Enforcement of Forum-Selection Clauses in Federal Court After *Atlantic Marine*

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ENFORCEMENT OF FORUM-SELECTION CLAUSES IN FEDERAL COURT
AFTER ATLANTIC MARINE

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Forum-selection clauses are important agreements that limit exposure to risk of litigation in an undesired locale. The enforcement of forum-selection clauses in the U.S. federal court system was not always certain, but today, such agreements are broadly considered enforceable. Courts, however, are split as to whether such clauses are governed by state or federal law and as to the proper procedural mechanism for enforcement. Recently, in Atlantic Marine Construction Co. v. U.S. District Court, the U.S. Supreme Court made strides toward resolving these disagreements among lower courts.

This Note explores the history of enforcement of forum-selection clauses in federal court and articulates the legal complexities that remain in the wake of Atlantic Marine. It argues that Atlantic Marine implicitly resolved the choice-of-law split in favor of applying state substantive law to determine a forum clause’s validity and federal procedural law to determine its enforceability. To effectuate this implicit resolution, this Note proposes that courts engage in a two-step analysis in evaluating motions to enforce forum-selection clauses and that litigants bring such motions under Federal Rules of Civil Procedure 12(b)(6), 12(c), or 56.

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INTRODUCTION

A large internet service provider makes the search records of more than 650,000 customers available for public download.1 These records are subsequently distributed widely throughout the internet.2 They reveal highly sensitive personal information, including the customers’ struggles with sexuality, alcohol addiction, mental illness, physical abuse, domestic violence, incest, adultery, and rape.3 The records also “contain[] addresses, phone numbers, credit card numbers, social security numbers, passwords and other personal information.”4 In response to this information breach, two customers, suing as “Doe” plaintiffs to protect their anonymity, bring a class action against the internet service provider in California federal court seeking relief for all customers under a federal privacy statute and various California consumer protection laws.5 The defendant, seeking to enforce a forum-selection clause found in its standard customer agreement, brings a motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3).6 If the motion is successful, the plaintiffs will be compelled to bring their lawsuit in Virginia state court “where a class action remedy would be unavailable to them”7 and could be forced to bring their claims pursuant to Virginia law, which “provides significantly less consumer protection to its citizens than California law.”8

This Note assesses the substantive law governing the validity and enforceability of forum-selection clauses9 and procedural mechanisms for enforcing such clauses in federal court. The U.S. Supreme Court, in Atlantic Marine Construction Co. v. U.S. District Court,10 recently resolved a circuit split on the use of 28 U.S.C. §§ 1404 and 1406, relating to “Change of Venue” and “Cure or waiver of defects” in venue, respectively, and Rule 12(b)(3), relating to the enforcement of forum-selection clauses.

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1. Doe 1 v. AOL LLC, 552 F.3d 1077, 1078 (9th Cir. 2009).
2. Id. at 1079.
3. Id.
4. Id.
5. Id. at 1079–80.
6. Id. at 1080 (noting that the defendant “moved to dismiss the action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3)” on the basis of the parties’ forum selection clause).
7. Id. at 1079; see also id. at 1081–82 (“[T]he forum selection clause at issue here—designating the courts of Virginia—means the state courts of Virginia only . . . .”).
8. Id. at 1084 n.13; see also id. at 1083 n.12 (“California courts have ‘extolled’ ‘the right to seek class action relief in consumer cases.’ In Virginia state court, in contrast, class action relief for consumer claims is unavailable.” (quoting Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 712 (Ct. App. 2001))).
9. A forum-selection clause is a “contractual provision in which the parties [to the contract] establish the place . . . for specified litigation between them.” BLACK’S LAW DICTIONARY 726 (9th ed. 2009). The case law and academic literature use a number of different terms to describe the same basic contractual provisions, and this Note uses these terms interchangeably. See Patrick J. Borchers, Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform, 67 WASH. L. REV. 55, 56 n.1 (1992) (referring to “‘forum selection clause’ or ‘forum clause’ and ‘forum selection agreement’ or ‘forum agreement’ interchangeably”).
Missing from the narrow debate before the Court in *Atlantic Marine*, however, was discussion of a broader circuit split concerning the validity and enforcement of forum-selection clauses.11

