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## Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court

Linda S. Mullenix

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### Cover Page Footnote

Associate Professor of Law, Catholic University of America Law School. B.A. 1971, City College of New York; M. Phil. 1974, Ph.D. 1977, Columbia University; J.D. 1980, Georgetown University Law Center. This Article was written with support from a summer research grant provided by the Catholic University of America Law School.

# ANOTHER CHOICE OF FORUM, ANOTHER CHOICE OF LAW: CONSENSUAL ADJUDICATORY PROCEDURE IN FEDERAL COURT

LINDA S. MULLENIX\*

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*Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights.*<sup>1</sup>

## INTRODUCTION

NOTHING is quite as pleasing as a legal doctrine that makes good, common sense. In a complex litigation system, the idea that people should be able to agree to where they will sue each other is one such satisfying proposition. Indeed, so enticing is the notion that people ought to be able to agree to the terms of any litigation, that federal courts have eagerly embraced the idea.<sup>2</sup>

The ability of prospective litigants to choose in advance both the court that will hear the case and the law that will govern the dispute now enjoys widespread approval in federal courts.<sup>3</sup> This was not always so. In-

1. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

2. One survey indicates that since 1980 the enforceability of forum-selection clauses has been the topic of litigation in 211 federal cases and 50 state cases. See Note, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law*: Stewart Organization v. Ricoh Corporation, 72 Minn. L. Rev. 1090, 1091 n.9 (1988).

3. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-30 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982); *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047, 1052 (3d Cir. 1987); *National Iranian Oil Co. v. Ashland Oil Inc.*, 817 F.2d 326, 332 (5th Cir.), *cert. denied*, 108 S. Ct. 329 (1987); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1069-70 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988); *Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir. 1986); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1067-68 (8th Cir. 1986); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 359 (3d Cir. 1986); *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 187-88 (7th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984); *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 156 (2d Cir. 1984); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 7 (1st Cir. 1984); *Lien Ho Hsing Steel Enter. Co. v. Weihtag*, 738 F.2d 1455, 1458 (9th Cir. 1984); *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 774 (3d Cir. 1984); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 317 (4th Cir. 1982); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 721 (2d Cir. 1982); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 631 (9th Cir. 1982); *Crown Beverage Co. v. Cervceria Moctezuma, S.A.*, 663 F.2d 886, 888 (9th Cir. 1981); *Janko v. Outboard Marine Corp.*, 605 F. Supp. 51, 52 (W.D. Okla. 1985); *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6, 8 (W.D. Okla. 1984); *LFC Lessors, Inc. v. Pearson*, 585 F. Supp. 1362, 1364 (D. Mass. 1984); *Visicorp v. Software Arts, Inc.*, 575 F. Supp. 1528, 1532 (N.D. Cal. 1983); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983); *C. Pappas Co. v. E. & J. Gallo Winery*, 565 F. Supp. 1015, 1017 (D. Mass. 1983); *Northeast Theatre Corp. v. Edie & Ely Landau, Inc.*, 563 F. Supp. 833, 834 (D. Mass. 1983); *Gordonsville Indus., Inc. v. American Artos Corp.*, 549 F. Supp. 200, 205 (W.D. Va. 1982); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 470 (D. Vt. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *Anastasi Bros. Corp. v. St. Paul Fire & Marine Ins. Co.*, 519 F. Supp. 862, 863-64 (E.D. Pa. 1981); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 871 (D. Minn. 1980); *Zima Corp. v. M.V. Roman*

deed, the current doctrine of consensual adjudicatory procedure represents a wholesale abandonment of a 100-year taboo against party autonomy in procedural matters.<sup>4</sup> The federal courts have been unusually quick to cast aside well-established jurisdictional tenets, as well as the arcane niceties of conflicts principles, and to import contract principles into the jurisdictional arena.

The doctrine of consensual adjudicatory procedure is now well entrenched in federal practice and is widely heralded as a form of salutary progressivism.<sup>5</sup> The doctrine is lauded for enhancing the values of predictability, certainty, security, stability and simplicity.<sup>6</sup> With court approval, party autonomy regarding crucial procedural determinations flourishes in an increasingly wider range of commercial and non-commercial settings.<sup>7</sup> Some courts verge on the self-congratulatory when

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Pazinski, 493 F. Supp. 268, 276-77 (S.D.N.Y. 1980); *Dick Proctor Imports, Inc. v. Sumitomo Corp. of Am.*, 486 F. Supp. 815, 818-19 (E.D. Mo. 1980).

The validity and enforceability of forum-selection clauses is a frequently litigated issue in federal court and there are dozens of reported cases. For extensive citation to pre-1980 cases, see Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 (1984); see also Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. Ill. L. Rev. 133 (1982) [hereinafter Gruson, *Forum-Selection Clauses*]. This Article discusses the nature and effect of forum-selection and choice-of-law provisions in federal procedure only; there is, however, a parallel body of state law decisions. See generally Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements—New York's Approach*, 1982 U. Ill. L. Rev. 207, 208 (1982) [hereinafter Gruson, *Governing-Law Clauses*] (New York law often stipulated as governing law in international commercial transactions); Annotation, *supra*, at 409-45 and cases cited therein (state cases).

4. See *Insurance Co. of New York v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void"); *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174, 179-85 (1856) (no legal effect to parties' agreement as to where lawsuit should be brought). For discussions of the historical antipathy to consensual adjudicatory procedure, see Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 8 Int'l Law. 83, 87-98 (1974); Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1, 11-20 (1976).

5. See, e.g., Gruson, *Forum-Selection Clauses*, *supra* note 3, at 133; Gruson, *Governing-Law Clauses*, *supra* note 3, at 207; Reese, *The Supreme Court Supports Enforcement of Choice of Forum Clauses*, 7 Int'l Law. 530, 535 (1973).

6. See Reese, *supra* note 5, at 535. Another perspective of the doctrine of consensual adjudicatory procedure is that it entails a waiver of litigation rights. For a description of the beneficial values of waiver in the litigation context, see Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478, 488-89 (1981) (values of cost minimization, time efficiency, bargaining chips in contract negotiation, and flexibility).

7. See *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (arbitration clause in securities action); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration clause in antitrust action); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (arbitration clause in securities action); *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (employment contract in FELA action); *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) (bill of lading); *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987) (securities underwriting agreement); *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047 (3d Cir. 1987) (bankruptcy proceedings); *National Iranian Oil Co. v. Ashland Oil Inc.*, 817 F.2d 326 (5th Cir.) (arbitration agreement), *cert. denied*, 108 S. Ct. 329 (1987); *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986) (securities fraud action); *Jackam v. Hospi-*

confronted with a forum-selection clause:<sup>8</sup> not only is the court able to

tal Corp. of Am. Mideast, 800 F.2d 1577 (11th Cir. 1986) (employment contract); Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985) (municipal contract bidding); AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984) (securities fraud action); Lien Ho Hsing Steel Enter. Co. v. Weihtag, 738 F.2d 1455 (9th Cir. 1984) (insurance policy); Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380 (9th Cir. 1984) (boilerplate contract); Livolsi v. Ram Constr. Co., 728 F.2d 600 (3d Cir. 1984) (ERISA consent order); Zimmerman v. Continental Airlines, 712 F.2d 55 (3d Cir. 1983) (bankruptcy proceedings), *cert. denied*, 464 U.S. 1038 (1984); Dracos v. Hellenic Lines Ltd., 705 F.2d 1392 (4th Cir. 1983) (employment contract), *cert. denied*, 474 U.S. 945 (1985); Bense v. Interstate Battery Sys. of Am., 683 F.2d 718 (2d Cir. 1982) (antitrust action); Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982) (admiralty action); Crown Beverage Co. v. Cervceria Moctezuma, 663 F.2d 886 (9th Cir. 1981) (distributorship agreement); Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981) (bill of lading); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842 (2d Cir. 1977) (brokers' commodities agreement); Aacon Auto Transport, Inc. v. State Farm Mutual Auto. Ins. Co., 537 F.2d 648 (2d Cir. 1976) (arbitration agreement), *cert. denied*, 429 U.S. 1042 (1977); Tai Kien Indus. Co. v. M/V Hamburg, 528 F.2d 835 (9th Cir. 1976) (towage contract); Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. 1975) (construction contract); Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294 (1st Cir. 1974) (bill of lading); Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972) (book publishing contract); Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) (bill of lading); Carbon Black Export, Inc. v. S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958) (bill of lading), *cert. dismissed*, 359 U.S. 180 (1959); Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d 806 (2d Cir.) (bill of lading), *cert. denied*, 350 U.S. 903 (1955).

The underlying agreements and actions have been similarly varied at the district court level. See Richardson Greenshields Secs., Inc. v. Metz, 566 F. Supp. 131 (S.D.N.Y. 1983) (commodities trading agreement); Gordonsville Indus., Inc. v. American Artos Corp., 549 F. Supp. 200 (W.D. Va. 1982) (private international contract); Colonial Leasing Co. v. Best, 552 F. Supp. 605 (D. Or. 1982) (equipment lease agreement); Anastasi Bros. Corp. v. St. Paul Fire & Marine Ins. Co., 519 F. Supp. 862 (E.D. Pa. 1981) (construction contract); Lulling v. Barnaby's Family Inns, Inc., 482 F. Supp. 318 (E.D. Wis. 1980) (franchise agreement); First Nat'l Monetary Corp. v. Chesney, 514 F. Supp. 649 (E.D. Mich. 1980) (brokerage agreement); Zima Corp. v. M.V. Roman Pazinski, 493 F. Supp. 268 (S.D.N.Y. 1980) (bill of lading); Dick Proctor Imports, Inc. v. Sumitomo Corp. of Am., 486 F. Supp. 815 (E.D. Mo. 1980) (franchise agreement); International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co., 474 F. Supp. 370 (W.D. Pa. 1979) (mem.) (collective bargaining agreement); Full-Sight Contact Lens Corp. v. Soft Lenses, Inc., 466 F. Supp. 71 (S.D.N.Y. 1978) (distributorship agreement); Cruise v. Castleton, Inc., 449 F. Supp. 564 (S.D.N.Y. 1978) (harness-racing association by-laws); First Nat'l City Bank v. Nanz, Inc., 437 F. Supp. 184 (S.D.N.Y. 1975) (mem.) (loan agreement); St. Paul Fire & Marine Ins. Co. v. Travelers Indem. Co., 401 F. Supp. 927 (D. Mass. 1975) (construction subcontracts); Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975) (employment contract); Brown v. Gingiss Int'l, Inc., 360 F. Supp. 1042 (E.D. Wis. 1973) (franchise agreement); Jack Winter, Inc. v. Koratron Co., 326 F. Supp. 121 (N.D. Cal. 1971) (patent licensing agreement); National Equip. Rental, Ltd. v. Sanders, 271 F. Supp. 756 (E.D.N.Y. 1967) (equipment lease); Takemura & Co. v. S.S. Tsuneshima Maru, 197 F. Supp. 909 (S.D.N.Y. 1961) (bill of lading).

8. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985) (lauding enhanced values of international comity, sensitivity to international commercial system, and predictability); Luce v. Edelstein, 802 F.2d 49, 57 (2d Cir. 1986) (forum-selection clauses not disfavored in law); Bense v. Interstate Battery Sys. of Am., 683 F.2d 718, 721 (2d Cir. 1982) ("general hostility" towards forum-selection clauses is today simply a vestigial remainder of an outmoded doctrine"); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977) ("forum selection clauses have come to be recognized as useful devices").

carry out the wishes of the parties, but the court also effectively demurs active participation in a breach of contract.<sup>9</sup> Another benefit, not incidental, is that the enforcing court successfully accomplishes its own goal of docket-clearing. The sum of litigation is neither reduced nor simplified; it is simply shifted someplace else.

Precisely because the doctrine is so basically appealing and universally accepted, it is anathema to suggest that the doctrine of consensual procedure is problematic. And yet, as is true of many simple ideas, the simplicity masks or ignores complex issues. This deceptive little doctrine has taken root and continues to flourish without much thoughtful discussion or close analytical scrutiny. The central problem, however, is not one of inadequate doctrinal development—although this is a serious deficiency. The central problem is that substantial litigation rights are sacrificed to enhance purely prudential considerations. Contract principles now effectively usurp long-standing jurisdictional and conflict-of-laws rules, but courts and commentators have devoted scant attention to the deleterious effects of this quiet revolution.

#### A. *Issues of Consensual Adjudicatory Procedure*

Consensual adjudicatory procedure denotes the ability of potential or prospective litigants to choose, in advance of any litigation, the court that will hear the dispute and the law that will govern the substantive merits of the litigation.<sup>10</sup> It is essentially a doctrine of procedural choices by consent of the parties. These choices and this consent are typically manifested in “forum-selection clauses” and “choice-of-law clauses” contained in an agreement between the parties.<sup>11</sup> Although these agreements affect basic procedural rights, their interpretation is nonetheless irretrievably based in contract law.

The thesis of this Article is that the supremacy of contract law over long-established jurisdictional doctrines has significantly eroded certain

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9. See *Mitsubishi Motors Corp.*, 473 U.S. at 628 (“[h]aving made the bargain to arbitrate, the party should be held to it”); *Luce*, 802 F.2d at 57 (“what would be unreasonable and unjust would be to allow one of the [parties] to disregard [the agreement]” (quoting *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 156 (2d Cir. 1984)); see also Gilbert, *supra* note 4, at 20-21.

10. See J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 3.5, at 104 (1985).

11. This Article is limited to a discussion of consensual designation of the litigation forum and governing law. A more comprehensive view of consensual adjudicatory procedure would entail examination of consent and waiver of various litigation rights throughout the adjudicatory process. Thus, it is possible to effect consensual waiver of defenses, objections or causes of action and waiver of the right to an adjudication, through cognovit clauses, arbitration agreements, consent judgments and settlements. In civil law, “[v]irtually any adjudication-related right can be waived.” Rubin, *supra* note 6, at 521. This Article focuses specifically on forum access and governing law because of the due process concerns implicated in these aspects of adjudicatory procedure. The general critique developed from these two fundamental litigation elements is equally applicable to analogous waivable rights. For a comprehensive survey of waiver possibilities in civil litigation, see *id.* at 512-28.



fundamental litigation rights. This is particularly egregious insofar as various mechanisms for securing consensual adjudicatory procedure are becoming pervasive throughout a wide array of party relationships.<sup>12</sup> Not only has the overlay of contract law confounded jurisdictional principles, but the doctrine of consensual adjudicatory procedure is predicated on an analytical confusion of the concepts of jurisdiction, venue, forum non conveniens and choice-of-law.

The pervasive authority of contract principles in the procedural arena also has obfuscated a wide variety of troubling issues with regard to these forum and choice-of-law clauses. For example, it is unclear whether forum-selection clauses are matters of jurisdiction or venue, and whether this conceptual distinction makes an analytical difference for courts construing the validity of such clauses.<sup>13</sup> For instance, should such clauses be construed according to procedural rules or contract principles?<sup>14</sup> Assuming that such clauses are valid, there is confusion over the appropriate remedy for the party seeking enforcement of the clause; choices include dismissal, stay of jurisdiction, transfer or remand.<sup>15</sup> And a final cause for confusion is the relationship of the doctrine of forum non conveniens to forum-selection clauses.<sup>16</sup>

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12. See *supra* note 7 and accompanying text.

13. Thus, one commentator has suggested:

This conceptual difference [between jurisdiction and venue] has not influenced the analysis of jurisdiction clauses, and the federal courts deal with the enforceability of forum-selection clauses in the same manner whether the choice is between two federal district courts or between a federal court and a foreign court. Characterization of the issue as one of "venue," however, probably has influenced the decision of some courts to apply federal rather than state law to the question whether forum-selection clauses are enforceable.

Gruson, *Forum Selection Clauses*, *supra* note 3, at 157-58 (footnotes omitted); see also Farquharson, *supra* note 4, at 95-99 (forum non conveniens and jurisdiction approaches); Gilbert, *supra* note 4, at 10-11 (distinction between jurisdictional and forum non conveniens analysis); *id.* at 42 (effects of venue on forum-selection clauses); Gruson, *Forum Selection Clauses*, *supra* note 3, at 140 (forum-selection clause cannot oust a court of jurisdiction); *id.* at 142-43 (forum-selection clause reasonableness determined by factors similar or identical to forum non conveniens determinants); Reese, *supra* note 5, at 534 (ouster of jurisdiction concept rejected). For a discussion of the case law construction of the characterization problem, see *infra* Part II A.

14. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) (forum-selection clauses governed by matters of federal venue procedure on transfer motion under 28 U.S.C. § 1404(a) (1982)); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (forum-selection clause validity determined by traditional contractual principles). See generally Gilbert, *supra* note 4 *passim* (same); Rubin, *supra* note 6 *passim* (contract law interpretation of civil waivers and due process implications). For a discussion of the effects of contractual interpretation of forum-selection clauses, see *infra* Part VI.

15. See Gruson, *Forum Selection Clauses*, *supra* note 3, at 137. For a discussion of the case law involving these various possible remedies, see *infra* Part II B.

16. See *supra* note 13 and accompanying text. The common law doctrine of forum non conveniens has to a large extent been superseded by federal transfer provisions. See 28 U.S.C. §§ 1404, 1406 (1982 & Supp. 1988). Nonetheless, forum non conveniens analysis predicated on the Supreme Court's articulation of the doctrine in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), still enjoys continued vitality in federal court decisions, including numerous forum-selection clause cases. See 15 C. Wright & A. Miller, *Federal*

Contractual drafting methods also present a problem. At the broadest theoretical level, is there a significant difference between prorogation and derogation clauses<sup>17</sup> and between mandatory and permissive clauses?<sup>18</sup>

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Practice and Procedure § 3828, at 278 (2d ed. 1986). For a discussion of forum-selection clause cases implicating forum non conveniens analysis, see *infra* Part II B.

17. Under a derogation clause, the parties have chosen not to allow action in a jurisdiction, while under a prorogation clause the parties grant or accept a given jurisdiction. See Aballi, *Comparative Developments in the Law of Choice of Forum*, 1 N.Y.U. J. Int'l L. & Pol. 178, 179 (1968); Farquharson, *supra* note 4, at 86; Gilbert, *supra* note 4, at 5-6; Gruson, *Forum-Selection Clauses*, *supra* note 3, at 136 & n.7; Lenhoff, *The Parties' Choice of Forum: "Prorogation Agreements"*, 15 Rutgers L. Rev. 414, 415-19 (1961); Perillo, *Selected Forum Agreements in Western Europe*, 13 Am. J. Comp. L. 162, 162 (1964) (presented at Proceedings of the 1964 Annual Meeting of the American Foreign Law Association); Schwind, *Derogation Clauses in Latin American Law*, 13 Am. J. Comp. L. 157, 167 (1964) (presented at Proceedings of the 1964 Annual Meeting of the American Foreign Law Association). For a discussion of the prorogation and derogation framework for construing federal forum-selection clauses, see *infra* Part III C.

18. Forum-selection and governing law clauses are usually construed according to traditional contract principles of language construction. See *Louisiana Ice Cream Distrib., Inc. v. Carvel Corp.*, 821 F.2d 1031, 1033 (5th Cir. 1987) (ambiguous forum-selection clause); *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 407 (3d Cir. 1987) (ambiguous combined forum and choice-of-law clause); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77-78 (9th Cir. 1987) (permissive, not mandatory provision); *Jackam v. Hospital Corp. of Am. Mideast Ltd.*, 800 F.2d 1577, 1581-82 (11th Cir. 1986) (same); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985) (per curiam) (Brazilian forum-selection clause deemed ambiguous); *Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela*, 760 F.2d 390, 395-96 (2d Cir. 1985) (two conflicting forum selection provisions); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 346-47 (8th Cir.) (distinguishing mandatory language and construing "should" as ambiguous), *cert. denied*, 474 U.S. 948 (1985); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 7-8 (1st Cir. 1984) (ambiguous clause); *Yarn Indus. Inc. v. Krupp Int'l, Inc.*, 736 F.2d 125, 129 (4th Cir. 1984) (two documents with ambiguous and inconsistent provisions); *Rockwell Int'l Sys. v. Citibank, N.A.*, 719 F.2d 583, 587 (2d Cir. 1983) (mandatory forum-selection clause); *Zapata Marine Serv. v. O/Y Finnlines, Ltd.*, 571 F.2d 208, 209 (5th Cir. 1978) (per curiam) (contract principles utilized to construe ambiguous clause against drafter); *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6, 8-9 (W.D. Okla. 1984) (permissive versus mandatory language); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.) (mandatory, not permissive clause); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) (clause held not ambiguous); *Gordonsville Indus., Inc. v. American Artos Corp.*, 549 F. Supp. 200, 206 (W.D. Va. 1982) (same); *City of New York v. Pullman Inc.*, 477 F. Supp. 438, 443 (S.D.N.Y. 1979) (contract principles used to construe ambiguous clause against drafter); *Randolph Eng'g Co. v. Fredenhagen Kommandit-Gesellschaft*, 476 F. Supp. 1355, 1359-60 (W.D. Pa. 1979) (mem.) (ambiguous forum-selection clause not enforced); *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 372 (W.D. Pa. 1979) (mem.) (forum-selection clause not mandatory); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148 (N.D. Tex. 1979) (mandatory versus permissive language problem); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 187 (S.D.N.Y. 1975) (mem.) (ambiguous clause not mandatory); *A. C. Miller Concrete Prods. Corp. v. Quikset Vault Sales Corp.*, 309 F. Supp. 1094, 1095 (E.D. Pa. 1970) (ambiguous clause upheld); *United States v. Aetna Casualty & Sur. Co.*, 38 F.R.D. 418, 420 (N.D. Cal. 1965) (ambiguous clause cannot oust jurisdiction); see also Gruson, *Forum-Selection Clauses*, *supra* note 3, at 134 & n.3. The abundance of litigation surrounding the basic language construction of forum-selection and choice-of-law provisions should serve as a warning to attorneys drafting such clauses. Certainly, the amount of litigation concerning fundamental lan-

In addition, are claims not narrowly covered by the contract clause also subject to the forum and choice-of-law provisions, or must the lawsuit be fragmented?<sup>19</sup>

Moreover, these clauses raise complex federalism issues. Initially, there is the fundamental question whether the Supreme Court has created a new federal common law of consensual adjudicatory procedure, governed by federal common law contract rules.<sup>20</sup> Beyond this basic point are an array of vexatious *Erie*<sup>21</sup> problems. Adding further compli-

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guage interpretation calls into serious doubt whether these devices actually enhance the values of certainty, predictability, security, stability, simplicity and cost minimization. For a discussion of the application of general contract principles to determine clause validity, see *infra* Part VI B.

19. See *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986) (multiple claims additional reason for non-enforcement of forum-selection clause); *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986) (clause enforced in multiple claims lawsuit); *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643 (multiple claims not grounds for unenforceability of clause), *vacated*, 785 F.2d 896 (11th Cir. 1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988); *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984) (discussion of fraud claim in relation to clause); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718 (2d Cir. 1982) (antitrust claim construed within intent of contract clause); *Crown Beverage Co. v. Cervectoria Moctezuma*, 663 F.2d 886 (9th Cir. 1981) (in multiple claims case involving antitrust allegations, Sherman Act claims adjudicated but pendent contract claims dismissed); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953 (3d Cir. 1978) (multiple claims; clause not enforced); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545 (N.D. Tex. 1982) (combined legal claims; analysis of "related to contract" language); *Hoes of America, Inc. v. Hoes*, 493 F. Supp. 1205 (C.D. Ill. 1979) (multiple claims, multiple remedies; clause enforceable); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868 (D. Minn. 1980) (multiple claims; analysis of "arise out of" language); *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983 (S.D. W. Va. 1980) (mem.) (multiple claims, multiple remedies; clause not enforced); *City of New York v. Pullman, Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979) (multiple claims; ambiguous provision enforced); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71 (S.D.N.Y. 1978) (antitrust and tort claims encompassed by enforceable contract clause); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564 (S.D.N.Y. 1978) (tort claims encompassed by contract clause).

20. See Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 Wayne L. Rev. 49, 59-60 (1972) (expansive view of *The Bremen* as applicable to all forum-clause cases); Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 Vand. J. of Transnat'l L. 387 (1973) (arguing that *The Bremen* rule may be limited to maritime and international commercial cases); cf. Reese, *supra* note 5, at 537 ("The Supreme Court's decision in the *Zapata* case is not of constitutional dimension and hence does not have binding force in areas governed by state law."). For further discussion of the federal common law implications of *The Bremen*, see the discussion *infra* Parts I A, VI A-B.

21. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). One question concerns whether forum-selection clauses are enforceable in federal court when underlying state law considers them violative of public policy. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) (enforcing forum-selection clause even though against state law policy). For an extensive discussion of *Ricoh*, see *infra* Part III; see also Note, *supra* note 2 (*Ricoh* case commentary).

In addition, are forum-selection clauses substantive or procedural for *Erie* purposes? Although the Supreme Court definitively answered that such clauses are procedural when the issue arises on a 28 U.S.C. § 1404 transfer motion, an extensive *Erie* debate exists among the circuits. See *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987) (forum-clause determined by federal law); *Diaz Contracting, Inc.*

cation, are choice-of-law clauses substantive for *Erie* purposes under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, while choice of forum clauses are procedural under *Stewart Organization, Inc. v. Ricoh Corp.*?<sup>22</sup> In contracts with concomitant choice-of-law and forum-selection clauses, should the choice-of-law provision be interpreted first so as to supply the rules of construction for the forum-selection clause?<sup>23</sup> Furthermore, what is the relationship of these clauses, and to what extent do they func-

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v. Nanco Contracting Corp., 817 F.2d 1047 (3d Cir. 1987) (applying New York state law); Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986) (applying Missouri state law; policy forbids enforcement); Sun World Lines, Ltd. v. March Shipping Corp., 801 F.2d 1066 (8th Cir. 1986) (applying federal common law in admiralty case); General Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986) (applying state standards not federal common law); Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985) (applying Virginia law, which follows *The Bremen*); Nascone v. Spudnuts, Inc., 735 F.2d 763 (3d Cir. 1984) (illustrative of bizarre *Erie* argument); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.) (applying *Bremen* federal common law), cert. denied, 464 U.S. 938 (1983); Visicorp v. Software Arts, Inc., 575 F. Supp. 1528 (N.D. Cal. 1983) (applying federal venue law); Hoffman v. Burroughs Corp., 571 F. Supp. 545 (N.D. Tex. 1982) (applying federal common law); C. Pappas Co. v. E. & J. Gallo Winery, 565 F. Supp. 1015 (D. Mass. 1983) (applying federal law); Northeast Theatre Corp. v. Edie & Ely Landau, 563 F. Supp. 833 (D. Mass. 1983) (applying federal venue law); Richardson Eng'g Co. v. IBM, 554 F. Supp. 467 (D. Vt. 1981) (Vermont would follow *The Bremen*, aff'd, 697 F.2d 296 (2d Cir. 1982); Kolendo v. Jerell, Inc., 489 F. Supp. 983 (S.D. W. Va. 1980) (mem.) (applying West Virginia law); Kline v. Kawai Am. Corp., 498 F. Supp. 868 (D. Minn. 1980) (applying federal common law); Dick Proctor Imports, Inc. v. Sumitomo Corp. of Am., 486 F. Supp. 815 (E.D. Mo. 1980) (applying federal venue law); Wellmore Coal Corp. v. Gates Learjet Corp., 475 F. Supp. 1140 (W.D. Va. 1979) (no need to choose when state and federal law the same); Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145 (N.D. Tex. 1979) (federal law controls); Cruise v. Castleton, Inc., 449 F. Supp. 564 (S.D.N.Y. 1978) (same outcome under federal law or New York state law); Leasewell, Ltd. v. Jake Shelton Ford, Inc., 423 F. Supp. 1011 (S.D. W. Va. 1976) (mem.) (applying West Virginia conflicts rules to determine validity of forum-selection clause); Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (S.D.N.Y. 1974) (state law determines clause enforceability); Matthiessen v. National Trailer Convoy, Inc., 294 F. Supp. 1132 (D. Minn. 1968) (*Erie* issue raised but not resolved); Geiger v. Keilani, 270 F. Supp. 761 (E.D. Mich. 1967) (no resolution of *Erie* issue; suggests treatise could be written on the problem).

22. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) (forum selection is venue matter; procedural analysis applies); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (federal courts must apply the conflict-of-laws rules of the states in which they sit to promote uniform application of state substantive law).

23. See, e.g., *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 722 (2d Cir. 1982) (court declines to apply Texas choice-of-law to defeat clause); *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 214-15 (W.D. Tenn. 1985) (confused interpretation of choice-of-law provision and Tennessee conflicts law); *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 712 (D.R.I. 1983) (confused analysis of choice-of-law provision to determine enforceability of forum-selection clause); *Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205, 1207-08 (C.D. Ill. 1979) (German law applied to construe choice-of-forum provision); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1144 (W.D. Va. 1979) (applied Virginia conflicts rules to look to Arizona law for contract enforceability); *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976) (mem.) (applied West Virginia conflicts rules to determine validity of forum-selection clause).

tion independently?<sup>24</sup>

Federal procedural rules raise other troubling questions. For instance, the effect of federal enforcement of a choice-of-forum clause with a consequent transfer is uncertain. Does it make a difference that the transfer is accomplished under transfer provisions<sup>25</sup> or pursuant to the doctrine of forum non conveniens?<sup>26</sup>

Similarly, what happens when a defendant removes the case from state court to federal court, but the plaintiff requests a remand to enforce a forum-selection clause?<sup>27</sup> Finally, the lower federal courts' construction of forum and choice-of-law clauses is in disarray, lacking a unified analytical approach.<sup>28</sup>

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24. See, e.g., *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 550-51 (N.D. Tex. 1982) (discussion of applicable law under choice-of-law provision); *Colonial Leasing Co. v. Best*, 552 F. Supp. 605, 607 (D. Or. 1982) (analysis confused jurisdiction and conflict-of-law); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147 nn.1-2 (N.D. Tex. 1979) (convoluted *Erie*/conflicts analysis); see also Felix, *Diversity Jurisdiction and Choice of Law: Of Strangers Bearing Stale Products Liability Claims*, 25 S.C.L. Rev. 199, 207-13 (1973); Gilbert, *supra* note 4, at 43-66; Gruson, *Governing-Law Clauses*, *supra* note 3, at 222-25; Reese, *supra* note 5, at 537; Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 Colum. L. Rev. 553, at 554-55 (1957).

