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## CHOICE OF FORUM PROVISIONS AND THE INTRASTATE DILEMMA: IS OUSTER OUSTED?

### INTRODUCTION

Traditionally, contract clauses that specify the forum for the resolution of claims arising under that contract were deemed void as wresting jurisdiction from other forums in which the parties could have lawfully sought redress.<sup>1</sup> The traditional view reflected judicial reluctance to allow individuals to be precluded from their substantial right of access to all competent courts.<sup>2</sup> Nevertheless, businessmen required the certainty and convenience inherent in choice of forum clauses. Perhaps in recognition of these needs, the modern trend has been to accept these provisions as valid unless proven unreasonable. Today, these "ouster" clauses are treated as requests to courts excluded by the contract to decline jurisdiction as a matter of discretion.<sup>3</sup> Mechanical deference to forum selection provisions, however, has created the possibility of abuse.

The Supreme Court in *The Bremen v. Zapata Off-Shore Co.*<sup>4</sup> confirmed the validity of forum selection clauses, rejecting the contention that these covenants wrest jurisdiction from tribunals not specified in the contract. Instead,

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1. Although the right to contract is fundamental, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), it can be restricted. In *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 808 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled on other grounds*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), the court recognized the validity of the contention that parties to a contract are powerless to oust a court of its admitted jurisdiction. This principle has been generally accepted. Restatement (Second) of Conflict of Laws § 80 (1971); *e.g.*, *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966); *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297, 300-01 & n.9 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959); *Goff v. Aamco Automatic Transmissions, Inc.*, 313 F. Supp. 667, 669 (D. Md. 1970); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848, 851 (D. Hawaii 1968); *Geiger v. Keilani*, 270 F. Supp. 761, 764-65 (E.D. Mich. 1967).

2. For a general discussion of the historical treatment of choice of forum clauses, see Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1 (1976); Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements,"* 15 Rutgers L. Rev. 414 (1961); Reese, *The Contractual Forum: Situation in the United States*, 13 Am. J. Comp. L. 187 (1964). A party may voluntarily submit to the personal jurisdiction of an otherwise competent court through a contractual stipulation or by appearing without objection. A. Ehrenzweig, *A Treatise on the Conflict of Laws* § 41 (1962); Reese, *supra*, at 187; *see, e.g.*, *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964); *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 836 (D.C. Cir. 1972); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761 (E.D.N.Y. 1967). Parties cannot contractually confer subject matter jurisdiction on an improper court. The existence of a clause designating a particular forum that otherwise lacks subject matter jurisdiction does not vest that court with jurisdiction. Despite the agreement, any party may raise a jurisdictional objection, at least during the pendency of the suit. *See, e.g.*, *Eckert v. Eckert*, 34 A.D.2d 684, 684, 312 N.Y.S.2d 183, 184 (2d Dep't 1970); *Werner v. Illinois Cent. R.R.* 379 Ill. 559, 566, 42 N.E.2d 82, 85 (1942); M. Green, *Basic Civil Procedure* 15-32 (2d ed. 1979). This Note assumes *arguendo* that the contractually designated court has subject matter jurisdiction.

3. *See, e.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled on other grounds*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967); *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951).

4. 407 U.S. 1 (1972).

the Court analyzed the international forum selection clause before it in accordance with traditional contract principles and in terms of reasonableness and fairness.<sup>5</sup> Several lower courts subsequently faced with the issue have found choice of forum clauses *prima facie* valid without investigating the circumstances under which they were drawn.<sup>6</sup> Such blanket approval of these covenants may, as a practical matter, render the clauses ouster agreements, even if the parties to the contract did not intend this effect. This is particularly true when the parties stipulate that any action arising under their contract must be brought in state court to the exclusion of federal courts in the same geographical polity.<sup>7</sup>

This Note agrees that choice of forum clauses can and do serve useful functions and generally are not intended to oust courts of jurisdiction. Nevertheless, it is contended that automatic acceptance of these clauses, without further investigation, may constitute ouster and deprive some litigants of their right to choose one among many proper forums. Only a full analysis of the contested clause can achieve the proper balance between the right to contract and the right to litigate wherever proper. With reference to the historical development of this field, Part I discusses whether parties may explicitly or implicitly oust a court of jurisdiction by their contract. The conclusion is drawn that rigid acceptance of the contractual agreement has itself resulted in ouster, an unacceptable result. Part II, therefore, urges the adoption of a flexible balancing test.

## I. THE FORMULATION OF THE PRIMA FACIE VALID RULE

### A. *The Traditional Ouster Analysis*

Historically, American courts had viewed choice of forum clauses with disfavor. Lurking throughout the decisions that have rejected attempts to prescribe contractually the place for litigation is the concept of "ouster." Any definition of ouster must necessarily be vague and metamorphic. It is axiomatic that no contract clause can operate to divest a court of its jurisdiction.<sup>8</sup> A specific pronouncement that litigation cannot be brought in a certain forum would appear to be the most obvious example of an attempt to oust. The notion of ouster, however, was not limited to explicit exclusionary provisions in a contract. Early courts found that the "legal effect" of any clause that was

5. *Id.* at 8-20.

6. *Spatz v. Nascone*, 368 F. Supp. 352 (W.D. Pa.), *aff'd*, 364 F. Supp. 967 (W.D. Pa. 1973); *see City of N.Y. v. Pullman Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979). Although the forum selection clause in *Pullman* was not enforced because it was ambiguous, 477 F. Supp. at 443, Judge Weinfeld noted that, had the language clearly excluded the federal forum, the court would have upheld the clause. "If the purpose was to preclude a federal forum, explicit language to that effect would have foreclosed any issue on the matter." *Id.* at 442 (footnote omitted); *see* note 97 *infra*. *But see* pt. II *infra*.

7. *See* Gilbert, *supra* note 2, at 68-69; 58 Cornell L. Rev. 416, 426-27 (1973) [hereinafter cited as *Enforcing Choice of Forum Clauses*].

8. *E.g.*, *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874); *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y. 1889); *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 72 Mass. (6 Gray) 596 (1856); *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174 (1856); *Gitler v. Russian Co.*, 124 A.D. 273, 108 N.Y.S. 793 (1st Dep't 1908). In holding that forum selection clauses are *prima facie* valid, modern courts have held that the covenants do not reflect an

intended to confine litigation to certain specified forums was an ouster of other available forums.<sup>9</sup>

In evaluating choice of forum clauses, courts initially ignored the exercise of the right to contract freely and, whatever definition of ouster was employed, equated choice of forum clauses with ouster clauses.<sup>10</sup> Any attempt to wrest lawful jurisdiction from a court was against public policy and absolutely void.<sup>11</sup> Federal courts were not alone in protecting their jurisdiction with a broad interpretation of ouster; with as much certitude, state courts declared void contract provisions that effected an ouster of their jurisdiction.<sup>12</sup>

There were various justifications for the ouster concept and the resultant judicial ill will toward choice of forum provisions. Paramount was the idea that an individual should be permitted to seek redress of his rights in any competent court. It is well established that access to the state courts is a basic right.<sup>13</sup> Similarly, the jurisdiction of the federal courts extends to "all Cases . . . arising under this Constitution [and] the Laws of the United States . . . ; [and] to Controversies . . . between Citizens of different States."<sup>14</sup> To carry out this

attempt to oust. See notes 44-89 *infra* and accompanying text. For other examples of exclusive forum clauses, see *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 942 (2d Cir. 1930); *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 F. 508, 510 (6th Cir. 1897); *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387, 388 (S.D.N.Y. 1918); *Huntley v. Alejandre*, 139 So. 2d 911, (Fla. Dist. Ct. App. 1962); *Kyler v. United States Trotting Ass'n*, 12 A.D.2d 874, 874, 210 N.Y.S.2d 25, 26-27 (4th Dep't 1961).