Prior to *Atlantic Marine*, there was no meaningful consensus among the circuits concerning the standard for determining the validity and enforceability of forum-selection clauses or the proper procedural mechanisms for enforcement.12 While *Atlantic Marine* has provided some clarification, the remaining multifaceted circuit splits implicate longstanding federalism concerns,13 threaten to confuse litigators and courts, and jeopardize parties’ substantial litigation and contractual rights in federal court.14

Part I of this Note begins with an overview of the importance of forum-selection clauses to contracting parties. These provisions assist parties in allocating the risk of litigating in a given jurisdiction before contractual disputes arise and thus increase predictability and efficient resolution of such disputes.15 The overview also explores the difference between so-called “mandatory” and “permissive” forum-selection clauses,16 how they interact with choice-of-law agreements, and how federal courts interpret the scope and meaning of such provisions.17 Part I includes a discussion of the Supreme Court’s forum-selection clause jurisprudence. This discussion begins with the Court’s historic refusal to give effect to forum-selection clauses, traces how that refusal was grounded in the “ouster doctrine,”18 and examines its subsequent abandonment by the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*19 Part I.B discusses the Court’s holdings in *The Bremen*, *Stewart Organization, Inc. v. Ricoh Corp.*,20 and *Carnival Cruise Lines, Inc. v. Shute*,21 which led to widespread disagreements among lower

11. See infra Part II.A.
17. See infra Part I.A.
18. Borchers, supra note 9, at 60.
federal courts concerning the enforcement of forum-selection clauses.\textsuperscript{22} It concludes with a discussion of Atlantic Marine,\textsuperscript{23} which resolved some—but far from all—of these disagreements and altered the standard of enforcement of forum clauses through the federal common law\textsuperscript{24} doctrine of forum non conveniens and § 1404(a).\textsuperscript{25}

Part II explains the disagreements that remain among lower courts concerning the enforcement of forum-selection clauses. First, it discusses the split among federal courts concerning the application of federal or state law to determine the validity and enforceability of forum-selection clauses.\textsuperscript{26} Part II concludes by discussing the viability of enforcing forum-selection clauses via Federal Rules of Civil Procedure 12(b)(6), 12(c), and § 1404(a)\textsuperscript{27} and explores the implications of this approach alongside Atlantic Marine’s newly articulated § 1404(a) and forum non conveniens standard.\textsuperscript{28}

Part III argues that Atlantic Marine breathed new life into arguments that the validity of forum-selection clauses should be determined according to state law, even if enforceability is a question of federal law. It proposes that courts and litigants adopt a two-step method in assessing whether a given forum-selection clause should be enforced.\textsuperscript{29}

This argument is grounded in the Stewart Court’s interpretation of the venue transfer statute, § 1404(a), as implicating only the enforceability of forum-selection clauses and not their validity.\textsuperscript{30} Part III then argues that the Supreme Court implicitly adopted this interpretation in Atlantic Marine when it held that “venue in all civil actions” is determined exclusively by statute and that § 1406(a) and Rule 12(b)(3) are applicable only when venue is statutorily infirm.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{23} No. 12-929 (U.S. Dec. 3, 2013).
\item \textsuperscript{24} See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253–54 (1981) (discussing the federal “common-law doctrine” of forum non conveniens).
\item \textsuperscript{25} See infra Part I.B.4.b.
\item \textsuperscript{26} See infra Part II.A.
\item \textsuperscript{27} See infra Part II.B.1.
\item \textsuperscript{28} See infra Part II.B.2.
\item \textsuperscript{29} See infra Part III.A.
\item \textsuperscript{30} See infra Part III.A.1. As Justice Antonin Scalia observed in his Stewart dissent: “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.” Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37 (1988) (Scalia, J., dissenting).
\item \textsuperscript{31} See Atl. Marine Constr. Co. v. U.S. Dist. Court, No. 12-929, slip op. at 4–8 (U.S. Dec. 3, 2013). Proper venue is established according to the dictates of 28 U.S.C. § 1391(b) and an agreement of the parties cannot fairly be characterized as rendering statutory venue “improper.” See Licensed Practical Nurses, Technicians & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc., 131 F. Supp. 2d 393, 404–05 (S.D.N.Y. 2000) (“‘Venue,’ in turn, is defined by statute at 28 U.S.C. § 1391, which sets forth where venue may properly be laid. The determination of the appropriate venue under Section 1391 revolves around [various factors listed in that statute, which do not include forum-selection clauses.] . . . The fact that the parties contractually agreed to litigate disputes in another forum is not a
Next, Part III argues that enforcing forum-selection clauses through the doctrine of forum non conveniens could raise concerns grounded in the *Erie Railroad Co. v. Tompkins*\(^\text{32}\) doctrine. This is because the forum non conveniens inquiry under federal law allows for a balancing of various interests in making the enforcement-dismissal determination,\(^\text{33}\) while state law may presume validity and enforceability of forum clauses absent a showing of extraordinary circumstances such as fraud, adhesion, or violation of public policy.\(^\text{34}\) Thus, the application of forum non conveniens doctrine could violate the twin aims of *Erie* by encouraging forum shopping and leading to possible inequitable administration of state contract law.\(^\text{35}\)

