs' counsel had conceded the crucial issue).

149. *Id.* at 1527.

150. *Id.*

151. *Id.*

The *Bremen* reasonableness test, therefore, had to be “refine[d] . . . to account for the realities of form passage contracts.”¹⁵² Three factors led the Court to conclude that the clause was reasonable under the circumstances. First, the cruise line “has a special interest in limiting the fora in which it potentially could be subject to suit . . . [because] it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora.”¹⁵³ Second, the clause simplified the jurisdictional inquiry.¹⁵⁴ Third, “it stands to reason that passengers who purchase tickets containing a forum clause like that at issue . . . benefit in the form of reduced fares”¹⁵⁵

Turning to the third issue, the majority held that the agreement was not statutorily prohibited. The relevant statute,¹⁵⁶ the Court concluded, prohibited only formal limitations on access to a “court of competent jurisdiction.”¹⁵⁷ Unlike a damage limitation or hold harmless clause, a forum selection clause still provides for a theoretical right of access to process.

In dissent, Justice Stevens, joined by Justice Marshall, took issue with the majority on several points. First, Stevens disagreed with the majority on the notice issue.¹⁵⁸ Stevens, who reproduced the entire ticket in its actual size as an appendix to his dissent, argued that the pre-printed form simply did not give notice in any meaningful way.¹⁵⁹ Even more important to Stevens, though, was that the Shutes had not received their tickets until after they had paid their money.¹⁶⁰

Second, under the *Bremen* principles, Justice Stevens would have held the agreement unenforceable.¹⁶¹ Because this was a “contract[] of adhesion . . . offered on a take-or-leave basis,” Stevens reasoned that it necessitated intensified scrutiny for fairness to the weaker party.¹⁶² Stevens found this fairness lacking because of the hardship imposed on the Shutes in litigating in Florida.¹⁶³

Third, unlike the majority, Justice Stevens believed the agreement to be proscribed by the Limitation of Vessel Owners’ Liability Act.¹⁶⁴

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 46 U.S.C. app. § 183c (1988).

157. *Carnival Cruise*, 111 S. Ct. at 1528.

158. *Id.* at 1529 (Stevens, J., dissenting).

159. *Id.*

160. *Id.*

161. *Id.* at 1531.

162. *Id.* at 1530–31.

163. *Id.* at 1532–33.

164. 46 U.S.C. app. § 183c (1988).

Relying on circuit authority interpreting a similar provision in the Carriage of Goods at Sea Act (COGSA),¹⁶⁵ Stevens argued for a liberal reading of the statute.¹⁶⁶ The appropriate reading, Stevens concluded, would void the agreement.¹⁶⁷

3. *The Troubling Nature of Carnival Cruise*

There are many troubling aspects to the *Carnival Cruise* decision. One difficult question is whether anything remains of the reasonableness rule announced in *Bremen*. Although the *Bremen* principles were indeterminate, their hallmark was their ability to validate those agreements that, on an intuitive level, seemed fair, and invalidate those that seemed unfair. The principles in *Carnival Cruise*, however, seem to validate every agreement. As discussed above, the majority pointed to three factors that made the *Carnival Cruise* clause reasonable: the risk of suit in multiple fora, simplification of the jurisdictional inquiry, and the possibility of reduced transactional costs being passed on to the consumers.¹⁶⁸ These factors amount to no real limitation on enforcement. Every large enterprise runs the risk of suits in multiple fora; every forum selection agreement simplifies the jurisdictional inquiry if enforced; reduced transaction costs always hold the theoretical possibility of consumer benefit.

Another difficult issue is attempting to divine how and why the Court ultimately disposed of the case. *Carnival* sought to enforce the forum selection agreement in two ways. First, it sought to dismiss the case for lack of personal jurisdiction, both on the grounds that *Carnival* lacked minimum contacts and that the forum selection agreement deprived the district court of personal jurisdiction.¹⁶⁹ Second, *Carnival* sought to enforce the clause with a transfer to the Southern District of Florida under section 1406.¹⁷⁰ The district court reached only the personal jurisdiction issue, and unconditionally dismissed the case.¹⁷¹ The Ninth Circuit, in reversing, necessarily had to reach all the issues, and remanded the case to the district court for trial.¹⁷²

165. 46 U.S.C. § 1303(8) (1988).

166. *Carnival Cruise*, 111 S. Ct. at 1532-33.

167. *Id.* at 1533.

168. See *supra* notes 153-55 and accompanying text.

169. Brief for the Petitioner at 5, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (No. 89-1647).

170. *Id.*

171. *Id.*

172. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990).

The Supreme Court, as noted above,¹⁷³ reached only the issue of the forum selection agreement, and concluded its opinion with the cryptic disposition: "The judgment of the Court of Appeals is reversed. It is so ordered."¹⁷⁴ The body of the opinion, particularly the portion that concluded that Florida was an acceptable forum, implied that the case should be transferred.¹⁷⁵ The disposition, however, by not remanding either to the district court or the Ninth Circuit, implied that the unconditional dismissal of the district court should be reinstated.¹⁷⁶

The disposition is significant for at least two reasons. First, a dismissal almost certainly would bar the Shutes from refile in Florida because of the expiration of the statute of limitations. A transfer to Florida, however, would allow for the action to continue.¹⁷⁷ Second, assuming that *Stewart's* rationale applies to section 1406 as well as section 1404 transfers, the standards for enforcement vary greatly depending upon the enforcement mechanism.¹⁷⁸ Because the district court's conclusion that the parties lacked minimum contacts with Washington does not prevent a section 1406 transfer,¹⁷⁹ the Supreme Court could have taken this opportunity to clear up some of the issues surrounding the appropriate enforcement mechanism. Instead, the Court and the parties ignored the problem and left a great deal to implication.

Even more troubling, perhaps, is the Court's handling of the notice issue. As a threshold matter, it is curious that the Court chose to frame the issue in terms of notice. The real question is whether Carnival had formed a contract with the Shutes that included the forum selection clause. The formation of a contract including this provision would require the Shutes' assent to the provision.¹⁸⁰ While notice of the provision is necessary for assent, it is certainly not sufficient for assent.¹⁸¹ Although this point seems too obvious for discussion, it appears to have escaped the majority entirely. Suppose the Shutes had paid for and received their tickets, and then, two days before leaving,

173. See *supra* note 144 and accompanying text.

174. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1529 (1991) (emphasis omitted).

175. *Id.* at 1528.

176. Carnival's brief sheds no light on the question. The brief prayed that "[t]he judgment of the Court of Appeals should be reversed and the case remanded [to the district court] to be dismissed for lack of jurisdiction over the person or, in the alternative, dismissed or transferred pursuant to 28 U.S.C. § 1406(a)." Brief for the Petitioner at 39.

177. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 261 (4th ed. 1983).

178. Cf. Freer, *supra* note 6, at 1128-29 (arguing that § 1406 was the proper statute in *Stewart*).

179. *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964).

180. *RESTATEMENT (SECOND) OF CONTRACTS* § 22 (1981).

181. *Id.* § 23.

received a telegram from Carnival stating: "Please take notice: Any litigation arising out of your cruise must take place exclusively in and before a Court located in the State of Florida, U.S.A." To be sure, this would have provided excellent notice of Carnival's intentions, but it would not have indicated the Shutes' assent to such an agreement. What, then, if anything, distinguishes the wording printed on the back of the ticket from the hypothetical telegram? The answer to this question depends on when the contract for passage was formed. There are two plausible possibilities. The first is that the travel agent was Carnival's agent to enter into the contract, and the contract was formed when the Shutes paid their money in Washington. If this were the case, the wording on the back of the ticket and the hypothetical telegram would have precisely the same effect. Although the ticket gratuitously described itself as a contract,¹⁸² under this view it was nothing more than a post-formation communication.¹⁸³

The other possibility was that the tickets constituted Carnival's offer to the Shutes, which the Shutes accepted by presenting them for passage. Under this view, the wording on the back of the tickets could be part of the contract, since presentment for passage would represent assent. The problem with this view, however, as Justice Stevens pointed out, is that the tickets were expressly made non-refundable.¹⁸⁴ The presentment for passage cannot represent voluntary assent to the terms of the contract, because there is a severe economic penalty for refusing to assent. Thus, the no-refund provision is consistent only with the view that the contract was formed at some earlier time, presumably in the travel agent's office.

This issue may have escaped the majority's attention, but Carnival's lawyers were wise to the problem. In their reply brief, Carnival's lawyers tried to explain away the no-refund provision by reference to a brochure "provided to prospective passengers."¹⁸⁵ Although the tickets unconditionally prohibited refunds "of tickets wholly or partly not used by a passenger,"¹⁸⁶ Carnival's lawyers argued that the brochure "makes clear that refunds are available to passengers who cancel a reasonable period before the cruise."¹⁸⁷ A more classic case of having it both ways is hard to imagine. If Carnival wanted to take the posi-

182. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1524 (1991) (copy of ticket reproduced in appendix to opinion).

183. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981) (additional terms to written contract enforceable only if supported by separate consideration).

184. *Carnival Cruise*, 111 S. Ct. at 1529 (Stevens, J., dissenting).

185. Reply Brief for the Petitioner at 9 n.6.

186. *Carnival Cruise*, 111 S. Ct. at 1529.

187. Reply Brief for the Petitioner at 9 n.6.

tion that the real contract was in the brochure—given to the Shutes when they bought their cruise—then why was the forum selection clause not included in the brochure? If Carnival wanted to take the position that the tickets were the memorial of the contract, then it must be bound by the unambiguous no-refund provision in those tickets.

The final troubling aspect of the Court's opinion was its eagerness to hang the Shutes on their brief. Although the Court concluded that the Shutes conceded the issue of notice in their brief,¹⁸⁸ this was not the same thing as conceding assent. In fact, the Shutes brief, only two pages later, hit on the crucial matter by arguing that "[t]he ticket contract also seems to prevent a refund for an unused ticket, thereby removing the passengers [sic] right to seek a refund if the clause were offensive."¹⁸⁹ Under the circumstances, therefore, the Court's conclusion that the Shutes' waived the issue of whether the clause was part of the contract—perhaps the most fundamental issue in the case—seems unjust.

Before turning to a discussion of the unsettled issues remaining in the wake of the new case law, two other consequences of *Carnival Cruise*, both of them felicitous, deserve mention. The first is that by construing the Limitation of Vessel Owners' Liability Act not to prevent forum selection agreements,¹⁹⁰ *Carnival Cruise* implicitly overruled *Indussa* and its progeny,¹⁹¹ which held that a similarly-worded statute in COGSA prevented forum selection clauses. The similarity between the COGSA provision and the provision in the Limitation of Vessel Owners' Liability Act, and Justice Stevens' explicit reliance on the COGSA cases in dissent,¹⁹² makes clear that COGSA is no longer an obstacle to enforcement of forum selection agreements. Because COGSA governs a large number of international commercial transactions,¹⁹³ where forum selection clauses are desirable, it was high time to wipe out this vestige of judicial hostility to contractual jurisdiction.

Second, *Carnival Cruise* pushed the Court closer than ever to recognizing that personal jurisdiction can no longer be a constitutional issue. Although the due process clauses of the fifth and fourteenth amendments have long been thought to limit personal jurisdiction, this view strains history and is inconsistent with recent Supreme Court

188. *Carnival Cruise*, 111 S. Ct. at 1525 (citing Brief for the Respondents at 26).

189. Brief for the Respondents at 28.

190. *Carnival Cruise*, 111 S. Ct. at 1529.

191. See *supra* note 18.

192. *Carnival Cruise*, 111 S. Ct. at 1532–33 (Stevens, J., dissenting).