9. *E.g.*, *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y. 1889); *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 72 Mass. (6 Gray) 596 (1856); *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174 (1856); *cf.* *Gitler v. Russian Co.*, 124 A.D. 273, 108 N.Y.S. 793 (1st Dep't 1908) (although agreement on manner and place of judgment collection is enforceable, forum selection clauses are void as against public policy). In *Prince Steam-Shipping Co.*, the contested contract clause stipulated that suits could only be brought in Philadelphia, the port of discharge. The court, refusing to adhere to the covenant, found that the "legal effect" of the forum provision was to wrest jurisdiction from all courts except those in Philadelphia. 39 F. at 704.

10. *United Fuel Gas Co. v. Columbian Fuel Corp.*, 165 F.2d 746 (4th Cir. 1948); *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y. 1889); see *Lenhoff, supra* note 2, at 431. In *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874), the Supreme Court declared unconstitutional a statutory restriction on the right to remove from state to federal court. The effect of barring removal, however, is to confine suit to state court. This restriction is directly analogous to a contractual restriction on a potential forum. Hence, the same rules should govern both. See notes 15-19 *infra* and accompanying text.

11. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874); *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704, 704 (S.D.N.Y. 1889); see *Reese, supra* note 2, at 188.

12. *E.g.*, *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N.E. 678 (1916); *Schwartz v. Zim Israel Navig. Co.*, 15 Misc. 2d 576, 131 N.Y.S.2d 283 (Sup. Ct. 1958).

13. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). "It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution . . . [to] free access . . . [to] courts of justice in the several States." *Id.* at 79 (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)); see *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825). Although access to state courts is a substantial right, it can be limited. *United States v. Kras*, 409 U.S. 434, 443-46, 450 (1973) (state need not waive court fees for bankrupt because access to courts is *not* sole available relief); *cf.* *Boddie v. Connecticut*, 401 U.S. 371, 380, 382-83 (1971) (state must pay indigent's court fees in divorce case because access to the courts is sole available relief).

14. U.S. Const. art. III, § 2, cl. 1.

constitutional mandate, Congress, by statute, has vested diversity<sup>15</sup> and federal question<sup>16</sup> jurisdiction in the federal courts.

Relying on the right of access, the Supreme Court espoused the traditional distaste for contractual limitations on the appropriate judicial forum. In *Insurance Co. v. Morse*,<sup>17</sup> the Court held unconstitutional a Wisconsin statute that expressly prohibited any foreign corporation qualifying to do business in Wisconsin from removing a cause of action to the federal court.<sup>18</sup> Reasoning that removal was a substantial right, the Court found that removal could not be restricted by state action.<sup>19</sup> Furthermore, this right was not to be negotiated nor contracted away.<sup>20</sup>

Moreover, an individual was not permitted to waive contractually his right

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15. 28 U.S.C. § 1332 (1976).

16. *Id.* § 1331.

17. 87 U.S. (20 Wall.) 445 (1874).

18. *Id.* at 446. The pertinent part of the Wisconsin statute applied to any fire insurance company, association, or partnership qualifying to do business in Wisconsin. *Id.* at 445-46. The statute did not restrict the right to sue initially in federal court.

19. *Id.* at 451-52, 458. The Court also held that the agreement not to remove, executed by the foreign corporation, "derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed." *Id.* at 458 (emphasis added).

20. *Id.* at 451-58. "A man may not barter away his life or his freedom, or his substantial rights." *Id.* at 451. The statutory right to remove, 28 U.S.C. § 1441 (1976), is one right affected by intrastate choice of forum provisions. A party can waive his right to remove after the cause of action has accrued. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874); *Colonial Bank & Trust Co. v. Cahill*, 424 F. Supp. 1200, 1202 (N.D. Ill. 1976). Although the question whether parties to a contract may restrict the right to remove in anticipation of litigation is unsettled, it is well established that a state may not promulgate legislation that would preclude a plaintiff from removing a case from that state's courts to a federal court. *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532-33 (1922); *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 453, 458 (1874); *Knighon v. Johnston County*, 330 F. Supp. 652, 654 (E.D.N.C. 1971); see *Donald v. Philadelphia & Reading Coal & Iron Co.*, 241 U.S. 329, 333 (1916). Professor Wright recognizes a split in the case law concerning this issue, but he argues that the modern view is to validate contracts barring removal in the event of litigation, if the restriction is reasonable. C. Wright, *Handbook of the Law of Federal Courts* § 38, at 154 (1976). See also 1A J. Moore *Federal Practice* ¶ 0.157[2], at 39-40, ¶ 0.157[9], at 128-29 (2d ed. 1979). Cases dealing with insurance contracts demonstrate the confusion as to whether the right to remove can be waived before the cause of action has arisen. The typical forum selection clause in these agreements allows the assured to sue in any competent court. The insurer is precluded from removing in deference to the assured's choice. Courts have generally upheld these forum selection clauses on the ground that they are not mandatory because no specific court is designated; rather, all available courts are open until the assured actually initiates suit. See *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453 (E.D. Cal. 1971); *Oil Well Serv. Co. v. Underwriters at Lloyd's London*, 302 F. Supp. 384 (C.D. Cal. 1969); *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431 (N.D. Ill. 1964); *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502 (S.D.N.Y. 1949). There are some cases that reflect opposition to forum selection in the removal context. These cases rely upon the idea set forth in *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874), that the right to remove is an absolute right based upon a federal statute. They have construed efforts to limit this right as an attempt to oust a court of its jurisdiction. See *Roberts v. Lexington Ins. Co.*, 305 F. Supp. 47 (E.D.N.C. 1969); *Hasek v. Certain Lloyd's Underwriters*, 228 F. Supp. 754 (W.D. Mo. 1963). See also *Colonial Bank & Trust Co. v. Cahill*, 424 F. Supp. 1200 (N.D. Ill. 1976); *Lavan Petroleum Co. v. Underwriters at Lloyds*, 334 F. Supp. 1069 (S.D.N.Y. 1971) (involving promissory notes).

to sue initially in a particular court. A court's "jurisdiction having been lawfully conferred, [that court] cannot be prevented from exercising it, when it is properly invoked, by the private contract of individuals."<sup>21</sup> Allowing the contracting parties to determine questions of accessibility to the courts ran afoul of the tenet that such questions must be governed by public policy.<sup>22</sup> The judiciary therefore took an active role in controlling the exercise and waiver of this right to prevent careless misuse by a potentially unknowledgeable individual.<sup>23</sup>

Nevertheless, even in the early cases, the public policy argument did not render all forum selection clauses absolutely invalid.<sup>24</sup> Hence, the policy rationale was augmented with the equally persuasive argument of convenience. Jurisdictional rules were established upon notions of convenience and expediency: by permitting contracting parties to alter such rules, the very "symmetry of the law" would be upset.<sup>25</sup> The extreme distaste for choice of forum clauses accurately reflected this point of view.

Perhaps the most reasonable explanation for the traditional distrust of forum selection covenants was that the law, not the contracting parties, was expected to provide the remedy. A party must have access to the courts in order to ensure effective protection of his contractual rights and obligations.

[P]arties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdictions; as conditions precedent to an appeal to the courts, they are void.<sup>26</sup>

The suggestion here is that matters of redress should not be disposed of by the fiat of the contracting parties.

An additional factor contributing to the traditional view of ouster was the fear that judicial acceptance of forum selection clauses would place the imprimatur of the courts on contracts that were unfairly negotiated.<sup>27</sup> In addition, several commentators, while groping for sound reasoning to support the traditional

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21. *McLean v. Tobin*, 58 Misc. 528, 530, 109 N.Y.S. 926, 928 (Sup. Ct. 1908) (dealing with a contract clause that affected access to state courts).

