Appealability of a District Court’s Denial of a Forum-Selection Clause Dismissal Motion: An Argument Against “Canceling Out” The Bremen

Howard W. Schreiber

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INTRODUCTION

In 1972, in *The Bremen v. Zapata Off-Shore Co.*, the Supreme Court reversed a longstanding tradition and held that contracting parties could agree in advance where they would litigate disputes arising under their agreement. In declaring forum-selection clauses presumptively valid, the *Bremen* Court set a new high-water mark for freedom-of-contract principles. A forum-selection clause furthers the contracting parties' fundamental goal of making the economic result of their agreement as certain and predictable as possible. In addition, by eliminating potential jurisdictional struggles between the parties, choice-of-forum agreements serve important interests of the judicial system.

2. See id. at 9-10 (holding forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown . . . to be 'unreasonable' under the circumstances").
3. A contractual provision specifying a particular forum for litigation arising under the contract is most often referred to as a "forum-selection clause." However, courts sometimes refer to these clauses as "choice-of-forum provisions," "forum clauses" or "jurisdiction clauses." See Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. Ill. L. Rev. 133, 136 n.4. A forum-selection clause can be exclusive or non-exclusive. An exclusive clause requires that any litigation arising under the contract be brought only in the designated forum. A non-exclusive clause permits litigation in the designated forum but does not prohibit an action from being brought elsewhere. See infra notes 35-36 and accompanying text (citing cases involving exclusive and non-exclusive clauses). Because only exclusive forum-selection clauses represent rights that will be irretrievably lost if denied immediate review, this Note is limited to discussing the appealability of a denial of a motion to dismiss based on an exclusive forum-selection clause. Unless otherwise indicated, any reference to a forum-selection clause refers only to an exclusive forum-selection clause.
5. See Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1, 2 (1976); Gruson, *supra* note 3, at 133; Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 Wayne L. Rev. 49, 50 (1972); see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) ("we conclude that . . . the need of the international commercial system for predictability in the resolution of disputes require[s] that we enforce the parties' [forum-selection] agreement"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (a forum-selection clause is essential to achieving "orderliness and predictability" in an international business transaction); *The Bremen* v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972) ("The elimination of all such uncertainties by agreeing in advance on a forum . . . is an indispensable element in international trade"). Achieving predictability in commercial transactions is a goal of parties to both domestic and international contracts. See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279 (9th Cir. 1984) ("we see no reason why the principles announced in *The Bremen* are not equally applicable to the domestic context").
6. A forum-selection clause allows the judicial system to function more efficiently by
Appellate procedure in the federal courts, however, threatens a drastic retreat from the gains made by *The Bremen*. The contractual right provided by a forum-selection clause may be effectively nullified when a district court refuses to dismiss an action brought in violation of the clause.\(^7\) If immediate appeal of this decision is denied, the defendant must await final judgment to have the issue reviewed. Even if the defendant then obtains a reversal\(^8\) and a subsequent trial in the contractual forum, this result will have defeated the primary purpose of the clause—to avoid being forced to litigate anywhere but in the agreed-upon forum.\(^9\)

Whether such appeals should be allowed before final judgment is currently in dispute.\(^10\) Under a statutory provision known as the final judgment rule, federal appellate jurisdiction extends only to appeals from "final" judgments of the district courts.\(^11\) An order denying a motion to dismiss based on a forum-selection clause, because it leaves the controversy pending, cannot technically be called a final judgment.\(^12\) However, under the limited exception created by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*,\(^13\) the order may be immediately appealable as a collateral order.\(^14\) The federal courts of appeals disagree

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"reliev[ing] courts of time consuming pre-trial motions." Stewart Org., Inc. v. Ricoh Corp., 108 S. Ct. 2239, 2250 (1988) (Kennedy, J., concurring). Justices Kennedy and O'Connor found the benefits of forum-selection clauses to courts and litigants so strong that they concluded "[c]ourts should announce and encourage rules that support private parties who negotiate such clauses." *Id.*

7. *Compare* Chasser v. Achille Lauro Lines, 844 F.2d 50, 53 (2d Cir.) (denial of motion to dismiss based on forum-selection clause held not immediately appealable), *cert. granted*, 109 S. Ct. 217 (1988) *with* Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986) (finding immediate appeal of order denying motion to dismiss on forum-selection clause grounds is necessary to avoid depriving party of a contractual right).

8. See infra notes 89-90 and accompanying text (discussing whether an erroneous forum-selection clause order would be an available ground for reversal after final judgment).

9. The "prime purpose" of an exclusive forum-selection clause is to "confine litigation between the parties to the [preselected forum]. As a practical matter, such a clause can have little efficacy unless the courts [not selected in the clause] refuse to hear suits brought in violation of its terms." Reese, *The Contractual Forum: Situation in the United States*, 13. Am. J. Comp. L. 187, 187 (1964).

10. See infra note 15.


14. See Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 908 (3d Cir. 1988); Diaz Contracting, Inc. v. Nanco Contracting Corp., 817 F.2d 1047, 1048 (3d Cir. 1987); Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986); 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, 197 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); cf. Sterling Forest Assocs., Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988) (order denying transfer motion based on forum-selection clause immediately appealable under *Cohen*).
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whether Cohen applies to an order denying a motion to dismiss based on a forum-selection clause.\textsuperscript{15}

Part I of this Note reviews the history of forum-selection clauses and their present-day status in the federal courts. Part II discusses the final judgment rule and its underlying policies, and then looks at the Cohen collateral order doctrine and the competing policies embodied in this judicial exception. Part III considers the applicability of the Cohen doctrine to an order denying a forum-selection clause dismissal motion. The Note concludes that such an order meets the requirements for appeal as a collateral order and that the strong federal policy supporting forum-selection clauses will be frustrated by denying immediate review.