193. See Black, *supra* note 18, at 365–66.

case law.¹⁹⁴ *Carnival Cruise*'s analysis clearly contemplated that the forum selection clause must have had both the effect of preventing any party from suing in any forum besides Florida as well as the effect of allowing either party to hale the other before Florida courts. Accordingly, if one accepts the view that personal jurisdiction is a right of constitutional dimension, then the Shutes "waived" a constitutional right, probably unknowingly, by accepting these tickets and their fine print. However, allowing such a waiver is inconsistent with the assumed constitutional status of the right.¹⁹⁵ Supreme Court precedent presumably would not allow for the conclusion that an inmate had waived his constitutional right against self-incrimination because the sugar packet on his meal tray contained a pre-printed waiver of rights form.¹⁹⁶

The deconstitutionalization of personal jurisdiction is a healthy development because it holds the best hope for the creation of sensible and practical jurisdictional rules.¹⁹⁷ Taking personal jurisdiction out of the realm of constitutional law allows for the creation of jurisdictional rules through a comprehensive legislative effort, as opposed to ad hoc development. Perhaps not coincidentally, the same factors counsel legislative intervention in the enforcement of forum selection agreements. However, before turning to that issue, it is necessary to survey the landscape and assess the issues in need of resolution.

III. CONUNDRUMS

Stewart and *Carnival Cruise* left a large number of important issues undecided and their resolution of the issues that they did decide has some unhappy consequences. Moreover, a substantial number of other issues have arisen in lower federal courts, but have not been ruled on by the Supreme Court. Thus, before attempting to devise a comprehensive plan for congressional action, a review of the existing case authority is vital.

A. Choice of Law

As mentioned above, *Stewart* did not decide whether state or federal law applies if enforcement of a forum selection agreement is attempted by some method other than a transfer under section 1404.¹⁹⁸ A large

194. Borchers, *supra* note 10, at 87-101.

195. See Mullenix, *supra* note 2, at 303.

196. Cf. *Michigan v. Jackson*, 475 U.S. 625 (1986) (right not to self-incriminate not waived even if voluntarily relinquished once request for counsel made by criminal defendant).

197. See Borchers, *supra* note 10, at 103-05.

198. See *supra* notes 129-32 and accompanying text.

number of cases both before and after *Stewart* have simply assumed without discussion that federal law applied, even in diversity cases.¹⁹⁹ At least equally frequent were cases that recognized the issue, but avoided it because of the similarity of state and federal standards.²⁰⁰ In diversity cases that have explicitly considered and resolved the issue, the preponderant, but by no means unanimous, view is that federal law applies. The Seventh Circuit “probably”²⁰¹ takes the position that federal law applies, and the Ninth Circuit clearly does.²⁰² Uncontradicted district court authority in the First²⁰³ and Second²⁰⁴ Circuits also supports application of federal law in diversity cases.

The Eighth Circuit, however, takes the position that state law applies.²⁰⁵ The Third Circuit also apparently applies state law,²⁰⁶ although it has refused to reaffirm this position after *Stewart*,²⁰⁷ and there is post-*Stewart* district court authority within the circuit for the application of federal law.²⁰⁸ The Fourth Circuit may also apply state law, although the case that supports this assertion, *Bryant Electric Co. v. City of Fredricksburg*,²⁰⁹ is not entirely clear on the matter and may have been based on a choice-of-law clause pointing to state law.²¹⁰ The state law position within the Fourth Circuit is bolstered by recent

199. See, e.g., *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989); *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4 (1st Cir. 1984); *Ernst v. Ernst*, 722 F. Supp. 61 (S.D.N.Y. 1989); *Pascalides v. Irwin Yacht Sales N., Inc.*, 118 F.R.D. 298 (D.R.I. 1988).

200. See, e.g., *Crescent Int'l, Inc. v. Avatar Communities, Inc.*, 857 F.2d 943 (3d Cir. 1988); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp.*, 696 F.2d 315 (4th Cir. 1982); *Hoffman v. National Equip. Rental, Ltd.*, 643 F.2d 987 (4th Cir. 1981); *Giroir v. MBank Dallas, N.A.*, 676 F. Supp. 915 (E.D. Ark. 1987); *Cedarbrook Assoc. v. Equitec Sav. Bank*, 678 F. Supp. 107 (E.D. Pa. 1987); *ECC Computer Centers of Ill., Inc. v. Entre Computer Centers, Inc.*, 597 F. Supp. 1182 (N.D. Ill. 1984).

201. *Northwestern Nat'l Ins. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990); see also *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286 (7th Cir. 1989).

202. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512 (9th Cir. 1988).

203. See, e.g., *TUC Elecs., Inc. v. Eagle Telephonics, Inc.*, 698 F. Supp. 35 (D. Conn. 1988); *C. Pappas Co. v. E. & J. Gallo Winery*, 565 F. Supp. 1015 (D. Mass. 1983); *Northeast Theatre Corp. v. Edie & Ely Landau, Inc.*, 563 F. Supp. 833 (D. Mass. 1983).

204. See, e.g., *Ritchie v. Carvel Corp.*, 714 F. Supp. 700 (S.D.N.Y. 1989); *Aloha Leasing v. Craig Germain Co.*, 644 F. Supp. 561 (N.D.N.Y. 1986).

205. *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986).

206. See, e.g., *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986).

207. See, e.g., *Crescent Int'l Inc. v. Avatar Communities, Inc.*, 857 F.2d 943 (3d Cir. 1988).

208. See *Lexington Inv. Co. v. Southwest Stainless, Inc.*, 697 F. Supp. 139 (S.D.N.Y. 1988).

209. 762 F.2d 1192 (4th Cir. 1985).

210. See *infra* notes 221-27 and accompanying text.

district court authority,²¹¹ although other Fourth Circuit cases have preferred to avoid the issue.²¹² Elsewhere the returns are mixed, with district court cases both on the state²¹³ and federal²¹⁴ side of the fence.

There were some optimistic predictions after *Stewart* that federal courts would apply federal law in all cases, regardless of the basis for subject matter jurisdiction or the method of enforcement.²¹⁵ Other observers, however, were not so sure.²¹⁶ *Stewart*'s refusal to decide the issue outside of the transfer context, however, has deepened the split of authority. The most persuasive opinion in support of the application of federal law in diversity cases was the Eleventh Circuit's en banc opinion in *Stewart*,²¹⁷ which other courts have found compelling despite the Supreme Court's equivocal affirmance.²¹⁸ In a strange turn of events, though, the Eleventh Circuit backtracked and announced in a post-*Stewart* opinion that it will apply state law in non-transfer diversity cases.²¹⁹

For jurisdictional bases other than diversity, the picture is less chaotic. In non-transfer federal question cases, the cases come down on the side of application of federal law, the theory apparently being that state law has less of a claim to application than in diversity cases.²²⁰

211. *Sterling Forest Assoc. v. Barnett-Range Corp.*, 673 F. Supp. 1394 (E.D.N.C. 1987), *rev'd on other grounds*, 840 F.2d 249 (4th Cir. 1988).

212. *See, e.g., Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp.*, 696 F.2d 315 (4th Cir. 1982) (similarity of state and federal standards precludes necessity of resolution); *Hoffman v. National Equip. Rental, Ltd.*, 643 F.2d 987 (4th Cir. 1981) (same).

213. *See, e.g., Medicine Shoppe Int'l, Inc. v. Browne*, 683 F. Supp. 731 (E.D. Mo. 1988); *Snively's Mill, Inc. v. Officine Roncaglia, S.p.A.*, 678 F. Supp. 1126 (E.D. Pa. 1987); *Snider v. Lone Star Art Trading Co.*, 672 F. Supp. 977 (E.D. Mich. 1987); *Bryfogle v. Carvel Corp.*, 666 F. Supp. 730 (E.D. Pa. 1987); *Sterling Forest Assoc. v. Barnett-Range Corp.*, 673 F. Supp. 1394 (E.D.N.C. 1987), *rev'd on other grounds*, 840 F.2d 249 (4th Cir. 1983).

214. *See, e.g., American Performance, Inc. v. Sanford*, 749 F. Supp. 1094 (M.D. Ala. 1990); *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653 (M.D. Ala. 1987); *Grissom v. Colotti*, 644 F. Supp. 903 (D.P.R. 1986); *Houston Int'l Televideo, Inc. v. Technicolor, Inc.*, 647 F. Supp. 554 (S.D. Tex. 1986); *Clarkco Contractors, Inc. v. Texas E. Gas Pipeline Co.*, 615 F. Supp. 775 (M.D. La. 1985); *Benge v. Software Galeria, Inc.*, 608 F. Supp. 601 (E.D. Mo. 1985); *Visicorp. v. Software Arts, Inc.*, 575 F. Supp. 1528 (N.D. Cal. 1983); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545 (N.D. Tex. 1982).

215. *See, e.g., Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) ("perhaps the circuit split will not survive [*Stewart*]"); *Mullenix, supra* note 2, at 338.

216. *Freer, supra* note 6, at 1139-41.

217. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd on other grounds*, 487 U.S. 22 (1988).

218. *See, e.g., Mannetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512 (9th Cir. 1988).

219. *Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912 (11th Cir. 1989).

220. *See, e.g., AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984) (Friendly, J.); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718 (2d Cir. 1982); *Ritchie v. Carvel Corp.*, 714 F. Supp. 700 (S.D.N.Y. 1989). *But see Coastal Steel Corp. v. Tilghman*

Further, *Bremen* made clear that federal law applies in admiralty cases.²²¹

Another choice-of-law issue has sown some confusion. If a forum selection clause is accompanied by a choice-of-law clause, which is quite common,²²² two possibilities exist. One is that forum law governs the validity of the forum selection clause; the other is that the law designated by the choice-of-law clause determines the validity of the forum selection clause.²²³ The confusion occurs if forum law would validate the clause, but the designated law would not.

Some courts have managed to avoid this problem simply by applying forum law.²²⁴ At least one court has reasoned that it is highly improbable that the parties would have written a forum selection clause in and out of the contract in the same breath.²²⁵ A surprising number of cases, though, have applied the designated law,²²⁶ even if this meant invalidation of the forum selection clause.²²⁷

B. Interpretive Issues

Clumsy drafting has presented a number of issues of interpretation for lower federal courts. Some of the issues are quite fundamental, such as whether to interpret the agreement as an exclusive or non-exclusive forum agreement. The Supreme Court has not addressed most of these issues. *National Equipment* involved a clause that was

Wheelabrator, Ltd., 709 F.2d 190, 201-02 (3d Cir.) (refusing to decide issue because of similarity of state and federal standards), *cert. denied*, 464 U.S. 938 (1983).

221. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991).

222. *Cf. Juenger, General Course on Private International Law*, 193 RECUEIL DES COURS 119, 305 (1983).

223. *See Collins, The Chaparral/Bremen Litigation: Two Commentaries: Choice of Forum and the Exercise of Judicial Discretion—Resolution of an Anglo-American Conflict*, 22 INT'L & COMP. L.Q. 332, 339 (1973); Juenger, *supra* note 222, at 305; Mullenix, *supra* note 2, at 347-50.

224. *AVC Nederland*, 740 F.2d at 155; *Bense*, 683 F.2d at 722; *L.A. Pipeline Constr. Co. v. Texas E. Prod. Pipeline Co.*, 699 F. Supp. 185, 186-87 (S.D. Ind. 1988).

225. *Bense*, 683 F.2d at 722.

226. *See, e.g., In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986); *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380 (9th Cir. 1984); *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Zions First Nat'l Bank v. Allen*, 688 F. Supp. 1495 (D. Utah 1988); *600 Grant Street Assoc. Ltd. Partnership v. Leon-Dielmann Inv. Partnership*, 681 F. Supp. 1062 (S.D.N.Y. 1988); *Coldwell Banker & Co. v. Eyde*, 661 F. Supp. 657 (N.D. Ill. 1986); *cf. Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205 (C.D. Ill. 1979) (designated law governs interpretation of clause; *lex fori* governs validity); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145 (N.D. Tex. 1979) (discussing the issue in dictum).