22. See *Hall v. People's Mut. Fire Ins. Co.*, 72 Mass. (6 Gray) 185, 192 (1856); *McLean v. Tobin*, 58 Misc. 528, 530-31, 109 N.Y.S. 926, 928-29 (Sup. Ct. 1908); *Arsenis v. Atlantic Tankers, Ltd.*, 39 Misc. 2d 124, 125, 240 N.Y.S.2d 69, 70 (Civ. Ct. 1963).

23. See *Hall v. People's Mut. Fire Ins. Co.*, 72 Mass. (6 Gray) 185, 192 (1856); *McLean v. Tobin*, 58 Misc. 528, 530-31, 109 N.Y.S. 926, 928-29 (Sup. Ct. 1908). But see *Greve v. Aetna Live Stock Ins. Co.*, 81 Hun. 28, 29, 30 N.Y.S. 668, 669 (Sup. Ct. 1894).

24. *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856) ("We place no great reliance upon considerations of public policy, though, as far as they go, we think they are opposed to [forum selection provisions].").

25. *Id.* See also *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 72 Mass. (6 Gray) 596 (1856); *Hall v. People's Mut. Fire Ins. Co.*, 72 Mass. (6 Gray) 185 (1856).

26. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 452-53 (1874) (quoting *Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me. 55, 70 (1866)); accord, *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 181 (1856) ("But the remedy does not depend on contract, but upon law . . . which regulates the construction and legal effect of the contract."); see *Benson v. Eastern Bldg. & Loan Ass'n*, 174 N.Y. 83, 85, 66 N.E. 627, 628 (1903).

27. *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856). See also *Reese*, *supra* note 2, at 188.

view, have suggested that judges were reluctant to allow any method or practice which might take business away from their courts.<sup>28</sup> While the reasons underlying the historical view were somewhat convincing, they did not reflect the changing realities of a modern commercial world, and hence were not insurmountable.

### B. *The Prima Facie Valid Test*

In sharp contrast to the traditional view that choice of forum clauses always operate to oust, the modern trend is to permit parties to determine freely the situs of any litigation. Due to the unique character of contracts between a resident and a foreigner, and the divergent procedural and substantive law of foreign countries, choice of forum clauses first gained acceptance in an international context. In *Mittenthal v. Mascagni*,<sup>29</sup> the Massachusetts Supreme Judicial Court recognized the desirability of allowing parties to an international contract to choose a mutually convenient forum. It therefore declined jurisdiction in favor of the Italian court specified in the contract.<sup>30</sup> The defendant was an Italian citizen, and the plaintiffs, who were Americans, were considered Italian domiciliaries under the terms of the contract. The contract was made in Italy, written in Italian, and was to be partially performed in Italy.<sup>31</sup> The inclusion of a choice of forum clause in the contract was deemed reasonable because there were three countries that might have taken jurisdiction.<sup>32</sup> It was therefore necessary to uphold the clause to ensure the certainty it afforded.

Instead of being viewed as attempts to deprive a court of its jurisdiction, forum selection clauses similar to the one in *Mittenthal* have been construed, under the new approach, as asking a court in its discretion to decline jurisdiction in favor of the contractually chosen forum; they therefore have been declared prima facie valid.<sup>33</sup> Merely because a forum has jurisdiction

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28. In the early judicial organization, judges did not earn a fixed annual salary; rather, they were paid according to the number of cases they heard. Gilbert, *supra* note 2, at 9; Reese, *supra* note 2, at 189; accord, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). Although this rationale helps to explain the traditional view, it is inapposite to the contemporary judicial system.

29. 183 Mass. 19, 66 N.E. 425 (1903).

30. *Id.* at 25, 66 N.E. at 427. The forum selection clause provided: "Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy." *Id.* at 21, 66 N.E. at 425.

31. *Id.* at 20-22, 66 N.E. at 425-26.

32. The contract required performance in Canada, Italy, and in many of the United States. Courts in all these countries might have had jurisdiction; hence, it was reasonable to include a choice of forum covenant to provide a definite and convenient forum for the parties. *Id.* at 23-24, 66 N.E. at 426-27.

33. See *Cerro de Pasco Copper Corp. v. Knut Knutsen*, O.A.S., 187 F.2d 990 (2d Cir. 1951). In that case, a contract clause stipulated that all litigation must be brought in Norwegian courts "to the exclusion of proceedings in the Courts of any other Country." *Id.* at 990. The Second Circuit found that the clause was not unreasonable and that a refusal to honor it would be unjust. The court held that the trial court had properly exercised its discretion when it declined to exercise its jurisdiction. *Id.* at 990-91. In *Aetna Ins. Co. v. The Satrustegui*, 171 F. Supp. 33 (D.P.R. 1959), the court recognized the broad judicial discretion exercisable in deciding the validity of forum selection clauses. "Absent any question of unreasonableness or in contravention of public policy, a sound

does not necessarily mean that its jurisdiction must be exercised.<sup>34</sup> For instance, courts adhering to the *prima facie* valid rule have not hesitated to consider the convenience of the parties and the witnesses when deciding whether to hear the controversy.<sup>35</sup>

The validity of a choice of forum clause under the early *prima facie* valid rule depended upon its reasonableness. In *Wm. H. Muller & Co. v. Swedish American Line Ltd.*,<sup>36</sup> the American plaintiff asked a federal court to exercise jurisdiction over the plaintiff's admiralty claim against a Swedish defendant. This was in contravention of the disputed contract's forum selection clause, which designated the courts of Sweden.<sup>37</sup> The Second Circuit held that the choice of forum provision should be adhered to as long as it was reasonable in light of the circumstances under which it was drawn.<sup>38</sup> *Muller* reasserts the proposition that it is within the court's discretion to decline jurisdiction for whatever reasons it deems appropriate.<sup>39</sup> Using the analysis *Muller* promul-

use of their discretion by the courts warrants the enforcement of jurisdictional agreements . . . ." *Id.* at 35.

34. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 507-08 (1946); Reese, *supra* note 2, at 188. The rationale is similar to that employed in deciding issues of *forum non conveniens*. *Forum non conveniens* is analogous in the sense that the court weighs the interests of the parties, of the court, and of the public before deciding whether to exercise its unquestioned jurisdiction. See T. James & G. Hazard, *Civil Procedure* § 12.29 (2d ed. 1977). Another example of the court's power to decline jurisdiction may be found under the general rubric of abstention cases. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); C. Wright, *supra* note 20, at 219.

35. See *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 73 (S.D.N.Y. 1978); *Aetna Ins. Co. v. The Satrustegui*, 171 F. Supp. 33, 35 (D.P.R. 1959); *Mittenthal v. Mascagni*, 183 Mass. 19, 23, 66 N.E. 425, 426 (1903).

36. 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled on other grounds*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967). *Muller* was overruled on the limited ground that the court had failed to apply properly the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-15 (1970). *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203 (2d Cir. 1967). COGSA presents special problems in the choice of forum context. The statute represents an attempt by Congress to control the field of international carriage contracts. The Act militates against agreements that exculpate or seek to reduce the liability of a carrier for its acts of negligence. In some situations, a choice of forum clause may be seen as an attempt to circumvent COGSA, and should therefore be declared void. Application of COGSA to choice of forum provisions has been varied and somewhat inconsistent. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (provision binding); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (provision not binding); *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959) (same); *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973) (provision binding). Although *Muller* was overruled, its discussion of choice of forum clauses has remained strong precedent for the trend toward the *prima facie* validity of these clauses. See *Geiger v. Keilani*, 270 F. Supp. 761, 764 n.3 (E.D. Mich. 1967).