I. Forum-Selection Clauses

A. Background

The common law historically viewed forum-selection clauses as an attempt by contracting parties to “oust” a court of jurisdiction and, as such, a violation of public policy.\textsuperscript{16} Courts reasoned that their jurisdictional power was established by law, and therefore could not be altered by private agreement.\textsuperscript{17} Although its logical basis was not closely ana-
lyzed, the common law approach was the prevailing view of state and federal courts until the mid-twentieth century. Eventually, however, judges began to question the doctrine that forum-selection clauses were prima facie unenforceable.

The decisive turn occurred in 1955 with a landmark Second Circuit decision. In *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, the Court of Appeals upheld a forum-selection clause in an international shipping contract that provided for exclusive jurisdiction in Swedish courts. The *Muller* court rejected the view that a forum-selection clause was an ouster of the court's jurisdiction and held that, by enforcing the clause, it merely declined to exercise its jurisdiction. The court's jurisdiction thus remained unaffected by the parties' agreement, but was withheld in order to give effect to the parties' intent.

F. 704, 704, (C.C.S.D.N.Y. 1889); Gilbert, supra note 5, at 8; Juenger, supra note 5, at 51.

Some courts also held that forum-selection clauses were unenforceable because they related to the law of remedies as established by the forum, which also could not be affected by private agreement. See Gruson, supra note 3, at 139; Note, *Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State*, 45 Yale L.J. 1150, 1150-51 (1936).

Some commentators have since questioned the reasoning offered by early courts following the common law approach; they suggest that the historical judicial hostility to forum-selection clauses may be explained by other factors, including judges' reluctance to relinquish cases at a time when they were paid by the number of cases heard. See Gilbert, supra note 5, at 9; Reese, supra note 9, at 188-89.

In 1949 Judge Learned Hand commented on the shift in judicial attitudes: "In truth, I do not believe that, today at least, there is an absolute taboo against such [forum-selection] contracts at all . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome." Krenger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir.) (Hand, J., concurring), cert. denied, 338 U.S. 866 (1949). Some very early cases did enforce forum-selection clauses. See, e.g., Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903); Daley v. People's Bldg., Loan & Sav. Ass'n, 178 Mass. 13, 59 N.E. 452 (1901).


The dramatic reversal in the judicial attitude toward forum-selection clauses coincided with a similar revolution in the area of choice-of-law provisions. In the 1950s, courts began to reject the vested rights doctrine, which fixed the law of the place where the contract was made as the governing law for any dispute under the agreement. The traditional vested rights doctrine was replaced by a majority rule that contracts could be governed on all issues by the law chosen by the parties. See Prebble, *Choice of Law to Determine the Validity and Effects of Contracts: A Comparison of the English and American Approaches to the Conflict of Laws*, 58 Cornell L. Rev. 433, 442-44 (1973). The contemporaneity of the revolutions in choice-of-law and choice-of-forum jurisprudence is not accidental, for the policies served by both types of clauses are the same: making the rights and obligations under the agreement as certain and predictable as possible. See Gruson, supra note 3, at 134; Gruson, *Governing Law Clauses in Commercial Agreements—New York's Approach*, 18 Colum. J. Transnat'l L., 323, 323 (1980). The two coinciding developments can be seen as components of a broader movement toward greater party autonomy.

22. See Muller, 224 F.2d at 808.

Muller and subsequent cases adopted a standard of reasonableness in deciding whether to enforce a forum-selection clause. This was the approach later recommended by the Restatement (Second) of Conflict of Laws, which stated that “[t]he parties’ agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.” An increasing number of courts began to follow this approach and extend the application of the reasonableness test to domestic as well as international forum-selection clauses. Nonetheless, courts did not take quickly to the modern view that contracting parties should be able to agree where they could be sued; a majority continued to invoke the traditional rule that forum-selection clauses were contrary to public policy and unenforceable.

B. Forum-Selection Clauses After The Bremen

Finally, in 1972, the increasingly popular modern view on forum-selection clause enforceability received the boost it needed to make it the clearly favored rule. In The Bremen v. Zapata Off-Shore Co., the Supreme Court held in an eight to one decision that forum-selection clauses are “prima facie valid and should be enforced unless enforcement


25. Restatement (Second) of Conflict of Laws § 80 (1971). The Restatement of Contracts, however, had earlier adopted the traditional view that forum-selection clauses were unenforceable:

A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action . . . is illegal.

Restatement of Contracts § 558 (1932).


27. See Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959); Muoio v. Italian Line, 228 F. Supp. 290, 292 (E.D. Pa. 1964). In Carbon Black the Court viewed the doctrine that forum-selection clauses are contrary to public policy and unenforceable as a “universally accepted rule.” See Carbon Black, 254 F.2d at 300-01. Although the modern view remained the minority position, the debate between proponents of the modern and traditional views grew sharper. A good example of the debate is presented in the majority and dissenting opinions in In re Unterweser Reederei GMBH, 428 F.2d 888 (5th Cir. 1970), aff’d, 446 F.2d 907 (5th Cir. 1971) (en banc), vacated on other grounds sub nom. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

28. See Gilbert, supra note 5, at 24.

is shown . . . to be ‘unreasonable’ under the circumstances.”