25. See 28 U.S.C. §§ 1404(a), 1406(a) (1982). For a discussion of the implications of transfer as a possible remedy, see the discussion *infra* Parts II A-B.

26. See *supra* notes 13, 16 and accompanying text. For the effect of a venue transfer on governing law, see 15 C. Wright & A. Miller, *supra* note 16, § 3846, at 363-68. In a 28 U.S.C. § 1404(a) action, governing law is generally determined by the rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964). *Van Dusen* requires that the transferee court apply the law of the transferor court, including its conflict-of-laws rules, "[b]ut if venue was improper or personal jurisdiction was lacking in the transferor court, the transferee court will apply the law that would have been applied if the action had been commenced in the transferee court." 15 C. Wright & A. Miller, *supra* note 16, § 3846, at 364-66. Obviously, these rules have interesting implications for forum-selection cases, where the transferor court frequently makes no personal jurisdiction determination in enforcing the clause.

27. See 28 U.S.C. §§ 1441-1449 (1982 & Supp. 1988), as amended by H.R. Conf. Rep. No. 4087, 100th Cong., 2d Sess. (1988) (section 1447(d) specifies particular grounds for remand). For a discussion of forum-selection clauses in the removal-remand situation and of pertinent cases, see *infra* Part IV (discussing 28 U.S.C. § 1441).

28. For a discussion of the growing list of post-*Bremen* enforceability factors, see *infra* Part VI. See generally Gilbert, *supra* note 4, at 32-42 (court should enforce forum selection clauses if fair and reasonable according to four factors of reasonableness); Gruson, *Forum Selection Clauses*, *supra* note 3, at 163-85 (two-pronged test under which plaintiff may avoid contractual forum provision).

At the appellate level, the federal courts have applied three different standards with regard to enforceability of these clauses. The three standards of review are: clearly erroneous, abuse of discretion and de novo review. See *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047, 1055 (3d Cir. 1987) (clearly erroneous); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 n.3 (8th Cir. 1986) (abuse of discretion); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 n.4 (9th Cir. 1984) (abuse of discretion); *Zimmerman v. Continental Airlines*, 712 F.2d 55, 60 (3d Cir. 1983) (abuse of discretion), *cert. denied*, 464 U.S. 1038 (1984); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 318 (4th Cir. 1982) (implicit de novo review); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 721 (2d Cir. 1982) (same); *In re Fireman's Fund Ins. Co.*, 588 F.2d 93, 95 (5th Cir. 1979) (de novo review); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 966

As the discussion below demonstrates, the federal courts have not clearly thought through all the implications of consensual procedure. A more cautious approach is needed to justify the deleterious consequences of party autonomy on jurisdiction and choice of law.

### B. *Neat Solutions and Untidy Problems*

In the rush to embrace a doctrine of consensual adjudicatory procedure, the federal courts have eagerly chosen the simple, neat solution. Unfortunately, the problems involved in consensual arrangements are not so tidy, and the courts have created a hodgepodge of principles and rationales to justify the doctrine.

Neither the Supreme Court nor the lower federal courts have done an admirable job of delineating a coherent and justifiable theory of consensual adjudicatory procedure. Due process requirements that normally inform jurisdictional analysis have evaporated in favor of expediency. Courts permit contract principles to replace carefully crafted jurisdictional rules. Essentially, the courts have evaded troubling questions: can parties contract away fundamental attributes of sovereignty or due process protection? If the Supreme Court has been unwilling to permit first amendment concerns to inform jurisdictional analysis,<sup>29</sup> why should contract principles effectively trump jurisdictional law? If the Supreme Court has repeatedly asserted that choice-of-law issues should not guide jurisdiction or venue analysis,<sup>30</sup> why should the choice-of-law tail wag the jurisdictional dog<sup>31</sup> when contract clauses are present?

Additionally, the standards governing consensual adjudicatory procedure, derived from *The Bremen v. Zapata Off-Shore Co.*<sup>32</sup> and subsequent federal court cases, obviate realistic inquiry into boilerplate contractual arrangements. *The Bremen* and its progeny effectively supersede conventional standards for jurisdiction, venue, transfer and forum non conveniens, imposing variegated standards for forum selection not

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(3d Cir. 1978) (clearly erroneous); *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972) (abuse of discretion).

29. See *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry."); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.12 (1984) ("[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause.").

30. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) ("The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law . . ."); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (possibility of change in substantive law under conflicts rules should not be given conclusive or substantial weight in forum non conveniens inquiry); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) ("The issue is personal jurisdiction, not choice of law.").

31. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 36 (1st Cir. 1982) ("[T]he New Hampshire tail is too small to wag so large an out-of-state dog."), *rev'd*, 465 U.S. 770 (1984).

32. 407 U.S. 1 (1972). See discussion *infra* Part I.

contemplated by those rules or doctrines. Indeed, the imposition of contract principles on forum selection rules has, in many instances, stood jurisdictional principles on their head: traditional deference to the plaintiff's choice of forum must yield to the defendant's invocation of contract law, while conversely a defendant must yield due process protections when the plaintiff seeks enforcement of a forum-selection provision.<sup>33</sup>

Even more troubling is the cavalier manner in which courts gloss over the implications of consensual adjudicatory procedure for fundamental concepts of sovereignty and liberty interests. The right to choose a forum is perhaps *the* most fundamental and essential litigation right, since it carries with it choice-of-law determinants. The notion of forum access, regulated by subject matter jurisdiction, is a fundamental governmental attribute intricately tied to the power and authority of the state.<sup>34</sup> Moreover, forum selection with regard to personal jurisdiction entails well-established due process concerns involving traditional notions of substantial justice and fair play.<sup>35</sup>

Notwithstanding these serious theoretical underpinnings to the concepts of jurisdiction and venue, prevailing doctrine in civil litigation is that waiver of these fundamental rights can be accomplished through qualitatively different contract standards. Criminal procedure, in contrast, has devoted substantial attention to the idea that fundamental litigation rights cannot be forfeited in the absence of a knowing and voluntary waiver.<sup>36</sup> Yet civil procedure contemplates no similar standard, and contract law in many instances effectively supersedes the state's authority as well as individual due process concerns. Perhaps this would be palatable if the doctrine were theoretically well-developed, but unfortunately it represents little more than a pastiche of black letter contract rules leavened by a large measure of judicial expediency.<sup>37</sup>

The doctrine of consensual adjudicatory procedure needs, at minimum, a far better justification than the federal courts typically offer in their rote recitations of *The Bremen* principles.<sup>38</sup> Courts ousted of jurisdiction and litigants forced to sue or to be sued elsewhere deserve some-

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33. See *infra* notes 202-03 and accompanying text.

34. See J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 2.1, at 10.

35. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1063, at 225 (2d ed. 1987).

36. See Dix, *Waiver in Criminal Procedure: A Brief For More Careful Analysis*, 55 *Tex. L. Rev.* 193 (1977); Rubin, *supra* note 6, at 480-83, 491-512; Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 *U. Pa. L. Rev.* 473 (1978); Tigar, *The Supreme Court 1969 Term Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 *Harv. L. Rev.* 1 (1970); Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 *Mich. L. Rev.* 1214 (1977); Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 *Calif. L. Rev.* 1262 (1966); Comment, *Guilty Plea Waivers and the Right to Compulsory Process*, 27 *UCLA L. Rev.* 1303 (1980). For a discussion of waiver in relation to civil law forum-selection clauses, see *infra* Parts VI C, VII B.

37. See *supra* notes 5-9 and accompanying text; *infra* Part I A.

38. See *infra* notes 49-54 and accompanying text (discussing *The Bremen*).

thing more than a set of boilerplate contract presumptions. Arguably, a potential litigant should not waive his due process rights merely by signing a contract containing a forum-selection clause. The due process requirements that inform choice-of-law analysis therefore should not be similarly yielded. Thus, the construction and enforceability of contracts should not be elevated over the requirements of state long-arm statutes and the due process clause of the fourteenth amendment.

Beyond a better theoretical justification, the doctrine of consensual adjudicatory procedure also requires a conceptual clarity informed by due process requirements that permits parties to select any forum or law with which the transaction has a normal connection.<sup>39</sup> Conversely, parties should not be free to select a forum or law by contriving contacts with an otherwise non-interested jurisdiction so as to validate the choice-of-law or forum.<sup>40</sup> Finally, a comprehensive standard for waiver in civil litigation is worth delineating to ensure an informed waiver of litigation rights.

### C. *Defining and Critiquing the Doctrine*

The doctrine of consensual adjudicatory procedure, a relatively new doctrine in civil litigation, is so widely accepted that it has largely escaped critical scrutiny. This Article outlines briefly the origins of the theory and its rapid development and acceptance in jurisdictional canons. It then critiques the weaknesses engendered by this rush to uncritical judgment and legitimacy.

Part I canvasses *The Bremen* doctrine and the subsequent federal cases that elaborate a theory of consensual adjudicatory procedure. The thesis is that the doctrine, as articulated by the Supreme Court, is largely pieced together by dicta and good intentions. The basic premise of *The Bremen*—the efficacy of contractual jurisdiction in the international trade context<sup>41</sup>—has never been seriously questioned in relation to its domestic application. *The Bremen* and its progeny, so to speak, have lived the unexamined life.

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39. See, e.g., U.C.C. § 1-105(1) (1987) ("when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties"); see also *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 754 (5th Cir. 1981) (affirming application of U.C.C. § 1-105 reasonable relation test to choice-of-law provision); *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 215 (W.D. Tenn. 1985) (no substantial relationship to Texas; forum/choice-of-law clauses unenforceable).

40. Under U.C.C. interpretation, this is known as the "contrivance principle." See *Woods-Tucker Leasing Corp.*, 642 F.2d at 750-53 (discussion and application of contrivance principle); see also *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408 (1927) ("parties must act in good faith, and . . . the form of the transaction must not 'disguise its real character'"). See generally Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 Duke L.J. 623, 628 ("parties' choice should be upheld unless the transaction lacks a normal connection with the state whose law was selected") (emphasis in original).

41. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972).



Part II explores the serious characterization problems engendered by the doctrine of consensual adjudicatory procedure. The purpose is to demonstrate that the federal courts, in their eagerness to embrace this simple doctrine, have failed to develop a clear and appropriate method for its implementation. The courts discuss consensual procedure in a hodgepodge of concepts including jurisdiction, venue and forum non conveniens. Moreover, the courts are in confusion concerning the appropriate remedy for legitimate claims: dismissal, transfer, remand or stay of proceedings. Finally, courts scarcely mention fundamental theoretical issues implicit in the characterization of provisions, such as whether particular clauses are prorogation or derogation clauses.

Part III reflects on the various problems of federalism ensnared in the doctrine. Although the Supreme Court last term in *Stewart Organization, Inc. v. Ricoh Corp.*<sup>42</sup> definitively resolved the basic *Erie* dilemma concerning the substantive or procedural nature of forum-selection clauses,<sup>43</sup> this decision carried on the unthinking tradition of Supreme Court pronouncements on this subject. *Ricoh* may prove most significant for the issues it left unanswered and the problems engendered in its wake.

Part IV continues with federalism issues by examining consensual adjudicatory procedure with regard to removal and remand. This Part shows how federal removal and remand principles sorely fray the theoretical fabric of consensual procedure, highlighting the frailties of that doctrine. In this context, consensual adjudicatory procedure most squarely presents derogation and ouster of jurisdiction antithetical to article III of the Constitution, the Federal Rules of Civil Procedure and their accompanying statutory provisions.

Part V explores the puzzling issues presented by concomitant choice-of-law provisions. These issues arise when courts cannot decide whether choice-of-law precedes jurisdictional analysis. The courts thus fall into ever darker abysses of conflicts analysis in order to determine enforceability of the clauses.

Part VI summarizes the consequences of elevating contract rules over jurisdictional principles. This section demonstrates how courts rotely apply black letter contract principles with insufficient attention to countervailing jurisdictional principles. It discusses the serious ramifications of contract presumptions on litigation rights, as well as the vapid notion of consent and waiver in the civil litigation arena.

Finally, Part VII surveys possible modifications or doctrinal improvements for a theory of consensual adjudicatory procedure, calling for a more principled notion of consensual litigation not purchased at the expense of litigants' rights. This section appeals for decisions that do not sacrifice important litigation values on the high altar of judicial expediency. It pleads for better-reasoned opinions that offer more to a con-

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42. 108 S. Ct. 2239 (1988). For an extensive discussion of *Ricoh*, see *infra* Part III.

43. See *infra* notes 139-44.

tracting party than the meaningless theory that the law presumes knowledge of a contractual provision.

### I. *THE BREMEN*: JURISDICTIONAL PRINCIPLES AFLOAT IN INTERNATIONAL WATERS

The doctrine of consensual adjudicatory procedure at the Supreme Court level has at best been cobbled together with baling wire and tape. In the major cases in which the Court has considered a problem of consensual procedure,<sup>44</sup> it has never clearly and affirmatively stated that such a doctrine of consensual jurisdiction applies in federal courts sitting on purely domestic federal cases.<sup>45</sup> Indeed, in its most recent opportunity to clarify this point, the Court chose to sidestep *The Bremen* issue altogether and rely on venue law.<sup>46</sup> Two Justices, displeased with that tactic but not with the result, decried that "[c]ourts should announce and encourage rules that support private parties who negotiate such clauses."<sup>47</sup> Yet the Supreme Court has declined to do so when given the chance.

Rather, the Supreme Court's doctrine of jurisdiction by consent consists of little more than conclusory pronouncements and dicta elevated into received dogma. This is quite remarkable because the theory embodies a complete reversal of long-standing repugnance to consensual jurisdiction.<sup>48</sup> If nothing else, certainly this traditional doctrine deserved a better, if not more explicit, demise.

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44. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988); *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (arbitration case); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration case); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (franchise agreement); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (waiver of objection to personal jurisdiction as discovery sanction); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (international towage contract); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (farm equipment lease); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) (contractual limitation against all liability for negligent towage by owner); *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (venue-limiting provision).

45. *But see* Gruson, *Forum-Selection Clauses*, *supra* note 3, at 149:

Federal courts have universally agreed that the teaching of *Bremen* is not limited to admiralty cases nor to cases involving the selection of a foreign forum but applies to all forum-selection clauses even if they select a domestic forum and even if they arise in a suit between parties of different states.

46. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2243-45 (1988).

47. *Id.* at 2250 (Kennedy and O'Connor, JJ., concurring).

48. "In 1950 it was said of the few cases that enforced a forum clause, 'they stand alone, separate and apart, branded with the malodorous antipathy of a bastard child at a family reunion of bluebloods.'" *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1072 n.1 (W.D. Mo. 1979) (quoting *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, 900 n.12 (5th Cir. 1970) (Wisdom, J., dissenting)). The Western District of Missouri embraced the new doctrine of *The Bremen* and enforced a forum-selection provision in a performance and payment bond. See *id.*; see also Gruson, *Forum-Selection Clauses*, *supra* note 3, at 138-47 (discussing pre-*Bremen* decisions); authorities cited *supra* note 4.

A. The Bremen and National Equipment Rental, Ltd. v. Szukhent

The current doctrine of consensual adjudicatory procedure enforced throughout the federal court system is based on Supreme Court pronouncements in *The Bremen*.<sup>49</sup> In its most often cited proposition, the Court opined that 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."<sup>50</sup> The rationales supporting this sweeping conclusion, however, leave nagging doubts about the applicability of this new rule to purely domestic federal cases.

The Court's major doctrinal support was somewhat dubious. In reaching its conclusion, the *Bremen* Court suggested that forum-selection clauses were "merely the other side of the proposition,"<sup>51</sup> recognized in *National Equipment Rental, Ltd. v. Szukhent*,<sup>52</sup> that "in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction."<sup>53</sup> *The Bremen* Court cited with approval the black letter rule posited in *Szukhent* that "it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."<sup>54</sup>

*Szukhent* is an inappropriate case on which to construct an entire doc-

49. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see Collins, *Choice of Forum and the Exercise of Judicial Discretion—The Resolution of an Anglo-American Conflict*, 22 Int'l & Comp. L.Q. 332 (1973); Collins, *Forum Selection and an Anglo-American Conflict—The Sad Case of The Chaparral*, 20 Int'l & Comp. L.Q. 550, 556-57 (1971); Delaume, *Choice of Forum Clauses and the American Forum Patriae; Something Happened on the Way to the Forum: Zapata and Silver*, 4 J. Mar. L. & Com. 295 (1973); Farquharson, *supra* note 4, at 97-98; Gilbert, *supra* note 4, at 24-28; Gruson, *Forum-Selection Clauses*, *supra* note 3, at 147-49; Juenger, *supra* note 20, at 49-50; Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 Vand. J. Transnat'l L. 387, 396-98 (1973); Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 Am. J. Comp. L. 124, 134 (1973); Reese, *supra* note 5, at 532-33; Note, *The Enforcement of Forum Selection Provisions in International Commercial Agreements: M/S Bremen v. Zapata Off-Shore Co.*, (U.S. Sup. Ct. 1972), 11 Colum. J. Transnat'l L. 449, 450 (1972); Note, *Choice of Forum*, 14 Harv. Int'l L.J. 145, 149-53 (1973); Comment, *Admiralty—International Commercial Transactions—Choice of Forum Clauses Presumed Valid*, 6 N.Y.U. J. Int'l L. & Pol. 369, 381-83 (1973).

50. *The Bremen*, 407 U.S. at 10; see *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1442 (5th Cir. 1987) (forum-selection clauses prima facie valid); *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047, 1050-52 (3d Cir. 1987) (same); *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (same); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir.) (forum-selection clauses presumptively valid), *cert. denied*, 464 U.S. 938 (1983). *But see* *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983, 985 (S.D. W. Va. 1980) (mem.) ("Nevertheless, it must not be assumed that *prima facie* validity means, in all but the most unconscionable cases, certain enforcement.").

51. *The Bremen*, 407 U.S. at 10.

52. 375 U.S. 311 (1964).

53. *The Bremen*, 407 U.S. at 10-11 (Justice Burger's construction of *Szukhent* holding).

54. *Id.* at 11 (quoting *Szukhent*, 375 U.S. at 315-16).

trine of consensual adjudicatory procedure. The cases cited in support of its black letter pronouncement dealt largely with anomalous international waiver situations.<sup>55</sup> At the time, prevailing Supreme Court precedent<sup>56</sup> and lower federal court opinions<sup>57</sup> still embodied traditional

55. The Court cited *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951) (bill of lading specifying Norwegian law) and *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N.E. 425 (1903) (contract between Italian citizens partly to be performed in United States and partly to be performed in Italy, specifying Italian law). See *The Bremen*, 407 U.S. at 10 n.10. Yet the Court also referred to *Daley v. People's Building, Loan & Savings Association*, 178 Mass. 13, 15, 59 N.E. 452, 452 (1901) (forum designation condition of contract). See *The Bremen*, 407 U.S. at 10 n.10.

Bergman persuasively argues that Judge Learned Hand's statement in *Krenger v. Pennsylvania R.R.*, 174 F.2d 556 (2d Cir. 1949), *cert. denied*, 338 U.S. 866 (1949), concerning no absolute taboo against forum clauses, was based on a misapprehension of the Restatement of Contracts § 558 (1932). See Bergman, *Contractual Restrictions on the Forum*, 48 Calif. L. Rev. 438, 440-47 (1960). Bergman found it ironic that the source of confusion supporting forum clauses was based in Judge Hand's concurring opinion, noting that "[i]t is somewhat difficult to understand how that which was so well settled in 1930 could become unsettled in the space of nineteen years." Bergman, *supra*, at 440.

56. See, e.g., *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697, 698 (1963) (tugboat owner may not validly contract against negligence liability); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90-91 (1955) (tugboat owner may not contract against negligence liability); *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 266 (1949) (venue limiting agreement void as conflicting with Federal Employers' Liability Act); *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("agreements in advance tooust courts of the jurisdiction conferred by law [were] illegal and void").

57. See *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203 (2d Cir. 1967) (forum-selection clause in bill of lading invalid under Carriage of Goods by Sea Act (COGSA)); *Carbon Black Export v. S.S. Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958) (forum-selection clause in bill of lading not enforced under COGSA), *cert. dismissed*, 359 U.S. 180 (1959); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132, 1134-35 (D. Minn. 1968) (forum-selection clause not enforced; third-party complaint); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848, 851 (D. Haw. 1968) (forum-selection clause not enforced); *United States v. Aetna Casualty & Sur. Co.*, 38 F.R.D. 418, 419-20 (N.D. Cal. 1965) (forum-selection clause not enforceable; in conflict with Miller Act).

A number of federal courts, however, adopted the "modern trend" towards enforceability signalled by the Second Circuit in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955). See, e.g., *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972) (provision enforced); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344 (3d Cir. 1966) (forum-selection clause enforced as not unreasonable); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 124-26 (N.D. Cal. 1971) (forum-selection clause upheld; exhaustive survey of existing law and movement towards modern trend); *A.C. Miller Concrete Prods. Corp. v. Quickset Vault Sales Corp.*, 309 F. Supp. 1094, 1095 (E.D. Pa. 1970) (forum clause upheld); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761-62 (E.D.N.Y. 1967) (forum clauses enforceable if not unreasonable or offensive to public policy); *Geiger v. Keilani*, 270 F. Supp. 761, 766 (E.D. Mich. 1967) (forum-selection clause enforceable under *Muller* reasonableness test); *Takemura & Co. v. S.S. Tsuneshima Maru*, 197 F. Supp. 909, 911-13 (S.D.N.Y. 1961) (forum-selection clause enforceable, using forum non conveniens analysis). See generally Bergman, *supra* note 55, at 438-47 (historical analysis of validity of choice of forum clauses); Farquharson, *supra* note 4, at 93-97 (discussing development of American conflicts rules); Gilbert, *supra* note 4, at 11-20 (historical sketch of pre-1972 problem of choice of forum provisions); Gruson, *Forum-Selection Clauses*, *supra* note 3, at 138-47 (extensive citation to pre-*Bremen* case law); Reese, *supra* note 5, at 536-37 (same).

abhorrence of consensual jurisdiction. That a conclusive rule of jurisdiction by contractual agreement should appear by fiat in *Szukhent* was surprising, indeed.

Moreover, the *Szukhent* Court's statement with regard to consensual jurisdiction was little more than dictum because, after all, *Szukhent* concerned statutory construction of agency requirements under Rule 4 of the Federal Rules of Civil Procedure.<sup>58</sup> It is certainly debatable whether service of process requirements and Rule 4 are jurisdictional in nature.<sup>59</sup> At a minimum, the ability of a party to waive notice requirements should not bootstrap a theory of consensual jurisdiction. Unless the bases for jurisdiction are congruent with the bases of service requirements—and they are not—then waiver and consent theories should not sweep so broadly as to encompass both concepts.

The *Bremen* Court's second rationale noted that enforcement of forum-selection clauses was an "approach . . . substantially that followed in other common-law countries including England."<sup>60</sup> Additionally, adoption of this approach "accord[ed] with ancient concepts of freedom of contract."<sup>61</sup> The Court, however, neglected to mention some other telling aspects of comparative law. While many common law countries generally approve of forum-selection clauses,<sup>62</sup> many countries still reject them.<sup>63</sup> Moreover, most nations have well-articulated theoretical justifications for embracing or repudiating consensual procedure, in contrast to

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58. The Court stated: "The only question now before us is whether the person upon whom the summons and complaint was served was 'an agent authorized by appointment' to receive the same, so as to subject the respondents to the jurisdiction of the federal court in New York." *Szukhent*, 375 U.S. 311, 313. See Fed. R. Civ. P. 4(d). The Court also noted that "[n]o questions of subject matter jurisdiction or of venue are presented." *Szukhent*, 375 U.S. at 313 n.2.

59. See 4 C. Wright & A. Miller, *supra* note 35, § 1063, at 225 (citing *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1312 n.61 (D.C. Cir. 1980); *Libby v. United States*, 657 F. Supp. 1251, 1252-53 (M.D. Fla. 1987); *Eastman Kodak Co. v. Studiengesellschaft Kohle*, 392 F. Supp. 1152, 1154 (D. Del. 1975)).

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

61. *Id.*

62. For a discussion of the validity of forum-selection clauses, see the papers presented at the Proceedings of the 1964 Annual Meeting of the American Foreign Law Association: Cowen & Mendes Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, 13 Am. J. Comp. L. 179 (1964); Eek, *The Contractual Forum: Scandinavia*, 13 Am. J. Comp. L. 173 (1964); Perillo, *supra* note 17; Reese, *The Contractual Forum: Situation in the United States*, 13 Am. J. Comp. L. 187 (1964); Schwind, *Derogation Clauses in Latin-American Law*, 13 Am. J. Comp. L. 167 (1964); see also Farquharson, *supra* note 4, at 86; Gilbert, *supra* note 4, at 20-21.

63. Although Farquharson's list suggests broad acceptance of such provisions, Professor Perillo notes that Austria, France, Germany and Switzerland's acceptance of such clauses are laden with qualifications and depend on whether the clauses are prorogation or derogation provisions. Further, Italy, the Netherlands, Spain and Portugal have severe limitations or outright prohibitions on certain clauses; certainly the validity and enforceability issues are not free from doubt. See Perillo, *supra* note 17, at 163-65. Schwind describes a generally unfavorable trend in Latin America based on resurgent nationalism. See Schwind, *supra* note 62, at 167-73.

the United States.<sup>64</sup>

When the Court suggested that the doctrine accorded with "ancient concepts of freedom of contract,"<sup>65</sup> it neglected to note that this particular perspective derived from the continental civil law tradition that emphasizes party autonomy to a degree alien to the American common law and statutory system.<sup>66</sup> Only after centuries did England abandon its repudiation of forum-selection clauses and self-consciously adopt the civil law approach; but it did so on the principled basis that the courts should not be a party to breach of contract.<sup>67</sup> *The Bremen* Court thus appropriated the rule without the reason. What it failed to recognize was that rather than adopting British common law it was engrafting a foreign legal principle onto dissimilar domestic stock.

The Court's third rationale for embracing the doctrine pointed out that it was the view "advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws."<sup>68</sup> Small wonder—the scholars cited, Professors Reese and Ehrenzweig, had a vested intellectual interest as reporters for the Second Restatement and the Model Choice of Forum Act, respectively.<sup>69</sup> Professor Reese baldly asserted that "[i]t is perfectly clear that consent is an effective basis of jurisdiction in the United States,"<sup>70</sup> citing, of course, *Szukhent*.<sup>71</sup>

With some modesty Professor Reese conceded that there were only three recognized situations where a defendant's consent provided a basis for jurisdiction: cognovit clauses, arbitration clauses and the appointment of an agent for the service of process.<sup>72</sup> Having surveyed this ter-

64. See authorities cited *supra* note 62. The well-developed doctrine of consensual theory in most other countries is predicated on a distinction between prorogation and derogation clauses. See Perillo, *supra* note 17, at 165. Also, Great Britain embraces the concept that forum-selection clauses are generally valid and enforceable so as to avoid making the state a party to a breach of contract. See Cowen & Mendes Da Costa, *supra* note 62, at 182-83; Gilbert, *supra* note 4, at 20.

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

66. See generally Farquharson, *supra* note 4, at 84-87 (tracing history of "autonomy of the will" to sixteenth century French jurists); Gilbert, *supra* note 4, at 20 ("in an international contract one party may expect a choice of forum to be enforced or not as a matter of course").

67. See Farquharson, *supra* note 4, at 84-87; Gilbert, *supra* note 3, at 20-24. See generally Cowen & Mendes Da Costa, *supra* note 62, at 179 (historical discussion of forum-selection clauses in England).

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

69. See Restatement (Second) of Conflict of Laws § 80 (1971); Reese, *The Contractual Forum*, *supra* note 62; Reese, *A Proposed Uniform Choice of Forum Act*, 5 Colum J. Transnat'l L. 193 (1966).