37. 224 F.2d at 807.

38. *Id.* at 808.

39. *Id.*; see, e.g., *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 344-45 (3d Cir. 1966); *Anastasiadis v. S.S. Little John*, 346 F.2d 281, 282-83 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132, 1134-35 (D. Minn. 1968); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761-62 (E.D.N.Y. 1967); *Hodom v. Stearns*, 32 A.D.2d 234, 236, 301 N.Y.S.2d 146, 148 (4th Dep't 1969); *Export Ins. Co. v. Mitsui Steamship Co.*, 26 A.D.2d 436, 437-38, 274 N.Y.S.2d 977, 979-80 (1st Dep't 1966).



gates, a court may still declare a forum selection clause void, provided it does not mechanically dispose of the forum stipulation.<sup>40</sup>

The applicability of the prima facie valid test was eventually expanded beyond international settings and into domestic cases.<sup>41</sup> The test is appropriate for international contracts because of the certainty it provides the parties as to the situs of possible litigation. The element of stability encourages trade and commerce.<sup>42</sup> The same rationale also applies in the interstate setting. State laws may be varied and complex, and it would behoove the parties to determine at the negotiation stage where any litigation could be brought.<sup>43</sup>

The growing acceptance of the prima facie valid rule and the concept of reasonableness inherent in its formulation were articulated by Judge Learned Hand.<sup>44</sup> Relying upon the Restatement of Contracts,<sup>45</sup> Judge Hand stated: "I do not believe that, today at least, there is an absolute taboo against [forum selection clauses] at all; in the words of the Restatement, they are invalid only when unreasonable. . . . What remains of the doctrine [concerning their invalidity] is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist."<sup>46</sup> Armed with such persuasive logic, the prima facie valid trend awaited Supreme Court sanction.

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40. *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 125 (N.D. Cal. 1971); *see Cerro de Pasco Copper Corp. v. Knut Knutsen*, O.A.S., 187 F.2d 990, 990-91 (2d Cir. 1951) (court suggested that choice of forum clause may be voided if it would be unjust to enforce); *Chemical Carriers Inc. v. L. Smit & Cos. Internationale Sleepdienst*, 154 F. Supp. 886, 888-89 (S.D.N.Y. 1957) (plaintiff should not be compelled to sue in contractually designated court because that forum's applicable law might deprive him of any remedy).

41. "[I]t is apparent that the reasonableness doctrine is not of peculiar significance to maritime law." *Geiger v. Keilani*, 270 F. Supp. 761, 765 (E.D. Mich. 1967) (footnote omitted).

42. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972); *see note 58 infra* and accompanying text.

43. For an excellent discussion concerning choice of forum provisions in international and interstate settings, *see* Gilbert, *supra* note 2, at 2-3. *See also* Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657, 674 (1959).

44. *Krenger v. Pennsylvania R.R.* 174 F.2d 556, 560 (2d Cir.) (Hand, J., concurring), *cert. denied*, 338 U.S. 866 (1949). The railroad company in *Krenger* paid its employee, who had been injured on the job, an advance in return for a promise that he would not litigate in certain forums. The stipulation was found to be unreasonable because it conflicted with the policy of the Federal Employers' Liability Act (FELA) to enhance an employee's bargaining position. Although *Krenger* deals with an agreement entered into *after* the cause of action accrues, Judge Hand's concurring opinion was addressed in part to clauses agreed upon before the cause of action accrued. This Note does not address the validity of clauses limiting access to courts that are entered into after the plaintiff has a cause of action. For examples of the different treatment accorded agreements entered into before injury, and those entered into after, *see* *Herrington v. Thompson*, 61 F. Supp. 903 (D.C. Mo. 1945); *Gitler v. Russian Co.*, 124 A.D. 273, 108 N.Y.S. 793 (1st Dep't 1908). Statutes such as the FELA, 45 U.S.C. § 51 (1976), may have an effect upon a party's ability to contract away certain rights. *See* *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949). In that case, a contract clause that restricted the courts available to the injured employee was declared void as violative of the FELA. The Court held that the FELA renders the right of an employee to choose the forum a substantial right. *Id.* at 265-66.

45. Restatement of Contracts § 558 (1932).

46. 174 F.2d at 561 (Hand, J., concurring) (footnote omitted).

## C. The Bremen v. Zapata Off-Shore Co.

The general hostility to choice of forum clauses noted by Judge Hand<sup>47</sup> was eradicated, at least with regard to international contracts, by the Supreme Court's opinion in *The Bremen v. Zapata Off-Shore Co.*<sup>48</sup> The Court's decision elevated the prima facie valid trend into the position it occupies today as the accepted rule. An American corporation, Zapata, contracted with a German towing company, Unterweser, to have a drilling rig transported from the Gulf of Mexico to Italy. The contract contained a stipulation that "[a]ny dispute arising must be treated before the London Court of Justice."<sup>49</sup>

As Unterweser's tow, the Bremen, was moving the rig through the Gulf, the rig was seriously damaged. Zapata ordered the Bremen to bring the rig into a Florida port and the Bremen complied. Zapata commenced suit against Unterweser in the District Court of Florida, alleging negligent towage and breach of contract. Unterweser sought removal to the London High Court pursuant to the parties' agreement. The district court gave little deference to the choice of forum clause because, in its view, the provision constituted an attempt to oust the court of its jurisdiction.<sup>50</sup> The court proceeded, instead, with a forum non conveniens analysis and retained jurisdiction.<sup>51</sup>

On appeal, the Supreme Court ruled that too little attention had been paid to the forum selection clause.<sup>52</sup> The Court chided the "provincial attitude" that American courts had taken concerning the fairness of foreign tribunals and concluded that, "in the light of present-day commercial realities and expanding international trade . . . the forum clause should control absent a strong showing that it should be set aside."<sup>53</sup> The resisting party could rebut the prima facie validity of the clause by demonstrating that "enforcement is . . . 'unreasonable' under the circumstances"<sup>54</sup>—that it would deprive the party of his full and

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47. See notes 44-46 *supra* and accompanying text.

48. 407 U.S. 1 (1972).

49. *Id.* at 2. The parties chose the London Court of Justice because that court was "a neutral forum experienced and capable in the resolution of admiralty litigation." *Id.* at 17.

50. *Id.* at 6.

51. *Id.* at 6-7. The district court's decision was affirmed by a divided panel of the Court of Appeals. It was reaffirmed on rehearing by eight of the 14 en banc judges. 296 F. Supp. 733 (M.D. Fla. 1969), *aff'd*, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated*, 407 U.S. 1 (1972).

52. 407 U.S. at 8.

53. *Id.* at 12, 15.

54. *Id.* at 10 (footnote omitted). Although the holding of the case may be restricted to federal courts sitting in admiralty, *id.*, the policy of aiding American commercial interests can be extended to different types of international transactions. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-19 (1974), the Court was faced with a contractual arbitration clause that stipulated a particular forum for the arbitration. Historically, courts have frowned upon such stipulations in a contract and refused to enforce them. *Id.* at 510. Overcrowded dockets and commercial necessities, however, have completely altered this view. See *id.* at 511. The United States Arbitration Act, 9 U.S.C. §§ 1-14 (1971), now permits and governs these clauses. When the federal law is inapplicable, state statutes frequently cover the particular contract in question. See R. Leflar, *American Conflicts Law* § 155 (3d ed. 1977). Arbitration clauses are highly analogous to forum selection clauses because both may be seen as attempts to limit jurisdiction. *Id.* § 52. The Supreme Court has termed arbitration

effective day in court.<sup>55</sup> The *Bremen* Court also retained public policy as one factor to be considered in determining reasonableness.<sup>56</sup> Moreover, the resisting party could demonstrate the clause's invalidity under a strict contract analysis by showing, for example, fraud or overreaching bargaining power.<sup>57</sup>

The *Bremen* holding is consistent with a policy of encouraging American business overseas.<sup>58</sup> American business interests will be furthered if American courts support contracts that are solemnly made, and reject "parochial concepts" that they should adjudicate all controversies.<sup>59</sup> The Supreme Court's affirmance of the *prima facie* valid rule in international contracts comports with developing trends<sup>60</sup> and is well taken.