227. *See, e.g., Snider v. Lone Star Art Trading Co.*, 672 F. Supp. 977 (E.D. Mich. 1987) (choice-of-law clause points to Texas; *lex fori* would validate forum selection clause; forum selection clause invalidated under Texas law).

clearly non-exclusive;²²⁸ *Stewart*²²⁹ and *Carnival Cruise*²³⁰ involved clauses that were clearly exclusive. The Court treated the clause in *Bremen* as an exclusive forum selection clause,²³¹ which was the fairest reading of it, although it was not a model of drafting clarity.²³²

In less clear cases, courts have a mild preference for interpreting unclear provisions as exclusive forum agreements.²³³ The theory often invoked is that if the designated forum would have jurisdiction without the clause, giving the clause non-exclusive effect is meaningless.²³⁴ Some inartful clauses, however, have proved especially challenging. A divided panel of the Fourth Circuit construed a provision stating that the "[p]lace of jurisdiction is Sao Paulo, Brazil" as having non-exclusive effect, relying on the old standby that a contract must be construed against the drafter.²³⁵ This maxim, though, cuts both ways, and can lead to either an exclusive or non-exclusive effect depending on which party is arguing for which effect.²³⁶ Other frequently-occurring phrases such as "jurisdiction shall be in . . ." and "the parties submit to the jurisdiction of . . ." have also given courts trouble, with cases splitting over the meaning of nearly identically-worded agree-

228. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

229. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

230. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991).

231. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2, 20 (1972) (clause stating that "[a]ny dispute arising must be treated before the London Court of Justice" is "clearly mandatory and all encompassing").

232. Juenger, *supra* note 1, at 58.

233. See, e.g., *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990); *Seward v. Divine*, 888 F.2d 957 (2d Cir. 1989); *Commerce Consultants Int'l, Inc. v. Vetreerie Riunite, S.p.A.*, 867 F.2d 697 (D.C. Cir. 1989); *Sterling Forest Assoc. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988); *Zapata Marine Serv. v. O/Y Finlines, Ltd.*, 571 F.2d 208 (5th Cir. 1978); *Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik GmbH*, 718 F. Supp. 886 (M.D. Ala. 1989); *L.A. Pipeline Constr. Corp. v. Texas E. Prod. Pipeline Co.*, 699 F. Supp. 185 (S.D. Ind. 1988); *Zions First Nat'l Bank v. Allen*, 688 F. Supp. 1495 (D. Utah 1988); *Bryfogle v. Carvel Corp.*, 666 F. Supp. 730 (E.D. Pa. 1987); *ASM Communications, Inc. v. Allen*, 656 F. Supp. 838 (S.D.N.Y. 1987); *Friedman v. World Transp., Inc.*, 636 F. Supp. 685 (N.D. Ill. 1986); *Mississippi River Bridge Auth. v. M/V Pola De Lena*, 567 F. Supp. 311 (E.D. La. 1983); *Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A.*, 84 F.R.D. 299 (W.D.N.Y. 1979); *Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205 (C.D. Ill. 1979). See generally Note, *Forum Selection: Selection Agreements Prima Facie Valid if Reasonable*—*Volkswagenwerk, A.G. v. Klippan, GmbH*, 10 UCLA-ALASKA L. REV. 99, 103 (1980) (discussing issue in state law cases).

234. See, e.g., *Sterling Forest Assoc. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988); *Zions First Nat'l Bank v. Allen*, 688 F. Supp. 1495 (D. Utah 1988).

235. *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231 (11th Cir. 1985).

236. See, e.g., *Zapata Marine Serv. v. O/V Finlines, Ltd.*, 571 F.2d 208 (5th Cir. 1978) (exclusive reading); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184 (S.D.N.Y. 1975) (non-exclusive reading).

ments.²³⁷ All of this demonstrates that drafters of interstate and international contracts are not always attuned to the significant differences between exclusive and non-exclusive forum agreements, and that courts, while generally aware of the distinctions, have not developed any clear interpretive guidelines.

Another difficult question of interpretation arises when the agreement merely refers to "the courts" of a particular political entity, most often a state. In the case of an agreement pointing to the courts of a state, there are two obvious possibilities. One is that this refers only to the state courts of that state; the other is that it refers to both the state courts and the federal district courts sitting in the state. Often courts have based their interpretations on tiny distinctions in the wording. A bare reference to the courts of a state usually is interpreted to mean both the state and federal courts.²³⁸ More convoluted references, however, have drawn a variety of responses. For instance, references to: "a court of original jurisdiction of the state of New York,"²³⁹ an action "in the courts[] of the commonwealth of Massachusetts,"²⁴⁰ "the courts of the commonwealth of Pennsylvania,"²⁴¹ and an action for which "venue shall be in Adams County, Colorado"²⁴² were all interpreted to mean that only the state courts were available. On the other hand, references to: an action in which "the situs of any suit . . .

237. Compare *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987) (clause stating that the California state courts "shall have jurisdiction" is non-exclusive) and *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184 (S.D.N.Y. 1975) ("Supreme Court of the State of New York . . . shall have jurisdiction of any dispute" is non-exclusive) with *ASM Communications, Inc. v. Allen*, 656 F. Supp. 838, 839-40 (S.D.N.Y. 1987) (clause stating that "jurisdiction and venue shall be in" the California courts is exclusive); compare *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955 (5th Cir. 1974) (clause stating that the "parties submit to the jurisdiction of the courts of New York" is non-exclusive) and *Sall v. G.H. Miller & Co.*, 612 F. Supp. 1499, 1501 (D. Colo. 1985) ("I specifically consent to and submit to the jurisdiction of the courts of the state of Illinois" is a non-exclusive agreement) and *Walter E. Heller & Co. v. James Godbe Co.*, 601 F. Supp. 319 (N.D. Ill. 1984) ("submit to the jurisdiction of" is a non-exclusive agreement) with *Zions First Nat'l Bank*, 688 F. Supp. at 1497 (clause stating that the parties expressly "submit[] to the jurisdiction of" is an exclusive agreement) and *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6 (W.D. Okla. 1984) ("submit to the jurisdiction of" is an exclusive agreement).

238. See, e.g., *Zimmerman Metals, Inc. v. United Eng'rs & Constructors, Inc.*, 720 F. Supp. 859 (D. Colo. 1989) ("courts of Colorado" means both state and federal courts); *Page Constr. Co. v. Perini Constr. Co.*, 712 F. Supp. 9 (D.R.I. 1989) (reference to Massachusetts forum applied to both state and federal courts); *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979).

239. *TUC Elecs., Inc. v. Eagle Telephonics, Inc.*, 698 F. Supp. 35, 39 (D. Conn. 1988).

240. *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 6 (1st Cir. 1984).

241. *Spatz v. Nascone*, 364 F. Supp. 967 (W.D. Pa. 1973).

242. *Intermountain Sys., Inc. v. Edsall Constr. Co.*, 575 F. Supp. 1195 (D. Colo. 1983).

shall be the County of Orange, State of California;"²⁴³ venue in the "County of Essex and State of New Jersey;"²⁴⁴ the courts of "the state of California;"²⁴⁵ an action for which "the proper venue . . . shall be in Erie County, Pennsylvania;"²⁴⁶ an action for which "exclusive venue shall be in the State of Delaware;"²⁴⁷ and an action for which "venue [shall be] in Fort Bend County, Texas"²⁴⁸ were all held to encompass both federal and state courts. This demonstrates that drafters often do not consider dual court systems when selecting fora, and that the courts have not hit upon any clear interpretive presumptions.

The final set of interpretive issues centers on the scope of forum selection clauses. The most frequently-litigated issue in this group is the question of whether the clause is broad enough to reach all claims in the case between the parties. In an arbitration context, the Supreme Court preferred a reading of the provision that encompassed all claims with a transactional relationship.²⁴⁹ In the context of traditional forum selection agreements, the lower federal courts usually have adopted a similar approach, holding that forum clauses encompass all claims bearing some relationship to the contract giving rise to the forum clause.²⁵⁰ Occasionally, though, courts have concluded that

243. *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 690 F. Supp. 891, 892 (C.D. Cal. 1988).

244. *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979).

245. *Frontier Airlines, Inc. Retirement Plan for Pilots v. Security Pac. Nat'l Bank, N.A.*, 696 F. Supp. 1403 (D. Colo. 1988).

246. *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local Union 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 371 (W.D. Pa. 1979).

247. *International Inv. & Equine Consultants, Inc. v. Jebrock*, 573 F. Supp. 592 (W.D. Pa. 1983).

248. *Lexington Inv. Co. v. Southwest Stainless, Inc.*, 697 F. Supp. 139, 141, 144 (S.D.N.Y. 1988).

249. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985).

250. *See, e.g., Crescent Int'l, Inc. v. Avatar Communities, Inc.*, 857 F.2d 943 (3d Cir. 1988); *Bense v. Interstate Battery Sys.*, 683 F.2d 718 (2d Cir. 1982); *Knutson v. Rexair, Inc.*, 749 F. Supp. 214 (D. Minn. 1990); *Brock v. Entre Computer Centers, Inc.*, 740 F. Supp. 428 (E.D. Tex. 1990); *Ritchie v. Carvel Corp.*, 714 F. Supp. 700 (S.D.N.Y. 1989); *Advent Elec., Inc. v. Samsung Semiconductor, Inc.*, 709 F. Supp. 843 (N.D. Ill. 1989); *Stephens v. Entre Computer Centers, Inc.*, 696 F. Supp. 636 (N.D. Ga. 1988); *Stewart v. Murlas Commodities, Inc.*, 684 F. Supp. 166 (E.D. Mich. 1988); *Pascalides v. Irwin Yacht Sales N., Inc.*, 118 F.R.D. 298 (D.R.I. 1988); *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653 (M.D. Ala. 1987); *Eastern Europe, Inc. v. Transportmaschinen, Export-Import, Inc.*, 658 F. Supp. 612 (S.D.N.Y. 1987); *Ronar, Inc. v. Wallace*, 649 F. Supp. 310 (S.D.N.Y. 1986); *Warner & Swasey Co. v. Salvagnini Transferica S.p.A.*, 633 F. Supp. 1209 (W.D.N.Y. 1986), *aff'd*, 806 F.2d 1045 (Fed. Cir. 1986); *Adelson v. World Transp., Inc.*, 631 F. Supp. 504 (S.D. Fla. 1986); *Crescent Corp. v. Proctor & Gamble Corp.*, 627 F. Supp. 745 (N.D. Ill. 1986); *Rini Wine Co. v. Guild Wireries and Distilleries*, 604 F. Supp. 1055 (N.D. Ohio 1985); *Clinton v. Janger*, 583 F. Supp. 284 (N.D. Ill. 1984); *Giordano v. Witzer*, 558 F. Supp. 1261 (E.D. Pa. 1983); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545 (N.D. Tex. 1982).

some portion of the case is not covered by the forum clause, leading to disjointed litigation.²⁵¹

The more difficult question, though, has been the appropriate treatment of persons who are parties to the litigation, but not parties to the forum agreement. Here the approaches of the courts diverge sharply. Some courts have held that non-parties to the forum agreement have the same rights and duties as parties to the forum agreement.²⁵² Others have taken the more moderate route and held that non-parties to the forum agreement are not bound by, and may not enforce, the agreement, unless some element of traditional contract law—such as third party beneficiary status—would confer those rights and duties.²⁵³ At the other end of the spectrum, at least one court has refused to give any effect to a forum selection agreement on the grounds that only one of six defendants was a party to the forum agreement.²⁵⁴

Poor drafting and difficult issues of interpretation are not unique to forum selection agreements. Forum selection agreements, however, have spawned more than their share of these issues, and, more often than in other issues of interpretation, courts seem to be adrift without reliable interpretive guidelines to help chart their course.

251. See, e.g., *Seward v. Devine*, 888 F.2d 957 (2d Cir. 1989) (RICO cause of action not encompassed by agreement); *Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982) (strained interpretation of agreement leads to the conclusion that implied indemnity agreement is not encompassed); *Crown Beverage Co. v. Cerveceria Moctezuma, S.A.*, 663 F.2d 886 (9th Cir. 1981) (agreement construed not to reach Sherman Act claims); *Cessna Aircraft Co. v. Fidelity & Casualty Co.*, 616 F. Supp. 671 (D.N.J. 1985).

252. See, e.g., *Brock v. Entre Computer Centers, Inc.*, 740 F. Supp. 428 (E.D. Tex. 1990); *Grossman v. Citrus Assoc. of N.Y. Cotton Exch., Inc.*, 706 F. Supp. 221 (S.D.N.Y. 1989); *Stephens v. Entre Computer Centers, Inc.*, 696 F. Supp. 636 (N.D. Ga. 1988).