In an opinion resting substantially on grounds of freedom of contract and commercial efficiency, the Court thus unequivocally rejected the longstanding judicial hostility to forum-selection clauses. “The expansion of American business and industry,” the Court said, “will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our law and in our courts.”

The Court placed a heavy burden of proof on the party opposing enforcement of the clause: “[I]n the light of present-day commercial realities . . . the forum clause should control absent a strong showing that it should be set aside.”

The Bremen quickly took on a formidable stature as the guiding analysis on forum-selection clause enforceability. Although its holding could arguably be limited to suits involving admiralty jurisdiction and international contracts, federal courts have read the decision as broad support for upholding forum-selection clauses generally.

C. Interpretation of Forum-Selection Clauses

The Bremen’s principles of commercial efficiency and freedom of contract can be substantially thwarted by a court’s interpretation of the forum-selection clause. By misinterpreting forum-selection clauses, courts obscure the reasons why orders denying enforcement should be immediately appealable. For example, in many cases contracting parties intend

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30. Id. at 10.
31. Id. at 9.
32. Id. at 15 (emphasis added). The Court also finally disposed of the argument that forum-selection clauses were an attempt to “oust” a court of jurisdiction; this view, the Court noted, “is hardly more than a vestigial legal fiction.” Id. at 12.
33. See Mullenix, Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court, 57 Fordham L. Rev. 315 n.99 (1988) (citing numerous cases showing that The Bremen has become the “lodestar” on the issue of forum-selection clause enforceability in the federal courts, but criticizing the adoption of The Bremen’s analysis in the domestic context).
to create an exclusive forum-selection clause requiring the parties to bring any litigation arising under the contract only in the designated forum.\textsuperscript{35} This is in contrast to a non-exclusive clause, also called a permissive or consent-to-jurisdiction clause, which merely permits litigation in the designated forum but does not prohibit an action from being brought elsewhere.\textsuperscript{36} The determination of whether the parties intended the forum-selection clause to be exclusive or non-exclusive is a question of contract interpretation for the court.\textsuperscript{37} When a court misinterprets the intent of the parties and construes an exclusive forum-selection clause as non-exclusive, or fails to make any distinction between the two types of clauses, it risks depriving a party of a bargained-for contractual right.

In \textit{Sterling Forest Associates, Ltd. v. Barnett-Range Corp.},\textsuperscript{38} the parties entered into a purchase agreement with a forum-selection clause that read in part: "[T]he parties agree that in any dispute jurisdiction and venue shall be in California."\textsuperscript{39} The district court interpreted this to mean that jurisdiction existed in California and "elsewhere as well,"\textsuperscript{40} thus treating the clause as non-exclusive and therefore merely a consent to jurisdiction in California. The Court of Appeals for the Fourth Circuit held this interpretation to be "patently erroneous," finding that it rendered the clause meaningless and redundant because jurisdiction already existed in California as a matter of law.\textsuperscript{41} Moreover, the court found this misinterpretation so egregious as to suggest "evidence of a continuing hostility to forum selection clauses"\textsuperscript{42} and viewed it as "an attempt to put the \textit{Bremen} principles to naught through a patently erroneous interpretation of the selection clause itself."\textsuperscript{43}

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\item \textsuperscript{36} See, e.g., Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77-78 (9th Cir. 1987); Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956 (5th Cir. 1974); First Nat'l City Bank v. Nanz, Inc., 437 F. Supp. 184, 186-87 (S.D.N.Y. 1975). \textit{See generally} Gruson, supra note 3, at 134-36 (discussing distinctions between exclusive and non-exclusive clauses).
\item \textsuperscript{37} \textit{See} Gruson, supra note 3, at 134.
\item \textsuperscript{38} 840 F.2d 249 (4th Cir. 1988).
\item \textsuperscript{39} Id. at 250.
\item \textsuperscript{40} Sterling Forest Assocs., Ltd. v. Barnett-Range Corp., 673 F. Supp. 1394, 1397 (E.D.N.C. 1987), rev'd, 840 F.2d 249 (4th Cir. 1988).
\item \textsuperscript{41} \textit{See} Sterling Forest Assocs., 840 F.2d at 251. The court found that federal diversity jurisdiction was proper in California, where the defendant was incorporated. \textit{See id.}
\item \textsuperscript{42} Id. at 252.
\item \textsuperscript{43} Id. at 251; \textit{see also} Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76 (9th Cir. 1987) (finding clause stating "courts of California . . . shall have jurisdiction over . . . any action at law" under contract was non-exclusive). \textit{Sterling Forest} noted that the use of the word "shall" generally indicates a mandatory intent. \textit{See} Sterling Forest Assocs., 840 F.2d at 252. Most courts correctly construe this language as exclusive. \textit{See}, e.g., Intermountain Sys., Inc. v. Edsall Constr. Co., 575 F. Supp. 1195, 1197 (D. Colo. 1983) ("venue shall be in Adams County, Colorado"); Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 148 (N.D. Tex. 1979) ("venue shall be laid in the county where Titan has its principal offices") (emphasis in original); Public Water Supply Dist. No. 1 v. American Ins. Co., 471 F. Supp. 1071, 1071 (W.D. Mo. 1979) ("venue shall lie in Mercer
The *Bremen* principles can also be undermined when a court, avoiding interpretive problems altogether, simply treats all forum-selection clauses alike. In *Chasser v. Achille Lauro Lines*, the clause at issue emphatically indicated an exclusionary function: “All controversies that may arise directly or indirectly in connection or in relation to this . . . contract must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived.” The Second Circuit, however, ignored the question of whether the clause at issue was exclusive or non-exclusive. Instead, it viewed the right conferred by forum-selection clauses generally as merely a “right to have the binding adjudication of claims occur in a certain forum,” neglecting to consider that an exclusive clause not only secures adjudication in a certain forum but also bars a trial in any other forum. Consequently, the court failed to see that immediate appeal was essential to protect the claimed right to avoid trial anywhere except Naples. In addition to those courts that strain to read these types of clauses as non-exclusive, some courts merely find them “ambiguous” and then construe the language against the drafter. See, e.g., *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1231 (11th Cir. 1985); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974); *First Nat’l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 187 (S.D.N.Y. 1975).