## II. *Bremen* AND THE INTRASTATE DILEMMA

Although the *Bremen* Court limited its holding to admiralty law,<sup>61</sup> its

agreements "a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. at 519 (footnote omitted). See also *Andros Compania Maritima, S.A. v. Andre & CIE., S.A.*, 430 F. Supp. 88, 94-95 (S.D.N.Y. 1977); *Incontrade, Inc. v. Oilborn Int'l, S.A.*, 407 F. Supp. 1359, 1361-62 (S.D.N.Y. 1976). Some courts have been reluctant to apply the *Bremen* rationale when the Federal Arbitration Act or other federal statutes are involved. *E.g.*, *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); see note 44 *supra*.

55. *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161, 168 (9th Cir. 1975); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 73 (S.D.N.Y. 1978); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 368-69 (S.D.N.Y. 1975).

56. 407 U.S. at 15.

57. See *id.*

58. "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur . . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 13-14.

59. "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* at 9.

60. See, *e.g.*, *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled on other grounds*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967); *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951); *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N.E. 425 (1903).

61. The *Bremen v. Zapata Off-Shore Corp.*, 407 U.S. 1, 10 (1972). Forum selection clauses "are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty." *Id.* (footnote omitted). In *Morse Electro Prods. Corp. v. S.S. Great Peace*, 437 F. Supp. 474 (D.N.J. 1977), the court, sitting in admiralty, applied the reasonableness analysis to reject a choice of forum provision. *Id.* at 487-88. Because the Supreme Court restricted its holding in *Bremen* to admiralty suits brought in federal courts, the case does not control in domestic situations. *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161, 168 (9th Cir. 1975); *Copperweld Steel Co. v. Demag-Mannesmann-Boehler*, 354 F. Supp. 571, 573 (W.D. Pa. 1973), *aff'd*, 578 F.2d 953 (3d Cir. 1978); see *Enforcing Choice of Forum Clauses*, *supra* note 7, at 426-27. Most courts, however, have found the case highly persuasive in the domestic arena. *E.g.*, *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 n.24 (6th Cir. 1972); *Public Water*

rationale may encompass any international contract.<sup>62</sup> Similarly, lower courts have applied the *Bremen* rationale in interstate settings,<sup>63</sup> reasoning that the parties to interstate transactions may have as great a need for certainty and jurisdictional limitation as have the parties to international transactions.<sup>64</sup>

The proposition that a choice of forum clause adds certainty to a contract is not as viable, however, when the parties are choosing between a state and federal court in the same geographical region. The earlier arguments that established the traditional approach,<sup>65</sup> including the fear that a person might contractually waive a substantial privilege such as access to the courts,<sup>66</sup> gain renewed vitality when applied in the intrastate context. Moreover, a contract clause that selects a state court as the only available forum to the exclusion of a federal court sitting in the same state may, in fact, be a disguised attempt to divest the federal court of its jurisdiction.<sup>67</sup> Such an intent runs counter to the

Supply Dist. No. 1 v. American Ins. Co., 471 F. Supp. 1071, 1072 (W.D. Mo. 1979); Cruise v. Castleton, Inc., 449 F. Supp. 564, 567 (S.D.N.Y. 1978); Leasewell, Ltd. v. Jake Shelton Ford, Inc., 423 F. Supp. 1011, 1015 (S.D.W. Va. 1976). See also Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 957 (5th Cir. 1974).

62. In *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361 (S.D.N.Y. 1975), the court determined the validity of a clause in an employment contract that stipulated the court in Essen, West Germany, as the forum for dispute resolution. Although not an admiralty case, *Gaskin* applies the *Bremen* rationale with vigor: "A forum selection clause contained in an international agreement of the type now before the Court will be enforced according to its terms when the criteria established by the Supreme Court in [*Bremen*] have been complied with." *Id.* at 363 (citation omitted). At least one case, *Copperweld Steel Co. v. Demag-Mannesmann-Boehler*, 354 F. Supp. 571 (W.D. Pa. 1973), *aff'd*, 578 F.2d 953 (3d Cir. 1978), attempted to limit the extension of *Bremen's* policy arguments to the international sphere. A German contracted to supply goods to an American. A clause in their contract allowed the supplier to choose a "court of justice having jurisdiction in the area where the supplier has its main office." *Id.* at 572. The court interpreted *Bremen* as upholding a forum selection clause if it is reasonable and if its purpose is to encourage American business abroad. *Id.* at 573. Business is encouraged when a neutral forum is selected. The court found this particular clause to be unreasonable because the forum selected was to be in the supplier's country and more specifically in the area of their principal offices. *Id.* The court construed *Bremen* too narrowly because that opinion also recognized that forum selection clauses provide much needed certainty in international dealings. The *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972); see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518 (1974); *Tai Kien Indus.Co. v. M/V Hamburg*, 528 F.2d 835, 836 (9th Cir. 1976).

63. See Gilbert, *supra* note 2, at 2-3; note 61 *supra*.

64. *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148 (N.D. Tex. 1979). The *Taylor* court, after recognizing the context of the *Bremen* decision, stated that, "[n]onetheless, the reasoning of the opinion is applicable, though perhaps with slightly less force, to forum-selection provisions between domestic corporations involved in multistate commercial transactions." *Id.* at 148.

65. See notes 10-28 *supra* and accompanying text.

66. Access to the federal courts via diversity of citizenship may be characterized as a substantial right. See notes 14-22 *supra* and accompanying text.

67. See *Geiger v. Keilani*, 270 F. Supp. 761 (E.D. Mich. 1967). When a court infers an intent to oust a court of jurisdiction in the intrastate setting, it may be motivated by a desire to ensure access to the courts. *Id.* at 765 n.6. This argument gains strength in intrastate cases because the counterbalancing arguments, available in the international situation, are not present. For example, the need for certainty and stability, which are compelling reasons for enforcing international contracts, are diminished in the intrastate context. If both the contractually designated court and the court being asked to disregard the contract are located in the same geographical polity, neither party would be faced with litigating in a remote forum. Similarly, forum selection clauses are a

rule that prohibits parties to a contract from ousting a court of its jurisdiction.<sup>68</sup>

The vitality of the argument that contracting parties who discriminate between state and federal courts sitting in the same area may be wresting jurisdiction from the nondesignated court, can be illustrated by a hypothetical. Assume a contract stipulates that the state courts of State X *must* adjudicate any disputes between the parties. Assume further that a dispute arises concerning a federal question<sup>69</sup> over which the state does not have concurrent jurisdiction.<sup>70</sup> If the action is then brought in, or removed to, the federal court, and that court defers to the choice of forum clause, the plaintiff will be precluded from all remedy. It is difficult to conceive, however, that the federal court would not retain jurisdiction after weighing the plaintiff's dilemma.

Even when the state court has concurrent jurisdiction over the federal question, it is nonetheless preferable to have the federal court entertain the case. The federal judiciary is thought to have a special competence concerning questions of federal constitutional and statutory law.<sup>71</sup> This alone may provide a sufficiently strong reason for prohibiting parties from contractually waiving access to the federal court.