253. See, e.g., *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) (bankruptcy-trustee plaintiff bound by forum selection clause because he stands in the shoes of the party to the agreement); *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986) (state law applied; non-parties to agreement cannot be bound); *Moretti & Perlow Law Offices v. Aleet Assoc.*, 668 F. Supp. 103 (D.R.I. 1987) (assignment of rights effective as to forum selection clause); *Consolidated Bathurst, Ltd. v. Rederiaktiebolaget Gustaf Erikson*, 645 F. Supp. 884 (S.D. Fla. 1986) (third-party beneficiary enforcing contract including a forum selection clause is bound by the clause); *Thomas v. Price*, 631 F. Supp. 114 (S.D.N.Y. 1986); *Crescent Corp. v. Proctor & Gamble Corp.*, 627 F. Supp. 745 (N.D. Ill. 1986); *Interpool Ltd. v. Through Transport Mut. Ins. Ass'n*, 635 F. Supp. 1503 (S.D. Fla. 1985) (arbitration agreement; third-party beneficiary is bound by the agreement); *Clinton v. Janger*, 583 F. Supp. 284 (N.D. Ill. 1984) (third-party beneficiary may enforce a forum clause); *Process & Storage Vessels, Inc. v. Tank Service, Inc.*, 541 F. Supp. 725 (D. Del. 1982), *aff'd*, 760 F.2d 260 (3d Cir. 1985) (third-party beneficiary of an agreement seeking to enforce the agreement is bound by the forum clause); *Richardson Eng'g Co. v. International Business Mach. Corp.*, 554 F. Supp. 467 (D. Vt. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982) (a non-party who novates a contract is bound by a forum selection agreement).

254. *Snider v. Lone Star Art Trading Co.*, 659 F. Supp. 1249 (E.D. Mich. 1987).

C. *Transfer Issues*

As discussed above,²⁵⁵ *Stewart* created a dichotomy between enforcement of forum selection agreements by motions to transfer under 28 U.S.C. § 1404 and enforcement by other mechanisms, such as a forum non conveniens motion.²⁵⁶ In the context of a transfer, *Stewart* concluded that a forum selection agreement is only one of several significant factors in evaluating the decision to transfer.²⁵⁷ At least rhetorically, this is a substantially different approach than the *Bremen* heavy-presumption-of-validity principle.²⁵⁸

At least two factors suggest, therefore, that district courts have significantly more leeway to refuse to enforce exclusive forum selection agreements in the transfer context. The first is the *Stewart* formulation itself. By merely making the agreement a factor in the balance, the Court suggested to district courts that something far less than the extreme inconvenience necessary to set aside an agreement under the *Bremen* standards could justify setting aside an exclusive forum selection agreement in the transfer context. The second is that, unlike an order granting a dismissal on jurisdictional or on forum non conveniens grounds, an order granting or denying a transfer under section 1404 is not appealable, unless the appellate court is willing to take the extraordinary step of certifying the matter for interlocutory appeal under 28 U.S.C. § 1292(b) or granting a writ of mandamus.²⁵⁹ This substantial isolation from review might encourage variable approaches among district courts.²⁶⁰

How much more latitude district courts are taking in the transfer context is hard to assess because the body of reported cases is quite small. A fair number of cases involving exclusive forum selection clauses simply grant or deny transfer, depending upon whether the court hearing the motion is the designated forum.²⁶¹ There are, how-

255. See *supra* notes 129-32 and accompanying text.

256. See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 4 (1972).

257. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28-29 (1988).

258. *Bremen*, 407 U.S. at 15.

259. See Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 472-78 (1990).

260. See Comment, *Appealability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument Against "Canceling Out" The Bremen*, 57 FORDHAM L. REV. 463, 464 (1988) (denying immediate appeal of denial of motions to dismiss under the *Bremen* standards threatens equal application of standards). But see *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989) (denying collateral final order status to orders denying dismissal pursuant to forum selection agreements; effectively rejecting *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir. 1983)).

261. See, e.g., *Page Constr. Co. v. Perini Constr. Co.*, 712 F. Supp. 9 (D.R.I. 1989); *Advent Elec., Inc. v. Samsung Semiconductor, Inc.*, 709 F. Supp. 843 (N.D. Ill. 1989); *Stephens v. Entre*

ever, some remarkable counterexamples. Most notably, on remand from *Stewart*, the United States District Court for the Northern District of Alabama, though purporting to obey the command from the Supreme Court to give the clause “significant” weight, decided it was too onerous for the Alabama party to journey to New York.²⁶² Although the Eleventh Circuit took the unusual step of granting a writ of mandamus to compel the transfer, the notoriety that the case had obtained on its trip to the Supreme Court most likely was a factor in granting the writ.²⁶³ On other occasions, though, district courts—without subsequent appellate intervention—have denied transfers to enforce exclusive forum selection clauses that doubtlessly would have merited enforcement under the *Bremen* standards.²⁶⁴

Another sticky question, unaddressed by *Stewart*, is what, if any, weight to give to a non-exclusive forum agreement in the transfer context. Outside the transfer context the answer is clear. A non-exclusive forum selection agreement does not deny jurisdiction to any forum; thus if the forum has jurisdiction (because of the agreement or for any other reason) it need not defer to any other tribunal. This would suggest that non-exclusive forum selection clauses should not be a factor in the transfer decision—except in the trivial respect that the transferee court must have jurisdiction over the case²⁶⁵—and some courts have taken this tack.²⁶⁶ Some courts, however, have given non-exclusive forum selection clauses approximately the same weight due exclusive forum selection clauses under *Stewart*.²⁶⁷ This latter approach, by confusing exclusive and non-exclusive forum agreements, may be partly responsible for the general lack of understanding of their differ-

Computer Centers, Inc., 696 F. Supp. 636 (N.D. Ga. 1988); Paul v. International Precious Metals Corp., 613 F. Supp. 174 (S.D. Miss. 1985). But cf. Moses v. Business Card Express, Inc., 929 F.2d 1131 (6th Cir. 1991) (questioning propriety of transferring on the basis of a forum selection clause without full investigation of all relevant factors).

262. *Stewart Org., Inc. v. Ricoh Corp.*, 696 F. Supp. 583 (N.D. Ala. 1988).

263. *In re Ricoh Corp.*, 870 F.2d 570 (11th Cir. 1989). Thus, on the sixth try, the Ricoh Corporation finally got its clause enforced.

264. See *Nelson v. Master Lease Corp.*, 759 F. Supp. 1397 (D. Minn. 1991) (denying transfer in a sex discrimination case on the basis of a forum selection clause contained in an employment contract); *Hoffman v. Minuteman Press Int'l, Inc.*, 747 F. Supp. 552 (W.D. Mo. 1990); *Fibra-Steel, Inc. v. Astoria Indus., Inc.*, 708 F. Supp. 255 (E.D. Mo. 1989).

265. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

266. See, e.g., *Kachal, Inc. v. Menzie*, 738 F. Supp. 371 (D. Nev. 1990); *Sterling Forest Assoc. v. Barnett-Range Corp.*, 673 F. Supp. 1394 (E.D.N.C. 1987), *rev'd on other grounds*, 840 F.2d 249 (4th Cir. 1988); *National Union Fire Ins. Co. v. Steckler*, 657 F. Supp. 930 (S.D.N.Y. 1987); *Credit Alliance Corp. v. Crook*, 567 F. Supp. 1462 (S.D.N.Y. 1983); *Coface v. Optique du Monde, Ltd.*, 521 F. Supp. 500 (S.D.N.Y. 1980).

267. See, e.g., *Heller Fin., Inc. v. Shop-A-Lot, Inc.*, 680 F. Supp. 292 (N.D. Ill. 1988); *Heller Fin., Inc. v. Nutra Food, Inc.*, 655 F. Supp. 1432 (N.D. Ill. 1987).

ences evidenced in contract drafting.²⁶⁸ At a minimum, the divergent approaches shown by district courts in the transfer context are good evidence that *Stewart* created problems that did not exist before.

D. Subject Matter Jurisdiction Issues

Another set of problems, largely untouched by the Supreme Court, relates to subject matter jurisdiction. It is quite clear that parties may not, by agreement, create subject matter jurisdiction in courts of limited subject matter jurisdiction.²⁶⁹ Because the federal courts are courts of limited jurisdiction, an agreement to litigate a case in federal court without some basis for subject matter jurisdiction, such as diversity of parties or the presence of a federal question, is clearly void.²⁷⁰

The more interesting question is whether, in matters in which the state and federal courts have concurrent jurisdiction, the parties can make an enforceable agreement to litigate in one or the other of those courts. The Supreme Court's original answer was that the parties may not make such an agreement. As noted above,²⁷¹ in *Insurance Co. v. Morse*,²⁷² the Supreme Court held that a Wisconsin statute extracting the consent of insurance companies doing business in Wisconsin was invalid. *Morse* relied on the ouster rationale,²⁷³ subsequently discredited by *Bremen*. *Bremen* treated *Morse* gingerly, however, observing in a footnote that *Morse* presented a question of "an unconstitutional condition on the exercise of the federal right of removal,"²⁷⁴ an issue not raised in *Bremen*.

There are occasional suggestions in the cases²⁷⁵ and the commentary²⁷⁶ that the federal courts are reluctant to hold that the parties can contract away their subject matter jurisdiction, especially when obtained by removal from state court. Courts do have a mild preference for finding that ambiguous references to the courts of a state also refer to the federal courts sitting within the state, and avoiding the issue.²⁷⁷ But most often courts hold that the right to elect between

268. See *supra* notes 228–37 and accompanying text.

269. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 398 (1975).

270. C. WRIGHT, *supra* note 177, at 22–26.

271. See *supra* notes 29–34 and accompanying text.

272. 87 U.S. (20 Wall.) 445 (1874).

273. *Id.* at 451.

274. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 n.10 (1972).

275. See, e.g., *Zimmerman Metals, Inc. v. United Eng'rs & Constructors, Inc.*, 720 F. Supp. 859 (D. Colo. 1989); *John's Insulation, Inc. v. Siska Constr. Co.*, 671 F. Supp. 289, 294–95 (S.D.N.Y. 1987) (agreement to "commence" action in state court does not preclude removal).

276. See Mullenix, *supra* note 2, at 344–46.

277. See *supra* notes 238–48 and accompanying text.

state and federal courts with concurrent jurisdiction is the subject of bargaining, and the parties' choice will not be set aside unless the agreement is void under the *Bremen* standards.²⁷⁸ Nonetheless, *Bremen's* hint that subject matter jurisdiction might be special, coupled with occasional case authority evincing reluctance to allow parties to bargain away their right to federal court access, holds the possibility of litigant and judicial confusion.

E. The Reasonableness Test

Bremen set forth several different bases for concluding that a forum selection agreement might be invalid. Unlike most of the other issues discussed, the Supreme Court has spoken again on this topic. The Court's vehicle, as discussed above, was the *Carnival Cruise* case.²⁷⁹ The question here is more fundamental: is there anything left of the reasonableness test articulated by the Court in *Bremen*?

One basis for setting aside an agreement, not addressed in *Carnival Cruise*, is the group of standard contract defenses including fraud and duress.²⁸⁰ Many dicta, but few holdings, suggest that forum agreements obtained by fraud or duress are unenforceable.²⁸¹ These defenses apply narrowly in the context of forum agreements. In *Scherk*, the Supreme Court concluded that in the arbitration context, fraud or duress must be shown as to the forum agreement itself.²⁸² Thus if the forum agreement is one clause in a larger agreement, an allegation of invalidity as to the larger agreement will not act as a

278. See, e.g., *Seward v. Devine*, 888 F.2d 957 (2d Cir. 1989); *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989); *Karl Koch Erecting Co., v. New York Convention Center Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4 (1st Cir. 1984); *Fireman's Fund Am. Ins. Co. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974); *American Performance, Inc. v. Sanford*, 749 F. Supp. 1094 (M.D. Ala. 1990); *Ritchie v. Carvel Corp.*, 714 F. Supp. 700 (S.D.N.Y. 1989); *Medical Legal Consulting Serv., Inc. v. Covarrubias*, 648 F. Supp. 153 (D. Md. 1986); *Grissom v. Colotti*, 644 F. Supp. 903 (D.P.R. 1986); *Cessna Aircraft Corp. v. Fidelity & Casualty Co.*, 616 F. Supp. 671 (D.N.J. 1985); *Intermountain Sys., Inc. v. Edsall Constr. Co.*, 575 F. Supp. 1195 (D. Colo. 1983); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071 (W.D. Mo. 1979); *Spatz v. Nascone*, 368 F. Supp. 352 (W.D. Pa. 1973).