This kind of interpretive problem can, of course, be avoided by making the parties’ intent crystal clear. See *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 275 (9th Cir. 1984) (forum-selection clause providing disputes “shall be litigated only in the Superior Court . . . (and in no other)”; see also Gilbert, supra note 5, at 7 (“Needless to say, when drafting a choice of forum provision one should always indicate the parties’ intent that the chosen forum is to be exclusive.”)). Less than perfect draftsmanship, however, should not allow a court to avoid determining whether a clause is reasonable. Where unequal bargaining power or other circumstances make enforcement of the forum-selection clause greatly unfair, the *Bremen*’s reasonableness standard gives the court sufficient discretion to so decide. When a court is in effect seeking to mitigate the harsh effects of a particular clause, the solution is not to strike down the clause because of so-called ambiguous language. Since appealability hinges on a correct reading of a clause’s exclusive or non-exclusive nature, this could shield a possibly erroneous order from effective appellate review. See infra notes 97-108 and accompanying text.


45. *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 907 (3d Cir. 1988) (emphasis added). *Hodes* involved the same forum-selection clause at issue in *Chasser*. In *Hodes* the Court of Appeals for the Third Circuit held the clause was enforceable and dismissed the suit, finding the clause permitted a suit to be brought only in Naples. See *Hodes*, 858 F.2d at 916. By treating the forum-selection clause as merely a consent to jurisdiction, the Second Circuit in *Chasser* effectively rendered the forum-selection clause non-exclusive; the opinion, however, did not quote or discuss any of the actual language of the clause. See *Chasser*, 844 F.2d at 50-56.

46. *Chasser*, 844 F.2d at 55. Elsewhere, however, the Second Circuit has recognized the exclusionary function of an exclusive forum-selection clause. See *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 656 F. Supp. 464, 466 (S.D.N.Y. 1987) (language of the clause “is necessarily aimed at preventing [plaintiff] from dragging [defendant] into a court other than the one selected by the agreement”), aff’d, 838 F.2d 656 (2d Cir. 1988).

47. The interpretive omission in *Chasser* is perhaps not as “egregious” as the district court’s misinterpretation in *Sterling Forest*, see *Sterling Forest Assocs., Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988) (discussed *supra* in notes 38-43 and accompanying text); nevertheless, in making irrelevant any distinction between exclusive and non-
Finding the order denying enforcement of the forum-selection clause unappealable, the Second Circuit did not reach the issue of the clause's enforceability. While the facts in Chasser suggest grounds on which a court might have reasonably refused to enforce the clause as a matter of equity, the Second Circuit strained to dispose of the case on procedural grounds. In so doing the court not only ignored the plain language of the clause, but also effectively extinguished the very right the clause sought to secure.

It is the loss of this right—the right to avoid being forced to litigate in a court other than the one agreed to—that makes an order denying a motion to dismiss based on a forum-selection clause effectively unreviewable after final judgment, and the loss on which the need for immediate appeal turns.

II. IMMEDIATE APPEAL UNDER THE COHEN COLLATERAL ORDER DOCTRINE

A. The Final Judgment Rule

The foundation of appellate jurisdiction in the federal courts is the final judgment rule, embodied in 28 U.S.C. § 1291, which provides that the courts of appeals have the power to review all "final decisions" of the district courts. In applying the statute, however, courts have not arrived at a precise definition of a final judgment. While the Supreme Court has said a final judgment is one that "ends the litigation on the exclusive clauses, the decision frustrates the Bremen policy of providing greater certainty and predictability in contracts by allowing parties to predetermine where they will be sued.

48. The plaintiffs in Chasser were passengers aboard a ship hijacked by Palestinian terrorists. The hijackers held captive and terrorized the passengers and killed one person on board. See Chasser v. Achille Lauro Lines, 844 F.2d 50, 51 (2d Cir.), cert. granted, 109 S. Ct. 217 (1988). A court could have considered these extreme unforeseen circumstances in deciding whether to enforce the clause. See Gilbert, supra note 5, at 72 ("the reasonableness test is flexible enough to allow courts to consider forum selection clauses in the light of basic equitable principles of individualization of justice, good faith, and relief from hardship"). The district court in Chasser, however, found the clause unenforceable on the narrow ground of lack of adequate notice. See Chasser, 844 F.2d at 51-52. But see Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 910 (3d Cir. 1988) (same forum-selection clause as in Chasser held to be enforceable and to reasonably communicate its terms).