70. Reese, *A Proposed Uniform Choice of Forum Act*, *supra* note 69, at 194.

71. See *id.* at 194 n.2; see also Reese, *supra* note 5, at 534 n.14 (citing *Szukhent*).

72. See Reese, *A Proposed Uniform Choice of Forum Act*, *supra* note 69, at 195. Cognovit clauses or "confession of judgment" provisions are particularly invidious and maligned devices regarded as consumer abuse. Although the Supreme Court validated their limited usage in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), that case is idiosyncratic on its unusual facts. See Rubin, *supra* note 6, at 517-18. Arbitration clauses, of course, provide the closest analogy of forum-selection provisions, but also have a long history of court antipathy to enforcement. See *id.* at 519-21. Arguably, arbitration

rain, Professor Reese further noted that “[t]here are only a few other situations where to date jurisdiction has been exercised over a defendant by reason of his consent”—again citing *Szuhkent*.<sup>73</sup>

Despite this meager collection of authorities, Professor Reese argued that “[t]he reasons given by American courts for denying effect to such agreements are not convincing”<sup>74</sup> and that “[m]ore probably judicial aversion to arbitration and to choice of forum provisions has a common origin, which is presently obscure.”<sup>75</sup> Professor Ehrenzweig focused on similar themes, mounting a frontal assault on the “non-ouster” rule of jurisdiction and conventional arguments against prorogation agreements.<sup>76</sup>

The scholarly attack consisted of two major criticisms: first, that traditional abhorrence of consensual jurisdiction rested on dubious historical assumptions, and second, that it relied on conclusory propositions.<sup>77</sup> The first criticism did little more than demonstrate the dangers of selective historical research; neither Professor Reese nor Professor Ehrenzweig gave due credit to contrary authority rejecting prorogation agreements.<sup>78</sup> The second criticism failed to address valid and serious reservations about such consensual arrangements,<sup>79</sup> ironically engendering a reversal of the doctrine predicated on a different set of conclusory assertions.<sup>80</sup>

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clauses represent an even greater yielding of litigation rights because not only is a judicial forum waived, but also the adjudicatory *procedure* is yielded. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). For a discussion of recent Supreme Court arbitration clause cases, see *infra* Part II B(1).

73. Reese, *A Proposed Uniform Choice of Forum Act*, *supra* note 69, at 195.

74. *Id.* at 196.

75. *Id.* at 197.

76. Professor Ehrenzweig argues: “The [non-ouster rule], however, which is contrary to the law of other countries, seems doubtful in light of an analysis of its history and current case law.” A. Ehrenzweig, *Conflict of Law* § 41, at 148 (1962) (citations omitted). The conventional arguments against prorogation agreements were: laws fixing venue on considerations of convenience and expediency; that the remedy for improper venue should rest in law, not in contract; that parties may not legislate; and that such provisions were against public policy. See *id.* at 148-49.

77. See *id.* § 41; Lenhoff, *supra* note 17, at 430-32; Reese, *The Contractual Forum*, *supra* note 62, at 187-89; Reese, *A Proposed Uniform Choice of Forum Act*, *supra* note 69, at 196-97.

78. See *supra* notes 57, 63 (illustrating disagreement among courts concerning enforceability of choice-of-forum agreements).

79. See *supra* note 76. Professor Reese characterized the reasons for denying effect to consensual forum clauses as “not convincing”:

- (1) that the parties cannot by their agreement oust a court of jurisdiction, (2) that to allow the parties to change the rules relating to the place where suit may be brought would “disturb the symmetry of the law” and lead to inconvenience and (3) that choice of forum provisions are against public policy.

Reese, *A Proposed Uniform Choice of Forum Act*, *supra* note 69, at 196 (citing Reese, *supra* note 62, at 188).

80. Professor Reese objected to denying effectiveness to consensual clauses:

- The last of these reasons merely states a conclusion without any attempt at explanation. The second—that to permit the parties to enter an effective agree-

The linchpin of *The Bremen's* approval of forum-selection clauses, however, lay in policy considerations rather than doctrinal support. The fact that *The Bremen* involved an international towage contract was crucial to the Court's adoption of consensual jurisdiction, because this approach "reflect[ed] an appreciation of the expanding horizons of American contractors who seek business in all parts of the world."<sup>81</sup> The Court extolled the virtues of the neutral forum to adjudicate international commercial disputes, characterizing the non-ouster rule as "something of a provincial attitude regarding the fairness of other tribunals."<sup>82</sup> The primary values of prorogation clauses were certainty and convenience: "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."<sup>83</sup>

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ment with respect to the place of suit would disturb the symmetry of the law—is without merit since there are no rules, other than those concerned with jurisdiction, which determine whether suit should be brought in one state rather than in another. As to the first reason, it is true that the parties cannot by their agreement oust a court of jurisdiction. But a court need not always exercise such jurisdiction as it may possess.

*Id.* at 196-97; *see also* Ehrenzweig, *supra* note 69, § 41, at 149 ("the statement that prorogation agreements are against public policy, is the conclusion to be proved rather than proof for the conclusion") (citation omitted).

It is with some irony, then, that the stricture against public policy violations has been imported into the post-*Bremen* reasonableness test. *See, e.g.,* Hoffman v. Burroughs Corp., 571 F. Supp. 545, 549 (N.D. Tex. 1982); D'Antuono v. CCH Computax Sys., 570 F. Supp. 708, 712 (D.R.I. 1983); Cutter v. Scott & Fetzer Co., 510 F. Supp. 905, 907-08 (E.D. Wis. 1981). *See generally* Gilbert, *supra* note 4, at 39-40 (conflicts with public policy trump the interest or disinterest of the forum); Gruson, *Forum-Selection Clauses*, *supra* note 3, at 170-73 (forum-selection clause not enforced if its application contravenes forum's public policy although parties and transactions are all connected to forum).

Professor Reese's second objection, that "there are no rules, other than those concerned with jurisdiction," is equally revealing. Post-*Bremen* dogma posits conclusorily that forum selection clauses are mainly venue-conferring. This perspective obviates the impact on jurisdictional principles that enforcement of the clauses effects. For a discussion of characterization problems, *see infra* Part II A. As to the non-ouster rule, current theory merely substitutes the obverse proposition, without acknowledgement of the abstention-like nature of such refusal to exercise jurisdiction. *See infra* notes 209-13, 407-09 and accompanying text.

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

82. *Id.* at 12.

83. *Id.* at 13-14. It is interesting to note that although the parties to the towage contract stipulated litigation of disputes in The High Court of Justice in London, they did not stipulate choice-of-law. Nonetheless, the Supreme Court was more than willing to infer this as well, finding that, "while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law." *Id.* at 13 n.15. This assumption has received some criticism. *See* Gilbert, *supra* note 4, at 62 ("It is fairly clear, then, that if in the *Zapata* situation the chosen forum applied a law of a state which had neither significant factual contacts with the transaction nor an interest in having its law applied on the matter in issue, due process would be denied."). *But see* Gruson, *Forum-Selection Clauses*, *supra* note 3, at 190-91 (governing law may be reasonably inferred from forum clause, except if violative of public policy). For a discussion of the choice-of-law implications for forum-clauses, *see infra* Part V.



The international commercial setting for *The Bremen*<sup>84</sup> clearly presented the strongest policy basis for abandoning traditional repudiation of prorogation agreements. Moreover, as a case based in admiralty jurisdiction, the Court could fashion a federal common law rule for maritime commercial cases.<sup>85</sup> Whether the Supreme Court could speak more broadly to domestic federal cases is troublesome; the Court took pains to note that “[w]e are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum.”<sup>86</sup> In such an instance, the Court suggested, “the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause.”<sup>87</sup>

Notwithstanding this cautionary note, federal courts routinely and uncritically import *The Bremen*'s rule on forum-selection clauses into the full range of domestic cases.<sup>88</sup> It is rare that a federal court even questions *The Bremen*'s applicability to domestic cases based in federal question or diversity jurisdiction.<sup>89</sup>

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84. The case involved a contract between a Houston-based American corporation and a German corporation for towing a drilling rig from Louisiana to a point near Italy in the Adriatic Sea. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

85. The Supreme Court has traditionally applied or created federal common law in admiralty and maritime cases. See *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39 (1961); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380-81 (1959); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 214-15 (1917). The Court also has felt free to develop federal common law with regard to legal problems touching on international relations. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964). See generally J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 4.7 (summarizing development and application of federal common law); 19 C. Wright & A. Miller, *Federal Practice and Procedure* § 4514 (1982) (analyzing justifications, scope and principal context of post-*Erie* common law); Edwards, *The Erie Doctrine in Foreign Affairs Cases*, 42 N.Y.U. L. Rev. 674 (1967) (discussing alternative grounds for federalizing foreign affair cases without violating *Erie*); Henkin, *The Foreign Affairs Power of The Federal Courts: Sabbatino*, 64 Colum. L. Rev. 805 (1964) (contending that the *Sabbatino* court asserted independent power beyond the Act of State doctrine to make supreme law involving foreign relations).

86. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972).

87. *Id.*

88. The cases in which *The Bremen* is routinely applied to domestic situations are too numerous to cite. See *supra* note 3. For specific instances where the court mentions or discusses application to domestic cases, see *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (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); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718 (2d Cir. 1982); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93 (5th Cir. 1979); *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161 (9th Cir. 1975); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868 (D. Minn. 1980); *Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205 (C.D. Ill. 1979); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140 (W.D. Va. 1979); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145 (N.D. Tex. 1979); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071 (W.D. Mo. 1979); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564 (S.D.N.Y. 1978).

89. See *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 187 (7th Cir. 1985) (attempting to distinguish *The Bremen*); *Visicorp v. Software Arts, Inc.*, 575 F. Supp. 1528, 1532 (N.D. Cal. 1983) (discussion of limiting *The Bremen* to international law

Yet there are good reasons to question the applicability of *The Bremen* doctrine in domestic federal cases. The kinds of uncertainties and insecurities that exist in the international legal setting are not manifestly present in the American federal system. Because of the lack of an Austinian sovereign to enforce rules and impose sanctions, the continued vitality of international law in large measure depends on consensual relationships.<sup>90</sup> Indeed, consent to jurisdiction is and must be the keystone of international dispute resolution, a proposition recognized by the jurisdictional provisions of the International Court of Justice.<sup>91</sup> In addition, international law is not concerned with American notions of due process with regard to the exercise of jurisdiction; on the contrary, civil law notions of party autonomy logically dominate the international legal scene.<sup>92</sup> In short, the question should be asked whether jurisdictional principles appropriate for autonomous nation-states provide a sound analogy for American domestic states within a federal system.<sup>93</sup> The analogy works only where prudential values are elevated over those ignored in the international arena: individual liberty interests defined by American notions of traditional justice and fair play.

Moreover, while it is clear that the Supreme Court may fashion a federal common law rule for international maritime cases, it is much less clear that it has the authority to do so in the domestic commercial context. What is the justification for the Court setting forth essentially a federal domestic common law rule of contractual jurisdiction, unless it is reverting to *Swift v. Tyson*<sup>94</sup> rule-making power? Can a federal common

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context); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 186-87 (S.D.N.Y. 1975) (mem.) (distinguishing *The Bremen*; conceding that it can be applied to domestic cases).

90. See generally O. Lissitzyn, *International Law Today and Tomorrow* 3-7, 8-11, 30-45 (1965) (discussing development and implementation of international law and importance of consent to continued existence of international law).

91. As Lissitzyn notes:

Reference of disputes to international tribunals, however, is still rare. In principle, the power of the International Court of Justice to decide a dispute between two states rests on the consent of both parties, although such consent may be given in general terms before the dispute has arisen by acceptance of the compulsory jurisdiction of the Court under the so-called "optional clause" in Article 36 of the Court's Statute or by a provision in another treaty. Similarly, resort to arbitration depends on the consent of the parties.

*Id.* at 33.

92. See *supra* notes 60-64 and accompanying text.

93. According to Lissitzyn, "Contemporary international law, of course, is not nearly as adequate or effective as the national legal systems of well-organized states." O. Lissitzyn, *supra* note 90, at 109. He nonetheless remains sanguine about the role of public international law: "But its role in world affairs, although not as important as the role of national law in most states, is far from negligible." *Id.*

94. 41 U.S. (16 Pet.) 1 (1842) (overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)). For a general discussion of the *Swift v. Tyson* era of federal common law rulemaking, see generally J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 4.1 (summarizing the effect of *Swift v. Tyson* on the Rules of Decision Act); 1 C. Wright & A. Miller, *Federal Practice and Procedure* § 4502 (1982) (discussing early history of federal case law); Field, *Source of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883 (1986) (challenging the traditional definition of "state law").

law rule created for international commercial cases blithely be appropriated for private domestic contract disputes?<sup>95</sup>

As a major doctrinal reversal, *The Bremen* is not a stellar illustration of a tight analytical argument. It is a major Supreme Court decision that relies on slim precedential support, fuzzy historical analysis, and selective comparative law. At best, it embodies a well-intentioned common sense rule in light of expanding international commercial relations. At its worst, it created a *prima facie* rule of dubious application in domestic federal cases, substituting one set of conclusory propositions for another.

### B. *In the Wake of The Bremen: Steaming into Domestic Waters*

In the two decades following *The Bremen's* complete reversal of course, the doctrine of consensual adjudicatory procedure drifted in two directions, reappearing in a half-dozen Supreme Court cases.<sup>96</sup> By inadvertent symmetry, three cases involved arbitration agreements (two in international trade settings),<sup>97</sup> while three tangentially implicated consensual jurisdiction in domestic commercial contexts.<sup>98</sup> Taken together, these cases subtly altered the doctrinal development of consensual procedure and expanded it beyond the international context. Nonetheless, *The Bremen* remains the lodestar for lower federal courts construing forum-selection clauses.<sup>99</sup> Further, there has been scant illumination of the choice-of-law issues present in these contractual forum arrangements.<sup>100</sup>

#### 1. The Arbitration Trilogy

The Supreme Court thrice has reaffirmed the notion that arbitration clauses incorporated in contractual agreements are enforceable in derogation of a party's right to litigate a securities or antitrust action in federal court.<sup>101</sup> The Court views arbitration clauses as "specialized kind[s] of forum-selection clause[s]" and holds that even exclusive federal court

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95. See *infra* Part III A-C.

96. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988); *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

97. See *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (arbitration agreement; purely domestic dispute); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration agreement; international context); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (same).

98. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) (forum clause; domestic diversity lawsuit); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (choice-of-law provision; state long-arm jurisdiction challenge); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (waiver of objection to personal jurisdiction as discovery sanction).

99. See *supra* notes 3, 88 and accompanying text.

100. See *supra* note 83; *infra* Part V (discussion of choice-of-law complications).

101. See *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974).

jurisdiction under the Securities and Exchange Act is waivable.<sup>102</sup> Although the major prop for this conclusion is the United States Arbitration Act,<sup>103</sup> which "revers[ed] centuries of judicial hostility to arbitration agreements,"<sup>104</sup> it is equally clear that the dynamics of international commerce greatly influenced the Court's thinking. The arbitration cases echo and reinforce the same policy considerations articulated in *The Bremen*. Thus, three years after *The Bremen*, the Court in *Scherk v. Alberto-Culver Co.*<sup>105</sup> again emphasized the prudential values of certitude, order and predictability served by arbitration clauses:

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.<sup>106</sup>

The virtue of the neutral forum also was sounded in *Scherk*: "Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."<sup>107</sup> Finally, the Court warned against corrosive nationalism, noting that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying . . . to secure tactical litigation advantages."<sup>108</sup>

The Court in *Scherk* viewed the arbitration clause as essentially a forum-selection clause with a minor difference, because the arbitration clause "posits not only the situs of suit but also the procedure to be used in resolving the dispute."<sup>109</sup> The Court reiterated this point in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>110</sup> suggesting that in the

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102. See *Scherk*, 417 U.S. at 519; see also *Mitsubishi Motors Corp.*, 473 U.S. at 630.

103. 9 U.S.C. §§ 1-208 (1982).

104. *Scherk*, 417 U.S. at 510; see also *McMahon*, 107 S. Ct. at 2337; *Mitsubishi Motors Corp.*, 473 U.S. at 625 n.14.

105. 417 U.S. 506 (1974).

106. *Id.* at 516.

107. *Id.*

108. *Id.* at 516-17.

109. *Id.* at 519. This conclusion followed the Court's discussion and analysis of the principles enunciated in *The Bremen*. See *id.* at 518. Similar to *The Bremen*, the *Scherk* Court noted that "[u]nder some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction." *Id.* at 519 n.13; see *supra* note 83.

110. 473 U.S. 614 (1985). The petitioner in *Mitsubishi* was a joint venture between Japanese and Swiss corporations to manufacture and distribute Chrysler automobiles outside the United States. The respondent Soler was a Puerto Rican corporation that entered into a sales and distribution agreement with Mitsubishi. The agreement contained an arbitration clause subjecting all disputes arising out of the agreement to arbitration before the Japan Commercial Arbitration Association. When Mitsubishi sued for

enforcement of an arbitration clause the party did not forego the substantive rights afforded by the antitrust statutes, but "only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>111</sup>

Concerns of international comity and international commercial activity also motivated the Court in *Mitsubishi*.<sup>112</sup> However, the Court went well beyond *The Bremen's* reasoning in upholding the sanctity of contractual agreements that directly clash with statutorily-conferred federal court jurisdiction:

We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>113</sup>

The Court achieved the ultimate extension of this waiver theory in *Shearson/American Express, Inc. v. McMahon*,<sup>114</sup> the third case in the arbitration-clause trilogy. In *McMahon*, an action brought under Rule 10b-5 of the Securities Exchange Act,<sup>115</sup> the Court abandoned any reliance on the international trade setting, largely because *McMahon* presented a purely domestic federal dispute.<sup>116</sup> Instead, the Court interpreted *Scherk*, *Mitsubishi* and *Wilko v. Swan*<sup>117</sup> to collectively stand for two propositions: first, that the right to a judicial forum can be waived only where arbitration is adequate to protect substantive rights; and second, the party opposing enforcement of an arbitration clause carries the

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compelled arbitration under the clause, Soler counterclaimed with causes of action under the Sherman Act. See *id.* at 616-22.

111. *Id.* at 628.

112. The Court in *Mitsubishi* stated:

As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

*Id.* at 629 (emphasis added).

113. *Id.* at 628 (citation omitted).

114. 107 S. Ct. 2332 (1987). *McMahon* and other customers of Shearson/American Express, Inc. brought suit in federal court against Shearson and its representatives who handled their accounts, alleging violations of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982) and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986). Shearson/American Express moved to stay the court proceedings and compel arbitration under § 3 of the Federal Arbitration Act. See *McMahon*, 107 S. Ct. at 2334.

115. See *McMahon*, 107 S. Ct. at 2334.

116. See *id.* at 2339.

117. 346 U.S. 427, 438 (1953) (holding that claims arising under Securities Exchange Act of 1933 are not subject to compulsory arbitration under arbitration agreement). *Wilko* was distinguished as not controlling on the facts in *McMahon*. See *McMahon*, 107 S. Ct. at 2337-43.

burden of demonstrating that Congress intended to preclude a waiver of judicial remedies for statutory rights.<sup>118</sup>

The arbitration trilogy seems, at first blush, merely to reaffirm the basic *Bremen* proposition that a contractual forum provision is enforceable unless proven inadequate by the party opposing the forum.<sup>119</sup> Yet the dissenting Justices recognized the slippery-slope reasoning in the Court's opinions. In *Scherk*, the dissenters noted that the Court invoked the "international contract talisman"<sup>120</sup> to approve a contractual forum in preference to a statutory one. This talismanic invocation disregarded both congressional statutory jurisdiction and *The Bremen* Court's own injunction that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."<sup>121</sup> Thus, "the international aura" which the *Scherk* majority conferred on the case was "ominous," because "[t]he loss of the proper judicial forum carries with it the loss of substantial rights."<sup>122</sup>

This telling critique also eluded the *Mitsubishi* majority, prompting a distressed Justice Stevens to note that *Scherk* was wholly inapplicable to an antitrust lawsuit whose merits were controlled entirely by American law.<sup>123</sup> In his dissent, Justice Stevens correctly linked the loss of forum to the loss of substantive rights:

The Court's repeated incantation of the high ideals of "international arbitration" creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute.<sup>124</sup>

Needless to say, the Court completely capitulated to the notion of consensual procedure in *McMahon*, where it made no attempt at all to cloak its conclusions in the mantle of international comity and trade. The dis-

118. See *McMahon*, 107 S. Ct. at 2339.

119. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-18 (1972).

120. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 529 (1974) (Douglas, J., dissenting).

121. *The Bremen*, 407 U.S. at 15. The dissenters in *Scherk*, citing to this proposition in *The Bremen*, argued:

That is inescapably the case here, as § 29 of the Securities Exchange Act and *Wilko v. Swan* make clear. Neither § 29, nor the Convention on international arbitration, nor *The Bremen* justifies abandonment of a national public policy that securities claims be heard by a judicial forum simply because some international elements are involved in a contract.

*Scherk*, 417 U.S. at 531 n.10 (Douglas, J., dissenting).

122. *Scherk*, 417 U.S. at 532, 533; see also *id.* at 532 n.11 (dissent suggesting that choice-of-law implications would render Alberto-Culver's victory Pyrrhic).

123. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 660-65 (1985) (Stevens, J., dissenting).

124. *Id.* at 665 (citation omitted).

senters could only protest that "the *Scherk* decision turned on the special nature of agreements to arbitrate in the international commercial context,"<sup>125</sup> and again decry the loss of the ability to litigate in a judicial forum substantive rights for alleged abuses in the securities industry.<sup>126</sup>

Thus, the arbitration cases are, as Justice Stevens suggested, ominous. Building on *The Bremen*, these cases removed the broad doctrine of consensual procedure from its original international context and approved it in domestic federal cases as well. More importantly, these cases signaled the Supreme Court's willingness to yield statutory jurisdiction and concomitant substantive rights when faced with a contractual provision. Incredibly, the Court accomplished this major doctrinal shift with little justification beyond *The Bremen's* good intentions and laudatory legal conclusions.

## 2. Further Supreme Court Imprimatur to Consensual Jurisdiction

The arbitration cases, standing alone, probably are a sufficient source from which one can derive a doctrine of domestic consensual adjudicatory procedure, but three additional post-*Bremen* cases give the doctrine its fullest meaning.<sup>127</sup> None, however, squarely states that federal courts are required to yield jurisdiction to a forum-selection clause or to abdicate conflicts analysis in the presence of a choice-of-law provision. The reluctance of the Supreme Court to impose this requirement is somewhat mysterious.

The first of these three post-*Bremen* cases further articulates the notion of waiver of jurisdiction. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,<sup>128</sup> the Court expounded that personal jurisdiction was an individual liberty interest and therefore a waivable right.<sup>129</sup> Relying on that old standby, *Szukhent*,<sup>130</sup> and a collection of arbitration

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125. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2352 (1987) (Blackmun, J., concurring in part and dissenting in part) (emphasis in original).

126. "The Court thus approves the abandonment of the judiciary's role in the resolution of claims under the Exchange Act and leaves such claims to the arbitral forum of the securities industry at a time when the industry's abuses towards investors are more apparent than ever." *Id.* at 2346 (Blackmun, J., concurring in part and dissenting in part); see also *id.* at 2355 (investor forced to resolve claims in securities-controlled forum).

127. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

128. 456 U.S. 694 (1982). The *Compagnie des Bauxites*, a Delaware corporation with its principal place of business in Guinea, sued various insurance companies to recover on a business interruption policy. The suit was brought in a federal district court in Pennsylvania, based on diversity jurisdiction. The defendants raised a defense of lack of personal jurisdiction and the plaintiff attempted to use discovery to ascertain jurisdictional facts. The defendants failed to comply with multiple discovery requests and the district court, under Fed. R. Civ. P. 37(b)(2)(A), imposed the sanction of assuming personal jurisdiction. See *id.* at 695-700.

129. See *id.* at 702-03.

130. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). See discussion *supra* Part I A.

cases, the Court reaffirmed the received dogma that "[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court."<sup>131</sup> *Insurance Corp. of Ireland* is significant for two reasons: first, it suggested the alarming possibility of *implied consent* to a court's jurisdiction—previously largely unmentioned; and second, it firmly rooted the doctrines of consent and waiver in the concept of *personal jurisdiction*—largely to be ignored in ensuing cases.<sup>132</sup>

The second post-*Bremen* case presented the Court with an interesting problem in consensual jurisdiction. *Burger King Corp. v. Rudzewicz*,<sup>133</sup> a case turning on standard minimum contacts jurisprudence,<sup>134</sup> focused on whether a franchise agreement with a Florida corporation could supply an adequate basis for the exercise of Florida long-arm jurisdiction.<sup>135</sup> The interesting wrinkle, however, was that the contract contained a choice-of-law provision, but no forum-selection clause. Based on this anomaly, the Court reached two fascinating conclusions. First, the majority suggested that even though the language of the choice-of-law provision did not *require* all suits concerning the agreement to be brought in Florida, it should have "reasonably . . . suggested to [the defendant] that by negative implication such suits *could* be filed there."<sup>136</sup> More importantly, the Court suggested that a contractual choice-of-law provision was a relevant contact in the calculus of personal jurisdiction:

Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction . . . it reinforced [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there.<sup>137</sup>

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131. *Insurance Corp. of Ireland*, 456 U.S. at 703.

132. The doctrine of implied consent had its heyday in non-resident motorist statutes. See *Hess v. Pawloski*, 274 U.S. 352 (1927) (use of state highway by non-resident is equivalent to appointment of registrar as agent for service of process). But see *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (challenging notion of implied consent to state assertion of jurisdiction). For a discussion of the confused handling of the concept of personal jurisdiction in forum-selection cases, see *infra* Part II A.

133. 471 U.S. 462 (1985). Rudzewicz and a partner, both Michigan residents, entered into a twenty-year franchise agreement with Burger King to operate a franchise in Michigan. Burger King was a Florida corporation with its principal offices in Miami. When Rudzewicz fell behind in payments, Burger King sued in federal district court in Florida alleging breach of franchise obligations. See *id.* at 463-71.

134. The Court stated that "[t]he question presented is whether this exercise of long-arm jurisdiction offended 'traditional conception[s] of fair play and substantial justice' embodied in the Due Process Clause of the Fourteenth Amendment." *Id.* at 464 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). For the Court's minimum-contacts analysis, see *Burger King*, 471 U.S. at 471-87.

135. See *Burger King*, 471 U.S. at 478-87.

136. *Id.* at 482 n.24.

137. *Id.* at 482 (emphasis in original).



By throwing consensual choice-of-law back into the jurisdictional stew,<sup>138</sup> the Court expanded the boundaries of express and implied jurisdictional consent.

The most recent domestic case, *Stewart Organization, Inc. v. Ricoh Corp.*,<sup>139</sup> represents the greatest disappointment for the doctrinal development of consensual adjudicatory procedure. There the Court faced an unadulterated forum-selection and choice-of-law issue raised in a diversity jurisdiction context.<sup>140</sup> The Court of Appeals viewed the case as a *Bremen* problem and applied *The Bremen* standards to the facts.<sup>141</sup> Yet the Supreme Court rejected this approach and chose instead the narrowest possible legal construction of the problem. Rather than make sweeping pronouncements about the enforceability of such clauses, the Court sheepishly evaded the issues:

Although we agree with the Court of Appeals that the *Bremen* case may prove "instructive" in resolving the parties' dispute . . . we disagree with the court's articulation of the relevant inquiry as "whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*."<sup>142</sup>

The Court viewed *Ricoh* as a review of abuse of discretion on a transfer motion.<sup>143</sup> In so doing the Court uncritically cast the problem in venue terms, circumventing jurisdictional analysis altogether.<sup>144</sup> Although *Ricoh* neatly and definitively solved the *Erie* problem inherent in diversity cases, the opinion added nothing to the analytical development of a theory of consensual adjudicatory procedure.

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138. There is some debate whether *Burger King* elevated choice-of-law to a "contact" for minimum-contacts analysis. Compare Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. Colo. L. Rev. 37, 38-40 (1988) (choice-of-law clause important in considering whether defendant purposefully invoked benefits and protections of chosen forum) with Rosenberg, *Foreword to the Colorado Symposium*, 59 U. Colo. L. Rev. 1, 4 (1988) (*Burger King* choice of law clause was used as objective evidence of where the defendant expected to be sued, and not as a step toward homogenizing the jurisdiction and choice-of-law inquiries). Traditional principles separate the jurisdictional inquiry from the choice-of-law determination. See *supra* note 30 and accompanying text.

139. 108 S. Ct. 2239 (1988). For a complete discussion of the factual setting of *Ricoh*, see *infra* Part III A.

140. See *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988); 785 F.2d 896 (granting petition for rehearing *en banc*), *vacating* 779 F.2d 643 (11th Cir. 1986).

141. See *Stewart Org., Inc.*, 810 F.2d at 1074-75. For a discussion of *The Bremen* standards, see *supra* Part I A.

142. *Stewart Org., Inc.*, 108 S. Ct. 2239, 2243 (1988) (citations omitted).

143. The Court phrased the initial issue as "whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court." *Id.*

144. The Court squarely stated: "We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Manhattan." *Id.* at 2245. For a discussion of the Court's legal analysis of the *Erie* question, see *infra* Parts III B-C.

## II. CHARACTERIZATION PROBLEMS: CONSENSUAL PROCEDURE IN CHAOTIC CONFUSION

One can marshal a compelling doctrine of consensual adjudicatory procedure by stringing together an array of disparate Supreme Court cases. Certainly, there is enough language to stock a good-sized canon of consensual jurisdiction. The doctrinal weaknesses of this theory are manifest, however, in lower court explications of the canon. As this section will show, the federal cases reveal gross analytical confusion stemming largely from characterization problems.

The lower federal courts have encountered three major characterization difficulties in construing forum-selection clauses. First, the courts have not amicably come to terms with whether forum-selection clauses are a matter of jurisdiction, venue, transfer or forum non conveniens.<sup>145</sup> Second, the courts rather randomly apply an array of possible remedies<sup>146</sup>—a confusion arising from the failure to solve the first problem. Third, the courts have paid virtually no attention to the civil law distinction between prorogation and derogation clauses,<sup>147</sup> which has directly contributed to the prevalence of the first two problems. The reluctance to struggle with the theoretical has induced courts to embrace the pragmatic and permitted contract principles to triumph over fundamental adjudicatory rights, such as choice of forum and choice of law.