Part III concludes by arguing that the Supreme Court gave too little consideration in *Atlantic Marine* to the method of raising a forum-selection clause as an affirmative defense and enforcing it by moving either to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), for judgment on the pleadings pursuant to Rule 12(c), or for summary judgment pursuant to Rule 56.\(^\text{36}\) In evaluating a hypothetical defendant’s forum-clause affirmative defense, a federal court sitting in diversity would look to the substantive state law governing contract disputes, including the state law that governs the validity of forum-selection clauses, and enforce the clause via dismissal provided that a defendant has met its procedural burden under the applicable rule of civil procedure.\(^\text{37}\) For example, where a plaintiff has filed a lawsuit in violation of a forum-selection clause, the defendant files a motion for summary judgment, and the plaintiff can “raise no genuine question of venue, but one of contract.” (quoting Nat’l Micrographics Sys., Inc. v. Canon U.S.A., Inc., 825 F. Supp. 671, 678–79 (D.N.J. 1993)).

\(^{32}\) *304 U.S. 64 (1938).*

\(^{33}\) *See MBI Grp., Inc. v. Credit Foncier Du Cameroun, 616 F.3d 568, 571 (D.C. Cir. 2010)* (“A court may . . . dismiss a suit for forum non conveniens if the defendant shows there is an alternative forum that is both available and adequate and, upon a weighing of public and private interests, the strongly preferred location for the litigation.” (emphasis added)). The Court has modified this standard when the movant is seeking to enforce a valid forum-selection clause, but some concerns remain. *See infra* Part III.B.

\(^{34}\) *See Doe 1 v. AOL LLC, 552 F.3d 1077, 1084 (9th Cir. 2009)* (recognizing California’s refusal to enforce forum-selection clauses that limit a resident’s ability to pursue state-law consumer protection claims); *Polzin v. Appleway Equip. Leasing, Inc., 191 P.3d 476, 481 (Mont. 2008)* (“[F]orum selection clauses are ‘prima facie [sic] valid’ and will be enforced unless the resisting party can show that the clause is unreasonable under the circumstances.” (quoting Milanovich v. Schnibben, 160 P.3d 562, 564 (Mont. 2007))).

\(^{35}\) *See Hanna v. Plumer, 380 U.S. 460, 468 (1965)* (noting the importance of “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws”).


dispute as to any material fact” that the forum-selection clause is valid and should be enforced, then the defendant would be entitled to summary judgment. 38 This approach is superior for four reasons. First, it circumvents the complicated statutory interpretation issues raised by the venue transfer approach. Second, it avoids the potential Erie problems of the forum non conveniens approach. 39 Third, it throws into sharp relief the important distinction between the validity and the enforceability of forum-selection clauses. Finally, it is superior to those solutions that propose statutory reform or the promulgation of a new Federal Rule of Civil Procedure, 40 because it does not depend on legislative action.