49. See infra notes 94-98 and accompanying text.


51. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."); Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) ("[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."); Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) ("The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered
merits and leaves nothing for the court to do but execute the judgment,"52 the Court has also said that "‘final’ . . . does not necessarily mean the last order possible to be made in a case."53 This confusion stems from competing policies underlying the final judgment rule.54

The fundamental policy reflected in the rule is the prevention of piecemeal appeals.55 Combining all appeals into one review at the end of the lower court proceeding reduces the expense and delay caused by interlocutory appeals.56 In addition to promoting judicial efficiency, the final judgment rule has been justified on the ground that it helps maintain the trial judge’s independence and underscores the deference owed by appellate courts to the trial judge.57

These policies notwithstanding, denying immediate appeal to some technically non-final orders can amount to a denial of justice.58 Consequently, courts often give the final judgment rule a practical rather than a literal construction.59 The Supreme Court has indicated that in some cases a weighing process is appropriate: “[I]n deciding the question of finality the most important competing considerations are ‘the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other’. ”60

These considerations have led to both statutory and judicial exceptions to the final judgment rule in order to mitigate its harsh effects.61 Because


56. See Firestone, 449 U.S. at 374 (final judgment rule “serves the important purpose of promoting efficient judicial administration”).


an order denying a forum-selection clause dismissal motion leaves the action pending, it cannot be called a final judgment; to be immediately appealable, therefore, it must come within one of the exceptions to the final judgment rule.

B. The Cohen Collateral Order Doctrine

In *Cohen v. Beneficial Industrial Loan Corp.*, the Supreme Court created a judicial exception to the final judgment rule. The *Cohen* collateral order doctrine allows for immediate appeal of district court orders that finally determine claims of right separate from and "collateral" to rights asserted in the action. In a later decision, the Court set out the precise requirements the order must satisfy to come within the exception. The order must: first, "conclusively determine the disputed question"; second, "resolve an important issue completely separate from the merits of the action"; and third, "be effectively unreviewable on appeal from a final judgment."

*Cohen*’s threshold requirement of a conclusive determination of the disputed question is satisfied by a district court order that is intended as the final word on the issue, even though it may be technically amendable. An order likely to be reassessed by the court after further developments in the litigation or to remain "open, unfinished or inconclusive" is characterized as "inherently tentative" and thus fails to meet the first requirement.

The second *Cohen* factor requires that the order "resolve an important issue completely separate from the merits." If the issue is enmeshed in the factual and legal issues of the cause of action, then an appellate court

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63. *See id.* at 546. In *Cohen*, a shareholder derivative action, the district court denied defendant’s motion to require the plaintiff to post security for costs as required by a state statute. The Supreme Court held that the order was immediately appealable because it "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*
67. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978). In *Coopers & Lybrand* the Court held that an order denying a motion for class certification is inherently tentative because it is subject to revision by the district court. *See id.* at 469. On the other hand, an order requiring defendants in a class action suit to pay 90 percent of the notification costs was held to be a collateral order, satisfying the first requirement because the court "conclusively rejected [defendants'] contention that they could not lawfully be required to bear [this] expense." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-72 (1974).
68. *Coopers & Lybrand*, 437 U.S. at 468.
can only effectively review the decision after a full exposition of those issues; as the Supreme Court cautioned in Cohen, immediate appeal of decisions that are "steps" toward final judgment is not justified. An additional element contained in the second prong of the Cohen test is a requirement that the order resolve an "important" issue. This is satisfied if the issue is important to the parties, even though it is not of general interest. The final Cohen requirement limits the reach of the collateral order doctrine to orders affecting rights that will be irretrievably lost without an immediate appeal. An order meeting this requirement is one that, "unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all."  

69. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The level of stringency required by this prong of the Cohen test was the cause of a division in the Supreme Court. See Mitchell v. Forsyth, 472 U.S. 511 (1985). Holding that an order denying a claim of qualified immunity was appealable under Cohen, a plurality of the court found the separability requirement satisfied because the order was "conceptually distinct" from the merits of plaintiff's claim, even though the appellate court referred to plaintiff's factual allegations. See id. at 527-28. The dissenters found the "conceptual distinction" test a "toothless standard" and held out for the more stringent requirement that the issue be completely separate from the merits. See id. at 547-49.  

70. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (to come within Cohen, an "order must ... resolve an important issue completely separate from the merits of the action" (emphasis added)).  

71. See In re Cessna Distributorship Antitrust Litigation, 532 F.2d 64, 67 (8th Cir. 1976). In Cessna the court noted that the Supreme Court has found several orders to be appealable as collateral orders under Cohen even though the issue was important only to the parties. See, e.g., Stack v. Boyle, 342 U.S. 1 (1951) (order denying reduction of bail); Roberts v. United States District Court, 339 U.S. 844 (1950) (order denying leave to proceed in forma pauperis). The First Circuit, however, requires that the order present "an important and unsettled question of controlling law" as an additional fourth criterion to be met before the collateral order doctrine applies. United States v. Sorren, 605 F.2d 1211, 1213 (1st Cir. 1979); accord In re Licht & Semonoff, 796 F.2d 564, 570-71 (1st Cir. 1986). Although this additional requirement has not been adopted by the Supreme Court, the Court may in the future choose to do so as a way to restrict the reach of the Cohen doctrine:  

I note that today's result could also be reached by application of the rule adopted by the First Circuit, that to come within the Cohen exception the issue on appeal must involve "an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion." Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133, 1145 (1988) (Scalia, J., concurring) (quoting Boreri v. Fiat S.P.A., 763 F.2d 17, 21 (1st Cir. 1985)).  