### A. *Jurisdiction, Venue or Forum Non Conveniens?*

The Supreme Court cases offer vague guidance on the characterization issue. *The Bremen* did not squarely address the issue whether forum-selection clauses are a matter of jurisdiction or venue, but the Court flatly rejected the long-standing non-ouster restriction on jurisdiction.<sup>148</sup> In *Insurance Corp. of Ireland*, the Court discussed at length the theoretical distinctions between subject matter and personal jurisdiction with regard to consent.<sup>149</sup> The Supreme Court's recent pronouncement in *Ricoh* implied that forum-selection clauses are a matter of venue, certainly at least for *Erie* purposes.<sup>150</sup> Yet in an earlier *Ricoh* opinion, one judge pointed out that the concepts of jurisdiction and venue are distinct, although state decisions tend to conflate the concepts:<sup>151</sup> "Subject matter jurisdiction refers to the institutional power of a court to adjudicate a case;

145. See *infra* Part II A.

146. See *infra* Part II B.

147. See *supra* note 17 and accompanying text.

148. *The Bremen* Court stated, "The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). Although the Court rejected the non-ouster rule, it nonetheless recognized (in so doing) that a jurisdictional issue was imminent in forum-selection clause cases. See *id.*

149. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-05 (1982).

150. See *supra* notes 143-44 and accompanying text.

151. See *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 647 n.7, *vacated*, 785 F.2d

venue dictates which among several courts having jurisdiction is appropriate as most convenient. A court must be seized of both jurisdiction and venue if properly to hear a case."<sup>152</sup> Moreover, the reasoning continues, subject matter cannot contractually be conferred, while venue may be so determined.<sup>153</sup>

Virtually none of the lower court forum-selection cases characterizes the issue as a jurisdictional problem. A few cases deem the provisions as pertaining to jurisdiction, without distinguishing between personal or subject matter jurisdiction.<sup>154</sup> Some cases pay lip-service to the discredited principle that jurisdiction of the courts cannot with certainty be ousted by private agreement in advance.<sup>155</sup> Other cases, following *The Bremen*, circumvent the jurisdictional issue by noting that jurisdiction exists to determine whether to decline it; hence, jurisdiction is not ousted by enforcement of a contract provision.<sup>156</sup> In a few instances courts have

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896 (1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988).

152. *Id.*

153. *See id.*

154. *See, e.g.,* Andrews v. Heinold Commodities, Inc., 771 F.2d 184 (7th Cir. 1985) ("consent to jurisdiction" clause); AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984) (good subject matter jurisdiction but case dismissed because of forum-selection clause); Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380 (9th Cir. 1984) (dismissal for lack of personal jurisdiction); Livolsi v. Ram Constr. Co., 728 F.2d 600 (3d Cir. 1984) (exclusive federal jurisdiction by consent not permissible); Dracos v. Hellenic Lines Ltd., 705 F.2d 1392 (1983) (no federal subject matter jurisdiction over maritime claim where decedent's employment contract had choice-of-forum clause specifying Greece), *aff'd on reh'g en banc*, 762 F.2d 348 (4th Cir.), *cert. denied*, 474 U.S. 945 (1985); Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp., 696 F.2d 315 (4th Cir. 1982) (clause discussed as jurisdictional); Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982) (forum provision upheld but district court could retain jurisdiction to obtain security by maritime attachment); Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953 (3d Cir. 1978) (forum-selection clause framed as jurisdictional issue); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842 (2d Cir. 1977) (motion to dismiss for lack of jurisdiction incorrectly granted); Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294 (1st Cir. 1974) (case dismissed for lack of jurisdiction); Wellmore Coal Corp. v. Gates Learjet Corp., 475 F. Supp. 1140 (W.D. Va. 1979) (motion to dismiss for lack of personal jurisdiction); Sanko Steamship Co. v. Newfoundland Refining Co., 411 F. Supp. 285 (S.D.N.Y.) (admiralty *in rem* jurisdiction; forum clause enforced), *aff'd*, 538 F.2d 313 (2d Cir.), *cert. denied*, 429 U.S. 858 (1976); A.C. Miller Concrete Prods. Corp. v. Quikset Vault Sales Corp., 309 F. Supp. 1094 (E.D. Pa. 1970) (combination jurisdiction-venue clause); Matthiessen v. National Trailer Convoy, Inc., 294 F. Supp. 1132 (D. Minn. 1968) (motion to dismiss for lack of jurisdiction denied).

155. *See* Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344 (3d Cir. 1966); Carbon Black Export, Inc. v. S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959); Wm. H. Muller & Co., Inc. v. Swedish Am. Line, Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); Brown v. Gingiss Int'l Inc., 360 F. Supp. 1042, 1047 (E.D. Wis. 1973); Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F. Supp. 848, 851 (D. Haw. 1968); Geiger v. Keilani, 270 F. Supp. 761, 764 (E.D. Mich. 1967); United States v. Aetna Casualty & Sur. Co., 38 F.R.D. 418, 420 (N.D. Cal. 1965).

156. *See, e.g.,* LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4, 6 (1st Cir. 1984); Wm. H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d

recognized that ambiguously worded clauses may confer or derogate exclusive jurisdiction;<sup>157</sup> but at least one court has concluded that "where the federal courts retain no power to vacate the determination of the state courts, such destruction of exclusive federal jurisdiction, even by consent, is not permissible."<sup>158</sup>

Discussions of the implications of forum-selection clauses for personal jurisdiction are equally rare and sometimes collapsed with venue notions. A litigant who challenged a provision as ambiguous and unenforceable because it referred only to venue and not to jurisdiction was told: "A waiver of objection to venue would be meaningless, however, if it did not also contemplate a concomitant waiver of objection to personal jurisdiction."<sup>159</sup> This sentiment has been generalized in the principle that although "the contract refers to venue only and not also to personal jurisdiction [that] is of no moment."<sup>160</sup> At least one court has recommended forum-selection clauses as a prophylactic device to avoid the consequences of state long-arm in personam jurisdiction.<sup>161</sup>

A Seventh Circuit case, *Andrews v. Heinold Commodities, Inc.*,<sup>162</sup> illustrates the confusion of personal jurisdiction and venue. In *Andrews*, the district court dismissed the suit when the defendant invoked a forum-selection clause.<sup>163</sup> The appellate court framed the issue as the "more subtle one of whether the forum selection clause functioned to deprive the district court of personal jurisdiction, or of venue only."<sup>164</sup> The court astutely noted that *The Bremen* did not address this precise issue

Cir.), cert. denied, 350 U.S. 903 (1955); see also *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) ("By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction." (citing *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931))).

157. See *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987) (ambiguous clause does not confer exclusive and mandatory jurisdiction); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 6-7 (1st Cir. 1984) (ambiguous clause did not oust jurisdiction of Massachusetts state courts).

158. *Livolsi v. Ram Constr. Co.*, 728 F.2d 600, 603 (3d Cir. 1984); cf. *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 633 (9th Cir. 1982) (court yields jurisdiction to selected forum but may maintain jurisdiction to ensure plaintiff has adequate remedy through security attachment).

159. *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983); see *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.) (same proposition).

160. *Intermountain Sys.*, 575 F. Supp. at 1198. For the analogous proposition with regard to arbitration clauses, see also *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977) (arbitration clause constitutes consent to personal jurisdiction of New York Court in suit to compel arbitration).

161. See *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 n.24 (6th Cir. 1972).

162. 771 F.2d 184 (7th Cir. 1985). This was a suit brought under § 10(b) of the Securities Exchange Act of 1934 and § 4(b) of the Commodity Exchange Act for losses exceeding \$38,000 in the handling of an account by the commodities brokerage house. See *id.* at 185-86.

163. See *id.* at 185-86.

164. *Id.* at 187.

whether transfer pursuant to a choice-of-forum clause was due to lack of personal jurisdiction or lack of venue alone.<sup>165</sup> The court answered that the district court had dismissed the case for lack of personal jurisdiction, rather than venue, clarifying this position as follows:

[The defendant] argues that the Indiana court's determining it lacked jurisdiction because of the contract clause means that the court actually possessed jurisdiction but declined to exercise it, and that this refusal to exercise its jurisdiction cannot constitute a dismissal for lack of jurisdiction . . . . We do not agree. . . . That the lack of personal jurisdiction also nullifies the venue that had lain in the Indiana court is irrelevant, because that is the consequence of any finding of no personal jurisdiction.<sup>166</sup>

A sizable number of cases characterize forum-selection clauses as "venue selection clauses,"<sup>167</sup> providing expanded relief options for the party seeking enforcement. Under this construction forum-selection clauses are a part of procedural venue law,<sup>168</sup> a view the Supreme Court endorses.<sup>169</sup> Again, questions of personal jurisdiction recede when forum provisions are deemed venue devices. Thus, in *Wellmore Coal Corp. v. Gates Learjet Corp.*,<sup>170</sup> the district court suggested that whether personal jurisdiction had been properly asserted over the defendant "must be held in abeyance pending a determination of the validity and enforceability of the forum selection clause."<sup>171</sup> In the court's view it was not necessary to have personal jurisdiction in order to transfer the case.<sup>172</sup>

Conversely, the failure to raise a venue defense with a forum-selection clause challenge need not prove fatal.<sup>173</sup> In one Seventh Circuit case,<sup>174</sup>

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165. *Id.*

166. *Id.* at 188; *cf. McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 543 (Fla. 1987) (forum-selection clause not enforceable where defendant lacked minimum contacts with Florida).

167. *See, e.g., Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 264 (1949); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 469 (D. Vt. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *Anastasi Bros. Corp. v. St. Paul Fire & Marine Ins. Co.*, 519 F. Supp. 862, 863-64 (E.D. Pa. 1981); *St. Paul Fire & Marine Ins. Co. v. Travelers Indem. Co.*, 401 F. Supp. 927, 929-30 (D. Mass. 1975); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 3 (S.D.N.Y. 1974); *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042, 1044 (E.D. Wis. 1973); *National Equip. Rental v. Sanders*, 271 F. Supp. 756, 761 (E.D.N.Y. 1967).

168. *See, e.g., Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986); *Visicorp. v. Software Arts, Inc.*, 575 F. Supp. 1528, 1533 (N.D. Cal. 1983); *Northeast Theatre Corp. v. Edie & Ely Landau, Inc.*, 563 F. Supp. 833, 834-35 (D. Mass. 1983).

169. *See Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988). For a discussion of the venue characterization under *Erie* principles, see *infra* Part III B-C.

170. 475 F. Supp. 1140 (W.D. Va. 1979).

171. *Id.* at 1142.

172. *See id.* (citing *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962)).

173. *See Snyder v. Smith*, 736 F.2d 409, 418-19 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

174. *University Life Ins. Co. of Am. v. Unimarc Ltd.*, 699 F.2d 846 (7th Cir. 1983).

a hapless defendant moved to dismiss on the grounds of improper service and lack of jurisdiction, but failed to raise the forum-selection clause as a ground for improper venue. The plaintiff contended that the venue defense was therefore waived pursuant to Rule 12 consolidation requirements.<sup>175</sup> The court stated that it "need not decide whether a forum selection clause constitutes 'venue' within the meaning of rule 12," because that defense had been sufficiently raised by the Rule 12 motion generally.<sup>176</sup> Glossing over technical differences between jurisdiction and venue, the court observed that the fact that the defendant had not labeled its defense as venue did not matter: "The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril."<sup>177</sup>

Finally, some courts have viewed forum-selection enforcement as a forum non conveniens problem.<sup>178</sup> Under this view, forum-selection provisions are a species of venue law with the appropriate forum ultimately to be determined by resort to the same factors that govern forum non conveniens analysis.<sup>179</sup> On the other hand, some courts disagree whether *The Bremen* factors are coextensive with forum non conveniens principles.<sup>180</sup> One theory is that forum non conveniens analysis may determine the reasonableness of the selected forum, which is a prerequisite of *The Bremen* enforceability.<sup>181</sup> Other cases view a forum non conveniens inquiry as one separate from the validity of the clause.<sup>182</sup>

What the characterization problem boils down to is three possible approaches. First, if the clause is viewed as jurisdictional, then the court

175. See *Snyder*, 736 F.2d at 414; Fed. R. Civ. P. 12(g)-(h).

176. *Snyder*, 736 F.2d at 419.

177. *Id.*

178. See, e.g., *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 725-26 (4th Cir. 1981) (alternative forum non conveniens argument); *Carbon Black Export, Inc. v. S.S. Monrosa*, 254 F.2d 297, 301 (5th Cir. 1958) (analogy to forum non conveniens theory), *cert. dismissed*, 359 U.S. 180 (1959); *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 369-70 (S.D.N.Y. 1982) (forum non conveniens analysis); see also Gruson, *Forum-Selection Clauses*, *supra* note 3, at 142 & n.28 ("The factors applied by the courts to determine the reasonableness or unreasonableness of a forum-selection clause are similar to or identical with the factors used by courts in deciding the issue of *forum non conveniens*.").

179. *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984). Under the doctrine of forum non conveniens, when venue is proper in the first instance, the court having jurisdiction may refuse to entertain the action when it can more appropriately be brought in an alternative forum. Convenience and efficiency are the factors to be weighed in the determination. See J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 2.7, at 88-90; see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

180. See *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 725 (4th Cir. 1981); see also Gruson, *Forum-Selection Clauses*, *supra* note 3, at 142 n.28 (collecting cases).

181. See *Takemura & Co. v. S.S. Tsuneshima Maru*, 197 F. Supp. 909, 912 (S.D.N.Y. 1961); see also Gruson, *Forum-Selection Clauses*, *supra* note 3, at 142 n.28.

182. See *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 369 (S.D.N.Y. 1982); *Heitner v. Zim Israel Navigation Co.*, 152 F. Supp. 3, 3-4 (S.D.N.Y. 1957); see also Gruson, *Forum-Selection Clauses*, *supra* note 3, at 142.

always has jurisdiction to determine jurisdiction. If the clause is characterized in terms of venue, then an objection to the clause would have to be specific. Finally, if characterized in terms of forum non conveniens, as discussed above, the courts have greater discretion in their construction.

B. *Enforcement of Forum-Selection Clauses: How Does the Litigant Plead Relief?*

Not surprisingly, given the courts' analytical confusion with regard to forum-selection clauses, there is also much confusion concerning appropriate relief. Attorneys seeking enforcement of a forum provision typically invoke an array of procedural remedies and defenses in the hope that one is appropriate to the court's view of the case. This makes for interesting lawyering and bad law.

Although the courts have generally eschewed characterizing forum-selection clauses as jurisdictional, attorneys nonetheless have moved to dismiss under Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure for lack of subject matter and personal jurisdiction.<sup>183</sup> Indeed, only in rare instances have parties seeking enforcement of a forum clause prevailed under the jurisdictional defenses.<sup>184</sup> Rather than order an outright dismissal, other courts have chosen to stay their proceedings.<sup>185</sup> Some creative attorneys challenge forum-selection clauses by invoking the Rule 12(b)(6) failure to state a claim defense.<sup>186</sup> Other litigants seek dismissal or remand as the remedy in removal situations.<sup>187</sup>

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183. See, e.g., *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1192 (4th Cir. 1985) (Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 7 (1st Cir. 1984) (motion under Rule 12(b)(1) and 12(b)(3), but court says motion should be under 12(b)(6)); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 630 (9th Cir. 1982) (Rule 12(b) motion to dismiss for lack of jurisdiction); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 843 (2d Cir. 1977) (motion to dismiss for lack of jurisdiction incorrectly granted); *Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1295 (1st Cir. 1974) (case dismissed for lack of jurisdiction); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 132 (S.D.N.Y. 1983) (motion to dismiss for lack of personal jurisdiction denied); *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 371 (W.D. Pa. 1979) (mem.) (Rule 12(b)(1) dismissal sought); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132, 1134-35 (D. Minn. 1968) (motion to dismiss for lack of jurisdiction denied).

184. See *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985). *But see* *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 372 (W.D. Pa. 1979) (mem.) (challenge under Rule 12(b)(1); held that "*Bremen* makes clear that the issues before the court involve matters of contract law and do not necessarily imply any unlawful action by the parties to restrict federal jurisdiction.").

185. See *Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205 (C.D. Ill. 1979) (court stays own proceedings to determine whether German court procedures adequate to protect interests of parties).

186. See, e.g., *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 7 (1st Cir. 1984); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 343 (3d Cir. 1966).

187. See *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987) (remand for further proceedings); *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d

The single greatest source of relief, however, is sought under Rule 12(b)(3) of the Federal Rules of Civil Procedure, with reliance on related venue statutes.<sup>188</sup> Although dismissal for improper venue is requested, attorneys often alternatively seek transfer to the selected forum. Whether forum-selection clauses should be enforced pursuant to section 1404(a) or section 1406(a) of 28 U.S.C. is a matter of some controversy among federal courts.<sup>189</sup> So confusing is this issue that at least one court

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1297, 1299 n.1 (9th Cir. 1985) (request for remand based on forum-selection clause denied); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984) (removed case remanded to state court); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195 (D. Colo. 1983) (mem.) (removed case remanded to state court); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071 (W.D. Mo. 1979) (removed case remanded to state court). *But see* *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905 (E.D. Wis. 1981) (motion for transfer or Rule 12(b)(3) dismissal after removal to federal court); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184 (S.D.N.Y. 1975) (mem.) (forum-selection clause construed against drafter to permit removal of case to federal court); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121 (N.D. Cal. 1971) (motion to dismiss or transfer after removal in multidistrict litigation). For a discussion of the treatment of forum-selection clauses in the removal-remand posture, see *infra* Part IV.

188. Fed. R. Civ. P. 12(b)(3) is the defense of improper venue. The related statutory provisions are 28 U.S.C. § 1404 (1982 & Supp. 1988) (change of venue) and 28 U.S.C. § 1406 (1982) (cure or waiver of defects). *See* *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718 (2d Cir. 1982) (forum-selection clause enforced through Rule 12(b)(3) dismissal); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93 (5th Cir. 1979) (forum-selection clause enforced through § 1404(a) transfer); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3d Cir. 1973) (on petition for writ of mandamus, order transferring action vacated); *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708 (D.R.I. 1983) (section 1406 found to control forum-selection clause, but court dismisses rather than transfers); *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362 (S.D.N.Y. 1982) (forum-selection clause designating New York found to be unreasonable; action transferred to Eastern District of Washington); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905 (E.D. Wis. 1981) (motion to transfer or dismiss); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868 (D. Minn. 1980) (forum selection clause unreasonable; action transferred to California); *Randolph Eng'g Co. v. Fredenhagen Kommandit-Gesellschaft*, 476 F. Supp. 1355 (W.D. Pa. 1979) (mem.) (motions to dismiss and transfer denied); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140 (W.D. Va. 1979) (motion to dismiss or, in the alternative, transfer under § 1406); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145 (N.D. Tex. 1979) (forum-clause enforced; case transferred to designated forum of Missouri); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71 (S.D.N.Y. 1978) (section 1404 or § 1406 transfer sought); *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042 (E.D. Wis. 1973) (motion to transfer granted); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121 (N.D. Cal. 1971) (motion to transfer); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756 (E.D.N.Y. 1967) (transfer requested); *Geiger v. Keilani*, 270 F. Supp. 761 (E.D. Mich. 1967) (Rule 12 motion treated similarly to § 1404 motion); *United States v. Aetna Casualty & Sur. Co.*, 38 F.R.D. 418 (N.D. Cal. 1965) (motion to dismiss and transfer under § 1404 or § 1406 denied).

189. *See* 28 U.S.C. §§ 1404(a), 1406(9) (1982 & Supp. 1988); *see, e.g.*, *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708 (D.R.I. 1983) (extensive discussion whether § 1404 or § 1406 applies); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868 (D. Minn. 1980) (transfer without ruling on venue); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140 (W.D. Va. 1979) (section 1406 transfer); *Geiger v. Keilani*, 270 F. Supp. 761 (E.D. Mich. 1967) (Rule 12 motion, treated similarly to § 1404(a) motion for transfer); *see also* Gruson, *Forum-Selection Clauses*, *supra* note 3, at 137 (articulating the dispute).



granted a transfer without referring to either statute,<sup>190</sup> while another court granted a transfer simultaneously under both sections<sup>191</sup> without committing to a finding of improper venue.<sup>192</sup>

This confusion of possible relief is not a trivial problem, as the court in *Hoffman v. Burroughs Corp.*<sup>193</sup> correctly noted:

The statutory selection may be more than academic. The statutory basis for transfer in a diversity of citizenship case may determine what the applicable law is, including whether the choice of law rules of the state of the transferee court or the transferor court apply. . . . That is, at least in this circuit, the choice of law rules of the transferor court's state would apply in a section 1404(a) transfer, while the choice of law rules of the transferee court's state would apply in a section 1406(a) transfer for improper venue (as long as the transfer is not because of lack of personal jurisdiction over the defendants).<sup>194</sup>

Thus, the court's choice of remedies has a significant effect on the choice-of-law determination, even without the additional complicating element of a choice-of-law provision.<sup>195</sup> Finally, some removal cases view remand as appropriate relief in a forum-selection clause challenge,<sup>196</sup> while other courts resort to a venue transfer under statutory provisions or the doctrine of forum non conveniens.<sup>197</sup>

### C. *Forum-Selection Clauses as Matters of Prorogation and Derogation*

The civil law system has long viewed the problem of forum-selection clauses as a matter of either prorogation or derogation.<sup>198</sup> That is, the prorogation effect of a forum provision is to consent or give jurisdiction to a particular court that the parties have agreed to in advance. This is

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190. See *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148-49 (N.D. Tex. 1979).

191. See *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 873 n.5 (D. Minn. 1980).

192. See *id.*

193. 571 F. Supp. 545 (N.D. Tex. 1982) (motion to transfer case to California pursuant to forum-selection clause contained in license agreements).

194. *Id.* at 550-51. The court held that transfer was more appropriate under § 1406(a): "[T]he nature of a motion to enforce a forum selection clause is that venue is wrong in the first instance, . . . and a plaintiff should not be allowed to gain an advantage by bringing suit in the wrong court." *Id.* at 551; *accord* *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 710 (D.R.I. 1983); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 909 (E.D. Wis. 1981); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 74 (S.D.N.Y. 1978). *But see* *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979) (affirming district court's transfer under § 1404(a)); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 (3d Cir. 1973) (court assumes § 1404(a) governs); *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 369-70 (S.D.N.Y. 1982) (section 1404(a) controls). See generally *J. Friedenthal, M. Kane, & A. Miller, supra* note 10, § 2.17, at 87 (discussing forum non conveniens and transfer); 15 C. Wright & A. Miller, *supra* note 16, § 3847, at 235 (discussing standard used to consider transfer).

195. For a discussion of the further complications raised by concurrent governing law provisions, see *infra* Part V.

196. See cases cited *supra* note 187.

197. See cases cited *supra* note 187.

198. See *supra* note 17.

the positive or affirmative effect of a forum-selection clause. Conversely, the derogation effect of a forum provision is to deprive a particular jurisdiction-holding court of the ability to hear a case, because the parties chose not to utilize that forum.<sup>199</sup>

American courts do not construe forum-selection clauses theoretically as prorogation or derogation mechanisms and the civil law terms are rarely invoked as analytical referents.<sup>200</sup> Consequently, most federal courts willingly embrace the notion that prorogation agreements present no problem; it is "the generally accepted rule . . . that a court which is otherwise competent may exercise personal jurisdiction bestowed upon it by the parties' consent before or after the cause of action accrues."<sup>201</sup>

Because of this uncritical acceptance of the prorogation effect of forum-selection clauses, courts systematically evade discussion of the due process dimensions to both personal jurisdiction and choice-of-law determinations.<sup>202</sup> Since the court's choice of an appropriate remedy for enforcement of a clause may carry with it a choice-of-law rule, the prorogation effect of such clauses tends to be more weighted than perhaps contemplated by the parties. Nonetheless, courts universally approve the prorogation nature of forum-selection clauses without sufficient regard to the due process concerns implicated in in personam jurisdiction and choice-of-law, or the public policy determinations inherent in venue and removal statutes.

A much more serious problem is presented by the negative or derogation effect of forum provisions. Professor Reese correctly framed this issue by noting that the essential question with regard to forum-selection clauses is whether a court "will refuse to entertain a suit brought in violation of the clause even though they have personal jurisdiction over the

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199. See Gilbert, *supra* note 4, at 5-7; Gruson, *Forum-Selection Clauses*, *supra* note 3, at 136; Reese, *supra* note 62, at 187.

200. Although *The Bremen* does address the concept of court ouster through enforcement of a forum-selection clause, see *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-12 (1972), the Court does not discuss the civil law concept of derogation, or the prorogation effect of such clauses. Lower federal court opinions are similarly devoid of this conceptual framework and terminology.

201. Gilbert, *supra* note 4, at 6 (citing *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (prior consent); *Adam v. Saenger*, 303 U.S. 59 (1938) (consent rendered after cause of action accrues)).

202. As a mechanism of consensual assent, prorogation agreements are therefore the flip-side of waiver. It is generally acknowledged that personal jurisdiction is a waivable right. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982). See generally J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 3.5, at 104; *id.* § 3.25, at 181 (discussing jurisdiction based on consent and challenges to jurisdiction). This uncritical acceptance of waiver of personal jurisdiction ignores due process notions tied to that right. Cf. Rubin, *supra* note 6, at 512-28 (discussing unequal bargaining power, need to openly discuss waiver and need for waiving party to obtain advantage). Although the received doctrine is that personal jurisdictional requirements are waivable by consent, the argument here (in agreement with Rubin) is that this should not be so in the absence of a principled theory of waiver in civil law. These same arguments apply equally to choice-of-law clauses, insofar as choice-of-law is grounded in due process requirements. For further discussion of this thesis, see *infra* Part VII.

defendant.”<sup>203</sup> In essence, then, the derogation effect of such clauses is a refusal to exercise rightful jurisdiction.

Traditionally, courts viewed derogation as a problem of ouster. Under the long-standing rule, a court with proper jurisdiction could not be ousted of its jurisdiction by consent of the parties.<sup>204</sup> The non-ouster rule was effectively and definitively buried by the Supreme Court in *The Bremen*, where the Court endorsed the view that forum-selection clauses did not, after all, oust courts of jurisdiction. Rather, courts construing such clauses already had jurisdiction; they were merely exercising that jurisdiction to decline utilizing it.<sup>205</sup>

The Supreme Court's burial of the non-ouster rule, now recited by rote in the lower federal courts,<sup>206</sup> represents some fancy, linguistic mumbo-jumbo that does violence to a common understanding of the English language.<sup>207</sup> In truth, when a court enforces a forum-selection clause it is in derogation of its own jurisdiction and deprives that court of its ability to adjudicate the legal claims of the disputing parties. Since forum-selection clauses are prima facie valid unless proven otherwise,<sup>208</sup> the original forum has, as a practical matter, no choice *but* to yield its jurisdiction to the selected forum. Surely, for those courts that view forum-selection clauses as jurisdictional with the concomitant remedy of dismissal, this effectively constitutes an ouster of jurisdiction. The Supreme Court has obviated the derogation effect of forum-selection clauses by the smoke-screen technique of defining the problem out of existence.

Moreover, courts have failed to distinguish between the derogation effect on subject matter and personal jurisdiction. The Supreme Court's non-ouster formulation cannot mean to imply that potential litigants may contract away subject matter jurisdiction.<sup>209</sup> Equally troubling is the failure of the courts to countenance the countervailing principle that

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203. Reese, *supra* note 62, at 187.

204. See *supra* notes 4, 48 and accompanying text.

205. *The Bremen* Court stated: "The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

206. See *supra* notes 155-56 and accompanying text.

207. See Webster's New World Dictionary of The American Language 1039 (College ed. 1962) ("Oust: to force out; expel; drive out; dispossess; eject.").

208. See *supra* note 50.

209. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue*, 409 U.S. 109 (1972) . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings"); see also U.S. Const. art. III, § 2, cl. 1; Fed. R. Civ. P. 12(b)(1), 12(g) and 12(h). In *The Bremen*, the Supreme Court did not address the issue of consensual conferral of subject matter jurisdiction, although that is precisely what the parties did: an American company and a German company contractually conferred subject matter jurisdiction on the London Court of Justice. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972). Lower federal court cases virtually never discuss the issue of conferral or derogation of subject matter jurisdiction.

federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."<sup>210</sup> In essence, the Supreme Court's construction of forum-selection clauses renders them a form of abstention theory; similar to abstention doctrines, the courts exercise their jurisdiction to decline it,<sup>211</sup> although forum-selection situations involve only a geographical rather than a subject matter jurisdiction declination. Unfortunately, the federalism concerns that underpin abstention theory bear no relation to the abdication of jurisdiction pursuant to a forum-selection clause. At least with abstention doctrines, the sacrifice of individual litigation interests is made for the sake of competing federalism values.<sup>212</sup> No such weighty constitutional values balance the yielding of jurisdiction to a contractual forum.<sup>213</sup>

### III. *ERIE* IN WONDERLAND: CONSENSUAL ADJUDICATORY PROCEDURE AND PROBLEMS OF FEDERALISM

Beyond doubt, the most perplexing issue raised by forum-selection cases for lower federal courts was the *Erie* issue presented by diversity jurisdiction: were forum-selection clauses substantive or procedural for *Erie* purposes? Should federal courts look to underlying state law to determine the validity and enforceability of such provisions, or were such clauses merely a matter of federal procedural law? *The Bremen*, a federal question case, did not address the *Erie* issue at all, and consequently the federal courts split fairly evenly on the great substance-procedure divide.<sup>214</sup> Some courts ignored the issue<sup>215</sup> or ruled that *The Bremen* rep-

210. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citing *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McClellan v. Carland*, 217 U.S. 268, 281 (1910); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum)). See generally Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 Geo. L. J. 99, 102 n.10 (1986) (additional cases cited).

211. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941). See generally Mullenix, *supra* note 210, at 102-03 and accompanying notes (abstention for reasons of judicial economy and administration); 17A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 4241-4255 (2d ed. 1988) (discussing abstention and "Our Federalism" doctrines in relation to state and federal courts). Enforcement of forum-selection clauses and concomitant declination of jurisdiction most resembles so-called "fourth-branch" or *Colorado River* abstention, see *supra* note 210, where courts abstain for reasons of judicial economy and wise judicial administration. Forum-selection clause enforcement, in addition to enhancing these prudential values, also honors the sanctity of contract law over due process protections.

212. See *infra* note 409 and accompanying text.

213. See *supra* Part I A.

214. For cases looking to state law to resolve the *Erie* issue, see *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047, 1050 (3d Cir. 1987) (New York law); *Farm-land Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 850-52 (8th Cir. 1986) (Missouri law); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986) (Maryland law); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985) (Virginia law); *Colonial Leasing Co. v. Best*, 552 F. Supp. 605, 606-07 (D. Or. 1982) (Missouri and Oregon law); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 470 (D. Vt. 1981) (prediction that Vermont would follow *The*

resented federal common law;<sup>216</sup> others waffled, humbly conceding that forum-selection clauses implicated both substantive contract law and procedural venue law.<sup>217</sup>

The Supreme Court definitively answered the *Erie* question in *Ricoh*,<sup>218</sup> where it determined that forum selection was a venue matter and therefore procedural,<sup>219</sup> through *Hanna v. Plumer*<sup>220</sup> analysis. In so

*Bremen*), *aff'd*, 697 F.2d 296 (2d Cir. 1982); First Nat'l Monetary Corp. v. Chesney, 514 F. Supp. 649, 655-56 (E.D. Mich. 1980) (Michigan statutory provision); Kolendo v. Jerrell, Inc., 489 F. Supp. 983, 985 (S.D. W. Va. 1980) (mem.) (West Virginia law); Leasewell, Ltd. v. Jake Shelton Ford, Inc., 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976) (mem.) (West Virginia conflicts rules); Davis v. Pro Basketball, Inc., 381 F. Supp. 1, 3 (S.D.N.Y. 1974) (New York law).

For cases construing forum-selection clauses as a matter of federal procedural venue law see, e.g., Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1067 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988); Visicorp v. Software Arts, Inc., 575 F. Supp. 1528, 1531-32 (N.D. Cal. 1983); Northeast Theatre Corp. v. Edie & Ely Landau, Inc., 563 F. Supp. 833, 834-35 (D. Mass. 1983); Dick Proctor Imports, Inc. v. Sumitomo Corp. of Am., 486 F. Supp. 815, 818 (E.D. Mo. 1980).

215. See *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184 (7th Cir. 1985) (no *Erie* analysis, thus ignored by implication); *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211 (W.D. Tenn. 1985) (same); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131 (S.D.N.Y. 1983) (same).

216. See *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 406-07 (3d Cir. 1987); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068-69 (8th Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 201 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 548 (N.D. Tex. 1982); *C. Pappas Co. v. E. & J. Gallo Winery*, 565 F. Supp. 1015, 1017 (D. Mass. 1983); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 871 (D. Minn. 1980); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147-48 (N.D. Tex. 1979).

217. See, e.g., *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773-74 (3d Cir. 1984) (bizarre *Erie* argument by plaintiff that in absence of Utah law, court should look to law of Utah's neighboring states of Missouri and Texas to reject enforceability); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344 (3d Cir. 1966) (*Erie* issue not resolved because federal and state law viewed as the same); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1143 (W.D. Va. 1979) (same); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 568 (S.D.N.Y. 1978) (same); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132, 1134 n.3 (D. Minn. 1968) (same); *Geiger v. Keilani*, 270 F. Supp. 761, 765 (E.D. Mich. 1967) ("While it would probably be possible to write at length about whether a federal court in a diversity case should apply state law in resolving the question at hand, such a discussion would be of only academic significance . . ."); see also *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 187-88 (7th Cir. 1985) (no *Erie* analysis); *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 213 (W.D. Tenn. 1985) (same); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) (contractual forum clauses upheld "unless they suffer from some sort of contract invalidity or unless they are unreasonable"). See generally *Gruson*, *supra* note 3, at 153-56 (discussing case law holding that forum selection clauses implicate contract and procedural law); *Maier*, *supra* note 20, at 396-98 (all reasonable agreements to arbitrate as well as selection of forum in international commercial contracts will be enforced in federal courts); *Reese*, *supra* note 5, at 539 (discussing need to deny effect to choice-of-law clauses when deference to state law is appropriate).

218. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988).

219. See *id.* at 2243-44; see also *Red Bull Assoc. v. Best Western Int'l Inc.*, 862 F.2d 963, 966-67 (2d Cir. 1988) (broadly interpreting *Ricoh* as applicable to civil rights cases).  
220. 380 U.S. 460 (1965).

concluding, the Court altogether missed *The Bremen* boat. The Court not only evaded discussion of the validity and enforceability of forum-selection clauses, but it largely ignored the implications of the choice-of-law provision. Moreover, the Court left unresolved whether there exists, under *The Bremen*, a federal common law of consensual adjudicatory procedure.

#### A. *Stewart v. Ricoh as the Paradigmatic Forum-Selection Case*

The Supreme Court's opinion in *Ricoh* is disappointing precisely because it presented to the Court, for the first time, a paradigmatic illustration of the forum-selection clause cases now so prevalent on lower federal court dockets. Notwithstanding this excellent factual context, the Court elected to frame and answer a subtly altered issue of its own choosing. Framing the issue as a venue-transfer problem clearly answered the *Erie* dilemma, because it followed ineluctably that venue would be deemed procedural for *Erie* purposes.<sup>221</sup>

The facts in *Ricoh* suggest some problems that the Court ignored in reaching its conclusion. Stewart Organization ("Stewart"), a closely-held Birmingham, Alabama corporation, negotiated with Ricoh Corporation ("Rico") to become a Ricoh copying machine dealer in central Alabama. Ricoh is a nationwide manufacturer with headquarters in New Jersey and substantial corporate operations in New York City. After negotiations, Ricoh gave Stewart a printed dealership agreement but Stewart did not read paragraph 18.1 which contained both a choice-of-forum and a choice-of-law provision.<sup>222</sup> The contract specified that the agreement would be governed by New York law and that "any appropriate state or federal district court located in the Borough of Manhattan, New York City" would have exclusive jurisdiction over a case or controversy arising in connection with the contract.<sup>223</sup>

Business relations between Stewart and Ricoh deteriorated and in Sep-

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221. The Court did not view the *Ricoh* situation as involving a "relatively unguided *Erie* choice." *Ricoh*, 108 S. Ct. at 2242 (quoting *Hanna*, 380 U.S. at 471). Rather, it clung to the narrowest possible *Erie* construct: "Our cases indicate that when the federal law sought to be applied is a congressional statute, the first and chief question for the District Court's determination is whether the statute is 'sufficiently broad to control the issue before the Court.'" *Id.* at 2242 (citing *Burlington Northern R.R. v. Woods*, 480 U.S. 1 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)); see *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The Court so determined that 28 U.S.C. § 1404(a) covered the point in dispute and resolved the case on straightforward *Hanna* analysis. See generally J. Friendenthal, M. Kane, & A. Miller, *supra* note 10, § 4.4, at 208-10 (outlining *Hanna* analysis for determining applicability of particular federal practice).

222. See *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 644-45, *vacated*, 785 F.2d 896 (1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988). A slightly different version of the facts is reported in the *per curiam* rehearing opinion. See 810 F.2d at 1067 (failing to make reference to boilerplate nature of contract; "take-it-or-leave-it" offer; and failure to notice or read forum and choice-of-law provisions).

223. *Ricoh*, 779 F.2d at 645 n.2.

tember 1984 Stewart filed a complaint in the United States District Court for the Northern District of Alabama, alleging breach of contract, breach of warranty, fraud and federal antitrust violations.<sup>224</sup> The action was based on both diversity and federal question jurisdiction.<sup>225</sup> Ricoh's attorneys filed motions to dismiss as well as to transfer, based on improper venue and inconvenient forum.<sup>226</sup> These motions were predicated on the contract's forum-selection clause.

*Ricoh* was argued three times before it reached the Supreme Court.<sup>227</sup> In the first instance the district court held that state law governed the validity and enforceability of such clauses, and because Alabama law deemed such provisions as contrary to public policy, the federal court could not enforce the forum clause.<sup>228</sup> Moreover, since the complaint raised multiple claims not countenanced by the contract provision, a court-ordered transfer would sever the case.<sup>229</sup> The Eleventh Circuit reversed, holding that the issue involved venue transfer, which was governed by federal procedural law in a diversity action.<sup>230</sup> The appellate court remanded to the district court with the instruction to transfer the case to the Southern District of New York.<sup>231</sup> On a rehearing *en banc*, an Eleventh Circuit majority reaffirmed that venue was a matter of federal procedural law and applied *The Bremen* standards to conclude that

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224. *See id.* at 645.

225. Diversity of citizenship was based on 28 U.S.C. § 1332 (1982); federal question jurisdiction was based on antitrust claims under 28 U.S.C. § 1337 (1982). Neither the district court nor the Court of Appeals addressed how the federal question issue would affect the case. *See Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067-68 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988). In its affirmance of *Ricoh*, the Supreme Court declared that it would not make a difference:

Our conclusion that federal law governs transfer of this case . . . makes this issue academic . . . because the presence of a federal question could cut only in favor of the application of federal law. We therefore are not called on to decide, nor do we decide, whether the existence of federal question as well as diversity jurisdiction necessarily alters a District Court's analysis of applicable law.

108 S. Ct. at 2242 n.3. The Supreme Court thus evaded the crucial *Bremen* question, because *The Bremen* was based on federal question jurisdiction. This suggests, then, that *The Bremen* is federal common law of contract, while forum clauses in diversity cases are procedurally venue-conferring.

226. *See Ricoh*, 779 F.2d at 645. For this scatter-shot approach to possible remedies, see *supra* Part II B.

227. *See Ricoh*, No. 84-AR-2460-S (N.D. Ala. Jan. 29, 1985), *rev'd*, 779 F.2d 643, *vacated*, 785 F.2d 896 (1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988).

228. *See Ricoh*, 779 F.2d at 645.

229. *See id.* The issue of transfer causing severance, central to many forum-selection clause cases, would disappear in subsequent consideration of the case. It remains an unresolved and troubling issue, for arguably litigants may not know that such clauses will also govern non-contract causes of action, nor may they have contemplated this at the time of negotiation and signing.

230. *See Ricoh*, 779 F.2d at 648. *But see Ricoh*, 810 F.2d 1066, 1068 (11th Cir. 1987) (en banc) (per curiam) ("we hold that venue in a diversity case is manifestly within the province of federal law"), *aff'd*, 108 S. Ct. 2239 (1988).

231. *See Ricoh*, 779 F.2d at 651.

"the choice of forum clause in this contract is in all respects enforceable generally as a matter of federal law."<sup>232</sup>

On the facts, *Ricoh* entailed many typical features of federal forum-selection cases. It involved two fairly sophisticated businessmen negotiating a commercial contract. One party was a nationwide manufacturer and distributor, the other a small, local entrepreneur. Although the commercial arrangement was negotiated, the weaker party was presented with an essentially boilerplate contract and the admonishment that the parent corporation did not permit substantive changes.<sup>233</sup> The agreement contained *both* a forum-selection clause and a choice-of-law provision favorable to the parent corporation. When the disgruntled plaintiff sought relief in *its* home federal forum, the defendant sought enforcement of the clause and transfer to *its* more favorable forum, the contractual one.

### B. *Ricoh*: The Supreme Court Punts

Notwithstanding this rather forthright presentation of the validity and enforceability of forum-selection clauses, the Supreme Court evaded the central contract issue raised by *The Bremen* and instead chose to recast the case as a venue transfer problem. The Court did this deliberately, stating "[a]t the outset we underscore a methodological difference in our approach to the question from that taken by the Court of Appeals."<sup>234</sup> Rather, the Court framed the issue narrowly as "whether § 1404(a) itself controls [the defendant's] request to give effect to the parties' contractual choice of venue and transfer."<sup>235</sup>

The Court incorrectly cast *Ricoh* as a venue-transfer problem. Instead of asking the threshold question, whether the dispute involved contract law or venue law, the Court instead asked whether a federal statute covered the point in dispute. The obvious answer to this question—28 U.S.C. section 1404—led to the plodding, unsurprising *Erie* conclusion that federal venue law must control in diversity cases.<sup>236</sup>

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232. *Ricoh*, 810 F.2d at 1071.

233. *See Ricoh*, 779 F.2d at 644-45.

234. *Ricoh*, 108 S. Ct. at 2243.

235. *Id.* The Court noted that "[t]he parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama." *Id.* at n.8. Therefore, because *Ricoh* came to the Court in a 28 U.S.C. § 1404(a) posture, the Court also avoided resolving the issue of the appropriate transfer provision in forum-selection cases where venue is improper, an issue which has generated much heat but little light among the lower federal courts. *See* discussion *supra* Part II B; *supra* notes 188-92. This represents another missed opportunity by the Court, and has left the issue unresolved. Needless to say, the Court also failed to comment on resultant choice-of-law implications.

236. *Ricoh*, 108 S. Ct. at 2243-45. The Court's narrowest reading of *Hanna v. Plumer*, 380 U.S. 460 (1965), moved the Court also to conclude: "Because a validly enacted Act of Congress controls the issue in dispute, we have no occasion to evaluate the impact of application of federal judge-made law on the 'twin aims' that animate the *Erie* doctrine."



The Court missed a number of nagging problems and side-stepped the interesting issues raised by concurrent federal question jurisdiction in the lawsuit.<sup>237</sup> The Court largely ignored contrary Alabama policy with regard to forum-selection clauses, noting that its section 1404 analysis "makes it unnecessary to address the contours of state law."<sup>238</sup> The Court altogether disregarded the simultaneous effect of the choice-of-law provision and offered no guidance as to controlling law after the ordered transfer.<sup>239</sup> The Court made no reference to transferability of the entire case, including the non-contract claims.<sup>240</sup> In addition, the Court made no attempt at *The Bremen* analysis, dismissing that case as largely irrelevant to its endeavor.<sup>241</sup> Instead, it infused section 1404(a) transfer determinations with a patchwork collection of factors sounding in *The Bremen* elements,<sup>242</sup> forum non conveniens principles, and federal "discretionary mode of operation"<sup>243</sup> "in the interest of justice."<sup>244</sup>

### C. Ricoh: *The Weary Erie Aftermath*

Justice Scalia, dissenting in *Ricoh*, correctly identified the heart of the problem that the Court's majority missed: "[T]he Court's description of the issue begs the question: what law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between

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*Ricoh*, 108 S. Ct. at 2245 n.11. Justice Scalia attacked this extremely narrow *Hanna* approach. See *id.* at 2245-49 (Scalia, J., dissenting).

237. See *supra* note 225.

238. *Ricoh*, 108 S. Ct. at 2244 n.9. This was the basis for the district court's refusal to enforce the clause, and is the basis for similar refusal by other courts. For cases applying state law to determine validity and enforceability under the *Erie* doctrine, see *supra* note 214.

239. The Supreme Court simply did not mention this issue. In the first Eleventh Circuit appeal, the court took notice, but rejected, that the case initially should be determined by substantive conflicts rules under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). See *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 647 n.8, *vacated*, 785 F.2d 896 (1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988). The *Ricoh* court declared that the "issue in this case, however, is *not* the legitimacy of a choice of law clause. Both states permit such clauses. Rather we are asked to enforce a choice of forum clause." *Ricoh*, 779 F.2d at 647 n.8 (emphasis in original). Although the Eleventh Circuit and the Supreme Court ignored the choice-of-law issue, other federal courts have thought *Klaxon* pertinent. See, e.g., *Instrumentation Assoc., Inc. v. Madsen Elec. Ltd.*, 859 F.2d 4, 8 (3d Cir. 1988); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357 n.4 (3d Cir. 1986); *Snider v. Lone Star Art Trading Co.*, 672 F. Supp. 977, 982 (E.D. Mich. 1987). For a discussion of the complications arising from concurrent choice-of-law provisions, see *infra* Part V.

240. See *supra* note 229.

241. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2243 (1988). Analysis of *The Bremen* factors for validity and enforceability was the centerpiece of Eleventh Circuit interpretation of the case. See *Ricoh*, 810 F.2d 1066, 1069-71 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988). Perhaps the Supreme Court did not wish to be backed into the corner of acknowledging a federal common law of contract principles under *The Bremen*; its narrow § 1404 holding avoids this result.

242. See *infra* Part I A.

243. *Ricoh*, 108 S. Ct. at 2244.

244. *Id.*

the parties."<sup>245</sup> As Justice Scalia ably argued, recasting the initial *Erie* question compelled a quite different *Erie* result.<sup>246</sup>

The majority opinion in *Ricoh* leaves a number of distressing problems and legal anomalies in its aftermath. For example, in diversity jurisdiction cases, the Supreme Court has now suggested that forum-selection clauses are basically venue matters governed by federal procedural law, at least when the issue is raised on a section 1404(a) transfer motion. On the narrowest possible reading of this holding, *Ricoh* leaves unsettled the *Erie* resolution of jurisdictional challenges, section 1406 transfers, Rule 12(b)(6) dismissals, or removal-remand situations.<sup>247</sup> On the broadest possible reading of *Ricoh's* holding, all forum-selection clause challenges in diversity cases are procedural, thereby creating a federal common-law rule on the validity of forum-selection clauses, albeit through back-door rulemaking.<sup>248</sup>

Making matters worse, the Court also has engendered further conceptual anomalies. In federal-question cases, *The Bremen* remains a federal common law rule for the enforceability of forum-selection clauses.<sup>249</sup> In this domain, such clauses are viewed primarily as jurisdictional and contractual. Either the clauses are procedurally venue-conferring, or they are substantively-contractual.

It is unsettling for the Supreme Court to have one conclusion for federal question cases and another for diversity suits. In addition, the Supreme Court now has a set of principles that deems forum-selection clauses procedural, but choice-of-law provisions substantive for *Erie* analysis.<sup>250</sup> It is hard to imagine that these *Erie* rules for forum and choice-of-law provisions are in fact conducive to the values of predictability, certainty, security, stability and simplicity. If lawyers and judges cannot figure this out, it is unfair to assume that the proverbial sophisti-

245. *Id.* at 2246 (Scalia, J., dissenting).

246. Justice Scalia argued:

Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law. It is difficult to believe that state contract law was meant to be pre-empted by this provision that we have said "should be regarded as a federal judicial housekeeping measure."

*Id.* at 2247 (citation omitted).

247. *Ricoh* only supplies an analysis based on 28 U.S.C. § 1404(a) transfer. Yet litigants often challenge the clauses, or seek enforcement, under many other procedural provisions and forms of relief. See *supra* Parts II A-B.

248. Justice Scalia objected to this creation of a federal common law of contracts:

[W]hatever the scope of the federal courts' authority to create federal common law in other areas, it is plain that the mere fact that petitioner here brought an antitrust claim . . . does not empower the federal courts to make common law on the question of the validity of the forum-selection clause.

*Ricoh*, 108 S. Ct. at 2248 (Scalia, J., dissenting); see Maier, *supra* note 20 (generally favorable to the development of a federal common law of contract principles in this area).

249. See *supra* Part I A.

250. See *supra* notes 218-19 and accompanying text.

cated businessman, let alone the lay amateur, can make an intelligent waiver of litigation rights.

#### IV. FURTHER ADVENTURES IN FEDERALISM: CONSENSUAL ADJUDICATORY PROCEDURE AND REMOVAL DOCTRINE

One of the many peculiarities fostered by an inadequately developed theory of consensual procedure is the courts' idiosyncratic view of forum-selection clauses in the federal removal context.<sup>251</sup> If litigants initially sue in federal court and raise a forum-selection clause issue, there is an exceedingly high probability that the court will validate the contractual forum provision and grant a dismissal or venue transfer.<sup>252</sup> On the other hand, if litigation is first instituted in state court and the defendant removes the case to federal court, there is an equally high probability that the federal court will not enforce the forum clause so as to order a remand of the litigation to state court.<sup>253</sup> Thus, the distinct trend is that federal courts jealously guard their removal jurisdiction far more than their original jurisdiction. Moreover, the cases suggest that it is easier for a litigant to waive federal court jurisdiction and venue than to waive the removal right.

The removal cases present three interesting theoretical problems that challenge the received doctrine of consensual procedure. The first is determining what law governs the federal court's construction of a forum-selection clause on a remand motion. The second is whether a forum-selection clause provides an independent ground for remand and whether such a determination is appealable under federal removal provisions.<sup>254</sup>

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251. Removal to federal court and remand to state court is governed by 28 U.S.C. §§ 1441, 1445-1447 (1982), *as amended* by H.R. Conf. Rep. No. 4087, 100th Cong., 2d Sess. (1988). For a discussion of general principles relating to removal, see J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 2.11; 14A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 3721-23 (2d ed. 1985).

252. See *supra* note 3 and accompanying text.

253. See *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1299 n.1 (9th Cir. 1985) (rejecting remand based on forum-selection clause); *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 397 (2d Cir. 1985) (forum-selection clause does not constitute waiver of right to removal from state to federal court); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 909 (E.D. Wis. 1981) (forum-selection clause designating Ohio not enforced on removal); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F. Supp. 318, 320 (E.D. Wis. 1980) (forum-selection clause not enforced on removal); *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 372 (W.D. Pa. 1979) (mem.) (forum-selection clause not enforced and removal permitted); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 187 (S.D.N.Y. 1975) (mem.) (forum clause construed against drafter to permit removal to federal court); *cf. Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280-81 (9th Cir. 1984) (remanded to state court; forum clause enforceable if not violative of public policy); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.) (remand to state court to enforce forum clause); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1072 (W.D. Mo. 1979) (remand to state court to enforce forum clause in forum in which contract was to be performed).

254. Title 28, § 1447(d) of the United States Code provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or other-

The third concerns how public policy should inform removal jurisdiction and whether these considerations are any different from the public policy notions that underlie federal jurisdiction or venue.

A. *Forum-Selection Clauses and Applicable Law on a Removal-Remand Motion*

When a defendant removes a lawsuit from state court to federal district court, the removal statutes, until recent amendment, specified that the case may be remanded "[i]f . . . it appears that the case was removed improvidently and without jurisdiction."<sup>255</sup> Thus, a petitioner seeking remand based on forum-selection clause enforcement must fulfill this requirement and wrestle the jurisdictional conundrum. Hence, a plaintiff's attorney must argue that the federal court had jurisdiction to determine the enforceability of the forum clause in order to decline its jurisdiction and remand to state court. This argument has been made successfully only once.<sup>256</sup>

This theory is consistent with *The Bremen's* pronouncement that forum-selection clauses do not effect an ouster of federal court jurisdiction.<sup>257</sup> Yet, without exception, the forum-selection clause cases removed to federal court are removed there on the basis of diversity jurisdiction.<sup>258</sup> In that posture, then, construction of the validity and enforceability of the clauses raises an *Erie* issue: on removal in diversity cases, are forum-selection clauses substantive or procedural?

One court that grappled with this issue determined that *The Bremen* contract principles governed the remand determination. Typical of many federal courts, the Ninth Circuit in *Pelleport Investors v. Budco*

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wise . . ." 28 U.S.C. § 1447(d) (1982). Although remand orders are generally unappealable, a sizable body of case law has developed a "collateral order" exception for forum clause cases. There is currently a split among the circuit courts concerning reviewability. The Supreme Court has recently granted certiorari to resolve this issue. See *Chasser v. Achille Lauro Lines*, 844 F.2d 50 (2d Cir.), cert. granted, 109 S. Ct. 217 (1988). For a discussion of the appealability of remand decisions, see *infra* Part IV B.

255. 28 U.S.C. § 1447(c) (1982). The removal statute was recently amended to provide that the case may be remanded "[i]f . . . it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c) (1982), as amended by H.R. Conf. Rep. No. 4087, 100th Cong., 2d Sess. (1988). The cases in this discussion, however, were decided before deletion of the "removed improvidently" language.

256. See *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1072-73 (W.D. Mo. 1979); cf. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir. 1984) ("Here too, the sole purpose of the remand is to surrender jurisdiction to the state court.").

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

258. See, e.g., *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1298 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 275 (9th Cir. 1984); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1197 (D. Colo. 1983) (mem.); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F. Supp. 318, 319 (E.D. Wis. 1980); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1073 (W.D. Mo. 1979).

*Quality Theatres*<sup>259</sup> uncritically opined that it could not see the "reason why the principles announced in *The Bremen* are not equally applicable to the domestic context."<sup>260</sup> Moreover, the court noted that in order to reach the contract issue, it had to have subject matter jurisdiction. With subject matter established on tenuous diversity grounds,<sup>261</sup> the court "ordered the case remanded to state court after it found the parties' agreement to litigate in state court enforceable. Not only did the court's determination that the forum selection clause was valid and enforceable precede the remand order, it formed the basis of that order."<sup>262</sup>

Similarly, most federal courts that have construed forum-selection clauses on a remand motion have applied *The Bremen* federal common law contract principles in diversity cases.<sup>263</sup> The question, of course, is how to reconcile this with the Court's pronouncement that venue transfer motions implicating forum-selection clauses are procedural for *Erie* purposes.<sup>264</sup> In *Ricoh*, it seems, the validity of the transfer preceded—if not precluded—any inquiry regarding validity of the forum-selection clause.

This analytical inconsistency encourages interesting forum-shopping possibilities.<sup>265</sup> It is most favorable to litigants seeking enforcement of forum-selection provisions to sue or to be sued initially in federal court on the basis of a federal question.<sup>266</sup> Litigants seeking to avoid the re-

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259. 741 F.2d 273 (9th Cir. 1984).

260. *Id.* at 279.

261. The plaintiff Pelleport based its remand motion, in part, on the theory that the court lacked proper subject matter jurisdiction under 28 U.S.C. § 1332 (1982) (diversity statute) because of the inclusion of Doe defendants. The court rejected this challenge, stating the inclusion of Doe defendants did not defeat diversity. See *Pelleport*, 741 F.2d at 278-79.

262. See *Pelleport*, 741 F.2d at 277 (affirming the district court's order of remand).

263. See, e.g., *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279-81 (9th Cir. 1984); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1197-98 (D. Colo. 1983) (mem.); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 907-09 (E.D. Wis. 1981); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F. Supp. 318, 320-21 (E.D. Wis. 1980); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1072-73 (W.D. Mo. 1979); cf. *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 371-72 (W.D. Pa. 1979) (mem.) (acknowledging *The Bremen*, but distinguishing mandatory and non-mandatory clauses); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 186-87 (S.D.N.Y. 1975) (mem.) (same).

264. See *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2245 (1988); *supra* Part III B.

265. "Forum shopping" was one of the evils that the *Erie* doctrine was supposed to cure, and under the expanded *Hanna v. Plumer* analysis, one of the tests for determining whether to apply federal law. Because the Supreme Court adopted the narrowest possible *Hanna* approach, see *supra* Part III B, it determined that it had no occasion to evaluate the impact of the application of federal judge-made law on the "twin aims" that animate the *Erie* doctrine. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). In *Hanna* the Court found that the two policies underlying the *Erie* doctrine were the "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* See generally 19 C. Wright & A. Miller, *Federal Practice and Procedure*, § 4503 (1982) (discussing facts and reasoning in *Erie*).

266. In this instance the court will most likely apply *The Bremen* factors for validity

striction of a forum-selection clause, however, are best advised to sue in state courts where public policy invalidates such clauses, or to remove the case to federal court. Justice Scalia, in his dissent in *Ricoh*, speculated:

With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and non-resident defendants will be encouraged to shop for more favorable law by removing to federal court.<sup>267</sup>

This assertion assumes that federal courts, on removal, are more likely to enforce forum-selection clauses. The opposite seems to be the case. Since most federal courts in removal cases apply either state contract law or general *Bremen* contract principles, the removal defendant seeking to enforce a state-based contract clause runs a greater risk of non-enforcement.<sup>268</sup> Conversely, the removal defendant seeking to evade a forum-selection clause has a higher probability of success by removing to federal court.

### B. *Forum-Selection Clauses as an Independent Ground for Remand*

It is a cardinal rule of judicial decision-making that federal courts under their article III authority do not have the power to make state law.<sup>269</sup> Although federal courts do have the authority to fashion procedural rules governing their own affairs, this power does not include the power to extend or expand the jurisdiction or venue of the federal courts.<sup>270</sup> With specific regard to removal jurisdiction, the Supreme Court has pronounced that district courts may not remand cases "on grounds not specified in the statute and not touching the propriety of the removal."<sup>271</sup> Finally, federal court remand orders, by statute, are gener-

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and enforceability, since *The Bremen* itself was a federal question case. If the lawsuit is based on diversity jurisdiction, the court is likely to apply either federal procedural rules of venue and transfer, or federalized *Bremen* contract principles. Only in rare instances will courts look to contrary state contract law to invalidate a clause. *See supra* Parts I A, II B-C.

267. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2249 (1988) (Scalia, J., dissenting).