279. See *supra* notes 144-67 and accompanying text.

280. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

281. See, e.g., *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988) (arbitration agreement); *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986); *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984); *Ritchie v. Carvel Corp.*, 714 F. Supp. 700 (S.D.N.Y. 1989); *Stephens v. Entre Computer Centers, Inc.*, 696 F. Supp. 636 (N.D. Ga. 1988).

282. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974).

defense to the forum selection. Lower federal courts have transported the requirement of showing fraud or duress as to the clause from the arbitration context to the context of traditional forum selection agreements.²⁸³ Thus, to avoid the effect of a forum selection agreement, a party must show that unusual circumstances exist, for example that the other party fraudulently altered the memorial of the contract to insert the forum selection clause.²⁸⁴

Another basis for invalidating a forum selection agreement under the *Bremen* principles is the lack of actual negotiation and the existence of "overweening bargaining power."²⁸⁵ *Carnival Cruise*, however, rejected this as a defense altogether. From the standpoint of showing an inequality of bargaining power and a lack of actual negotiation, *Carnival Cruise* offers appealing facts for setting aside the agreement. As Judge Posner, speaking of the Ninth Circuit's opinion in *Carnival Cruise*, noted: "If there ever was a case for stretching the concept of fraud in the name of unconscionability, it was [*Carnival Cruise*]; and perhaps no stretch was necessary."²⁸⁶ Moreover the factors substituted for analysis of the bargaining strength of the parties are sure to result in validation of nearly every conceivable agreement.²⁸⁷ The Supreme Court's refusal to invalidate the *Carnival Cruise* agreement, therefore, signalled that the adhesive nature of a contract is no longer a defense to enforcement of a forum selection agreement.²⁸⁸

283. See *supra* note 281.

284. Cf. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (Posner, J.) (party has a duty to read a contract before signing; ignorance of forum selection clause if visibly contained in the written memorial is no defense; "The print is small, but it is not fine; it is large enough that even the pale copies in the appendix on appeal can be read comfortably by the author of this opinion, with his heavily corrected middle-aged eyesight.").

285. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

286. *Northwestern Nat'l*, 916 F.2d at 376.

287. See *supra* notes 153-55 and accompanying text for discussion of the factors.

288. Before *Carnival Cruise*, opinions occasionally struck down forum selection agreements for lack of bargaining or as an adhesive contract. See, e.g., *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380 (9th Cir. 1984); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756 (E.D. Va. 1986) (arbitration agreement); *Galli v. Travelhost, Inc.*, 603 F. Supp. 1260 (D. Nev. 1985); *Couch v. First Guar. Ltd.*, 578 F. Supp. 331 (N.D. Tex. 1984); *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011 (S.D. W. Va. 1976) (collateral attack to judgment). This argument, however, though often raised, was seldom successful. See, e.g., *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990); *Heller Fin., Inc. v. Midwhay Powder Co.*, 883 F.2d 1286 (7th Cir. 1989); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988) (forum selection agreement on the back of a cruise ticket enforced), *cert. dismissed*, 490 U.S. 1001 (1989); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066 (8th Cir. 1986); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984); *Lien Ho Hsing Steel Enter. Co. v. Weihtag*, 738 F.2d 1455 (9th Cir. 1984); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315 (4th Cir. 1982); *L.A. Pipeline*

Finally, *Bremen* suggested that “serious inconvenience of the contractual forum” that “will for all practical purposes . . . [deprive a party of its] day in court”²⁸⁹ would be grounds for invalidating the agreement. Whether or not *Carnival Cruise* changed the law in this regard is difficult to evaluate. The *Carnival Cruise* majority showed no great sympathy for the Shutes’ contention that Florida was an inconvenient forum. The majority rejected the Ninth Circuit’s conclusion that the Shutes would be financially incapable of pursuing the case in Florida, tersely noting that the district court had made no such finding.²⁹⁰ Moreover, Florida was a rational choice from Carnival’s standpoint because its principal offices are located there.²⁹¹

The implication of the majority’s discussion is that if the party seeking enforcement had some cogent reason for choosing the contractual forum at the time that the contract was formed, that choice will be honored. As a rhetorical matter, this was a shift from *Bremen*, which suggested that the test for inconvenience was far more fact-specific and objective than the line of inquiry pursued by the *Carnival Cruise* majority. As a practical matter, though, this probably does not represent a substantial shift from post-*Bremen* case law. Although the “inconvenience” argument has been often raised in lower federal courts, it has been rejected routinely, with courts approving a wide variety of domestic and foreign fora.²⁹²

Constr. Co. v. Texas E. Prod. Pipeline Co., 699 F. Supp. 185 (S.D. Ind. 1988); *Stephens v. Entre Computer Centers, Inc.*, 696 F. Supp. 636 (N.D. Ga. 1988); *Everett v. Carnival Cruise Lines, Ltd.*, 677 F. Supp. 269 (M.D. Pa. 1987) (forum selection agreement on the back of a cruise ticket enforceable because the passengers had the tickets for two to three weeks prior to the cruise); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987) (forum selection agreement on the back of a cruise ticket is enforceable); *Dukane Fabrics Int’l, Inc. v. M.V. Hreljin*, 600 F. Supp. 202 (S.D.N.Y. 1985); *D’Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708 (D.R.I. 1983); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868 (D. Minn. 1980).

289. *Bremen*, 407 U.S. at 17–18.

290. *Carnival Cruise Lines, Ltd. v. Shute*, 111 S. Ct. 1522, 1528 (1991).

291. *Id.*

292. See, e.g., *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285 (5th Cir. 1989) (Saudi administrative tribunal is an adequate alternative forum); *Commerce Consultants Int’l, Inc. v. Vetrerie Riunite, S.p.A.*, 867 F.2d 697 (D.C. Cir. 1989) (Italy is an adequate alternative forum); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066 (8th Cir. 1986) (West Germany is a reasonable alternative forum); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984) (California is a reasonable forum notwithstanding the fact that the witnesses are on the East Coast); *Crown Beverage Co. v. Cervecería Moctezuma, S.A.*, 663 F.2d 886 (9th Cir. 1981) (Mexico is acceptable alternative forum); *Republic Int’l Corp. v. Amco Engineers, Inc.*, 516 F.2d 161 (9th Cir. 1975) (Uruguay is a reasonable alternative forum); *Ernst v. Ernst*, 722 F. Supp. 61 (S.D.N.Y. 1989) (France is a reasonable alternative forum); *Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik GmbH*, 718 F. Supp. 886 (M.D. Ala. 1989); *Damigos v. Flanders Compania Naviera, S.A.—Panama*, 716 F. Supp. 104 (S.D.N.Y. 1989) (Greece is an acceptable alternative forum); *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653 (M.D. Ala. 1987) (Labor Commission of Saudi Arabia is a reasonable alternative forum); *Ronar*,

One variant of the unreasonable forum argument, however, should survive *Carnival Cruise*. In some instances parties have agreed to a forum, and then circumstances have changed so severely that the forum would undoubtedly be less fair to the party than when the contract was formed. Most commonly this has occurred if the parties, prior to the Iranian revolution in 1979, contracted to have cases heard in the Iranian courts. In this circumstance, lower federal courts usually have released parties from their obligation to litigate in Iran.²⁹³ There is no reason that this sensible doctrine should not survive *Carnival Cruise*.

Accordingly, very little of the reasonableness test set forth in *Bremen* remains. Although occasionally a forum selection agreement may be unenforceable—for instance a true case of fraud or genuinely changed circumstances—the vast majority of agreements that are governed by *Carnival Cruise* must survive under its approach.

Inc. v. Wallace, 649 F. Supp. 310 (S.D.N.Y. 1986) (West Germany is an adequate alternative forum); Warner & Swasey Co. v. Salvagnini Transferica S.p.A., 633 F. Supp. 1209 (W.D.N.Y. 1986) (Italy is a reasonable alternative forum for a patent action); Santamauro v. Taito do Brasil Industria E Comercio Ltda., 587 F. Supp. 1312 (E.D. La. 1984) (Brazil is a reasonable alternative forum). But see Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft MbH, 699 F. Supp. 669 (N.D. Ill. 1988) (West Germany is an unreasonable forum because German courts will not as effectively enforce Sherman Act claims); Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474 (D.N.J. 1977) (stating in dictum that Nationalist China is an unreasonable alternative forum); Copperweld Steel Co. v. Demag-Mannesmann-Boehler, 347 F. Supp. 53, 55 (W.D. Pa. 1972) ("obvious impracticality of conducting the litigation in Germany" renders forum agreement unenforceable).

293. See, e.g., McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir.) (unforeseeable changed circumstances in Iran make clause unenforceable because it would be impossible for McDonnell Douglas to litigate in that forum), cert. denied, 474 U.S. 948 (1985); Rockwell Int'l Sys., Inc. v. Citibank, N.A., 719 F.2d 583 (2d Cir. 1983) (unforeseeable changed circumstances in Iran make clause unenforceable); Continental Grain Export Corp. v. Ministry of War-Etka Co., 603 F. Supp. 724 (S.D.N.Y. 1984). But see National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326 (5th Cir.) (no changed circumstances because clause entered into in 1979 when impossibility of American participation in proceedings was foreseeable because of Islamic revolution in which National Iranian had participated; however, practical effect of decision is to leave Iranian corporation without a remedy), cert. denied, 484 U.S. 943 (1987). See generally Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1, 6 (1984); Comment, *Mandatory Forum Selection Clauses and Foreign Sovereign Immunity: Iran's Litigation Problems in United States Courts*, McDonnell Douglas Corp. v. Islamic Republic of Iran, 12 BROOKLYN J. INT'L L. 553, 574-76 (1986); Comment, *National Iranian Oil Co. v. Ashland Oil, Inc.: All Dressed up and Nowhere to Arbitrate*, 63 N.Y.U. L. REV. 1142, 1164-65 (1988) (criticizing *National Iranian's* holding that the Iranian revolution was foreseeable at the time of contracting); Note, *Changed Circumstances and the Iranian Claims Arbitration: Applications to Forum Selection Clauses and Frustration of Contract*, 16 GEO. WASH. J. INT'L L. & ECON. 335 (1982).

IV. CONGRESSIONAL REFORM

The preceding part is not, of course, a complete canvass of all the issues that have ever been litigated in the federal courts with regard to forum selection agreements. The survey of the salient issues does, however, provide a basis for formulating a program for comprehensive statutory reform.

A. The Need for Congressional Reform

Before taking up the question of what route congressional reform should take, there is the more fundamental issue of whether any statutory action is necessary. Arguably, in an area that has developed largely as a matter of federal common law, the burden of persuasion is on those who wish to invoke congressional action. There is thoughtful commentary arguing that better-reasoned opinions hold the key to fair and predictable results as to the enforcement of forum selection agreements.²⁹⁴

Nevertheless, several factors clearly point towards a need for congressional action. The first is the sheer number of unresolved issues. As the preceding part demonstrates, there are at least five major groups of issues upon which there is conflict.²⁹⁵ Within those five groups multiple matters remain unsettled. It is quite unlikely that even if the Supreme Court takes several cases on this topic in the next few years it will resolve all of them. Unresolved issues are not in and of themselves objectionable, but they are nettlesome in this context. The rationale for making forum selection a matter of bargaining is that it is a right of some estimable value.²⁹⁶ Allowing it to become the subject of bargaining does not injure non-parties to the agreement and avoids the unacceptable transaction costs of litigating convoluted jurisdictional doctrine.²⁹⁷

Fundamental unresolved issues, however, drain the life out of this rationale. Difficult questions of, for instance, whether state or federal law govern enforcement, make it much more difficult to estimate the economic value of the agreement, because whatever value it has to the contracting party must be discounted by the probability that the agree-

294. Mullenix, *supra* note 2, at 305, 366-72; cf. Casenote, *The Enforcement of Forum Selection Provisions in International Commercial Agreements: M/S Bremen v. Zapata Off-Shore Co.*, 11 COLUM. J. TRANSNAT'L L. 449, 459 (1972) ("danger" that *Bremen* will lead to congressional intervention).