III. APPLICATION OF THE COHEN COLLATERAL ORDER DOCTRINE TO DENIALS OF MOTIONS TO DISMISS BASED ON FORUM-SELECTION CLAUSES

A. Characterizing the Forum-Selection Clause Dismissal Motion as an Application for Specific Performance

When a party commences suit in violation of an exclusive forum-selection clause, the defendant will most likely seek to enforce the clause by moving to dismiss for lack of jurisdiction or improper venue. If this motion is denied and immediate appeal is sought, proper resolution of the claim requires the appellate court to distinguish the order from other pretrial forum rulings customarily denied immediate appeal, such as a remand motion or a motion to dismiss based on forum non conveniens or routine lack of personal jurisdiction. A forum-selection clause dismissal motion is fundamentally distinguishable by its contractual basis. In practical effect the motion seeking to force the plaintiff to sue in the contractually agreed-upon forum should be viewed as an application for specific performance.

Courts analyzing the appealability of a motion based on a forum-selection clause solely in terms of its procedural label have overlooked the underlying substantive issues. An order denying a motion to dismiss based on a forum-selection clause is not a purely jurisdictional decision but a substantive contract law decision on the enforceability of the clause.

When a forum-selection clause is a substantive bargaining point for the

74. See, e.g., Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir.), cert. granted, 109 S. Ct. 217 (1988); Diaz Contracting, Inc. v. Nanco Contracting Corp., 817 F.2d 1047, 1047 (3d Cir. 1987); Coastal Steel Corp. v. TIlghman Wheelabrator Ltd., 709 F.2d 190, 193 (3d Cir.), cert. denied, 464 U.S. 938 (1983); see also Mullenix, supra note 33, at 328 n.188 (citing cases in which party sought to enforce forum-selection clause by moving to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure).

75. See, e.g., Louisiana Ice Cream Distribrs., Inc. v. Carvel Corp., 821 F.2d 1031, 1033 (5th Cir. 1987) ("We perceive no principled way to distinguish a ruling on a motion to dismiss for improper venue . . . from these other forum rulings."). Although the motion to dismiss for improper venue in Louisiana Ice Cream was based on a forum-selection clause and thus sought enforcement of a contractual right, this did not appear to add anything to the court's analysis of the appealability of the order denying the motion.

76. See Coastal Steel Corp. v. TIlghman Wheelabrator Ltd., 709 F.2d 190, 194 (3d Cir.), cert. denied, 464 U.S. 938 (1983) ("motion to dismiss an action in order to give effect to a forum selection clause is in practical effect an application for specific performance of that contractual provision"). The Supreme Court noted this aspect of a motion to enforce a forum-selection clause in The Bremen: "The threshold question is whether [the] court should have exercised its jurisdiction . . . by specifically enforcing the forum clause." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (emphasis added).

77. Confronting a substantially similar issue, one court held that an otherwise unappealable remand order based on a forum-selection clause was reviewable as a "contract interpretation order." See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 277 (9th Cir. 1984).
parties, it affects other terms of a contract. Even where boilerplate language is used, a forum-selection clause may be considered a "vital" part of the agreement because the contractual negotiations were conducted with the consequences of the forum clause in mind. By refusing to enforce the clause, the court may affect the consideration exchanged and thus shift the equities of the agreement. In conceptually viewing a motion to dismiss based on a forum-selection clause as an application for specific performance, courts will avoid the risk of overlooking the substantive contractual issues inherent in the motion. This treatment assures that important contractual rights will not be glossed over by a blind application of jurisdictional law.

B. Order Denying Motion to Dismiss Qualifies for Appeal as a Collateral Order

An order refusing to dismiss an action brought in violation of an exclusive forum-selection clause qualifies as a collateral order under Cohen. Such an order satisfies the first Cohen requirement because it is a conclusive determination of the disputed question. The order is not inherently tentative because the district court would not ordinarily reconsider its decision during the course of the litigation. Once dismissal is denied, the proceeding turns to the merits of plaintiff's cause of action; thus, the order was necessarily "made with the expectation that [it would] be the final word on the subject." Moreover, the order conclusively determines the law of the case and the location in which the suit is to be tried.

Cohen's separability requirement—resolution of an important issue completely separate from the merits of the action—is also satisfied because the clause "establ...
from the rights being asserted in the dispute to which it is addressed."

An order denying a forum-selection clause dismissal motion is also important to the parties; it conclusively determines where the suit will be heard and whether the contractual right will be enforced. In addition, judicial economy is preserved because the appeal will involve only the issue of the enforceability of the forum-selection clause and not the merits of any claims or defenses in the suit.

The third arm of the Cohen test has proved to be the most troublesome for courts applying the collateral order doctrine to orders denying forum-selection clause dismissal motions. Properly interpreting the rights conferred by an exclusive forum-selection clause is essential to the determination that the decision is effectively unreviewable. The right to be subject to litigation only in the designated forum has been irrevocably lost after a trial has taken place in a forum not agreed to by the parties.