268. *See supra* notes 253, 263 and accompanying text.

269. The Court in *Erie* stated the rule:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

*Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

270. *See Fed. R. Civ. P.* 82-83; *see also* 28 U.S.C. §§ 2071-2072 (1982).

271. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976) (district court may not remand after removal except for grounds authorized in removal statute; crowded federal docket not an authorized ground); *see also* *Ryan v. State Bd. of Elections*, 661 F.2d 1130, 1133-34 (7th Cir. 1981) (properly removed case may not be remanded as a form of abstention). *See generally* Mullenix, *supra* note 210, at 155-56

ally not reviewable.<sup>272</sup>

The appealability of remand decisions relating to forum-selection clauses logically arises either when remand is denied or when remand is ordered. When remand is denied, courts generally agree that an order *denying* a motion to enforce a forum-selection clause is reviewable as a collateral final order under 28 U.S.C. § 1291.<sup>273</sup> When remand is ordered, appealability raises an analytical inconsistency since the primary ground for appeal is lack of jurisdiction.<sup>274</sup> Yet the theory of consensual adjudicatory procedure posits that the forum must have jurisdiction in order to decline it in preference to the contractual forum. Therefore the "lack of jurisdiction" ground cannot logically form the basis for appeal of a remand order.

In order to circumvent this conundrum, the Ninth Circuit reasoned that "[t]he confusion appears to be generated by the label of remand."<sup>275</sup> Thus, the problem of non-reviewability under section 1447(d) disappeared magically: "Once the fact of remand is separated from the reason for its issuance, . . . it becomes clear that the district court did not merely remand this case to the state court; it reached a substantive decision on the merits apart from any jurisdictional decision."<sup>276</sup> Since the district court had made an essentially substantive determination on the merits of a contract dispute, the defendant was entitled to a review of this decision. In avoiding the section 1447(d) prohibition, the Ninth Circuit clearly cast the forum-selection issue as a matter of substantive contract law, albeit in a diversity posture.

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(remand for abstention after case is properly removed to federal court is not authorized by removal statutes and undermines basis for removal).

272. See 28 U.S.C. § 1447(d) (1982).

273. 28 U.S.C. § 1291 (1982) (final decisions of district courts).

274. See *Chasser v. Achille Lauro Lines*, 844 F.2d 50, 53 (2d Cir.), *cert. granted*, 109 S. Ct. 217 (1988); *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047, 1048 (3d Cir. 1987); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 355-56 (3d Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-201 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); *cf. Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 403-04 (3d Cir. 1987) (order denying motion to compel discontinuation of arbitration not immediately reviewable). *But see Louisiana Ice Cream Distribs., Inc. v. Carvel Corp.*, 821 F.2d 1031, 1033 (5th Cir. 1987) (denial of motion to dismiss for improper venue not immediately appealable); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 764 (3d Cir. 1984) (transfer order based on forum-selection clause not immediately appealable as collateral final order); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 861-62 (7th Cir.) (per curiam) (no immediate appeal of denial of remand to state court, predicated on forum-selection clause specifying Illinois state court), *cert. denied*, 469 U.S. 890 (1984).

275. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276 (9th Cir. 1984) (remand order based on enforceability of forum-selection clause is reviewable under 28 U.S.C. § 1447(d) and as a collaterally final order under 28 U.S.C. § 1291).

276. *Id.*

C. *Forum-Selection Clauses and Removal as a Public Policy Exception to Enforceability*

While courts easily subscribe to the doctrine of waiver of personal jurisdiction and venue, the courts have been more hesitant to embrace a notion of removal waiver.<sup>277</sup> Oddly, unlike personal jurisdiction and venue, removal is viewed as a party's right, even though all these procedural functions are statutorily-based.<sup>278</sup> For whatever reasons, courts have been somewhat more willing to recognize *The Bremen's* public policy restriction on forum-clause enforceability<sup>279</sup> when the issue arises in the removal context.

Removal jurisdiction represents a congressionally mandated public policy to insulate non-resident defendants from the potential biases that might attend state court litigation.<sup>280</sup> Hence, removal effects this public policy by permitting the defendant to move the lawsuit to a presumably

277. One commentator has stated:

The right of removal may be lost or waived, but the courts are slow to find such a waiver, even where the defendant had taken action in state court prior to seeking removal. An old case seemed to say that a contract stipulating that the parties would not remove cases to federal court would be invalid, but the modern view is that such a contract is a valid waiver of the right to remove unless the contract is unreasonable or procured by duress.

C. Wright, *Law of Federal Courts* § 38, at 218-19 (4th ed. 1983) (footnotes omitted); *see id.* at nn.55-57 (extensive citation of cases in support). Professor Wright supports his statement of the modern view with citation to *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955). It should be noted that *Muller* itself was not a removal case nor did it involve a contract restricting or waiving the right to removal. In addition, *Muller* was overruled in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967). Most commentators generally do mark the Second Circuit *Muller* decision as the beginning of the modern trend, but its Supreme Court imprimatur is given in *The Bremen*. Notwithstanding *The Bremen* and the modern trend, however, the federal courts do remain hesitant about the ability to waive the removal right as a consequence of a forum-selection clause. *See, e.g.*, *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 396-97 (2d Cir. 1985); *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 372-73 (W.D. Pa. 1979) (mem.); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 186 & n.2 (S.D.N.Y. 1975) (mem.).

278. Removal jurisdiction is based in 28 U.S.C. § 1441 (1982 & Supp. 1988), *as amended* by H.R. Conf. Rep. No. 4087, 100th Cong., 2d Sess. (1988), venue is based in 28 U.S.C. § 1391 (1982 & Supp. 1988), *as amended* by H.R. Conf. Rep. No. 4087, 100th Cong., 2d Sess. (1988), and personal jurisdiction in federal court is established by reference to state long-arm requirements and the fourteenth or fifth amendment due process clauses. *See* *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963). *See generally* J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 3.18, at 162-64 (discussing Second Circuit's jurisdictional analysis in *Arrowsmith*); 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1112, at 227-34 (2d ed. 1987) (analyzing federal rules dealing with service of process pursuant to state law).

279. *See, e.g.*, *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905 (E.D. Wis. 1981) (Wisconsin public policy overrides forum-selection clause designating Ohio forum); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F. Supp. 318 (E.D. Wis. 1980) (forum-selection clause designating Illinois not enforced in action pursuant to Wisconsin franchise investment law).

280. *See* J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 2.11, at 57.



less-biased federal forum. Enforcement of a forum-selection clause specifying state court jurisdiction under these circumstances would defeat the public policy goals of the removal statute.<sup>281</sup> Although this is a compelling theory, other similar public policy arguments have largely failed in forum-selection clause cases.<sup>282</sup> In removal cases, federal courts have retained jurisdiction in any instance where the contract clause was vague, ambiguous, or provided for potential dual forums.<sup>283</sup>

In one instance a federal court strenuously asserted the public policy theory of removal jurisdiction as a possible restraint on forum-clause enforcement. In *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*,<sup>284</sup> the defendant, a commercial Venezuelan bank, was sued in New York state court but removed the action to the Southern District of

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281. See *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 396-97 (2d Cir. 1985).

282. See *Diaz Contracting, Inc. v. Nanco Contracting Corp.*, 817 F.2d 1047, 1054-55 (3d Cir. 1987) (federal bankruptcy policy argument rejected); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068-70 (11th Cir. 1987) (en banc) (per curiam) (Alabama public policy inapplicable), *aff'd*, 108 S. Ct. 2239 (1988); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (Missouri public policy disfavoring clauses rejected); *Lien Ho Hsing Steel Enter. Co. v. Weihtag*, 738 F.2d 1455, 1461-62 (9th Cir. 1984) (no state policy on insurance overrides forum-selection clause); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (no contravening venue policy in federal Miller Act); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 550 (N.D. Tex. 1982) (rejection of Texas policy disfavoring such clauses); *cf. Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 266 (1949) (venue limiting provision void as in conflict with Federal Employer's Liability Act); *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (forum-selection clause forbidden by Missouri public policy not enforced); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 699 F.2d 657, 662-63 (3d Cir. 1983) (forum-selection clause overridden by Algerian declarations and Executive Order); *Aaacon Auto Transport, Inc. v. State Farm Mutual Auto. Ins. Co.*, 537 F.2d 648, 653-55 (2d Cir. 1976) (compulsory venue provision unenforceable in light of the Interstate Commerce Act), *cert. denied*, 429 U.S. 1042 (1977).

An entire cottage industry has developed in relation to enforceability of forum-selection clauses in view of the Carriage of Goods by Sea Act (COGSA). See *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1442 (5th Cir. 1987) (forum clause must yield to federal policy embodied in COGSA); *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724-25 (4th Cir. 1981) (Congressional policy embodied in COGSA supersedes *The Bremen*); *Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296 (1st Cir. 1974) (clause enforced as not violative of COGSA); *Carbon Black Export, Inc. v. S.S. Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958) (forum clause not enforced under COGSA), *cert. dismissed*, 359 U.S. 180 (1959); *Zima Corp. v. M.V. Roman Pazinski*, 493 F. Supp. 268, 276 n.14, 277 (S.D.N.Y. 1980) (forum clause enforced; COGSA held inapplicable); *Takemura & Co. v. S.S. Tsuneshima Maru*, 197 F. Supp. 909, 912-13 (S.D.N.Y. 1961) (forum clause not unreasonable; no indication Japanese courts would not apply COGSA). See generally Gruson, *Forum-Selection Clauses*, *supra* note 3, at 170-73 (if enforcement of forum-selection clause would contravene strong public policy of excluded forum, clause will not be enforced).

283. See, e.g., *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390 (2d Cir. 1985) (reconciliation of two possibly conflicting forum provisions); *International Ass'n of Bridge Workers Local 348 v. Koski Constr. Co.*, 474 F. Supp. 370 (W.D. Pa. 1979) (mem.) (clause held not mandatory); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184 (S.D.N.Y. 1975) (mem.) (ambiguous forum-selection clause held not mandatory).

284. 760 F.2d 390 (2d Cir. 1985).

New York. The plaintiff moved to remand, arguing that the defendant had consented to litigate in New York pursuant to two contemporaneous contractual agreements.<sup>285</sup> The Second Circuit decided that in signing the agreements the defendant had not expressly or impliedly waived its right of removal.<sup>286</sup>

The court noted that "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts."<sup>287</sup> As part of this public policy, Congress amended the general removal statute to include a provision specifying that foreign states could remove a civil action brought in state court against that foreign state.<sup>288</sup> Not only did the court find a congressional intent "to create a broad removal right,"<sup>289</sup> but it was aided in its ultimate conclusion by an ambiguous forum-selection clause.<sup>290</sup>

Although the court asserted the public policy argument, it did not reject the possibility of a waiver of removal. Rather, the court narrowly held "that a forum selection clause that merely puts jurisdiction in either a federal or state court does not constitute an express or implied waiver of the sovereign's right to remove under § 1441(d)."<sup>291</sup>

Ultimately, removal litigation suggests perplexing contradictions. First, removal cases treat forum-selection clauses largely as issues of substantive contract law, yet *Ricoh* diversity cases treat forum-selection clauses as issues of procedural venue law. Second, given that removal jurisdiction embodies a public policy amounting to a litigation right, it is curious that personal jurisdiction and venue requirements are treated differently.

## V. COMPLICATING THE CALCULUS WITH CONCURRENT CHOICE-OF-LAW PROVISIONS

If forum-selection cases are somewhat unsettling in their analytical methodology, then forum-selection cases complicated by a concurrent choice-of-law provision are even more daunting. Although some courts quite sensibly ignore the presence of a concurrent choice-of-law clause,<sup>292</sup> other courts have been irresistibly drawn to this "intellectual tar

285. *See id.* at 391-93.

286. *See id.* at 397.

287. *Id.* at 396 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983)).

288. *See id.*; 28 U.S.C. § 1441(d) (1982 & Supp. 1988).

289. *Proyecfin*, 760 F.2d at 397.

290. *See id.* at 395-96. The court stated: "We hold that the two provisions do not conflict and that paragraph 'Thirty-Fourth' does not bar an action between these parties in either a federal or a state court in New York." *Id.* at 396.

291. *Id.* at 397.

292. *See, e.g.,* *Luce v. Edelstein*, 802 F.2d 49, 57 n.4 (2d Cir. 1986) (agreement combined forum-selection and choice-of-law clauses, but court does not discuss choice-of-law provision); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 6-7 (1st Cir. 1984) (same); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 316 n.1 (4th Cir. 1982) (same).

baby.”<sup>293</sup>

Choice-of-law clauses that accompany forum-selection clauses raise four conflict-of-laws questions. First, does the contractual choice-of-law provision provide the applicable principles for construing the validity of the forum-selection clause? Second, is a choice-of-law provision a criterion for *The Bremen* forum-clause reasonableness? Third, how do choice-of-law provisions relate to public policy constraints? And finally, what are the requirements of full faith and credit with regard to a sister state's determination concerning forum-selection and choice-of-law clauses, and are these decisions open to collateral attack?

#### A. Which Comes First: Choice-of-Law or Forum Selection?

When confronted with a combined forum-selection and choice-of-law provision, most courts construe the forum-selection clause without any reference to the choice-of-law provision.<sup>294</sup> This is probably predicated on the notion that jurisdiction and venue are concerns separate from choice-of-law, and that determining the former usually precedes determining the latter.<sup>295</sup> A few courts, however, have speculated that the presence of a contractual choice-of-law provision might alter this conventional course of events.<sup>296</sup> Such idle speculation leads courts into predictable conflict-of-laws contortions.

An example of the interplay of conflicts principles and forum-selection clauses occurred in *Taylor v. Titan Midwest Construction Corp.*,<sup>297</sup> a breach of contract action brought by a Texas plaintiff against a Missouri corporate defendant in Texas federal district court. The defendant moved for dismissal or transfer to Missouri, relying on forum-selection and choice-of-law provisions in the parties' subcontracts.<sup>298</sup> Because the suit was based on federal diversity jurisdiction, the court first endeavored to resolve the *Erie* issue by determining that federal law should govern.<sup>299</sup> Not content with this conclusion, however, the court hypothe-

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293. This was Judge Johnson's description of the lure of *Erie* analysis in *Stewart Organization, Inc. v. Ricoh Corp.*, 779 F.2d 643, 645, *vacated*, 785 F.2d 896 (1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988), but it captures the flavor of those courts that venture into conflicts analysis, as well. The Supreme Court will address a contractual choice-of-law problem this upcoming term. See *Board of Trustees of Leland Stanford Junior Univ. v. Volt Information Sciences*, 195 Cal. App. 3d 349, 240 Cal. Rptr. 558 (1987) (choice-of-law clause in contract containing an arbitration clause upheld; no forum-selection clause involved), *aff'd*, 57 U.S.L.W. 4295 (U.S. Mar. 6, 1989).

294. See *supra* note 292 and accompanying text.

295. See Felix, *supra* note 24, at 207; Gilbert, *supra* note 4, at 43-45; *supra* note 30 and accompanying text.

296. See Gruson, *Forum-Selection Clauses*, *supra* note 3, at 185-92; Gruson, *Governing Law Clauses*, *supra* note 5, at 209-16; Reese, *supra* note 5, at 537; Reese, *A Proposed Uniform Choice-of-Forum Act*, *supra* note 69, at 196; Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 Colum. L. Rev. 553, 573 (1957).

297. 474 F. Supp. 145 (N.D. Tex. 1979).

298. See *id.* at 146.

299. See *id.* at 147.

sized the possible ramifications of applying Texas state law:

If this court were to apply state law, it would first apply the conflict of laws rules of Texas, which would in all likelihood result in the application of Texas law to the question of venue, since venue is considered by Texas law as a matter of procedure to be determined by the law of the forum.<sup>300</sup>

Thus, had conflicts rules been applied first, then "[u]nder Texas law, the contractual venue provision would not be enforceable."<sup>301</sup> On the other hand, uncertain of this conflicts analysis, the court further ventured that "[i]t is possible that a Texas court would honor the choice-of-law provision in the contracts and apply Missouri law. The result that would obtain under Missouri law is unclear."<sup>302</sup>

Having raised the choice-of-law problem, the court was sucked further into the conflicts maelstrom, stating:

To a certain extent, resolution of the conflict of laws questions turns on how the issue presented here—the enforceability of the forum-selection clause—is characterized. If it is characterized as primarily a matter of contract law, then arguably the *Erie* doctrine should apply and state law should determine the enforceability of the clause. Which state's law should apply would then be a problem, in view of the clause in the contract designating Missouri law as governing the contract. This court would have to determine whether *under Texas conflicts law*, this dispute is a matter of venue or a matter of contract law. If the former, Texas choice-of-law rules would dictate application of the law of the forum state, *i.e.*, Texas. If under Texas conflicts law this were viewed as primarily a question of contract law, then arguably a Texas court would apply Missouri law to its resolution, in view of the contractual choice-of-law provision.<sup>303</sup>

This tortuous analysis arises because a variety of conflicts questions remain unresolved by federal courts. In large measure, the scope of choice-of-law clauses combined with forum-selection clauses has not been examined in any meaningful fashion. In particular, it is unclear whether contractually-stipulated law governs the validity and interpretation of the contract, including the forum-selection clause.<sup>304</sup> Whether

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300. *Id.* at 147 n.1.

301. *Id.*

302. *Id.*

303. *Id.* at 147-48 n.2 (emphasis in original).

304. See *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir.) (stipulation of Iranian law), *cert. denied*, 108 S. Ct. 329 (1987); *Jackam v. Hospital Corp. of Am. Mideast*, 800 F.2d 1577, 1581-82 (11th Cir. 1986) (possible choice of Saudi Arabian law with respect to construction of contract); *Yarn Indus., Inc. v. Krupp Int'l, Inc.*, 736 F.2d 125, 126 (4th Cir. 1984) (remand to take evidence with regard to parties' intent on choice-of-law provision); *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392, 1395 (4th Cir. 1983) (Greek law governs), *cert. denied*, 474 U.S. 945 (1985); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 722 (2d Cir. 1982) (Texas venue law not applied to validity of forum-selection clause); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 632-33 (9th Cir. 1982) (English conflicts principles utilized to determine clause enforce-

choice-of-law provisions refer to the substantive law or to the whole law of the designated forum, is yet another open question.<sup>305</sup> Moreover, none of the forum-selection cases ordering transfer to effectuate a forum-selection clause have commented on the choice-of-law issue upon transfer. Does the choice-of-law clause override the mandate of *Van Dusen v. Barrack*<sup>306</sup> that the law of the transferor court applies on a section 1404(a) transfer? Should the original forum, in construing the choice-of-law clause in diversity cases, look to the original forum's conflict-of-laws rules pursuant to *Klaxon Co. v. Stentor Electric Manufacturing Co.*?<sup>307</sup> Or should the federal court apply the conflict-of-laws rules of the jurisdiction designated in a governing-law clause and then apply the substan-

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ability); *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 214-16 (W.D. Tenn. 1985) (Texas choice-of-law provision unenforceable); *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 712 (D.R.I. 1983) ("By the terms of the agreements . . . California law will govern the construction and interpretation of the contract provisions.") (footnote omitted); *Colonial Leasing Co. of New England v. Best*, 552 F. Supp. 605, 606 (D. Or. 1982) (clause would be invalidated under either Missouri or Oregon law, so no "true conflict" exists); *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983, 984-87 (S.D. W. Va. 1980) (mem.) (choice-of-law analysis to invalidate Texas choice of forum and law); *Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205, 1207 (C.D. Ill. 1979) (German law utilized to determine validity of clause); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1143-44 (W.D. Va. 1979) (apply Virginia choice-of-law rules to determine nature and validity of clause); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 568 & n.5 (S.D.N.Y. 1978) (application of New York choice-of-law rules to determine validity); *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976) (mem.) (apply West Virginia conflicts rules to determine validity of clause).

305. Thus, if the clauses refer only to the chosen forum's substantive law, that forum's contract principles would govern questions of construction and interpretation. However, if the clauses implicate the chosen forum's "whole law," this would include the designated forum's choice of law provisions as well. Application of the chosen forum's choice-of-law provisions conceivably could refer the issues of validity, enforceability, and interpretation back to the original non-selected forum under *renvoi* principles. For a discussion of the general concept of *renvoi*, see E. Scoles & P. Hay, *Conflict of Laws* §§ 3.13-3.14, at 67-72 (1982); see also Gruson, *Governing-Law Clauses*, *supra* note 3, at 222-24. At least some federal courts have agreed that federal courts sitting in diversity cases must apply the selected forum's choice-of-law rules under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). See *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1143 (W.D. Va. 1979); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 568 n.5 (S.D.N.Y. 1978); *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976) (mem.).

306. 376 U.S. 612 (1964). See generally E. Scoles & P. Hay, *supra* note 305, § 3.46, at 125-27 (describing *Van Dusen's* holding and rationale).

307. 313 U.S. 487 (1941). See *supra* note 305. Professors Scoles and Hay suggest:

Short of amounting to forum non conveniens, however, the § 1404(a) transfer . . . may also involve a case where the action itself is more closely related to the transferee forum. By selecting the initial forum, the plaintiff has selected the law. This type of forum-shopping, however, does not differ from that generally available to plaintiffs when, in the interstate setting, multiple fora have jurisdiction to entertain the action: it is not an *Erie* problem (that state substantive law be applied), but a *Klaxon* problem (that state conflicts law be applied).

E. Scoles & P. Hay, *supra* note 305, § 3.46, at 127; cf. *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 647 n.8 (*Klaxon* not implicated to determine forum-selection clause validity), *vacated*, 785 F.2d 896 (1986), *rev'd*, 810 F.2d 1066 (1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988).

tive law of the jurisdiction selected under the choice-of-law analysis?<sup>308</sup>

Courts have circumvented the choice-of-law issues present in these cases by focusing exclusively on the contractual-forum provision. This view is bolstered by the traditional separation of jurisdictional and choice-of-law inquiries. The problem with this analytical approach is that it evades the possibility that the original forum may be required to transfer or remand a case to a selected forum where enforcement of the contract provision offends the law or public policy of the original forum. Conversely, non-enforcement of a forum-selection clause can obviate application of a governing-law clause, or alternatively permit application of contractual law, suggesting yet another round of anomalous conflicts issues.<sup>309</sup>

### B. *Choice-of-Law Clauses as a Bremen "Reasonableness" Factor*

When a forum-selection clause comes into play, the choice-of-law tail can wag the jurisdictional dog.<sup>310</sup> Long-standing federal jurisdiction theory persistently separates jurisdictional and choice-of-law analysis,<sup>311</sup> although in *Burger King Corp. v. Rudzewicz*,<sup>312</sup> the Supreme Court suggested that the presence of a choice-of-law provision in a contract could be weighed in the analysis of a defendant's contacts with a forum.<sup>313</sup>

The forum-selection cases also view a choice-of-law provision as a relevant determinant of the reasonableness of a contractual forum. Choice-of-law considerations have crept into forum-selection analysis through a gloss on *The Bremen's* pronouncement that 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."<sup>314</sup> The

308. For the potential renvoi effect of choice-of-law determinations, see *supra* note 305.

309. See *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147-48 nn.1-2 (N.D. Tex. 1979). If the court in *Taylor* had carried out one of its many hypothesized conflicts analyses, it might have applied Texas conflicts law to invalidate the forum clause pursuant to Texas's antipathy to such clauses, or Missouri's antipathy, for that matter (a false conflict!). Fortunately, the court was blessed by the lack of a concomitant choice-of-law provision. It is highly unclear what the status of the choice-of-law provision would be under the circumstances, but it most likely would be independently enforced. See generally E. Scoles & P. Hay, *supra* note 305, §§ 18.1-18.12, at 632-52 (general overview of principle guiding forum-selection clauses and limitations on party autonomy).

310. See *supra* note 31 and accompanying text.

311. See *supra* note 30 and accompanying text.

312. 471 U.S. 462 (1985).

313. See *id.* at 481-82. But see *Sternberg v. O'Neil*, 550 A.2d 1105, 1113 (Del. 1988) (en banc) (absent minimum contacts, due process is satisfied by express consent to general jurisdiction). For a recent symposium discussion of the relationship of choice-of-law analysis to jurisdictional inquiry, see Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. Colo. L. Rev. 9 (1988); Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. Colo. L. Rev. 37 (1988); Rosenberg, *Foreword to the Colorado Symposium*, 59 U. Colo. L. Rev. 1 (1988); Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. Colo. L. Rev. 67 (1988).

314. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (emphasis added).

applicable law of the stipulated forum and traditional conflicts considerations infuse many forum-selection clause determinations.

In *D'Antuono v. CCH Computax Systems*<sup>315</sup> a Rhode Island federal district court exhibited this approach through a list of "synthesized" post-*Bremen* reasonableness factors.<sup>316</sup> The first four factors were: "(1) [t]he identity of the law which governs the construction of the contract; (2) [t]he place of execution of the contract[s;] (3) [t]he place where the transactions have been or are to be performed; and] (4) [t]he availability of remedies in the designated forum."<sup>317</sup> The court recognized that this quartet of factors was "cast in a traditional contract mold," and in applying them utilized straightforward conflicts analysis to assess the contractual choice-of-law.<sup>318</sup> Although the court acknowledged that California's contacts with the parties and their transactions were not "as direct, substantial or significant as those enjoyed by Rhode Island,"<sup>319</sup> it nonetheless upheld both a California-designating forum clause and a California choice-of-law provision.

On the contrary, perhaps with an eye toward the due process constraints on choice-of-law determinations,<sup>320</sup> the court somewhat defensively noted that "[t]here is nothing to indicate that California's relationship to the transaction is so peripheral, contrived or remote as to render nugatory the parties' choice of law."<sup>321</sup> The court conceded that on the facts there was no perfect solution short of trying the case in Kansas, and that "[i]t is simply a question of whose ox is to be gored."<sup>322</sup>

Choice-of-law, either by contractual stipulation or judicial construction, seems firmly implanted as an element of *The Bremen* reasonableness. Thus, in a backdoor fashion, choice-of-law determinants, contract principles and administrative efficiency often supplant traditional jurisdictional considerations. Moreover, the due process constraints that normally inform choice-of-law decisions are absent when transposed into forum-selection clause analysis. This raises the related issues of the validity of choice-of-law that is antagonistic to state public policy, and whether choice-of-law is a waivable litigation right.

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315. 570 F. Supp. 708 (D.R.I. 1983).

316. See *id.* at 712.

317. *Id.* (citing *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 548-49 (N.D. Tex. 1982); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 872 (D. Minn. 1980); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 73 (S.D.N.Y. 1978); *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1015-16 (S.D. W. Va. 1976) (mem.)).

318. See *D'Antuono*, 570 F. Supp. at 712.

319. *Id.* at 712-13.

320. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930); *cf.* *Allstate Ins. v. Hague*, 449 U.S. 302 (1981) (discussing due process constraints on choice of law determinations outside the contractual context). See generally E. Scoles & P. Hay, *supra* note 305, §§ 3.21-3.23, at 81-89 (general development of due process analysis after *Home Ins. Co.*).

321. *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 712 n.5 (D.R.I. 1983).

322. *Id.* at 714. The court further suggested that "it is precisely in this sort of situation that a forum selection clause can and should tip the scales." *Id.*

### C. *Public Policy Constraints on Contractual Choice-of-Law*

Both the Restatement (Second) of the Conflict of Laws<sup>323</sup> ("Restatement") and the Uniform Commercial Code ("U.C.C.")<sup>324</sup> recognize contractual choice-of-law provisions as enforceable. Similar to *The Bremen*, the Restatement would enforce governing-law provisions unless the consent of one of the parties "was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake."<sup>325</sup> The U.C.C. approves consensual governing law agreements provided that the commercial transaction bears a reasonable relationship to the designated forum.<sup>326</sup>

Although the law generally favors choice-of-law provisions, lurking due process concerns and public policy considerations cloud the analysis of combined forum-selection and choice-of-law clauses. Due process requires that governing law have at least a minimal connection with the forum and the underlying claims.<sup>327</sup> Further, "[c]omity does not require the application of another state's substantive law if it is contrary to the public policy of the forum state."<sup>328</sup>

The intersection of forum-selection and choice-of-law provisions therefore raises the question whether these consensual clauses obviate traditional due process or public policy constraints. This problem has been aptly stated by one commentator:

[T]he court being asked to exercise its discretion and dismiss the action should not permit the choice of forum to designate the applicable law where it would not allow an express choice of law to do so. . . . The general view is that the state whose law is chosen must have a reasonable relationship to the transaction.<sup>329</sup>

In a similar vein, a combined forum-selection and choice-of-law provision should not circumvent the non-selected state's public policy concerns:

Furthermore, if the rule to be applied by the chosen jurisdiction is contrary to a strong underlying policy of the rule of the nonchosen forum, the latter may refuse to give effect to the choice on public policy grounds regardless of whether the chosen forum is disinterested or not, or whether it would consider the interests of concerned states. Again, this is an application of the rule that the court should not permit the

323. Restatement (Second) of Conflict of Laws §§ 80, 187 comment b (1971).

324. U.C.C. § 1-105(1) (1987).

325. Restatement (Second) of Conflict of Laws § 187 comment b (1971).

326. The U.C.C. provides that "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." U.C.C. § 1-105(1) (1987).

327. See *supra* note 320 and accompanying text.

328. *Willard v. Aetna Casualty & Sur. Co.*, 213 Va. 481, 483, 193 S.E.2d 776, 778 (1973); see *Gilbert, supra* note 4, at 38-42, 43-45, 49-66; *Gruson, Governing Law Clauses, supra* note 3, at 220-22; *Reese, supra* note 5, at 537-39.