295. See *supra* notes 198-293 and accompanying text.

296. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990); Juenger, *supra* note 1, at 50.

297. See Borchers, *supra* note 10, at 103.

ment will not be enforced. Beyond that, the presence of these difficult questions greatly increases the transaction costs by encouraging complicated litigation with layer upon layer of appellate review.²⁹⁸

Thus, as long as forum selection agreements remain partially in limbo, they will necessarily have less than maximal social utility. A statute, therefore, as long as it is reasonably clear and does not create more problems than it solves, is desirable. Of course, the common law process might possibly lead down the road of certainty and clarity. However, in *Stewart* and *Carnival Cruise*, the Court demonstrated its penchant to raise more issues than it resolves,²⁹⁹ strongly suggesting that congressional action is the safer route.

Second, setting aside the questions of clarity and certainty, *Carnival Cruise* showed that the Court is headed in the wrong direction. The justification for enforcing forum selection agreements extends only insofar as the contracting parties have access to enough information to understand the economic significance of the agreement and the transaction is of sufficient magnitude that it is likely the parties will bargain and thereby distribute the benefits and burdens between them. *Bremen* recognized that there is some line, though perhaps indistinct, beyond which forum selection agreements are transformed from instruments of economic freedom to instruments of economic oppression.³⁰⁰ Wherever that line is, the *Carnival Cruise* agreement was clearly on the economic oppression side of it. In making a decision as to which cruise package to purchase, a consumer is in a position to compare the salient features such as price, the duration and the destinations. But to ask a consumer to make a reasoned judgment as to the economic benefits and burdens of competing forum selection clauses strains reality. Only the rare consumer appreciates the clauses' significance. Unlike larger transactions, it is not economically rational for a consumer of a vacation cruise to seek professional advice as to the significance of the forum clause. Thus, as a basic matter of fairness, the doctrine is in need of repair, and the Court's recent decisions make clear that any repair will have to come from Congress.

Third, congressional action is more likely to produce solutions that are clear without seriously compromising fairness. Legislation is inherently more capable of drawing sharp lines, such as rendering forum selection clauses void if included in a contract below a thresh-

298. See, e.g., *Stewart Org. v. Ricoh Corp.*, 713 F. Supp. 1419 (N.D. Ala. 1989) (clause finally enforced after six rounds of litigation).

299. See *supra* notes 19-23 and accompanying text.

300. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

old value³⁰¹ or in an employment contract.³⁰² The economic concerns at stake are more susceptible of legislative evaluation. Judicial doctrine, even if acceptable from a fairness standpoint, depends upon case by case resolution for its ultimate content, and thus must sacrifice clarity. While lack of clarity is not always objectionable, it is problematic in this context.

Fourth, forum selection has been the topic of legislative action before. Determining whether those efforts have been a success is a complex evaluative process that need not detain us here. Some legislation, such as the Federal Arbitration Act (FAA)³⁰³ and the Brussels Convention on the Recognition of Enforcement of Judgments³⁰⁴ enjoy good reputations. Other legislation, such as the Model Choice of Forum Act,³⁰⁵ which was adopted by only four states and subsequently withdrawn,³⁰⁶ and the Hague Convention, which was never ratified,³⁰⁷ have had less influence. But the fact that there have been prior legislative efforts contributes to the basic understanding of the subject and suggests various routes that contemplated reform might take.

B. *A Proposal for Congressional Action*

It is one thing to state in the abstract that congressional action is desirable. It is entirely another to attempt to formulate a workable solution. In the appendix to this Article, a statutory proposal is set forth in full. The following defends and offers an explanation of the proposed statute.

1. *Scope*

The proposed statute applies to any agreement evidenced by a writing to litigate a dispute in any forum. Forum is defined broadly in

301. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989).

302. See, e.g., 9 U.S.C. § 1 (1988).

303. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305-06 (1985) ("Arbitration is once again in vogue. In the last three years, the Court has fulfilled the promise of its earlier decision and dramatically expanded the ambit of the FAA.").

304. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1207-08 (1984).

305. MODEL CHOICE OF FORUM ACT (1968), reprinted in 17 AM. J. COMP. L. 292 (1969).

306. W. REESE, M. ROSENBERG & P. HAY, CONFLICT OF LAWS: CASES AND MATERIALS 184 (9th ed. 1990); Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 594 (noting withdrawal in 1975 of Model Choice of Forum Act).

307. Hague Convention on the Choice of Court, opened for signature Nov. 25, 1965, 4 I.L.M. 348.

section 1(b) to include all dispute resolving bodies except for arbitrators and arbitration panels. The reason for excluding arbitration is that it is already the subject of the FAA as well as the 1957 New York Convention.³⁰⁸ The same section also excludes agreements to confess judgment and similar agreements because of their draconian nature and the general trend against their enforcement.³⁰⁹

Section 2 of the proposed statute makes clear that it applies only to federal court actions. There are several reasons for this. First, the need for forum selection agreements is greatest in interstate and international disputes, which often present some basis for federal jurisdiction. Second, as discussed above, several vexing issues peculiar to the federal courts are in need of resolution.³¹⁰ Attempting to draft a proposal applicable to state courts would mean ignoring these problems and thereby diminishing the efficacy of the proposed solution. Third, changes in federal doctrine in this area spur state reform, as demonstrated by widespread state court adoption of the *Bremen* principles.³¹¹

Section 2 also makes clear that the same standards apply to all federal court actions, regardless of the basis for subject matter jurisdiction. Congress clearly has the power to pass such a statute.³¹² This does not answer the question, however, of whether it is wise to have uniform rules applicable for all jurisdictional bases in federal court actions. Justice Scalia argued in dissent in *Stewart*,³¹³ and some commentators have agreed,³¹⁴ that the risk of intrastate forum shopping caused by different state and federal standards requires federal court deference to state standards, at least in diversity cases.

This argument, however, overlooks the fact that preventing intrastate forum shopping only encourages interstate forum shopping. As long as the states have different rules on this subject, sophisticated litigants will travel to the state in which the law is most favorable. The only way to discourage interstate forum shopping is to develop uniform rules that transcend state lines. Requiring all federal courts to adhere to the same rule is a substantial step in this direction. Moreover, the likelihood of the existence of federal subject matter jurisdic-

308. See *supra* notes 79-97 and accompanying text.

309. See Reese, *supra* note 23, at 195 (rationale for excluding from the Model Choice of Forum Act).

310. See *supra* notes 198-227, 269-78 and accompanying text.

311. See *supra* note 77.

312. In fact, this is one of the holdings of *Stewart*. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

313. *Id.* at 39-40 (Scalia, J., dissenting).

314. See, e.g., Freer, *supra* note 6, at 1123-24; Mullenix, *supra* note 2, at 337-38.

tion in interstate and international disputes means that relatively few of these cases will remain in the state courts. Thus a uniform federal rule, not deference to the state rules, is the route to uniformity and litigant fairness.

Section 5 of the proposed statute states that it applies notwithstanding the existence of a choice-of-law clause designating some other law to govern the rest of the contract. The risk is that the parties will designate some law that voids the forum selection clause, thus making it unclear whether the forum clause should be enforced.³¹⁵ The better-reasoned cases on this subject point out that it is highly unlikely that the parties intended to write the forum selection clause in and out of the contract in the same breath.³¹⁶ The proposed statute requires application of forum law, while making clear that the choice-of-law clause remains effective for other purposes. This approach does not limit party autonomy. If the parties do not wish to make a forum selection agreement, they need not. Section 5, therefore, simply removes a trap for the unwary.

Finally, section 2 excludes bankruptcy actions from the statute's reach. There are a couple of reasons for this. First, the cases on the effectiveness of forum selection agreements in the bankruptcy context are in conflict, and depend upon technical matters such as the context in which the matter arises and whether it is the bankruptcy trustee or a creditor seeking enforcement.³¹⁷ Second, commentators have noted that forum selection agreements in bankruptcy actions are in tension with the principle of providing a single forum to adjudicate and dispose of the estate.³¹⁸ This is not to suggest that some statutory solution is not appropriate in bankruptcy matters, only that these matters probably should not be painted with the same brush as other federal court actions.

315. *See supra* notes 222–27 and accompanying text.

316. *See, e.g.,* Bense v. Interstate Battery Sys., 683 F.2d 718, 722 (2d Cir. 1982).

317. *See, e.g.,* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989) (forum selection clause enforceable in non-core adversary bankruptcy proceedings; trustee-plaintiff bound by the clause because he stands in the shoes of the party to the contract); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir. 1983) (forum selection clause enforceable by creditor in bankruptcy proceeding); Societe Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 Bankr. 606 (D. Mass. 1987) (arbitration clause enforceable in adversary proceeding); Coar v. Brown, 29 Bankr. 806 (N.D. Ill. 1983) (arbitration clause not enforceable in bankruptcy matters); *In re* Brookhaven Textiles, Inc., 21 B.R. 204 (Bankr. S.D.N.Y. 1982) (same).

318. *See, e.g.,* Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 596–97 (1983).

2. *Issues of Interpretation*

Sections 1(d), 3, and 4 relate to issues of interpretation.³¹⁹ Section 3(a) generally requires a reasonable interpretation of an agreement, while the rest of the section provides more specific guidance. Section 3(b)(1) creates a presumption in favor of interpreting a forum selection agreement as an exclusive forum selection agreement. This codifies the majority approach on the theory that in doubtful cases an exclusive forum selection agreement probably effectuates the parties' intentions.³²⁰ Of course, nothing prevents the parties from making a non-exclusive forum agreement, as long as the agreement is reasonably clear to that effect.

Section 3(b)(2) creates a presumption that a reference to the courts of some geographical area or political entity is a reference to all courts having subject matter jurisdiction in that area or within that political entity. Again, this codifies the majority approach and is most likely to give reasonable effect to the intentions of the parties by avoiding subject matter jurisdiction problems.³²¹ Section 3(b)(3) also endeavors to avoid subject matter jurisdiction problems by selecting a reasonable alternative forum in the event that the parties designate only courts that lack competence to decide the case. So, for instance, if the parties enter into an exclusive forum selection agreement designating a state court for an action that is a matter of exclusive federal jurisdiction, section 3(b)(3) designates a reasonable alternative forum, in this case, the federal court embracing that state court. If the matter is one that cannot be brought in a single forum for reasons of subject matter jurisdiction,³²² section 3(b)(3) requires designation of the most reasonable multiple fora.

Section 1(d) creates a presumption that all claims which have a common nucleus of operative fact are encompassed by the forum agreement. This is the majority approach,³²³ which is eminently sound. Bringing claims with a transactional relationship within the reach of the agreement most probably accords with the reasonable expectations of the parties, and avoids in most instances the inefficiency of having litigation spread across fora.

Section 4 addresses the problem of non-parties to the agreement who are parties to the litigation. The proposed statute takes the mod-

319. See *supra* notes 231-54 and accompanying text.

320. See *supra* notes 233-34 and accompanying text.

321. See *supra* note 238 and accompanying text.

322. See, e.g., *Finley v. United States*, 490 U.S. 545 (1989).

323. See *supra* notes 249-51 and accompanying text.

erate route among the divergent approaches of the courts. The statute provides that non-parties to the agreement are bound by the agreement only if they would be bound under the contract rules ordinarily applicable in commercial transactions.³²⁴ Thus, a party that is a third-party beneficiary of a contract including a forum clause may enforce and must be bound by the clause, but a party to the litigation who just happens to have co-parties that entered into a forum agreement is not bound. This avoids the unfairness and analytical difficulties inherent in binding a person to an agreement that he or she did not make and from which he or she has received no benefit. Section 4 addresses the potential inefficiency of having litigation in different fora by making clear that the district court's power to transfer an action under 28 U.S.C §§ 1404 and 1406 is not affected. Thus, if under the forum agreement, some of the parties to the litigation will be proceeding before another district court, section 4 allows for the transfer of the other parties if it would be justified under section 1404 or section 1406.