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desirable device in insurance contracts primarily for the degree of stability they give the assured. An insurance company may have offices in every state. Under certain circumstances an assured party may then be forced to go to trial in some distant state. Anxiety over such a possibility can be reduced by the reasonable use of choice of forum provisions. *See In re Fireman's Fund Ins. Cos.*, 588 F.2d 93 (5th Cir. 1979); *St. Paul Fire & Marine Ins. Co. v. Travelers Indem. Co.*, 401 F. Supp. 927 (D. Mass. 1975). Insurance contracts should be examined to determine if they are adhesion contracts. Usually, the company uses a form policy which may contain a choice of forum provision. The clause may be excluded on the grounds that it was the product of unequal bargaining positions instead of free negotiation. *Diamond v. Mutual Life Ins. Co. of N.Y.*, 75 Misc. 2d 443, 444, 347 N.Y.S.2d 907, 909 (N.Y. City Civil Ct. 1973), *rev'd on other grounds*, 77 Misc. 2d 528, 356 N.Y.S.2d 164 (App. Term, 1st Dep't 1974); Ehrenzweig, *supra* note 2, § 41, at 150; Patterson, *The Delivery of a Life-Insurance Policy*, 33 Harv. L. Rev. 198, 222 (1919).

68. Section 558 of the Restatement of Contracts states: "A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted, is illegal." Restatement of Contracts § 558 (1932). The clear import of this section is to support *reasonable* forum selection clauses so long as they do not discriminate between federal and state courts located within the same geographical polity. The tentative draft for the Restatement (Second) of Contracts does not address choice of forum provisions, but refers the reader to the Restatement (Second) of Conflict of Laws §§ 32, 80 (1971). Restatement (Second) of Contracts, Introductory Note, ch. 14, at 47 (Tent. Draft No. 12, 1977).

69. Federal questions involve disputes which arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976).

70. Some examples of federal law preempting state law are suggested in T. James & G. Hazard, *supra* note 34, § 1.13. Federal courts have exclusive jurisdiction over the federal antitrust laws, *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436, 440-41 (1920), and over patent infringement cases. 28 U.S.C. § 1338(a) (1976).

71. "[T]he existence of the federal courts and the delegation to them of competence over the cases specified in Article III bear a direct relationship to the basic objects sought by the Constitution. A federal judiciary is needed to interpret and apply the laws of the Union, and to compel obedience to them. Without federal competence, the laws and treaties and even the Constitution of the United States might become a dead letter." B. Schwartz, *Constitutional Law* § 1.6 (1979).

Accessibility to the federal courts on matters concerning diversity of citizenship<sup>72</sup> poses less of a policy problem.<sup>73</sup> A federal court sitting in diversity is concerned with matters of state substantive law.<sup>74</sup> Other policy reasons, however, are apparent in a diversity case and should be considered by the federal court when deciding whether to decline jurisdiction. Diversity was established "to furnish an impartial forum for the traveler who is away from home."<sup>75</sup> It is not suggested that a party should be absolutely prohibited from bargaining away access to a neutral forum; allowing him to do so, however, without ensuring that the bargain resulted from free negotiation between knowledgeable parties, defeats the very reason diversity jurisdiction came into being.

Unfortunately, courts have begun to assume that the validity of a particular choice of forum clause is no longer a disputed issue, thus rendering the prima facie valid—reasonable rule meaningless.<sup>76</sup> In *Spatz v. Nascone*,<sup>77</sup> for example, the court adhered to the forum selection clause with no more than a cursory glance at the underlying circumstances. The court interpreted a contract clause, naming the courts of the Commonwealth of Pennsylvania as the forum to resolve all disputes arising under the contract, as an exclusion of the federal courts situated in Pennsylvania.<sup>78</sup> The court, holding the contested clause valid, relied in part on the language in *Bremen* that ouster is nothing more than a "vestigial legal fiction;"<sup>79</sup> this assertion, however, while appropriate in the international context, is inapposite to the *Spatz* situation because of the relationship between state and federal courts sitting in the same locale.

On rehearing,<sup>80</sup> the *Spatz* choice of forum provision was upheld. The court

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72. 28 U.S.C. § 1332 (1976).

73. Diversity jurisdiction has been heavily criticized. Because diversity cases involve questions of state law that state courts are equally if not more competent to deal with, the plaintiff may not have a vested interest in having the federal courts resolve his claim. Some have even urged that the diversity jurisdiction of the federal courts be abolished entirely. See, e.g., H.R. 9123, H.R. 9622, 95th Cong., 1st Sess. (1977), reprinted in *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 25-26, 248-51 (1977); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963 (1979).

74. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (federal court sitting in diversity applies state law that is outcome determinative); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); C. Wright, *supra* note 20, § 23, at 88-89.

75. M. Green, *supra* note 2, at 19. The Supreme Court has recognized that the adoption of the judiciary clause in the federal Constitution reflected the framers' apprehensions concerning the impartiality of state tribunals. "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

76. "[T]he very fact [the rule against allowing parties to oust] is so well established tends to reduce its value . . . ." *Geiger v. Keilani*, 270 F. Supp. 761, 765 (E.D. Mich. 1967).

77. 364 F. Supp. 967 (W.D. Pa.), *aff'd*, 368 F. Supp. 352 (W.D. Pa. 1973).

78. *Id.* at 974.

79. *Id.* at 977; see *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

80. 368 F. Supp. 352 (W.D. Pa.), *aff'g*, 364 F. Supp. 967 (W.D. Pa. 1973).

acknowledged that *Bremen* was decided "in the context of the choice of forum between one in this country and one in England."<sup>81</sup> The *Bremen* rationale, however, pervades the opinion without being further distinguished. The court also noted the argument that, in an intrastate situation, diversity jurisdiction of the federal courts may be a more substantial right than the right to contract.<sup>82</sup> Nevertheless, the need to balance these two competing rights as well as the other interests of the parties was rejected.<sup>83</sup> Freedom to contract was not merely the weightier consideration; it appeared to be the sole interest of the court. "[T]he parties are free to 'determine' where their commercial interest lies and whether or not their commercial interests are to be served by limiting suit to the State Courts."<sup>84</sup>

The most troublesome aspect of the *Spatz* decision is its implicit adoption of the assumption employed in *Geiger v. Keilani*,<sup>85</sup> namely, that choice of forum clauses do not have the effect of ousting. The *Geiger* court reaffirmed the established rule that a forum selection clause is not valid if it operates to oust a competent court of its jurisdiction,<sup>86</sup> but assumed that the parties were cognizant of this rule at the time of contracting. The covenant was therefore interpreted as a request to the court to decline jurisdiction as a matter of discretion.<sup>87</sup>

The forum selection clause in *Geiger* is distinguishable from that in *Spatz*, however, as it designated the Chilean courts to the exclusion of the American courts.<sup>88</sup> A covenant such as the one in *Spatz*, which specifies a state court without expressly excluding a federal court, may in fact imply an intent to oust the federal court of jurisdiction.<sup>89</sup> This implicit evidence of invalidity may be as strong as if the clause had explicitly barred access to the federal court. If

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81. *Id.* at 356.

82. Counsel for the plaintiff, the party opposing the choice of forum clause, suggested that *Bremen* does not determine "federal versus state questions." The court, however, disagreed. *Id.*

83. "[Plaintiffs'] argument goes something like this: (1) in determining whether to enforce the clause in question, a successive balancing of interest is required, (2) a strong public policy underlies the diversity jurisdiction, and (3) that policy must enter into the balancing of the interest." *Id.*

84. *Id.* at 357. The court on rehearing refused to conduct a balancing of interests test and seemed unwilling to consider policy arguments, such as the importance of access to a court.