In addition, if the defendant loses on the merits, the order denying the dismissal motion is likely to be unreviewable because the defendant would not be able to show the prejudice necessary to obtain a reversal. A party who bargained for a contractual right should not have to show prejudice before the right is enforced. It is the loss of the contract right and not the outcome of the trial that is the injury.

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84. Coastal Steel, 709 F.2d at 195; see Farmland, 806 F.2d at 850. A choice-of-forum clause may be accompanied by a choice-of-law clause, which determines the law to be applied in any litigation between the parties. See Gruson, supra note 3, at 133. Although courts find the order is conclusive because it "establish[es] the law of the case," this would only be so when there is not an enforceable choice-of-law provision. However, an order refusing to dismiss an action in violation of a forum-selection clause conclusively determines the jurisdiction in which the suit must be tried. See Farmland, 806 F.2d at 850.

85. See Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850 (8th Cir. 1986); In re Cessna Distributorship Antitrust Litigation, 532 F.2d 64, 67 (8th Cir. 1976).

86. See Farmland, 806 F.2d at 850; see also Sterling Forest Assoc., Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988) (order denying motion to remand on forum-selection clause grounds "easily" meets requirement that it be completely separate from the merits); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 278 (9th Cir. 1984) (order granting motion to remand based on forum-selection clause "conclusively determines enforceability of the clause, an issue completely separate from the merits of [plaintiff]'s breach of contract claim"). But see Louisiana Ice Cream Distrib., Inc. v. Carvel Corp., 821 F.2d 1031, 1033 (5th Cir. 1987) (interpretation of ambiguous forum-selection clause not separate from merits).

87. See, e.g., Coastal Steel, 709 F.2d at 196 ("more difficult question is whether the third Coopers & Lybrand factor is satisfied").

88. See supra notes 35-49 and accompanying text.

89. See Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 851 (8th Cir. 1986); Coastal Steel, 709 F.2d at 196; cf. Sterling Forest Assoc., Ltd v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988) (denial of transfer motion based on a forum-selection clause is final because "it is inconceivable that [defendant] could prove that a different result would have been reached had the case been tried in [the chosen forum]"").

90. See Farmland, 806 F.2d at 851.

91. This is true whether the defendant wins or loses. If the defendant is successful on the merits, the order denying the motion to dismiss will, of course, evade review. See
Some courts have held that a denial of a forum-selection clause dismissal motion is immediately appealable under Cohen. Perhaps the best rationale was articulated by the Eighth Circuit in Farmland Industries, Inc. v. Frazier-Parrot Commodities, Inc. Emphasizing the tradition of taking a practical approach to issues under the final judgment rule, the court found that the order denying enforcement of the forum-selection clause would be effectively unreviewable after final judgment because the right to a single trial in a preselected forum will have been lost at that point. Allowing the suit to proceed in a forum not agreed to in the contract would effectively deprive the defendant of a contractual right. This approach, in recognizing the collateral nature of the order and the importance of the contractual right, is the most consistent with the policies of the Bremen.

C. Analogy to Order Denying Claim of Double Jeopardy in Abney v. United States

The right conferred by an exclusive forum-selection clause is analogous to the right to be free from double jeopardy, which was at stake in Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 196 (3d Cir.), cert. denied, 464 U.S. 938 (1983). Although pleased with the outcome, the defendant may have incurred increased costs in litigating in a forum not anticipated in the contract. See, e.g., Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 908 (3d Cir. 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, 709 F.2d at 197. The Coastal Steel court also found the order appealable on two alternate grounds: (1) as an interlocutory decision under 28 U.S.C. § 1292(a)(1) (providing for interlocutory review of orders “granting, continuing, modifying, refusing or dissolving injunctions”); and (2) as a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651 (allowing issuance of writs in “aid of” jurisdiction when “necessary or appropriate”).

92. See, e.g., Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 908 (3d Cir. 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, 709 F.2d at 197. The Coastal Steel court also found the order appealable on two alternate grounds: (1) as an interlocutory decision under 28 U.S.C. § 1292(a)(1) (providing for interlocutory review of orders “granting, continuing, modifying, refusing or dissolving injunctions”); and (2) as a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651 (allowing issuance of writs in “aid of” jurisdiction when “necessary or appropriate”).

93. 806 F.2d 848 (8th Cir. 1986).
94. See id. at 851.
95. See id.
96. The Third Circuit reached the same result, albeit through more esoteric reasoning. It relied on a statute providing that there could be no reversal of “matters in abatement.” Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 196 (3d Cir.), cert. denied, 464 U.S. 938 (1983). The statute provides: “There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.” 28 U.S.C. § 2105 (1982). Although the court acknowledged that “[n]ineteenth century lawyers were obviously better versed in the meaning of pleas of abatement,” Coastal Steel, 709 F.2d at 196, it found that the statute made the district court’s refusal to enforce the forum-selection clause unreviewable after final judgment. See id. However, the use of this statute to find the order unavailable has been criticized. See Chasser v. Achille Lauro Lines, 844 F.2d 50, 53-54 (2d Cir.) (rejecting use of statute to find order unavailable), cert. granted, 109 S. Ct. 217 (1988); Coastal Steel, 709 F.2d at 210-12 (Rosenn, J., concurring) (rejecting use of “old, obscure statute” (28 U.S.C. § 2105) to find order unavailable; finding order appealable instead under balancing approach in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)); see also 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3903 at 412, 413 (1976) (referring to § 2105 as “[o]ne of the most commonly ignored provisions of the Judicial Code”).
Abney v. United States.\textsuperscript{97} There the Supreme Court held that an order denying a claim of double jeopardy was immediately appealable under the collateral order doctrine.\textsuperscript{98} The Court held this order was effectively unreviewable because the right not to stand trial a second time for the same offense is effectively denied when the second trial proceeds.\textsuperscript{99} Similarly, the right conferred by an exclusive forum-selection clause—the right to a single trial in the preselected forum—is lost when a trial proceeds to final judgment in a different forum. At this point the "legal and practical value"\textsuperscript{100} of the asserted right has been destroyed; the denial of immediate review would thus "render impossible any review whatsoever."\textsuperscript{101}