I. THE HISTORY OF FORUM-SELECTION CLAUSES AND THE SUPREME COURT’S FORUM-SELECTION CLAUSE JURISPRUDENCE

This Part begins with a discussion of the importance of forum-selection clauses to contracting parties including their economic and contractual significance: forum clauses are either part of the parties’ bargained-for exchange (in the case of sophisticated parties) or they more generally reduce transaction costs and produce savings that are then passed on to consumers (in the case of form contracts with little or no bargaining). Part I.B.1, Part I.B.2, and Part I.B.3 give a detailed account of three Supreme Court cases, The Bremen, Stewart, and Carnival Cruise, whose subsequent interpretation by lower federal courts led to disarray in forum-selection clause enforcement. This disarray includes numerous circuit splits. 41 Part I.B.4 concludes with an examination of the Supreme Court’s recent holding in Atlantic Marine, where the Court resolved some, but not all, of the disagreements concerning the enforcement of forum-selection clauses.

A. The Importance of Forum-Selection Clauses to Contracting Parties

Forum-selection clauses have numerous benefits in complex national or transnational transactions. Such transactions are by their very nature “fraught with legal risks,” including the “unwelcome possibility of litigation in a foreign court applying unfamiliar rules.” 42 The economic disruptions caused by having to litigate in an unfamiliar court system can be substantial—they include: significant travel expenses, communication and language barriers, and lack of familiarity with laws governing the jurisdiction. 43 Forum-selection clauses can diminish the costs of these risks, and the resultant savings are presumably passed on to the contracting

38. FED. R. CIV. P. 56(a); see also cases cited supra note 37 (applying Rule 12(b)(6)).
39. See infra Part III.C.
40. See, e.g., Borchers, supra note 9, at 93–111 (proposing a federal statute); Lee, supra note 13, 690–95 (same); Wright, supra note 22, at 1651–54 (advocating promulgation of a new Federal Rule of Civil Procedure).
41. See Wright, supra note 22, at 1635–42.
42. Friedrich K. Juenger, Supreme Court Validation of Forum-Selection Clauses, 19 WAYNE L. REV. 49, 50 (1972).
43. Id.
parties.\textsuperscript{44} Courts and commentators have noted, “The right to litigate in one forum or another has an economic value that parties can estimate with reasonable accuracy,”\textsuperscript{45} and it is arguably superior for the parties to allocate the costs associated with that right via contract.\textsuperscript{46} As a result, forum-selection clauses can be an important part of the contracting parties’ bargaining process.\textsuperscript{47} Beyond the context of international business, the savings gained from forum-selection clauses is recognized by those engaged in all types of business.\textsuperscript{48} Forum-selection clauses have permeated American commercial activity to such an extent that even many of today’s form contracts designate the appropriate forum to litigate disputes.\textsuperscript{49}

The scope of a forum-selection clause, is, in a sense, constrained only by the imagination of the drafter.\textsuperscript{50} But, broadly classified, a forum-selection clause can be one of two types.\textsuperscript{51} Either it is merely “an agreement to litigate in the agreed forum or fora,” or it is “an agreement to litigate only in a forum or fora.”\textsuperscript{52} The former is called a “permissive” or “nonexclusive” forum clause, while the latter is called a “mandatory” or “exclusive” forum clause.\textsuperscript{53} In determining whether a forum clause is mandatory or permissive, the “inquiry is one of . . . interpretation” according to basic principles of contract law.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{44} See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) (“[I]t stands to reason that [consumers entering into contracts] containing a forum clause . . . benefit in the form of reduced [prices] reflecting the savings that [a merchant] enjoys by limiting the fora in which it may be sued.”).
\item \textsuperscript{45} Borchers, supra note 9, at 57 (citing Nw’l Ins. Co. v. Donovan, 916 F.2d 372, 378 (7th Cir. 1990) (Posner, J.).
\item \textsuperscript{46} Carnival Cruise, 499 U.S. at 594. But see Goldman, supra note 15, at 701 (noting that the Supreme Court “implicitly, if not explicitly, based its decision [in Carnival Cruise] on principles of economic efficiency,” but arguing that economic analysis cannot support its result or reasoning).
\item \textsuperscript{47} The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 14 (1972) (noting, in the context of an admiralty towing agreement, that “it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations”).
\item \textsuperscript{48} See, e.g., Carnival Cruise, 499 U.S. at 587–88 (examining a forum-selection clause on a boat cruise ticket); Doe 1 v. AOL LLC, 552 F.3d 1077, 1078 (9th Cir. 2009) (interpreting a forum-selection clause in an internet service provider customer agreement); Jason A. Lien, Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court’s Pending Review of Atlantic Marine, CONSTRUCTION LAW., Fall 2002, at 27, 27 (“Most standard construction contract forms require that any disputes be venued where the project is located.”).
\item \textsuperscript{49} See sources cited supra note 48.
\item \textsuperscript{50} See Borchers, supra note 9, at 56–57; cf. Nat’l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964) (“[P]arties to a contract may agree in advance to submit to the jurisdiction of [any] given court.”).
\item \textsuperscript{51} Borchers, supra note 9, at 56–57.
\item \textsuperscript{52} Id. at 56 n.1.
\item \textsuperscript{53} Id.; see also Phillips v. Audio Active Ltd., 494 F.3d 378, 383 (2d Cir. 2007).
\item \textsuperscript{54} Phillips, 494 F.3d at 386. It should be noted that whether a forum clause should be interpreted according to federal or state law is an open question. See Nw. Nat’l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990) (Posner, J.) (“[I]t can be argued that as the rest of the contract in which a forum selection clause is found will be interpreted under the principles of interpretation followed by the state whose law governs the contract, so should
While not always the case, presently at the state level, forum-selection clauses are broadly enforced. As to the procedural mechanism for enforcement, the most popular appears to be dismissal, although other methods are used as well. There is overlap between the standards employed for determining the validity and the enforceability of forum clauses in state and federal court. This overlap is largely due to state court adoption of the U.S. Supreme Court’s forum-selection clause jurisprudence since the early 1970s. Still, the standards are far from entirely coextensive.