85. 270 F. Supp. 761, 765 (E.D. Mich. 1967). The agreement in *Geiger* between a New York resident and a Chilean corporation provided that all disputes arising thereunder would be resolved by the Chilean courts. Although the court recognized the existence of the traditional view, it opted for the trend against *per se* invalidation. *Id.* at 763-66.

86. *Id.* at 764-65.

87. *Id.* Because the rule that parties to a contract cannot oust a court of jurisdiction had become so well established, the court reasoned that it was logical to assume that the parties were aware of it when they entered into their agreement. *Id.*

88. *Id.* at 763.

89. "In some cases it would seem comparatively easy to find that when entering into an exclusive forum agreement the parties were motivated primarily by a desire to oust a court of its jurisdiction. See, e.g., *United States ex rel. M.G.M. Constr. Co. v. Aetna Cas. & Sur. Co.*, 38 F.R.D. 418 (N.D. Cal. 1965), where the effect of the contract term, if enforced, would have been to limit suit to state courts in a particular section of California while prohibiting litigation in the federal court sitting in the same area." *Id.* at 765 n.6. In *General Elec. Co. v. City of Tacoma*, 250 F. Supp. 125 (W.D. Wash. 1966), a contract clause naming a particular state court as the forum was upheld. The court applied a test of reasonableness under the circumstances, rather than treating the clause as *per se* invalid.

the *Geiger* conceptualization is relied upon, the question of whether there is an ouster will never be reached.

The court in *Spatz* too rigidly interpreted both the established rule that parties to a contract may not wrest jurisdiction from a court and the mechanics of prima facie validity.<sup>90</sup> The rule against ouster is totally emasculated when, as in *Spatz*, forum selection clauses are validated without probing the circumstances of the particular controversy. Similarly, the rule is hollowed if it is conclusively presumed that the parties were aware they could not oust by contract, and consequently had not intended to do so. Hence, a rule that is flexible enough to be applied in all situations should be adopted.<sup>91</sup>

The prima facie valid rule set forth in *Bremen* provides the requisite flexibility if its accompanying tests are carefully and consistently observed.<sup>92</sup> Obviously, the *Bremen* Court did not intend that forum selection clauses be accepted without further inquiry. A court, asked to decide whether the clause deserves enforcement, must exercise discretion,<sup>93</sup> and consider all the circumstances and facts peculiar to the case.<sup>94</sup>

The court in *Gaskin v. Stumm Handel GmbH*,<sup>95</sup> building upon the rationale espoused in *Bremen*, established a practical "two-pronged" analysis: 1) the "invalidity" test, and 2) the "unreasonable and unjust" test.<sup>96</sup> The former approach is used to determine if the clause is the product of fraud, overreaching, adhesion, or unequal bargaining positions.<sup>97</sup> The parameters of this investiga-

90. See *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761 (E.D.N.Y. 1967). The court in that case reasoned that the fact that a clause is not per se invalid does not mean it must be enforced. *Id.*

91. The National Conference of Commissioners on Uniform State Laws has advocated the use of a rule that a forum selection clause is prima facie valid if reasonable. Model Choice of Forum Act § 3 (1968), reprinted in 17 Am. J. Comp. L. 292, 293-96 (1969). Professor Leflar has joined this view: "Choice-of-forum contract provisions are today generally regarded as neither absolutely binding nor absolutely void, but rather as factors which help a court to exercise its discretion on a reasonable basis as to whether its legally existent jurisdiction ought to be exercised. . . . [contracts which limit judicial jurisdiction] are less likely to be sustained . . . if genuine inconvenience or inadequacy of remedy would ensue from them." R. Leflar, *supra* note 54, § 52.

92. See Gilbert, *supra* note 2, at 71-72.

93. *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 569 (S.D.N.Y. 1978); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 3 (S.D.N.Y. 1974); *Hodom v. Stearns*, 32 A.D.2d 234, 236, 301 N.Y.S.2d 146, 148 (4th Dep't), appeal dismissed, 25 N.Y.2d 722, 255 N.E.2d 564, 307 N.Y.S.2d 225 (1969); *Export Ins. Co. v. Mitsui Steamship Co.*, 26 A.D.2d 436, 437-38, 274 N.Y.S.2d 977, 979-80 (1st Dep't 1966).

94. See *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 457-58 (D. Del. 1978); *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042, 1044 (E.D. Wis. 1973).

95. 390 F. Supp. 361 (S.D.N.Y. 1975).

96. *Id.* at 364-65. Some courts implicitly apply the two-pronged test. For some examples of its use, see *Tai Kien Indus. Co. v. M/V Hamburg*, 528 F.2d 835, 836 (9th Cir. 1976); *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161, 168 (9th Cir. 1975); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148-49 (N.D. Tex. 1979); *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481, 484 (N.D. Cal. 1973). The second prong may be "characterized in terms of 'reasonableness.'" *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 365 (S.D.N.Y. 1975). Therefore, the test may be termed the reasonableness test.

97. 390 F. Supp. at 365; see *City of N.Y. v. Pullman Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979). In *Pullman*, the city had contracted with Pullman to have the company supply subway passenger cars to be used by the New York City Transit System. The city sued Pullman, as well as Rockwell International Corp., the subcontractor, for alleged defects in the trucks and for delays in delivery.



tion are defined by contract law principles.<sup>98</sup> The "unreasonable or unjust" test is a more policy oriented approach.<sup>99</sup> Although some of the same considerations employed under the invalidity analysis factor into the reasonableness analysis, the tests are distinct.<sup>100</sup> A court is provided with a more expansive ambit of analytical tools under the reasonableness approach, allowing it to balance interests more fully.<sup>101</sup>

The distinguishing feature of the reasonableness test is its juxtaposition of the established rule that parties may not oust a court of jurisdiction with the equally prevalent rule that freely contracted clauses should be enforced if legitimate.<sup>102</sup> When the policy considerations that support validation are strong and readily apparent, the rule against ouster is correctly termed a "vestigial legal fiction."<sup>103</sup> When these considerations are not viable, the ouster argument may be used as a bastion against unfair negotiations.<sup>104</sup>

The components of the reasonableness test are varied. The *Gaskin* court proposed seven elements to be considered: "(1) inequality of bargaining power; (2) public policy; (3) injustice; (4) availability of remedies in the chosen forum; (5)

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Suit was filed in the Supreme Court of the State of New York. Pullman removed the case to the district court based on diversity of citizenship among the three parties. 477 F. Supp. at 439. The city moved to remand, *id.* at 439-40, based upon a contractual clause which stated: "This contract is to be construed pursuant to the Laws of the State of New York and the undersigned bidder agrees that only the New York courts shall have jurisdiction over this contract and any controversies arising out of this contract. The undersigned bidder also agrees to submit any controversies or problems arising out of this contract to the New York courts and the New York courts only." *Id.* at 440. The issue raised by Pullman was whether parties to a contract could stipulate that any dispute arising under the contract must be brought in the state courts to the implicit exclusion of the federal courts sitting in the same geographical polity. The court did not reach the issue, however, but decided the case on contract principles. The court found the contract to be ambiguous. The language was therefore construed against the draftsman (the city). *See id.* at 443; note 98 *infra*. The court ruled that the term "New York courts" included the federal courts sitting in New York. The court considered the term to be one of geography, rather than sovereignty. 477 F. Supp. at 440, 442-43.

98. An example of the applicability of contract law to choice of forum clauses is presented when the contractual stipulation does not clearly set forth in which court, federal or state, a suit must be brought. *City of N.Y. v. Pullman Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979). When such ambiguity exists, the contract is normally construed against the party who drafted it. *Stern v. Satra Corp.*, 539 F.2d 1305, 1310 (2d Cir. 1976); 477 F. Supp. at 443.