329. *Gilbert, supra* note 4, at 39.



choice of forum provision to do what it would not let a choice of law clause do. Thus, if the court would not give effect to choice of a certain state's law on public policy grounds, it should not enforce a choice of forum which would accomplish the same thing.<sup>330</sup>

A Tennessee district court appreciated these critiques in its construction of a combined forum-selection and choice-of-law provision.<sup>331</sup> The court held that in a multi-state commercial transaction involving Tennessee, Illinois and Texas, contractual clauses specifying a Texas forum and Texas law were unreasonable and unenforceable.<sup>332</sup> After conducting an ostensible *Bremen* analysis (sounding much like *International Shoe* minimum contacts jurisprudence<sup>333</sup>), the court concluded that Texas did not have a reasonable relationship to the transaction,<sup>334</sup> thus invalidating the choice-of-law provision. Since the choice-of-law provision was unenforceable, the court looked to Tennessee state law, the law of the non-contractual forum, to determine choice-of-law.<sup>335</sup>

Ironically, Tennessee conflicts rules required that the substantive rights of contracting parties be governed by the law intended by the parties. That was the stipulated Texas law, but the court reasoned that since the choice-of-law provision was unenforceable and inapplicable, it would instead look to the place of the contract's making.<sup>336</sup>

Although it arrived at its conclusion by circuitous means, the Tennessee opinion illustrates an instance where consensual forum and choice-of-law provisions did not trump traditional due process or public policy analysis associated with jurisdiction or governing law. However ineptly, the court viewed these concerns as paramount in its evaluation.

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330. *Id.* at 39-40.

331. *See* *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211 (W.D. Tenn. 1985).

332. *Id.* at 214-15.

333. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

334. *See* *Carefree Vacations*, 615 F. Supp. at 214. The court considered the factors that none of the parties lived or did business in Texas, the contract was executed in Illinois and Tennessee, and only one witness was from Texas. The court also rejected the idea that "the fact that payments were wired through Texas enroute to Illinois gives Texas the requisite relationship." *Id.*

335. *See id.* at 214-15. In determining the validity of the choice-of-law provision, the court observed: "In a multi-state transaction, the contracting parties' choice-of-law provision is valid absent contravention of public policy of the forum state or a showing that the selected forum does not bear a reasonable relationship to the transaction." *Id.* at 215 (citing *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 749-53 (5th Cir. Apr. 1981), and relying on the "substantial relation" standard from the U.C.C. provisions of Texas, Tennessee and Illinois).

336. *See* *Carefree Vacations*, 615 F. Supp. at 215-16. *Carefree Vacations* serves as another illustration of hopelessly confused conflicts analysis that is neither predictable nor certain for the parties to the agreement. For a lengthy and thoughtful public policy and due process-centered approach to forum-selection and choice-of-law provisions, see Gilbert, *supra* note 4, at 43-72. Other commentators, however, see such efforts to infuse reasonable relation tests as misguided and highly detrimental to the primary value of party autonomy. *See* Gruson, *Governing Law Clauses*, *supra* note 3, at 216; E. Scoles & P. Hay, *supra* note 305, § 18.8, at 647-48.

#### D. Full Faith and Credit to Consensual Adjudicatory Decisions

The construction of forum-selection clauses by a non-selected forum implicates full faith and credit issues,<sup>337</sup> including subsequent collateral attack. In particular, if forum-selection clauses are viewed as jurisdictional, then various conflicts principles govern interstate recognition of a sister state's determination.

A determination of good subject matter jurisdiction generally is not open to collateral attack if that issue was fully and fairly litigated in the first forum.<sup>338</sup> Further, collateral attack based on a lack of personal jurisdiction in the first forum is always unavailing. If a defendant appears but does not raise a defense of lack of personal jurisdiction, this constitutes a waiver of that jurisdictional defect.<sup>339</sup> If the defendant appears and contests personal jurisdiction but loses, this precludes relitigation in a second forum.<sup>340</sup>

Against this backdrop, the Fourth Circuit ruled that a South Carolina district court was not collaterally estopped from relitigating the validity of a forum-selection clause where a New York federal court had found proper venue.<sup>341</sup> Reconsideration of the clause was not precluded because the New York court finding was based on a venue interpretation: "Once that was determined, the issue of whether the . . . choice-of-forum clause was valid was of no consequence."<sup>342</sup> Thus, because the New York court arrived only at a venue conclusion, the validity of the clause could be determined in a subsequent suit between the parties.

A West Virginia district court denied full faith and credit to a New York default judgment predicated on a forum-selection clause.<sup>343</sup> Construing the contractual provision as jurisdiction-conferring, the court stated that the validity of the clause was open to collateral attack. Since

337. See U.S. Const. art. IV, § 1 (among states of the union, each state must give "Full Faith and Credit . . . to the . . . Judicial Proceedings of every other State"); see also E. Scoles & P. Hay, *supra* note 305, §§ 3.24-3.25, 3.30, §§ 24.1-24.48.

338. See *Durfee v. Duke*, 375 U.S. 106 (1963); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). But see *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (subject matter jurisdiction may be open to collateral attack if state court makes erroneous conclusion over exclusive federal court jurisdiction).

339. See J. Friedenthal, M. Kane & A. Miller, *supra* note 10, § 3.26, at 182.

340. See *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

341. See *Yarn Indus., Inc. v. Krupp Int'l, Inc.*, 736 F.2d 125, 128-29 (4th Cir. 1984).

342. *Id.* at 129. The Fourth Circuit noted that neither the district court nor the Second Circuit had ever ruled on the efficacy of the forum-selection clause: "Neither court discussed the validity of the clause or its reasonableness, but rather agreed that under any interpretation of the clause venue for any action arising under the contract between Yarn and Krupp could only be in Delaware or South Carolina, not in New York." *Id.* The court viewed the case as presenting a problem of issue preclusion under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). See *Yarn Indus., Inc.*, 736 F.2d at 128.

343. The court noted, "[w]ere it not for that contract provision, New York would lack both jurisdiction and venue. The only issue in this proceeding, therefore, is whether or not the contract provision providing for the acquisition of jurisdiction was valid." *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1013 (S.D. W. Va. 1976) (mem.).

the defendant had not appeared and contested jurisdiction in New York, West Virginia could construe the clause. Moreover, in construing the validity of the clause the court ignored the New York choice-of-law provision, arguing that "[t]o do otherwise would be to permit the clause to 'pull itself up by its own bootstraps.'" <sup>344</sup> Under West Virginia law <sup>345</sup> the court held the clauses unjust, unreasonable, and unenforceable and therefore refused to give full faith and credit to the judgment based on jurisdiction conferred by the clauses. <sup>346</sup>

A number of potential full faith and credit issues remain to be explored by the courts. In instances where the clauses are not viewed as jurisdictional, will this effectively preclude re-examination of the validity determination in the second forum? <sup>347</sup> A more interesting question is whether a second forum could refuse to give full faith and credit to the valid judgment of a first forum because the judgment was based on a combined forum-selection and choice-of-law provision that violates the public policy of the second forum. <sup>348</sup> Although *The Bremen* speaks generally about non-enforcement where clauses contravene public policy, <sup>349</sup> that stricture rarely prevails and has not yet been tested in a full faith and credit challenge.

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344. *Id.* at 1014. The court relied on *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525 (1931), for the proposition that a jurisdictional issue may be raised on collateral attack if a foreign corporation did not appear to challenge jurisdiction and therefore "never . . . had its day in court with respect to jurisdiction." See *Leasewell, Ltd.*, 423 F. Supp. at 1014 (quoting *Baldwin*, 283 U.S. at 525).

345. *Leasewell, Ltd.*, 423 F. Supp. at 1014. The court first applied the conflicts rules of West Virginia under the mandate of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). See *supra* notes 305-07 and accompanying text.

346. See *Leasewell Ltd.*, 423 F. Supp. at 1015-17. The court stated that it "refuse[d] to extend full faith and credit to the judgment of the Supreme Court of the State of New York. . . ." *Id.* at 1017.

347. See E. Scoles & P. Hay, *supra* note 305, § 24.15, at 938 (1982) (noting disparate treatment of default judgments based on warrant of attorney or cognovit notes). The authors believe that various state refusals of recognition of judgments in these instances are based on reasons that are "inappropriate." Moreover, the authors believe that full-faith-and-credit is due since the Supreme Court's holding in *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 187 (1972) (cognovit clause consenting to judgment without notice or hearing not unconstitutional per se and not in violation of fourteenth amendment rights).

348. See Restatement (Second) of Conflict of Laws § 103 (1971) (a state need not accord interstate recognition to a judgment if it "is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State"). Professors Scoles and Hay argue that § 103 "does not identify areas where local public policy may serve as a basis for the refusal to accord recognition to a sister-state judgment when such recognition is otherwise mandated under the Full Faith and Credit Clause of the Constitution." E. Scoles & P. Hay, *supra* note 305, § 24.21, at 946.

349. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). The "public policy" exception to *The Bremen* is generally a difficult argument on which to prevail in urging non-enforcement of a clause. See *supra* note 282 and accompanying text.

## VI. CONTRACTUAL SUPREMACY OVER FORUM-SELECTION AND GOVERNING LAW

When *The Bremen* asserted that a forum-selection clause was prima facie valid and should control absent a strong showing that it should be set aside,<sup>350</sup> the Supreme Court set the stage for the wholesale importation of contract principles into traditional jurisdiction and venue analysis. Although the Court attempted to temper the concept of a contractual forum with a countervailing consideration of "reasonableness,"<sup>351</sup> the Court instead allowed the lower federal courts to create a new hodgepodge test for forum access.

The federal courts now apply a test that is a pastiche of principles imported from jurisdiction, venue, forum non conveniens and choice-of-law rules. The major ingredients, however, are contract principles. Contract principles dominate interpretation of the validity and scope of forum-selection provisions. Because of this, the due process concerns that typically predominate forum access either recede in importance or disappear altogether. In addition, the courts have failed to supply any meaningful content to the concept of waiver in the civil litigation context.

### A. The Bremen Test for Forum-Selection Clauses

As is true for many landmark Supreme Court cases, *The Bremen* offered only broad limitations on forum-selection clause applicability. Thus, such clauses were generally enforceable and the resisting party carried the burden to "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."<sup>352</sup> Moreover, an allegation that the contractual forum was inconvenient was insufficient, unless the opposing party could demonstrate that "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."<sup>353</sup>

These very generalized strictures have generated a proliferation of tests and factors. One district court noted that the Supreme Court cited, with-

350. See *The Bremen*, 407 U.S. at 10.

351. *Id.* The Court in *The Bremen* relied on a series of lower federal and state cases that had already made some concept of "reasonableness" the benchmark for forum-selection clause enforceability. See *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 345 (3d Cir. 1966); *Anastasiadis v. S.S. Little John*, 346 F.2d 281, 284 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966); *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 808 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990, 991 (2d Cir. 1951); *Central Contracting Co. v. C.E. Youngdahl & Co.*, 418 Pa. 122, 132-34, 209 A.2d 810, 816 (1965). The Court also noted that *Muller* was overruled in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967), as in conflict with COGSA, thereby anticipating *The Bremen's* "public policy" exception. See *supra* note 282 and accompanying text.

352. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

353. *Id.* at 18. For a discussion of these factors in the literature, see Gilbert, *supra* note 4, at 32-42; Gruson, *Forum-Selection Clauses*, *supra* note 3, at 163-92.

out indicating their sufficiency or exclusivity, only four mitigating factors: inconvenience to the parties; fraud; undue influence; or overweening bargaining power.<sup>354</sup> Another district court read *The Bremen* as promulgating a two-pronged test. The first prong rested on contract principles to show the forum-clause void or voidable and therefore unenforceable.<sup>355</sup> The contract approach derived from the "fraud or overreaching" factors, and implicated the standard contract doctrines of mistake, coercion, lack of consideration, unconscionability and adhesion.<sup>356</sup> The court termed this approach the "invalidity test."<sup>357</sup> The second prong involved demonstrating that the contractual forum was unreasonable or unjust, an inquiry related to *The Bremen's* inconvenience dicta.<sup>358</sup> This second prong, in turn, involved an evaluation of seven factors "flowing from the *Bremen* decision": (1) inequality of bargaining power; (2) public policy; (3) injustice; (4) availability of remedies in the chosen forum; (5) the governing law; (6) inconvenience; and (7) conduct of the parties.<sup>359</sup>

This two-pronged test has been largely ignored in favor of freelance judicial buccaneering. The two-pronged approach suggested conceptual difficulties; some reasonableness factors were elements of contract validity. Moreover, most courts have been unwilling—consciously or unconsciously—to draw firm analytical distinctions among concepts of contract validity, forum convenience, justice and reasonableness.<sup>360</sup> Rather, courts typically resort to an ever-growing hybrid list to guide the determination of enforceability.

This trend toward further expansion of *The Bremen* elements reached its apotheosis in *D'Antuono v. CCH Computax Systems*,<sup>361</sup> where a Rhode Island district court undertook to definitively articulate *The Bremen* test. The court dismissed the "inconvenience" prong of *The Bremen* by asserting that "by consenting to the inclusion of a forum designation in the contracts, the plaintiff, to the extent that such a cove-

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354. See *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983, 985 (S.D. W. Va. 1980) (mem.). The *Kolendo* court noted that other courts recognized the additional factors of applicable governing law and place of execution or performance of the contract. See *id.* at 985 (citations omitted); *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972).

355. See *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 364-65 (S.D.N.Y. 1975).

356. See *id.* at 365.

357. *Id.*

358. See *id.*

359. *Id.*

360. See generally cases cited *supra* note 3. The *Gaskin* court anticipated much of this analytical soup when it attempted to clarify some of these elements: "[T]he question is not whether the agreement is, as a matter of law, vitiated by the lack of equality, but rather whether justice requires that a distinction be drawn between freely negotiated contracts and standard form contracts, particularly where there is a lack of equality." *Gaskin*, 390 F. Supp. at 365 n.5. Similarly, the court noted: "[C]onduct which does not rise to the level of unconscionability as a matter of contract law may well warrant consideration under the 'inequality' or 'overweening bargaining power' element of the reasonableness test." *Id.* at 365 n.6.

361. 570 F. Supp. 708 (D.R.I. 1983).

nant is valid in a particular case, has waived any consideration of *his* convenience."<sup>362</sup> The court then observed that numerous federal courts had synthesized and refined *The Bremen* factors to provide a "yardstick of reasonableness." These include the following:

- (1) The identity of the law which governs construction of the contract.<sup>363</sup>
- (2) The place of execution of the contract(s).<sup>364</sup>
- (3) The place where the transactions have been or are to be performed.<sup>365</sup>
- (4) The availability of remedies in the designated forum.<sup>366</sup>
- (5) The public policy of the initial forum state . . . .<sup>367</sup>
- (6) The location of the parties, the convenience of prospective witnesses, and the accessibility of evidence.<sup>368</sup>
- (7) The relative bargaining power of the parties and the circumstances surrounding their dealings.<sup>369</sup>
- (8) The presence or absence of fraud, undue influence or other extenuating (or exacerbating) circumstances.<sup>370</sup>
- (9) The conduct of the parties.<sup>371</sup>

The court also assayed the related issues of relevance and weight of these elements: "While each of these factors has some degree of relevance and some claim to weight, there are no hard-and-fast rules, no precise formulae. The totality of the circumstances, measured in the interests of justice, will—and should—ultimately control."<sup>372</sup>

Although *D'Antuono* articulated the most comprehensive *Bremen* test, courts have nonetheless been inventive in adding additional elements to the list, such as residence of the parties and witnesses.<sup>373</sup> The problem, however, is that the "totality of the circumstances" mentality has ena-

362. *Id.* at 710 (emphasis in original).

363. *Id.* at 712 (citing *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972)).

364. *Id.* (citing *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1015-16 (S.D. W. Va. 1976) (mem.)).

365. *Id.* (citing *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 872 (D. Minn. 1980)).

366. *Id.* (citing *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 549 (N.D. Tex. 1982); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 73 (S.D.N.Y. 1978)).

367. *Id.* (citing *Hoffman*, 571 F. Supp. at 549; *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908 (E.D. Wis. 1981)).

368. *Id.* (citing *Anastasi Bros. Corp. v. St. Paul Fire & Marine Ins. Co.*, 519 F. Supp. 862, 864 (E.D. Pa. 1981)).

369. *Id.* (citing *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757 (3d Cir. 1973)).

370. *Id.* (citing *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 907 (E.D. Wis. 1981)).

371. *Id.* (citing *Full-Sight Contact Lens Corp. v. Soft-Lens, Inc.*, 466 F. Supp. at 73; *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 365 (S.D.N.Y. 1975)).

372. *Id.*

373. *See Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 214 (W.D. Tenn. 1985). The court adhered to its own version of a two-pronged test, *id.* at 213, and derived its factors from *Taylor v. Titan Midwest Construction Corp.*, 474 F. Supp. 145, 149 (N.D. Tex. 1979); *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972); and *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 368-69 (S.D.N.Y. 1975). *See Carefree Vacations*, 615 F. Supp. at 214.

bled courts to pick and choose among possible determinants. Some courts focus on contractual factors;<sup>374</sup> others on convenience concerns;<sup>375</sup> and others on vague reasonableness theories.<sup>376</sup> Given the

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374. See *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1443-44 (5th Cir. 1987) (discussion of inequality of bargaining power); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (straight contract interpretation); *Farmland Indus. Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (contract tainted by fraud allegation); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (no unequal bargaining power found); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 360 (3d Cir. 1986) (no evidence of coercion in contract); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196-97 (4th Cir. 1985) (rejects unequal bargaining power argument in context of municipal contract bidding process); *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 155-59 (2d Cir. 1984) (discussion of fraud basis of claim and connection to contract clause); *Lien Ho Hsing Steel Enter. Co. v. Wehntag*, 738 F.2d 1455, 1458-60 (9th Cir. 1984) (no overweening bargaining power in non-negotiated insurance policy due to party's representation by broker); *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382-83 (9th Cir. 1984) (no negotiation in fine print contract for take-it-or-leave-it clause; clause not enforced); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir.) (no overreaching on contract negotiations), *cert. denied*, 464 U.S. 938 (1983); *Crown Beverage Co. v. Cerveceria Moctezuma, S.A.*, 663 F.2d 886, 888 (9th Cir. 1981) (no fraud or overreaching); *Aaacon Auto Transport, Inc. v. State Farm Mutual Auto Ins. Co.*, 537 F.2d 648, 661 (2d Cir. 1976) (court does not reach contract of adhesion arguments), *cert. denied*, 429 U.S. 1042 (1977); see also *Janko v. Outboard Marine Corp.*, 605 F. Supp. 51, 52 (W.D. Okla. 1985) (claim of boilerplate contract does not preclude enforcement of clause); *LFC Lessors, Inc. v. Pearson*, 585 F. Supp. 1362, 1364-65 (D. Mass. 1984) (focus on contract negotiations, lack of sophistication and legal advice, contract of adhesion); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) (no overreaching even though party alleges no contract negotiations); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 549 (N.D. Tex. 1982) (no overreaching, but parties did not discuss boilerplate contract); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 470 (D. Vt. 1981) (rejects contract of adhesion argument), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *First Nat'l Monetary Corp. v. Chesney*, 514 F. Supp. 649, 656 (E.D. Mich. 1980) (brokerage agreement clause held to be contract of adhesion); *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983, 986 (S.D. W. Va. 1980) (mem.) (clause not enforced in part on ground of overweening bargaining power); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 149 (N.D. Tex. 1979) (enforcement of boilerplate clauses limited to facts of case); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 570 (S.D.N.Y. 1978) (straight contract analysis; no finding of contract of adhesion); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 365-66 (S.D.N.Y. 1975) (no unfairness or injustice where German contract not translated into English); *cf. Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3d Cir. 1973) (district court held clause invalid on face of contract and without any evidence).

375. It is virtually impossible to successfully challenge validity and enforceability of a forum-selection clause on the ground of "inconvenience." See, e.g., *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (no inconvenience found; witnesses can be deposed); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 359 (3d Cir. 1986) (same); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 318 (4th Cir. 1982) (same); *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6, 10 (W.D. Okla. 1984) (same); *LFC Lessors, Inc. v. Pearson*, 585 F. Supp. 1362, 1365 (D. Mass. 1984) (same); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.) (same); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 134 (S.D.N.Y. 1983) (same); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 469 (D. Vt. 1981) (same), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *Gordonsville Indus., Inc. v. American Artos Corp.*, 549 F. Supp. 200, 205-06 (W.D. Va. 1982) (rejects inconvenience argument despite having to litigate in Germany); *Anastasi*

broad spectrum of elements that bear on enforceability, litigants have little clue as to which tack any particular court may take in construing a forum-selection clause. This reality surely does not serve the values of certainty and predictability that supposedly underlie contractual forum provisions.

Moreover, this expanding laundry list of post-*Bremen* factors is nothing more than a patchwork of concepts drawn from jurisdiction, venue, forum non conveniens and contract law.<sup>377</sup> It is as if the courts, vaguely mindful that consensual procedure involves a waiver of carefully-wrought litigation protections,<sup>378</sup> have reintroduced due process concerns through additional relevant elements. Due process ignored is in effect due process denied, so courts have serviced due process through the back door. Even though post-*Bremen* analysis may be viewed as moving more toward fairness concerns, contract analysis still predominates. And in this manner forum-selection decisions threaten litigation rights.

### B. *Applied Contract Law in the Realms of Jurisdiction, Venue and Forum Non Conveniens*

Many federal courts have clung to a narrow contractual interpretation of forum-selection clauses.<sup>379</sup> In these instances contract law has proven

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Bros. Corp. v. St. Paul Fire & Marine Ins. Co., 519 F. Supp. 862, 864 (E.D. Pa. 1981) (no unreasonable inconvenience shown); Full-Sight Contact Lens Corp. v. Soft Lenses, Inc., 466 F. Supp. 71, 74 (S.D.N.Y. 1978) (same); Brown v. Gingiss Int'l, Inc., 360 F. Supp. 1042, 1044 (E.D. Wis. 1973) ("net inconvenience" not significant). *But see* McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 346 (8th Cir.) (judicial notice of impracticality and impossibility of litigating in Iran), *cert. denied*, 474 U.S. 948 (1985); Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721, 724-25 (4th Cir. 1981) (alternative forum non conveniens argument); Leasing Serv. Corp. v. Broetje, 545 F. Supp. 362, 369 (S.D.N.Y. 1982) (same); Randolph Eng'g Co. v. Fredenhagen Kommandit-Gesellschaft, 476 F. Supp. 1355, 1359-60 (W.D. Pa. 1979) (mem.) (clause not enforced; extensive inconvenience discussion).

376. *See* Diaz Contracting, Inc. v. Nanco Contracting Corp., 817 F.2d 1047, 1052 (3d Cir. 1987) (discussion of evidence required by *Bremen* unreasonableness test); National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 332-33 (5th Cir.) (discussing impossibility and impracticability), *cert. denied*, 108 S. Ct. 329 (1987); Luce v. Edelstein, 802 F.2d 49, 57 (2d Cir. 1986) (clauses not disfavored and would be unreasonable not to enforce); Furbee v. Vantage Press, Inc., 464 F.2d 835, 837 (D.C. Cir. 1972) (list of factors of reasonableness); Colonial Leasing Co. v. Best, 552 F. Supp. 605, 607-08 (D. Or. 1982) (standard of unreasonableness for forum-selection clause easier to satisfy than defense of duress for contract of adhesion); Kline v. Kawai Am. Corp., 498 F. Supp. 868, 871-72 (D. Minn. 1980) (lengthy discussion of reasonableness factors); Hoes of Am., Inc. v. Hoes, 493 F. Supp. 1205, 1208-09 (C.D. Ill. 1979) (not unreasonable or unjust to apply German law; stay to determine if German court procedures adequate); Dick Proctor Imports, Inc. v. Sumitomo Corp. of Am., 486 F. Supp. 815, 818-19 (E.D. Mo. 1980) (clause not unreasonable, unjust, or unconscionable); *cf.* Takemura & Co. v. S.S. Tsuneshima Maru, 197 F. Supp. 909, 912-13 (S.D.N.Y. 1961) (pre-*Bremen* case testing reasonableness by forum non conveniens factors).

377. *See* cases cited *supra* notes 374-76.

378. *See supra* notes 10-12 and accompanying text.

379. *See supra* note 374 and accompanying text.



to be a difficult taskmaster, with harsh results. Contract principles have been applied to basic issues of language construction, as well as to broader issues of adhesion and unconscionability. In almost all instances the courts have unsympathetically posited the reasonable businessman predicate, noting in one instance that "[i]t is not unlawful for a business person to drive a hard bargain so as to attain for himself the best possible deal."<sup>380</sup> And in almost all instances, this unremitting, stringent application of contract rules has not been tempered by broader justice concerns.

Contract principles have played a large role in determining forum-clause enforceability where the language of the provision is ambiguous, or where the agreement incorporates more than one such clause. In these situations courts have invoked various contract rules, including the "plain meaning" rule wherein "[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it."<sup>381</sup> Although many courts have taken an expansive view of forum provisions,<sup>382</sup> parties challenging ambiguous clauses have successfully invoked the rule of contract interpretation construing the language against the drafter.<sup>383</sup> Also, courts will attempt to reconcile and give effect to conflicting provisions when it can reasonably be done.<sup>384</sup>

On the contrary, challenges based on ignorance of the clauses have proven consistently unavailing. Courts repeatedly lecture that a party's knowledge of contract provisions is presumed by the party's signature,<sup>385</sup> and that ignorance due to a failure to read is no defense in contract law.<sup>386</sup> Despite this harsh rule, a few courts have liberally construed the

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380. LFC Lessors, Inc. v. Pearson, 585 F. Supp. 1362, 1364 (D. Mass. 1984).

381. Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987) (quoting 4 S. Williston, A Treatise on the Law of Contracts § 618 (3d ed. 1961)).

382. See *supra* note 3.

383. See, e.g., Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 78 (9th Cir. 1987); Zapata Marine Serv. v. O/Y Finnlines, Ltd., 571 F.2d 208, 209 (5th Cir. 1978) (per curiam); City of New York v. Pullman Inc., 477 F. Supp. 438, 443 (S.D.N.Y. 1979); First Nat'l City Bank v. Nanz, Inc., 437 F. Supp. 184, 187 (S.D.N.Y. 1975) (mem.).

384. See *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 395-97 (2d Cir. 1985).

385. See, e.g., Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345-46 (3d Cir. 1966) (discussion of contract principles relating to duty to read); Richardson Greenshields Secs., Inc. v. Metz, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) (citing J. Calamari & J. Perillo, *The Law of Contracts* §§ 9-41 to -46 (2d ed. 1977) on duty to read, among other contract principles); Richardson Eng'g Co. v. IBM, 554 F. Supp. 467, 469 (D. Vt. 1981) (contract signifies agreement not to plead unfamiliarity with contract provisions), *aff'd*, 697 F.2d 296 (2d Cir. 1982); Cruise v. Castleton, Inc., 449 F. Supp. 564, 570 (S.D.N.Y. 1978) (members' knowledge of association constitution and by-laws, containing forum-selection clause, is presumed).

386. See *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 345-46 (3d Cir. 1966); Richardson Greenshields Secs., Inc. v. Metz, 566 F. Supp. 131, 133 (S.D.N.Y. 1983); Richardson Eng'g Co. v. IBM, 554 F. Supp. 467, 469 (D. Vt. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982); Cruise v. Castleton, Inc., 449 F. Supp. 564, 570 (S.D.N.Y. 1978); see also *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 318 (4th Cir. 1982) ("Additionally, Mercury avers that the forum choice never became a

parol evidence rule to permit a challenging party to establish allegations of fraud, mistake or other equitable reasons for relief,<sup>387</sup> but no one ever wins on these grounds.

In *The Bremen*, enforceability was predicated on a freely negotiated private international agreement unaffected by fraud, undue influence or overweening bargaining power.<sup>388</sup> This has impelled courts to assess whether contractual forum provisions are adhesive or unconscionable. In general, courts recite by rote the talismanic phrases "fraud," "undue influence" and "overweening bargaining power" and conclude that these factors did not taint the clause.<sup>389</sup> The courts rarely distinguish between the concepts of adhesion and unconscionability, roaming rather freely over this aspect of contract law.<sup>390</sup>

In almost every instance, without regard to the comparative size, skills, sophistication or assets of the parties, the courts find fair bargaining.<sup>391</sup> In reaching this conclusion the courts rely on another contract presumption, that the party opposing the forum-clause received consideration or a contractual concession in return for the provision.<sup>392</sup> In other

part of the contract because Fortney was unable to read the clause when he signed. Nonetheless, ignorance due to failure to read is no excuse in West Virginia or New York.").

387. See *Jackam v. Hospital Corp. of Am. Mideast*, 800 F.2d 1577, 1582 (11th Cir. 1986) (parol evidence allowed to determine whether Saudi or U.S. law should apply to employee claim where contract was ambiguous); *Yarn Indus., Inc. v. Krupp Int'l, Inc.*, 736 F.2d 125, 129 (4th Cir. 1984) (parol evidence allowed for mutual mistake).

388. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 n.14, 13-14, 17 (1972).