3. *Enforcement*

Much of the proposed statute addresses the problems created by having a variety of different mechanisms for enforcing forum selection agreements and the variable standards of enforcement. Several provisions in the proposal address these problems.

Section 2 provides that the proposal is the exclusive means for enforcing forum selection agreements in the federal courts. This eliminates the *Stewart* problem of variable standards by making the standards of the proposed statute uniformly applicable.

Section 6 covers the specifics of enforcement. Section 6(a) forbids the district court from dismissing a case for lack of personal jurisdiction or defect of venue if the court is one of the designated fora in an exclusive forum agreement, or, in the case of a non-exclusive forum agreement, if the forum has personal jurisdiction and venue. Section 6(a) also provides that if other district courts are proper fora, the district court may transfer the case to one of those other district courts. So, for instance, if the forum agreement is an exclusive forum agreement that points to more than one district court, the district court may transfer the case to one of those other district courts if transfer would be justified under section 1404. Similarly, if the forum selection agreement is a non-exclusive forum agreement, section 6(a) allows for transfer to another district court that has jurisdiction and venue, provided that transfer would be justified under section 1404.

324. See *supra* notes 252–54 and accompanying text.

Section 6(b) covers instances in which the district court is not a proper forum. If the case was removed from a state court that was a proper forum, and the district court is not a proper forum, section 6(b)(1) requires remand to the state court. This accords with the majority approach and endorses the position that access to federal court in cases of concurrent jurisdiction is a right that can be bargained away, as are other choices regarding forum.³²⁵

Section 6(b)(2) covers instances in which the district court is not a proper forum, but some other district court is a proper forum. In these circumstances, section 6(b)(2) provides for transfer, in a manner like that provided for in section 1404 and section 1406, to some other district court that is a proper forum. The reason for adopting a transfer approach is that it prevents problems with the statute of limitations caused by requiring the plaintiff to refile. Section 6(b)(2) also adopts the section 1406 rule that the transferee court applies its own choice-of-law rules, and ignores those of the transferor court.³²⁶ This avoids law shopping, that is, the party filing in an obviously improper forum to take advantage of its substantive law, knowing that the action will ultimately be transferred to a forum with a less favorable law.³²⁷

Section 6(b)(3) covers instances in which the district court is not a proper forum and no other district court is a proper forum. This occurs, for instance, in the case of an exclusive forum agreement pointing to the courts of a foreign nation or some state court. In these circumstances, the proposed statute requires dismissal of the case. Section 7, however, allows the dismissal to be conditional, in the manner of a forum non conveniens dismissal. Thus, the district court has the power to require the moving party to waive the defense of limitations³²⁸ and accept service in the refiled action in a reasonable manner. Section 7 also endorses the sensible rule that in some circumstances the district court may find it just to retain any attachment obtained in order to secure any foreign judgment ultimately obtained.³²⁹

325. See *supra* notes 271-78 and accompanying text.

326. *Nelson v. International Paint Co.*, 716 F.2d 640 (9th Cir. 1983). But cf. *Ferens v. John Deere, Inc.*, 110 S. Ct. 1274, 1280-81 (1990) (§ 1404 transfer by defendant); *Van Dusen v. Barrack*, 376 U.S. 612, 637-39 (1964) (§ 1404 transfer by plaintiff).

327. Cf. *Ferens v. John Deere, Inc.*, 110 S. Ct. 1274 (1990) (plaintiff who makes a transfer motion under § 1404 is entitled to the benefit of the law of the transferor forum).

328. See, e.g., *Santamauro v. Taito do Brasil Industria e Comercia Ltda.*, 587 F. Supp. 1312 (E.D. La. 1984); *Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrows, S.A.*, 493 F. Supp. 626 (S.D.N.Y. 1980).

329. See, e.g., *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982) (district court may maintain attachment of ship to enforce any favorable judgment obtained in the English courts); *Teyseer Cement Co. v. Halla Maritime Corp.*, 583 F. Supp. 1268 (W.D. Wash. 1984) (court has discretion to retain attachment except when jurisdiction agreement is

4. *Exceptions to Enforcement*

The problem of which agreements to enforce and which to void is, of course, the heart of the matter. It is this problem that undoubtedly will generate the most controversy in any reform effort, and this area in which a comparison with other solutions may well prove the most valuable.

The problem with the *Carnival Cruise* approach of validating every agreement, no matter how adhesive, is that the economic rationale for validating forum selection agreements breaks down in this context. Weaker parties to small transactions simply do not have access to enough information to evaluate forum selection clauses and the costs of obtaining this information are prohibitively high in relation to the size of the transaction. The difficulty, therefore, is attempting to distinguish those transactions in which enforcement is fair from those in which it is not fair.

The *Bremen* approach is tempting, with its reliance on an ad hoc judgment as to what is fair and what is not. At least two problems with the basic-fairness approach appeared over the years. The first is unpredictable results. In attempting to apply the *Bremen* criteria courts arrived at substantially divergent results.³³⁰ This is problematic because not only does it produce some unacceptable results, it greatly reduces the value of forum selection agreements as a tool of economic planning. The second major problem is that this approach invests a high degree of confidence in judicial competence to distinguish the fair from the unfair. *Carnival Cruise* pointedly demonstrates that any abiding confidence in this respect is misplaced.

There have been several different efforts to address these difficulties. The FAA simply excludes "contracts for employment"³³¹ from its reach. Likewise, German law prohibits enforcement of forum agreements that arise out of "individual labor cases."³³² The Brussels Convention steers a similar course by employing categorical exclusions.

expressly exclusive); *Wijsmuller B.V. v. Tug Benasque*, 528 F. Supp. 1081 (D. Del. 1981); cf. *Sanko Steamship Co. v. Newfoundland Refining Co.*, 411 F. Supp. 285 (S.D.N.Y.) (attachment set aside because of forum selection clause), *aff'd*, 538 F.2d 313 (2d Cir.), *cert. denied*, 429 U.S. 858 (1976); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361 (S.D.N.Y. 1975) (same).

330. See *supra* notes 280-93 and accompanying text.

331. 9 U.S.C. § 1 (1988). Recently, however, the Court has taken an extremely narrow view of this exclusion, requiring in essence that the arbitration agreement be a part of a document that constitutes a memorial of the entire terms of the employment contract. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651 n.2 (1991). The proposed statute rejects this interpretation by stating broadly that its exemption applies to all agreements that "arise[] out of a contract of employment." See *infra* app., § 8(b).

332. Perillo, *supra* note 1, at 165.

Article 12 prohibits enforcement of a forum selection agreement in a contract for insurance unless it is agreed to after the dispute has arisen,³³³ is favorable to the policy-holder,³³⁴ or involves certain types of insurance generally purchased only by businesses.³³⁵ Article 15 of the Brussels Convention also prohibits forum selection agreements in consumer contracts until after the dispute has arisen or unless the agreement is favorable to the consumer.³³⁶ These exclusions are all based on the common-sense proposition that employees, consumers, and policy-holders usually have neither access to information nor the bargaining power to protect themselves from oppressive forum selection agreements.

Another approach can be found in a statute passed recently by the state of New York. That statute endorses forum selection agreements, but only if they "aris[e] out of a transaction covering in the aggregate, not less than one million dollars."³³⁷ Other countries also recognize that forum clauses are inappropriate in relatively small transactions.³³⁸ This recognizes that if the transaction is too small, the relative costs of obtaining information about forum selection agreements are prohibitive.

Other approaches are also possible. The Italian Civil Code requires parties, under some circumstances, to separately sign forum clauses.³³⁹ The separate initial requirement is also employed in the United States for other onerous provisions contained in form contracts.³⁴⁰

There are advantages and disadvantages to each of these approaches, but two types of protection commend themselves. One is the categorical exclusions for consumer, insurance and employment contracts found in the Brussels Convention, the FAA and elsewhere. As noted above, it is unlikely that both parties to such a transaction have access to information for meaningful evaluation of the forum clauses. Accordingly, the justifications for enforcement break down. Thus Sections 8(a)(2) and 8(a)(3) adopt these enforcement exclusions. The other is the "amount of the transaction" standard employed in the New York statute and elsewhere. This recognizes that below a certain point access to information regarding technical matters, such as forum

333. Brussels Convention, *supra* note 23, art. 12.

334. *Id.*

335. *Id.*

336. *Id.* art. 15.

337. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989).

338. Schwind, *supra* note 23, at 169 (Brazilian law).

339. Perillo, *supra* note 1, at 165.

340. *See, e.g.,* R.I. GEN. LAWS § 31-34-7 (Supp. 1990) (requires separate notification and acknowledgement for rental car insurance).

clauses, is prohibitively high in relation to the value of the contract. Thus, section 8(a)(1) forbids enforcement of any forum clause that arises out of a transaction with a value in the aggregate of less than \$50,000.00. The separate initial approach employed for some contracts has the difficulty that it does not get to the root of the problem. Although it may have the effect of putting the contracting party on better notice as to the existence of the forum clause, it does nothing to solve the problems of lack of information and the prohibitive costs of obtaining the information.

There are other exceptions to enforcement in section 8, all of which are less controversial. Section 8(a)(4) preserves the standard contract defenses of fraud, duress, mistake and coercion, and incorporates in section 1(i) the standard commercial law definitions of these terms. Section 8(a)(4) also preserves the requirement that the fraud, duress, coercion or mistake run directly to the clause itself. This recognizes the fact that allowing a defense of fraud as to the whole agreement is intertwined with the merits of the case, and would allow any party to effectively block enforcement of the forum clause simply by alleging fraud.

Section 8(a)(5) preserves the “changed character of the forum” defense recognized in case law.³⁴¹ This recognizes that, as a matter of elementary fairness, a party should not be held to a bargain with adverse consequences beyond the scope of foreseeability. Contract law has long recognized similar principles,³⁴² and there is no reason that this justification should not be applicable here.

Section 8(a)(6) precludes enforcement if the forum clause is intentionally buried in the memorial of the agreement. Thus, if the forum clause is substantially less conspicuous than the other terms of the agreement, the forum clause is void. This preserves the duty of a party to read the contract, but refuses to allow one party to hide the forum clause.

Section 8(c) allows parties to modify forum agreements. Because the proposed statute requires that any forum agreement be in writing, it also requires modification in writing.

Two notable absences are the lack of any generalized unfairness provision or a provision that an agreement designating an inconvenient forum will not be recognized. The drafters of the Model Choice of

341. See *supra* note 293 and accompanying text.

342. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 263 (1981).

Forum Act employed such provisions in that statute,³⁴³ however, a variety of factors make these escape hatches unnecessary and unwise here. First, the Model Choice of Forum Act, unlike the proposed statute, did not employ any categorical exemptions.³⁴⁴ This absence, of course, necessitated the use of some sort of escape route to avoid the oppressive use of forum selection agreements. As the Brussels Convention demonstrates, categorical exemptions, if chosen wisely, can obviate the need for any generalized exceptions to enforcement. Second, generalized exceptions come at the expense of predictability and certainty. The greatest drawback to the *Bremen* principles was that they led to inconsistent application. Codifying such an approach can only lead to the same result. Finally, generalized exceptions invest a great deal of confidence in the wise exercise of judicial discretion, which, as argued above,³⁴⁵ is misplaced. Thus, instead of employing any such generalized exceptions, the proposed statute employs categorical exemptions, and section 8(b) makes clear that these are the exclusive exemptions.

5. *Procedural Matters*

The proposed statute also endeavors to clear up some confusion over various details of the procedure for enforcing forum selection agreements. The odd variety of procedural devices currently employed to enforce forum selection agreements has led to some doubt as to the point in time at which a party seeking to enforce a forum selection agreement must move to enforce before waiving his rights. Some cases have taken the position that such a motion can be made as late as immediately prior to the start of trial,³⁴⁶ while others have concluded that any motion to enforce must be made immediately.³⁴⁷ Consistent with the general federal policy of requiring defenses of jurisdiction and venue to be raised immediately in order to avoid unfairness to litigants,³⁴⁸ section 9(a) of the proposed statute requires a party to raise the matter in its responsive pleading.