99. *See Gilbert, supra* note 2, at 43-66.

100. "It must be remembered that once the 'avoiding' party has made the 'strong showing' which is required of him with regard to either (or both) of these standards, we will not enforce the forum clause." *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 365 (S.D.N.Y. 1975).

101. The "unreasonable or unjust" test is more policy oriented because it allows for a weighing of interests. "Such proof [of unreasonableness or unfairness] will, in most instances, go to the equities of the matter . . ." *Id.* at 365.

102. The Restatement (Second) of Conflict of Laws § 80 (1971), expresses this idea vividly: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." The Restatement is suggesting a balancing test. The court may decline to exercise its jurisdiction if it deems itself an inappropriate forum. A factor that should be considered is the agreement of the parties as to which court they had decided upon when contracting. *Id.* Comment a.

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

104. Intrastate choice of forum provisions exemplify the weakening of the policies behind the prima facie valid view. *See Enforcing Choice of Forum Clauses, supra* note 7, at 427.

the governing law; (6) inconvenience; and (7) conduct of the parties."<sup>105</sup> When applying the reasonableness test to an intrastate conflict, policy arguments which were properly dormant in the more geographically diverse cases take on a new vitality.

The forum selection provision should be presumed reasonable and fair; the party questioning its enforceability must set out those aspects of the reasonableness test believed to be violated. When confronted with a challenge to the clause's validity, the court should weigh the assertions supporting that contention against the other factors pertaining to the clause's reasonableness. If the court engages in this in-depth analysis, its decision on the enforceability of the choice of forum agreement will be a true and proper exercise of its discretion. The *prima facie* valid view is a sound approach only when used by the court to safeguard broader rights, such as accessibility to all courts, which a more restricted outlook would not protect.

An excellent example of the effective use of the two-pronged test and its components is provided by *Taylor v. Titan Midwest Construction Corp.*<sup>106</sup> A

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105. *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 365 (S.D.N.Y. 1975) (footnote omitted). The seven factors were later used to determine the enforceability of a venue selection clause. *Full-Sight Contact Lens v. Soft Lenses, Inc.*, 466 F. Supp. 71, 73 (S.D.N.Y. 1978). The court may uphold a venue selection clause when it is reasonable. *Id.* at 74; *see Sanko S.S. Co. v. Newfoundland Ref. Co.*, 411 F. Supp. 285 (S.D.N.Y.), *aff'd*, 538 F.2d 313 (2d Cir.), *cert. denied*, 429 U.S. 858 (1976). A party wishing to render a forum selection clause inoperative on grounds of inconvenience has an uphill struggle at best. He must prove that the forum stipulated is so substantially less convenient that he has in effect been precluded from an opportunity in court. Model Choice of Forum Act § 3, Comment, cl. 3 (1968), *reprinted in* 17 Am. J. Comp. L. 292, 293-96 (1969); Note, *Forum Selection Clauses in Maritime Contracts*, 33 La. L. Rev. 481, 487 (1973). Mere inconvenience alone will seldom be used to invalidate a choice of forum clause. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16-17 (1972); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 368 (S.D.N.Y. 1975). This stringent standard of inconvenience may result from the assumption employed by some courts that the chosen forum was properly contemplated and was supported by consideration. *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966); *Full-Sight Contact Lens v. Soft Lenses, Inc.*, 466 F. Supp. 71, 73 (S.D.N.Y. 1978).

Some additional factors that aid in determining reasonableness are: "1) Which law governs the formation and construction of the contract; 2) The residency of the parties; 3) The place of execution and/or performance of the contract; 4) The location of the parties and witnesses probably involved in the litigation." *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972). Unreasonableness is inherent in any contract that seriously impairs the plaintiff's ability to pursue his cause of action because it may also impair the forum court's ability to fully and fairly adjudicate the controversy. *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966). Distrust of the contemplated forum's ability to adjudicate a claim fairly is apparent when the contract names a foreign tribunal. *See, e.g., National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761 (E.D.N.Y. 1967); *Hernandez v. Koninklijke Nederlandsche Stoomboot Maatschappij N.V.*, 252 F. Supp. 652, 654 (S.D.N.Y. 1965); *Takemura & Co. v. The S.S. Tsuneshima Maru*, 197 F. Supp. 909, 912 (S.D.N.Y. 1961); *Nieto v. The S.S. Tinnun*, 170 F. Supp. 295, 297 (S.D.N.Y. 1958).

106. 474 F. Supp. 145 (N.D. Tex. 1979). The *Taylor* case dealt with a choice of venue clause. The question as to whether state or federal law should be used to determine the enforceability of a contractual venue stipulation was addressed. In *Taylor*, the court decided that the federal law should govern; there has been, however, no uniformity on the question. *Compare Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011 (S.D.W. Va. 1976) and *Davis v. Pro Basketball, Inc.*, 381 F.

dispute arose concerning subcontracts between a Texas based proprietorship and a Delaware corporation whose principal place of business was in Missouri. The contract stipulated that jurisdiction and venue shall be in the appropriate court in the county in which the Delaware corporation's Missouri offices were located.<sup>107</sup> The court, ruling on the validity of the clause, cited the modern trend toward *prima facie* validity, but proceeded to incorporate the analytical tests promulgated by *Bremen*.

The *Taylor* rationale exemplifies the optimum operation of the *prima facie* valid rule. Applying both ends of the two-pronged test, the court emphasized the need to ensure that no "overweening bargaining" or "inequality of bargaining power" occurred.<sup>108</sup> The court gave careful consideration to the rights of the complaining party. After determining that the parties were in equal bargaining positions and that the specified forum was not unreasonably inconvenient, the court chose to uphold the clause.<sup>109</sup> This well reasoned use of judicial discretion is in stark contrast to the court's approach on rehearing in *Spatz*.

### CONCLUSION

Certain policy considerations require varying degrees of deference, depending upon the circumstances of the case. The policy argument underlying accessibility to the courts, for instance, may be subordinate to a stronger policy which encourages American business both interstate and abroad. Accessibility becomes a much more important consideration when the choice is between state and federal courts sitting in the same state. The law provides the remedy of access; individuals should not be given unhindered freedom to alter such basic remedial decisions.<sup>110</sup>

The *prima facie* valid rule should govern the field of forum selection clauses. Nevertheless, this rule must be applied cautiously to avoid its misuse. The tests that accompany the rule in its purest form can provide the requisite protection to the contracting parties, but only when the courts properly and consistently observe them.

Patrick J. Barrett

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Supp. 1 (S.D.N.Y. 1974) with *St. Paul Fire & Marine Ins. Co. v. Travelers Indem. Co.*, 401 F. Supp. 927 (D. Mass. 1975) and *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042 (E.D. Wis. 1973).

107. 474 F. Supp. at 146.

108. *Id.* at 149. "It bears emphasis that overweening bargaining power or inequality in bargaining power ought to be carefully watched for. And appearance as 'boiler plate' in form contracts is a warning. This court is here satisfied but shares the concern expressed by Justice Black's dissent in *National Equipment Rental, Ltd. v. Szukhent*." *Id.* (citation omitted). In his strong dissent in *National Equipment*, Justice Black expressed the fear that adhering to a clause that "attempts to restrict jurisdiction to a single court or courts," may lead to contracts that are adhesive in nature. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 326-29 (1964) (Black, J., dissenting) (citations omitted).

109. 474 F. Supp. at 149.

110. See note 26 *supra* and accompanying text. The remedy under consideration here concerns access to the federal courts. There are two basic methods of gaining access to the federal courts: if the claim raises a federal question, 28 U.S.C. § 1331 (1976), or if the parties are of diverse citizenship. *Id.* § 1332.