The court in Chasser v. Achille Lauro Lines dismissed the analogy to the double jeopardy rights at stake in Abney because the right to litigate in a particular forum is not "of the same magnitude as a constitutional right."\textsuperscript{102} The Supreme Court, however, has not limited the collateral order doctrine to constitutional claims.\textsuperscript{103} In a footnote to the Abney opinion, the Court specifically referred to the similarities between the non-constitutional rights in Cohen and the constitutional claim of double jeopardy in Abney:

A cogent analogy can be drawn to the Cohen decision. There, the corporate defendant claimed that the state security statute, if applicable, conferred on it a right not to face trial at all unless the dissatisfied shareholder first posted security for the costs of the litigation. By permitting an immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not "canceled out."\textsuperscript{104}

The "essence" of the right claimed under an exclusive forum-selection

\begin{footnotes}
\textsuperscript{97} 431 U.S. 651 (1977).
\textsuperscript{98} See id. at 662-63.
\textsuperscript{99} See id. at 662.
\textsuperscript{100} United States v. MacDonald, 435 U.S. 850, 860 (1978).
\textsuperscript{103} Cohen, the case that announced the collateral order doctrine, was based on a non-constitutional right. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (right under state statute to security in shareholder's derivative suit); see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 31 (1983) (right to proceed with federal action despite pendency of similar state court action); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (right to avoid paying 90 percent of notice costs in a class action suit); Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 688-89 (1950) (right to attachment of vessel in admiralty action).
\textsuperscript{104} Abney v. United States, 431 U.S. 651, 662 n.7 (1977).
\end{footnotes}
clause is a right not to stand trial anywhere but in the selected forum.\textsuperscript{105} The Supreme Court implicitly recognized this in \textit{The Bremen}; the purpose of the clause there was to prevent the defendant towing company from being subject to suit in any of the myriad jurisdictions through which its ship traveled.\textsuperscript{106} The claimed right is thus an entitlement not to stand trial under certain circumstances that is effectively lost if the case is erroneously permitted to go to trial. Like the statute in \textit{Cohen}, which prohibited a shareholder's suit unless security was first posted, a forum-selection clause establishes a procedural rule to be followed in subsequent litigation; like the benefits of the statute in \textit{Cohen}, the benefits of an exclusive forum-selection clause, so proudly heralded by \textit{The Bremen}, will be "canceled out" unless immediate appeal is permitted.

**CONCLUSION**

A district court order refusing to dismiss an action brought in violation of an exclusive forum-selection clause meets all of the requirements for immediate appeal as a collateral order. It conclusively determines where the litigation will take place; it resolves an issue completely separate from the merits of the cause of action; and it is effectively unreviewable on appeal from final judgment. Unless immediate appeal is allowed, moreover, the party seeking to enforce the clause will be deprived of a bargained-for contractual right. This right cannot be vindicated on appeal from final judgment because the right to litigate only in the forum selected by the parties will have been irretrievably lost. This result will defeat the purpose of the parties in negotiating the clause: to eliminate the risk of suit in an unknown forum. The expense and burden of defending a suit in any court that might assert jurisdiction over a dispute between the parties can be a substantial hindrance to commercial transactions. These considerations led the Supreme Court to validate forum-selection clauses in \textit{The Bremen}. The importance of the right to have a dispute litigated in a single preselected forum and the federal policies

\textsuperscript{105} In \textit{Van Cauwenberghe v. Biard}, 108 S. Ct. 1945, 1950 (1988), the Supreme Court said the "critical question" in deciding whether an order is effectively unreviewable under \textit{Cohen} "is whether 'the essence' of the claimed right is a right not to stand trial." \textit{Id.} (quoting Mitchell v. Forsyth, 472 U.S. 511, 525 (1985)). When a forum-selection clause is viewed consistently with the \textit{Bremen} principles it clearly satisfies this test. In \textit{Van Cauwenberghe}, the Court held that an order denying a motion to dismiss on the ground of forum non conveniens is not immediately appealable under \textit{Cohen} because the forum non conveniens issue was not immediately separable from the merits of the action. The Court found that the various factors considered in assessing a forum non conveniens motion would "substantially overlap factual and legal issues of the underlying dispute." \textit{Id.} at 1953. A forum-selection clause on the other hand has been held to "establish[ ] a legal right which is analytically distinct from the rights being asserted in the dispute to which it is addressed." \textit{Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.}, 709 F.2d 190, 195 (3d Cir.), \textit{cert. denied}, 464 U.S. 938 (1983).

encouraging parties to negotiate forum-selection clauses therefore require that the order be permitted immediate appeal.

Howard W. Schreiber