389. See cases cited *supra* note 374.

390. See, e.g., *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.) (commingling concepts of adhesion, fraud, and overreaching); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) (conflates concepts of fraud, overreaching, and unconscionability); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 469 (D. Vt. 1981) (commingling contract of adhesion and overweening bargaining power arguments), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *Colonial Leasing Co. v. Best*, 552 F. Supp. 605, 607-08 (D. Or. 1982) (maintaining that the "unfair or unreasonable" test for forum-clause validity easier to satisfy than defenses of duress or unconscionability as to *substantive* terms of a contract of adhesion) (emphasis in original); *Kolondo v. Jerell, Inc.*, 489 F. Supp. 983, 985 (S.D. W. Va. 1980) (mem.) (factors against honoring forum-selection clause include: fraud, overreaching and unreasonableness in application to facts at hand); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 570 (S.D.N.Y. 1978) (same); *cf. Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 365 nn.5-6 (S.D.N.Y. 1975) (distinguishing concepts of adhesion contracts, unconscionability, inequality and overweening bargaining power). See generally J. Calamari & J. Perillo, *The Law of Contracts* § 9-40, at 406-09 (3d ed. 1987) (unconscionability); Leff, *Unconscionability and The Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967) (extensive discussion of U.C.C. § 2-302 unconscionability); U.C.C. § 2-302 (1987) (unconscionable contract or clause).

391. See cases cited *supra* note 374. *But see Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (no bargaining on "take-it-or-leave-it"; clause held unreasonable and unenforceable); *Colonial Leasing Co. v. Best*, 552 F. Supp. 605, 607 (D. Or. 1982) ("The defendant had no knowledge of the meaning of the ['take-it-or-leave-it'] clause.").

392. See, e.g., *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 360 (3d Cir. 1986) ("Both parties here are sophisticated business entities capable of understanding and adjusting for the risks associated with a forum selection clause."); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) (mem.)

words, the courts *presume* a fair bargain. And despite the many instances of boilerplate contract clauses, the courts rarely invalidate a forum-selection clause on the grounds of adhesion or unconscionability.<sup>393</sup> Since outright fraud never forms the basis for a forum-selection clause, it is virtually impossible to challenge a clearly drafted provision.

Finally, in construing contract validity the federal courts have in effect created a federal common law of contract interpretation. Although a few courts look to underlying state principles in diversity cases,<sup>394</sup> many courts derive contract rules from general sources of law.<sup>395</sup> This is certainly true in federal question cases.<sup>396</sup> Yet nothing authorizes the fed-

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("[The defendant] is presumed to have received appropriate consideration, in the form of a lower price, for the venue selection clause."); *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 713 (D.R.I. 1983) ("The better-reasoned view is that the plaintiff, by consenting to inclusion of the forum designation in the agreements, has in effect subordinated his convenience to the bargain.").

393. See *Lien Ho Hsing Steel Enter. Co. v. Weihtag*, 738 F.2d 1455, 1458 (9th Cir. 1984) (forum clause in non-negotiated insurance policy upheld); *Janko v. Outboard Marine Corp.*, 605 F. Supp. 51, 52 (W.D. Okla. 1985) (claim of boilerplate contract does not preclude enforcement of clause); *LFC Lessors, Inc. v. Pearson*, 585 F. Supp. 1362, 1364-65 (D. Mass. 1984) (clause enforced despite allegations of contract of adhesion, lack of business sophistication and legal advice); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545 (N.D. Tex. 1982) (no discussion of boilerplate challenge to clause due to sophistication of parties); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 469 (D. Vt. 1981) (rejection of unfamiliarity with contract provisions argument), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 570 (S.D.N.Y. 1978) (rejection of contract of adhesion argument). *But see* *First Nat'l Monetary Corp. v. Chesney*, 514 F. Supp. 649, 656 (E.D. Mich. 1980) (brokerage agreement clause found to be unenforceable contract of adhesion); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908 (E.D. Wis. 1981) (clause not enforced where, among other things, no evidence of negotiation or bargaining on provision); *cf.* *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 149 (N.D. Tex. 1979) (reservation in regard to boilerplate contracts; agreeing with *Szukhent* dissent).

394. See, e.g., *Jackam v. Hospital Corp. of Am. Mideast*, 800 F.2d 1577, 1582 (11th Cir. 1986) (Georgia contract law); *Yarn Indus. v. Krupp Int'l, Inc.*, 736 F.2d 125, 129 (4th Cir. 1984) (South Carolina contract principles); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 318 (4th Cir. 1982) (West Virginia and New York contract principles); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 345-46 (3d Cir. 1966) (Pennsylvania contract principles); *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 215 (W.D. Tenn. 1985) (Tennessee contract principles); *Richardson Eng'g Co. v. IBM*, 554 F. Supp. 467, 470 (D. Vt. 1981) (Vermont contract law), *aff'd*, 697 F.2d 296 (2d Cir. 1982); *Colonial Leasing Co. v. Best*, 552 F. Supp. 605, 607 (D. Or. 1982) (Oregon contract principles); *City of New York v. Pullman, Inc.*, 477 F. Supp. 438, 442 (S.D.N.Y. 1979) (New York contract principles).

395. See, e.g., *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (reliance on S. Williston, *A Treatise on the Law of Contracts* (3d ed. 1961)); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) (reliance on J. Calamari & J. Perillo, *The Law of Contracts* (2d ed. 1977)); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 366 (S.D.N.Y. 1975) (reliance on New York law, as well as S. Williston, *Law of Contracts* (3d ed. 1970)); A. Corbin, *Corbin on Contracts* (1961 & Supp. 1971); Calamari, *Duty to Read—A Changing Concept*, 43 *Fordham L. Rev.* 341 (1974)).

396. See cases cited *supra* note 374; see, e.g., *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1197-98 (D. Colo. 1983) (mem.) (relying on general principles from *The Bremen* and post-*Bremen* federal cases); *D'Antuono v. CCH Computax Sys.*, 570 F.

eral courts to create federal common law contract principles to govern the essentially private contractual relationship between private citizens.<sup>397</sup> This is a return to pre-*Erie* federal court rulemaking.

### C. *The Civil Litigation Concept of Waiver*

In *Szukhent*, the Supreme Court case that undergirded the entire subsequent doctrine of consensual adjudicatory procedure, Justice Black based his dissent on the boilerplate contract provisions that the Szukhents unwittingly subscribed to in order to obtain their rental farm equipment.<sup>398</sup> From Justice Black's perspective, the majority treated the contractual provision as a waiver of the Szukhents' objection to personal jurisdiction—a waiver Justice Black characterized as a "constitutional right not to be compelled to go to a New York court to defend themselves against the company's claims."<sup>399</sup> Justice Black protested that it strained and exhausted credulity to suggest that a Michigan farmer or layman "reading these legalistic words" would know or even suspect that the service of process clause subjected them to suit in New York.<sup>400</sup> Most offensive, however, was the majority's cavalier treatment of the concept of waiver. Justice Black explained, "[w]aivers of constitutional

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Supp. 708, 711-12 (D.R.I. 1983) (same); *Cruise v. Castleton*, 449 F. Supp. 564, 568-70 (S.D.N.Y. 1978) (same); see also *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356 n.2 (3d Cir. 1986) (list of federal *Bremen* cases).

397. One court recognized the need for special circumstances to exist in order to create federal common law:

We must correct the assumption that federal courts are bound as a matter of federal common law to apply *The Bremen* standard to forum selection clauses. The construction of contracts is usually a matter of state, not federal, common law. Federal courts are able to create federal common law only in those areas where Congress or the Constitution has given the courts the authority to develop substantive law, as in labor and admiralty, or where strong federal interests are involved, as in cases concerning the rights and obligations of the United States. Only rarely will federal common law displace state law in a suit between private parties.

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The interpretation of forum selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law. . . . Thus, the Court has used a federal standard only where the Constitution or Congress has recognized, either expressly or implicitly, the authority of federal courts to create substantive law. This is not such a suit.

*General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986) (citations omitted); see also *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-43 (1981) (court has limited power to create federal common law when "necessary to protect uniquely federal interests" and where Congress has given the power to create substantive law) (quoting *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 426 (1964)); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31-32 (1977) (federal common law should be fashioned when there is significant conflict between federal interests and the use of state law) (citing *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

398. See *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 324-29 (1964) (Black, J., dissenting).

399. *Id.* at 332.

400. *Id.* at 332-33.

rights to be effective, this Court has said, must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language."<sup>401</sup>

Justice Black's point has gone unheeded in forum-selection cases. Throughout dozens of opinions, courts have failed to give much conceptual clarity to waiver in civil litigation. Only two circuit courts have given passing recognition to the propositions that "a waiver is a voluntary relinquishment of a known right,"<sup>402</sup> and "[a] party signing a waiver must know what rights it is waiving."<sup>403</sup> Nonetheless, without further evidentiary basis, those courts found effective waiver.<sup>404</sup> One lone federal district court has raised the spectre of a possible *Johnson v. Zerbst* waiver standard,<sup>405</sup> but that court retreated from the suggestion by noting that it did not have to pass on the waiver standard to decide the enforceability of the forum-selection clause.<sup>406</sup>

The large number of boilerplate contractual provisions that form the basis of these cases call for a more finely-developed concept of civil waiver, and certainly one that is not grounded in contract law. The application of contract principles has simply failed to balance competing constitutional concerns. This is especially ominous, since contractual challenges to forum-selection rarely succeed. In enforcing the contractual basis of forum-selection clauses, courts have ignored the implications for surrender of constitutional rights. It is essential, therefore, that courts develop a concept of civil waiver that counters the rigid, formulaic application of contract law.

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401. *Id.* at 332 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) and a string of other waiver cases in the criminal law area). For a discussion of the parallel but dissimilar development of the concept of waiver in the criminal and civil law, see Rubin, *supra* note 6 *passim*; *infra* Part VII B.

402. *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 331-32 (5th Cir.) (citing *Watkins v. Fly*, 136 F.2d 578, 580 (5th Cir.), *cert. denied*, 320 U.S. 769 (1943); Restatement (Second) of Contracts § 84, comment b (1981)), *cert. denied*, 108 S. Ct. 329 (1987).

403. *Patten Secs. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 407 (3d Cir. 1987) (citing *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568 (9th Cir. 1964)).

404. See *Patten Secs. Corp.*, 819 F.2d at 407; *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 332 (5th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).

405. See *Leaswell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1016-17 (S.D. W. Va. 1976) (mem.) (extensive citation to Justice Black's dissenting opinion in *Szukhent*).

406. See *id.* at 1017. The court held the forum-selection clause unjust and unreasonable under *Bremen* standards, which it expected West Virginia would and should adopt as the modern view. See *id.* at 1015. It also avoided addressing the issue of unequal bargaining power. See *id.* at 1016-17; see also Gilbert, *supra* note 4, at 72 ("Even outside the contract of adhesion field, abuse of such clauses is widespread . . . . In today's economy, equal bargaining power cannot be 'presumed.' *Zapata* will render a disservice to sound development of the law if it leads to a choice-of-court-clauses epidemic.") (quoting Nadelman, *supra* note 49, at 134).

## VII. RECOMMENDATIONS FOR A MEANINGFUL DOCTRINE OF CONSENSUAL ADJUDICATORY PROCEDURE

To describe the judicial mediation of consensual adjudicatory procedure is also to explicate its many doctrinal weaknesses. Among these are the serious defects of inadequate theoretical justification and confused characterization. The inconsistent treatment of federalism problems is disturbing, as is the vexation of a choice-of-law overlay onto the choice-of-forum issue. Finally, the rote application of black letter contract principles, in the absence of a balanced theory of civil waiver, serves to vitiate important procedural rights.

At a minimum, courts should do a better job of characterizing the issues and justifying their decisions. Beyond this, a principled doctrine of consensual procedure should incorporate appropriate regard for the due process considerations implicated in forum access and governing law. Additionally, courts ought to develop a constructive standard of waiver for civil litigation rights.

### A. *Restoring Due Process and Reasonable Relationship Concepts*

Characterization problems lie at the heart of a principled theory of consensual adjudicatory procedure. The generally accepted view of forum-selection clauses as venue-conferring contributes directly to the devaluation of competing fundamental litigation rights. The venue characterization covers a wealth of procedural sins and allows courts easy justifications for bad rulings. Moreover, the venue characterization has permitted the Supreme Court to evade the central *Erie* issue of federal common law rulemaking in the area of contract law.

The first step toward a principled theory of consensual adjudicatory procedure is recognizing that forum-selection clauses are jurisdictional and not merely matters of venue. It is judicial sleight-of-hand to pronounce that forum-selection clauses do not oust a court of jurisdiction when, as a matter of theoretical and practical effect, such provisions do rob a particular court of its ability to adjudicate the substantive merits of a lawsuit. When a court is asked to abdicate its jurisdiction, whether the abdication is merely geographical or substantive, its starting proposition should be the principle that "[w]hen a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."<sup>407</sup> Further, as the abstention cases teach,<sup>408</sup> the federal courts should have exceptional or extraordinary reasons for yielding their properly conferred jurisdiction.<sup>409</sup>

407. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909)).

408. *See, e.g., Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

409. *See Louisiana Power & Light Co.*, 360 U.S. at 29 (state court determinations of decisive issue of state law); *Burford*, 319 U.S. at 327-34 (state regulatory agency subject to

The most immediate effect of construing forum-selection clauses as jurisdictional is to obviate the need for the post-*Bremen* litany of reasonableness factors. The subsequent history of *The Bremen* demonstrates how doctrinal laxity spawns a mishmash of legal tests and standards. Forum-selection clauses are now measured by reasonableness criteria derived from venue, forum non conveniens and contract principles. Clause enforceability in large measure depends on the particular spin a judge chooses to impose on the facts. Moreover, the reasonableness concerns that inform venue, forum non conveniens, and contract law are qualitatively different from the reasonableness considerations of jurisdictional analysis.<sup>410</sup>

In addition to characterizing forum-selection clauses as jurisdictional, courts should engage in thoughtful distinction between derogation and prorogation concepts.<sup>411</sup> On the derogation side, it should be emphatically recognized that subject matter jurisdiction cannot be consensually yielded by prospective litigants. It should also be recognized that personal jurisdiction cannot simply be waived without some consideration of the due process protections implicated in that concept. On the prorogation side, analogous scrutiny should be afforded to the nature of the consent of the parties. Consent should not be refracted through contractual principles, but rather through a standard of informed civil waiver.

The federal courts have labored for more than forty years elaborating highly technical requirements for due process fairness in relation to personal jurisdiction,<sup>412</sup> only to collapse in the face of forum-selection clauses. It is ironic that the law steadfastly protects a defendant from litigation in an unreasonable forum when that defendant knows nothing at all about subject matter or personal jurisdiction, yet the law does not supply the same due process protection if the defendant signs a boilerplate agreement. In the latter instance the law simply imputes knowledge.

Moreover, it is troubling that a Supreme Court that has so carefully crafted jurisdictional prerequisites blindly accedes to the notion that par-

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de novo review should be respected and federal courts should stay their hands to prevent confusing interpretation of state law); *Pullman*, 312 U.S. at 496 (federal judicial resources should not be wasted to make determinations of state regulatory law when effective state tribunal exists to protect constitutional claims).

410. This critique is developed generally by Professor Gilbert. See *supra* note 4, at 43-67. Also, the due process concerns and reasonableness tests underlying personal jurisdiction and choice-of-law analysis are similar, but not co-extensive. See authorities cited *supra* note 313.

411. For a discussion of derogation and prorogation clauses, see *supra* note 17.

412. For the development of the due process constitutional protections in regard to personal jurisdiction, see *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See generally J. Friedenthal, M. Kane, & A. Miller, *supra* note 10, §§ 3.10-3.17, at 123-61 (discussing development of fairness requirement in personal jurisdiction); E. Scoles & P. Hay, *supra* note 305, §§ 8.25-8.30, at 292-307 (jurisdiction based on defendant's economic activities within the state).

ties, in advance of litigation, can designate an appropriate forum. This proposition is antithetical to the well-articulated principle that legal claims should have some reasonable relationship to the forum in which the claims are adjudicated.<sup>413</sup> How can parties consent, in advance of their litigation, to such an appropriate forum?<sup>414</sup> Moreover, it is well-established that if a contractual dispute triggers application of a forum-selection clause, all the non-contractual claims travel to the selected forum.<sup>415</sup> Can it reasonably be maintained that when the forum-selection clause was negotiated, the parties also contemplated adjudication of non-contract claims in the selected forum?<sup>416</sup> These same issues are implicated in choice-of-law provisions that prospectively designate governing law without regard to the nature or situs of the underlying claims.

Viewing forum-selection clauses as jurisdictional also serves to counter potential inequities raised by offensive and defensive assertion of a forum-selection clause. Courts have devoted virtually no analytical scrutiny to which party invokes the clause or challenges its enforceability.<sup>417</sup> When a plaintiff seeks to enforce a forum-selection clause against a defendant,

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413. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930); cf. *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 215 (W.D. Tenn. 1985) ("In a multi-state transaction, the contracting parties' choice-of-law provision is valid absent contravention of public policy of the forum state or a showing that the selected forum does not bear a reasonable relationship to the transaction."). Both the U.C.C. and the Restatement (Second) of Conflict of Laws require some kind of "reasonable relation" or "substantial relationship" to the forum in order to validate a choice-of-forum or choice-of-law clause. See U.C.C. § 1-105 (1987); Restatement (Second) of Conflict of Laws § 187(2)(a) (1971).

414. See Gilbert, *supra* note 4, at 56-57 (discussing due process implications of foreseeability and requirement of predicting appropriate forum and applicable law).

415. See *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 650-51, *vacated*, 785 F.2d 896 (1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988); cf. *Stewart Org. Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2245 (1988) (non-contractual claims travel to selected forum by implication, since court did not discuss issue of severability raised in the lower court opinions).

416. The Eleventh Circuit in *Ricoh* thought this possibility had in fact been considered. In determining the scope of the forum-selection clause to include non-contractual claims, the court stated:

It is clear from the language of the agreement that it anticipated that any dispute arising out of or in connection with the dealer-manufacturer relationship was to be governed by the clause. Of necessity this includes causes of action arising directly from the contract and those causes concomitant. There is no logical reason not to give these parties the benefit of their bargain.

*Ricoh*, 779 F.2d at 650 (emphasis in original) (relying on *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 720 (2d Cir. 1982)). See also *Ricoh*, 810 F.2d at 1069-70 (same). The concurring opinion also noted that the fact that the parties entered into a valid contract creates a conclusive presumption "that Ricoh has already compensated Stewart, through lowered costs or some other method, for any inconvenience that Stewart or its witnesses might suffer by trying this case in New York." *Ricoh*, 810 F.2d at 1075 (Tjoflat, J., concurring).

417. See Gruson, *Forum-Selection Clauses*, *supra* note 3, at 200. Both plaintiffs and defendants have challenged forum-selection clauses, or asserted their enforcement, in the variety of procedural postures in which these cases arise: state court, federal court and removal jurisdiction.



proper regard should be given to the defendant's due process rights to be sued in a particular forum. Conversely, when a defendant challenges or invokes a forum-selection clause to the detriment of the plaintiff, the courts should accord at least some traditional deference to the plaintiff's choice-of-forum.

In summary, traditional jurisdictional principles relating to forum access should govern forum-selection clause enforceability. Litigants may choose their forum and governing law so long as the choices comport with articulated notions of justice and fair play. The concept of reasonableness should derive from jurisdiction and choice-of-law canons, not venue or contract law.

While there is no law against making a bad bargain,<sup>418</sup> there is a long-standing American tradition that "[w]aivers of constitutional rights . . . must be deliberately and understandingly made."<sup>419</sup> Even the Supreme Court has acknowledged that personal jurisdiction represents an individual liberty interest grounded in fourteenth amendment due process concerns,<sup>420</sup> and that this substantial right should not so freely and uncritically be bartered away.

### B. Contractual Waiver of Civil Litigation Rights

The waiver of rights in criminal and civil law has developed in analogous but not identical fashion.<sup>421</sup> The central requirements for a waiver in criminal law, knowledge and voluntariness, are derived from the 1938 Supreme Court case *Johnson v. Zerbst*,<sup>422</sup> which defined waiver as "an intentional relinquishment . . . of a known right or privilege."<sup>423</sup> In civil law cases, on the other hand, contract principles and terminology generally govern the validity of waivers.<sup>424</sup> Nevertheless, criminal and civil waivers are united in the common but elusive notion of consent.<sup>425</sup>

Both criminal and civil waivers have developed different standards in relation to different rights. For example, in criminal law, the strictest *Johnson* standard of knowing and voluntary waiver has been applied to the right to counsel, formal indictment before trial, the right to trial itself, and trial by jury.<sup>426</sup> A lesser standard of waiver has been applied to the right to be tried in the district where the offense was committed, to be

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418. See J. Calamari & J. Perillo, *supra* note 390, § 10-1, at 429-30 (consumer protection).

419. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332 (1964) (Black, J., dissenting).

420. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982); see also *supra* note 412 and accompanying text.

421. See generally Rubin, *supra* note 6 (discussing lack of clear definition of waiver in both civil and criminal contexts).

422. 304 U.S. 458 (1938).

423. *Id.* at 464.

424. See Rubin, *supra* note 6, at 491, 512-28.

425. See *id.* at 529.

426. See *id.* at 494-95 nn.76-79 (denoted as the "strict standard" of waiver).

present at one's trial, to raise defenses and objections and to avoid self-incrimination.<sup>427</sup> The waiver of these rights must be voluntary but need not be made knowingly.<sup>428</sup> On the civil side, consent judgments and settlements that are tantamount to a waiver of the right to trial are judged by principles of contract law,<sup>429</sup> while waiver of defenses and objections generally are not evaluated by contract principles or *Johnson* standards, but by the principle of "stage" preclusion.<sup>430</sup>

As one commentator suggests, "the law of waiver, when viewed as a totality, is presently in disarray,"<sup>431</sup> and conceptual problems are patently manifest in the case law. Although many different standards for waiver exist in both criminal and civil cases, "no court has articulated a general rule for determining the category in which a particular waiver belongs."<sup>432</sup> This same commentator notes that different types of rights exist that require different waiver standards, yet the cases do not distinguish these rights in any meaningful fashion.<sup>433</sup> Therefore, even rights viewed as "fundamental rights" can nonetheless be subjected to a lesser standard of waiver.<sup>434</sup>

Waiver theory is also plagued by linguistic and analytical difficulties. Concepts such as knowledge, intention, voluntariness and consent necessarily entail ventures into philosophy and psychology, generating at times "a unique level of obscurity."<sup>435</sup> On the civil side, waiver excep-

427. See *id.* at 496-97 & nn.87-91.

428. See *id.* at 496. Rubin makes the point that these rights may be waived by omission or inconsistent action, such as going to trial in another district, absenting one's self from the courtroom, failing to raise an objection, defense or appeal at an appropriate time, or by willingly testifying about an incriminating matter. This is true for many civil litigation rights as well. See, e.g., Fed. R. Civ. P. 12(h).

429. See Rubin, *supra* note 6, at 512-13 & nn.188-92.

430. Rubin notes:

This principle [of stage preclusion] demands that a right be asserted during the stage of trial to which it is most relevant. Thus, a party who fails to assert his right at the proper time or takes an action inconsistent with assertion of the right will be held to have waived it . . .

*Id.* at 515.

431. *Id.* at 480.

432. *Id.* at 498. Rubin makes this statement with regard to waiver of criminal rights, but it applies equally well to the situation of civil law waivers.

433. See *id.* Again, this comment is with regard to criminal waivers, but it is even more pertinent on the civil law side, where courts have eschewed any *Johnson* waiver standards. In the civil law area, *contract principles* have failed to distinguish between types of rights involved and have thus resulted in the wholesale disregard of the due process implications of choice-of-forum and choice-of-law clauses.

434. See *id.* at 498 n.98. Rubin points out that in the criminal law area, many of the rights subject to both the strict and lesser waiver standards implicate rights guaranteed by the fourth, sixth and fourteenth amendments.

435. *Id.* at 498. Rubin notes:

Judicial definitions of voluntariness include such mysterious terms as "free will" or "free choice," terms that have been sources of debate for several millennia. Efforts to avoid such philosophical issues necessarily lead to the equally uncertain field of psychology. As Justice Frankfurter wrote, the question of volition "invites psychological judgment—a psychological judgment that reflects deep,

tions based in public policy also provide elusive, mysterious determinants.<sup>436</sup>

Moreover, the concept of waiver strikes an uneasy balance between values enhanced and dangers inherent in recognition of the waiver. In criminal law, the application of a strict waiver standard counters the dangers, but inadequately accounts for countervailing values.<sup>437</sup> In contrast, the application of contractual principles in civil law favors the value-enhancing aspect of waivers at the expense of potential and actual dangers:

By permitting parties to waive their legal rights through private agreements, this framework allows the value of waivers to be realized, but offers little protection against their dangers. Since the general civil law policy is to enforce private agreements, it is rare that a waiver will be invalidated on the contract law grounds of fraud, duress or illegality.<sup>438</sup>

Finally, application of contract principles in civil law to determine the validity of waiver strains notions of consent and voluntariness. It is ironic that courts in forum-selection cases enforce such provisions over the strenuous objection of one of the "consenting" parties.<sup>439</sup> That courts do so is more a tribute to the sanctity of contract than a recognition of competing rights.

Thus the ultimate inquiry must be whether the application of contract principles to civil law waivers adequately balances the dangers of waiver with the value-enhancing dimension of consent. The cases suggest that it does not. If a waiver represents an "alternative, informal interaction that the state encourages by its enforcement of the waiver,"<sup>440</sup> then it is incumbent that "courts should strive to translate the fairness of the plenary interaction into the informal setting of the abbreviated one."<sup>441</sup> Therefore, a party waiving a right should be assured the functional equivalent of that right in the setting in which the right is foregone. As a practical matter, it is the court's task to "determine the nature of the right that has been waived, identify the kind of protection that the right provides, and then require that an informal version of those same protections be provided."<sup>442</sup>

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even if inarticulate, feelings of our society." It seems unlikely that any court could respond to this invitation with a set of clear legal rules.

*Id.* at 529-30 (citations omitted).

436. *See id.* at 531 (unclear what "public policy" consists of); *supra* notes 282, 349 and accompanying text.

437. *See* Rubin, *supra* note 6, at 488-91, 533-34.

438. *Id.* at 534.

439. It is almost painfully obvious that "[i]n such a situation, it does not make sense to argue that enforcing the waiver fulfills the first party's desires. Perhaps he was willing to part with his right at one time, but now he is no longer so inclined; otherwise there would be no dispute." *Id.*

440. *Id.* at 537.

441. *Id.*

442. *Id.*

This equivalence principle supplies a useful framework for determining the validity of forum-selection clauses. Under this view the most important rights, those affecting judicial adjudication, are governed by the due process clause:

For all these adjudication-related waivers, therefore, courts should require that the functional equivalent of due process protection be provided in the interaction between parties. A due process standard would protect against the dangers of waivers; under a rigorous application of such a standard, a waiver would be no more likely to produce injustice than would a full-scale procedure.<sup>443</sup>

Forum-selection and choice-of-law provisions should not be viewed as mere creatures of contract law. These provisions must be viewed as involving serious due process rights in relation to forum-access and governing law. Although contractual principles may supply some guidance for contract interpretation, contract law should not subvert due process inquiries into the fundamental rights at stake. The due process concerns of jurisdiction and choice-of-law must prevail as the central referents for validity and enforceability of such consensual arrangements. Contract rules "cannot be used to justify those waivers that involve constitutional rights since such rights necessarily take precedence over the contract policy of honoring private agreements."<sup>444</sup>

#### CONCLUSION

The doctrine of consensual adjudicatory procedure manifested through forum-selection and choice-of-law provisions is now a fixed feature of the adjective law. Traditional rejection of such mechanisms has yielded to wholesale, largely uncritical enforcement. Because of the favorable reception that courts accord forum-selection and choice-of-law provisions, these stipulations are becoming increasingly prevalent in all aspects of commercial and non-commercial dealings.

The task of the courts is to supply more conceptual clarity to the doctrine of consensual adjudicatory procedure. This entails acknowledging forum-selection clauses as jurisdiction-ousting or jurisdiction-conferring. This entails recognizing that the supremacy of contract principles in civil law waiver has sacrificed fundamental litigation rights. Due process concerns must be restored as the centerpiece of judicial scrutiny.

The values enhanced by consensual agreements are not to be trivialized in the context of contemporary complex litigation. Among these values are predictability, certainty, security, stability and simplicity.

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443. *Id.* at 538; *see also* Gilbert, *supra* note 4, at 40, 43-66 (placing the forum in an uninterested state implicates due process concerns). *But see* E. Scoles & P. Hay, *supra* note 305, §§ 8.13-8.19, at 275-84 (discussing jurisdiction based on consent); *id.* §§ 18.1-18.13, at 632-53 (discussing party autonomy in choice of forum law); Gruson, *Governing Law Clauses*, *supra* note 3, at 216-17 (1982) (voiding the forum selection clause nullifies the parties' freedom of contract).

444. Rubin, *supra* note 6, at 545.

Other values are cost minimization, time efficiency and flexibility. Yet the courts have not inquired whether contractual provisions have actually enhanced these values. Indeed, it is patently ironic that proliferating litigation over forum-selection and governing-law clauses is counter-productive to the very values that these devices supposedly enhance.

Finally, courts must acknowledge that “[w]aivers can be dangerous for precisely the same reason that they can be valuable: they constitute alternatives to the protections provided by the plenary assertion of one’s rights.”<sup>445</sup> Therefore, a principled theory of consensual adjudicatory procedure will strike a fair balance between the values of such waivers and the dangers inherent in yielding fundamental rights. That balance must be mediated by the due process principles that traditionally have guided jurisdictional and choice-of-law determinations.

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445. *Id.* at 489.