Consistent with prompt and economical resolution of the matter, the proposed statute requires early consideration of the forum selec-

343. MODEL CHOICE OF FORUM ACT (1968), reprinted in 17 AM. J. COMP. L. 292, at 295 (1969).

344. *Id.* at 292.

345. See *supra* note 330 and accompanying text.

346. Cf. *Chantier Naval Voisin v. M/Y Daybreak*, 677 F. Supp. 1563 (S.D. Fla. 1988) (waiver by failure to present at the start of trial); *Avant Petroleum, Inc. v. Banque Paribas*, 652 F. Supp. 542 (S.D.N.Y. 1987), *aff'd*, 853 F.2d 140 (2d Cir. 1988).

347. See, e.g., *Queen Noor, Inc. v. McGinn*, 578 F. Supp. 218 (S.D. Tex. 1984).

348. See FED. R. CIV. P. 12(h).

tion agreement. Thus, section 9(a) requires a party to put forward its evidence in support of enforcement when the issue is raised, and section 9(b) allows any party opposing the motion to submit documentary evidence to the contrary. Section 9(e) generally prohibits the use of extrinsic evidence,³⁴⁹ except in the case of attempting to demonstrate an exception to enforcement, as these matters usually demand proof in the form of extrinsic evidence. Section 9(d) requires the District Court to resolve the matter on the basis of documentary evidence, unless there is a material issue of fact that requires live testimony. Also consistent with treating the forum selection agreement as a threshold issue, section 9(d) stays discovery on all issues other than the forum selection agreement.

Finally, section 9(f) of the proposed statute overrules the Supreme Court's decision in *Lauro Lines, S.R.L. v. Chasser*,³⁵⁰ and allows interlocutory appeals from both orders granting and denying enforcement. As noted above,³⁵¹ the hit-and-miss appealability of orders on forum selection agreements and orders on transfer motions has contributed to uneven enforcement. The limited record generated at this early stage of the proceedings prevents the appeals from being too burdensome either for courts or litigants.

V. CONCLUSION

After decades of hostility towards forum selection agreements, American acceptance of forum agreements had a promising start in *Bremen*. *Bremen* adopted a standard of basic fairness for enforcement. Although this indeterminate standard left a large amount of room for judicial discretion, it worked acceptably well because it recognized that the freedom of contract rationale for enforcing forum selection agreements broke down when the transaction was small or the parties lacked access to information to evaluate the value of the forum agreement. Two recent Supreme Court decisions have considerably worsened the state of affairs. In *Stewart* the Court muddled the waters as to those matters in which the *Bremen* principles applied, and created a dual standard that depended upon the procedural mechanism that the party seeking to enforce the agreement employed. More recently, in *Carnival Cruise*, the Supreme Court contorted the fundamental fair-

349. See *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979) (extrinsic evidence not admissible).

350. 490 U.S. 495 (1989).

351. See *supra* notes 259-60 and accompanying text.

ness standard of *Bremen* in such a way as to validate nearly all conceivable forum agreements, no matter how unfair or adhesive.

A comprehensive statute that regulates forum selection agreements in all federal court cases, notwithstanding the basis for subject matter jurisdiction, would resolve the existing confusion. Uniform standards will promote certainty and litigant fairness and resolve the problems created by *Stewart*. The proposed statute generally respects enforcement of forum agreements, but, following other efforts, such as the Brussels Convention and the FAA, creates categorical exemptions for employment contracts, individual insurance contracts, consumer contracts, and forum agreements in which the aggregate consideration for the transaction is less than \$50,000.00. The proposed statute also creates efficient and unitary procedures for enforcement, thus eliminating various sources of confusion and traps for the unwary.

APPENDIX

FORUM SELECTION STATUTE

SECTION 1: *Definitions:*

As used in this Act, the following definitions apply:

- (a) “Forum selection agreement” means any agreement evidenced by a writing to resolve, litigate, mediate or otherwise dispose of any dispute in any forum, except that “forum selection agreement” does not mean any agreement to arbitrate and does not mean any agreement to allow confession of judgment or similar agreement.
- (b) “Forum” means any state court, federal court, court of a foreign nation, administrative body or any other entity or body empowered to resolve disputes, but does not mean any arbitrator or arbitration panel.
- (c) “Party” or “parties” mean any party or parties to a forum selection agreement as defined by subsection (a) of this section.
- (d) “The action” means any dispute or claim between the parties which is encompassed by the forum selection agreement, and, unless the forum selection agreement specifically provides otherwise, any other dispute or claim between the parties that has a common nucleus of operative fact with any dispute or claim encompassed by the forum selection agreement.
- (e) “The district court” means the United States district court in which the action is filed or to which the action is removed from a state court.
- (f) “Exclusive forum selection agreement” means any forum selection agreement that precludes the parties from proceeding on the action before any forum other than the forum or fora before which the parties agreed to proceed.
- (g) “Non-exclusive forum selection agreement” means any forum selection agreement that is not an exclusive forum selection agreement.
- (h) In the case of an exclusive forum selection agreement, “proper forum” means the forum or fora before which the parties agreed to proceed in the forum selection agreement, as interpreted in accordance with section 3 of this Act. In the case of a non-exclusive forum selection agreement, “proper forum” means the forum or fora before which the parties agreed to proceed in the forum selection agreement, as interpreted in accordance with section 3 of this Act, as well as any other forum which has subject matter and

personal jurisdiction over the parties, and in which venue is proper.

- (i) "Fraud," "duress," "coercion," and "mistake" are defined as those terms are generally defined by principles of contract law applicable in commercial transactions.

SECTION 2: *Scope of Application and Enforcement:* This Act applies to any civil case in any United States district court in which the district court has obtained subject matter jurisdiction either as an original matter or upon removal from a state court, except that it does not apply to any action arising under the bankruptcy laws. Subject to the terms, limitations, and exceptions of this Act, and in accordance with the procedures set forth in this Act, any forum selection agreement shall be enforced according to its terms. This Act is the exclusive means of enforcing forum selection agreements.

SECTION 3: *Construction and Interpretation:*

- (a) A forum selection agreement shall be given a reasonable interpretation to effectuate its terms.

- (b) In interpreting a forum selection agreement the district court shall abide by the following provisions:

- (1) Unless a forum selection agreement clearly provides otherwise, a forum selection agreement shall be interpreted to be an exclusive forum selection agreement.

- (2) Unless a forum selection agreement clearly provides otherwise, a reference to a geographical area or political entity shall be interpreted as a reference to all fora having subject matter jurisdiction over the action within that geographical area or political entity.

- (3) In the event that there is no proper forum with subject matter jurisdiction over the entire action, a forum selection agreement shall be interpreted to require that the parties proceed before a reasonable alternative forum having subject matter jurisdiction over the entire action and within reasonable geographical proximity to a proper forum. In the event that there is no reasonable alternative forum with subject matter jurisdiction over the entire action, a forum selection agreement shall be interpreted to allow prosecution of the action in more than one forum in the manner most reasonable under the circumstances.

SECTION 4: *Effect on Non-Parties:* Only parties may enforce and be bound by a forum selection agreement, except that non-parties may enforce and be bound by a forum selection agreement in a manner

consistent with general principles of contract law applicable in commercial transactions and consistent with this Act. With regard to persons or entities that are not parties and are not otherwise bound by a forum selection agreement, nothing in this Act modifies or limits the power of the district court to dismiss or transfer such persons or entities for reasons other than the forum selection agreement.

SECTION 5: *Choice-of-law Provisions:* This Act applies notwithstanding any agreement of the parties with regard to the law governing the action. Nothing in this Act modifies or limits the power of parties to agree to the law governing the action with regard to matters other than the enforcement of a forum selection agreement.

SECTION 6: *Mechanism for Enforcement:*

- (a) If the district court is a proper forum, the district court shall proceed with the action and shall neither dismiss the action for reason of defect of venue or lack of personal jurisdiction, nor shall the district court transfer the action to any other district court that is not a proper forum. Nothing in this subsection limits or modifies the power of the district court to transfer the action, pursuant to section 1404 of Title 28 of the United States Code, to another district court that is a proper forum.
- (b) If the district court is not a proper forum, the district court shall proceed as provided for in this subsection; if:
 - (1) the action was removed from a state court that is a proper forum, the district court shall remand the action to the state court;
 - (2) the action was brought originally in the district court, or was removed from a state court that is not a proper forum, and one or more district courts other than the district court are proper fora, the district court shall transfer the action, in the manner provided for under sections 1404 and 1406 of Title 28 of the United States Code, to one of those district courts that is a proper forum. The transferee district court shall determine the law applicable to the action as if the action had been filed originally in the transferee district court;
 - (3) or, the action was brought originally in the district court, or was removed from a state court that is not a proper forum, and no other district court is a proper forum, the action shall be dismissed in the manner provided for in section 7.

SECTION 7: *Procedure on Dismissal:* In the event that the district court is required to dismiss the action under section 6(b)(3), the district court may condition the dismissal upon such terms as are just,

including, but not limited to, requiring the moving party to waive any defense of limitation upon refiling in a proper forum, preserving any attachment obtained in the district court to secure any final judgment obtained upon refiling in a proper forum against the moving party, and requiring the moving party to accept service upon refiling in a proper forum in a reasonable manner.

SECTION 8: *Exceptions:*

(a) Notwithstanding any other provision in this Act a forum selection agreement is not enforceable if:

(1) the forum selection agreement arises out of a transaction in which the consideration is, in the aggregate, less than \$50,000.00;

(2) the forum selection agreement arises out a contract for the employment of an individual, unless the forum selection agreement is entered into after the dispute has arisen between the parties;

(3) the forum selection agreement arises out of a contract with an individual, not within the scope of that individual's trade or business, for insurance, or for the purchase of goods and services, unless the forum selection agreement is entered into after the dispute has arisen between the parties;

(4) the forum selection agreement itself was the product of fraud, duress, mistake or coercion;

(5) due to unforeseeable events or circumstances beyond the control of the party seeking to avoid enforcement of the forum selection agreement, the proper forum or fora have changed in character so as to make it substantially unjust to require the party seeking to avoid enforcement of the forum agreement to submit to the proper forum or fora;

(6) or, the forum selection agreement is part of a larger agreement and the forum selection agreement is substantially less conspicuous than a substantial portion of the other terms within the written memorial of that larger agreement.

(b) The exceptions to enforcement under subsections (a)(1) through (a)(6) of this section constitute the exclusive exceptions to enforcement of forum selection agreements.

(c) This Act does not prevent the parties from mutually modifying or rescinding any forum selection agreement, provided that any modification or rescission must be in writing.

SECTION 9: *Procedures Before the District Court:*

- (a) Within the time required to file a responsive pleading before the district court, and prior to, or contemporaneously with, the filing any other responsive pleading, a party before the district court wishing to enforce a forum selection agreement shall move under this section to enforce the agreement. Failure to make a timely motion under this section waives that party's right to seek to enforce the forum selection agreement. The motion shall be accompanied by an authenticated copy of the forum selection agreement, any affidavits and any other documentary evidence that the party seeking to enforce the agreement may wish to submit, and shall set forth with particularity the relief sought under this Act.
- (b) Any other party before the district court may oppose the motion and may present evidence in documentary form with such opposition.
- (c) The party seeking enforcement of the forum selection agreement has the burdens of production and persuasion on all matters except for the existence of exceptions to enforcement under section 8 of this Act; as to those exceptions, the burdens of production and persuasion rest with the party resisting enforcement.
- (d) The district court shall rule on the motion on the basis of the evidence submitted with the motion and the opposition, unless the district court determines that there is a disputed issue or issues of material fact. In the event that there is a disputed issue or issues of material fact the district court shall conduct a hearing to consider live testimony on the issue or issues. The district court may, in its discretion, allow the parties to conduct limited discovery with regard to the disputed issue or issues of material fact, but shall otherwise stay discovery until it rules on the motion.
- (e) In no instance shall extrinsic evidence be admissible to demonstrate or explain any ambiguity or unclarity in the forum selection agreement; however, extrinsic evidence is admissible to show the applicability or non-applicability of any exception to enforcement under section 8 of this Act.
- (f) Any order granting or denying a motion under this section shall be immediately appealable. The district court shall have discretion to stay its order pending any appeal from any order on motions under this section.