### B. The Supreme Court’s Forum-Selection Clause Jurisprudence

Historically, American courts, both state and federal, were nearly unanimous in their refusal to enforce forum-selection clauses. The primary support for this categorical refusal was found in the (now rejected) “ouster doctrine.” Put simply, in the era of the ouster doctrine, courts refused to enforce forum-selection clauses because they were “contrary to public policy,” or . . . their effect was to ‘oust the jurisdiction’ of the court.” In other words, a court properly vested with jurisdiction could not be ousted by the acts of a private party. The ouster doctrine began to fall into disfavor in the mid-twentieth century and was finally explicitly rejected by the Supreme Court in 1972 in The Bremen v.

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55. See generally Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4TH 404 (1984) (collecting cases from every state where forum-selection clauses were enforced). But in limited circumstances enforcement of forum-selection clauses is deemed contrary to public policy. See id. § 3; see also Doe 1 v. AOL LLC, 552 F.3d 1077, 1083–84 (9th Cir. 2009); Morris v. Towers Fin. Corp., 916 P.2d 678, 679 (Colo. App. 1996).


57. See id. § 3.

58. See generally Dougherty, supra note 55, § 4.

59. See generally id. § 4[a] (“[C]ourts in [nearly all states] have adopted the view that contractual provisions limiting the place or court in which a future action may be brought are not invalid per se, and that such provisions may be enforceable if, upon consideration of the facts of each case, they are ascertained to be reasonable.”).

60. See id.

61. Borchers, supra note 9, at 56–57; Mullenix, supra note 14, at 307–10; see also The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (“Forum-selection clauses have historically not been favored by American courts.”).

62. Borchers, supra note 9, at 60.


64. See Juenger, supra note 42, at 51.
Zapata Off-Shore Co., which forms the foundation of the federal courts’ understanding of forum-selection clauses.


*The Bremen* was an admiralty case. In that case, plaintiff Zapata, a corporation based in Houston, Texas, contracted with defendant Unterweser, a German corporation and owner of the tug boat “Bremen,” to tow Zapata’s oil rig from Louisiana to Ravenna, Italy, where Zapata planned to drill wells. The contract contained the following forum-selection clause: “Any dispute arising must be treated before the London Court of Justice.”

The oil rig’s journey from Louisiana to Italy was cut short when severe weather conditions in the Gulf of Mexico caused substantial damage to the rig and Zapata instructed the Bremen to tow the damaged rig to Tampa, Florida. Zapata brought suit in the Middle District of Florida against Unterweser in personam and the Bremen in rem seeking $3.5 million in damages. Unterweser invoked the contract’s forum-selection clause and moved to dismiss for lack of jurisdiction, in apparent reliance on a theory of ouster, “or on *forum non conveniens* grounds.”

The district court refused to enforce the forum-selection clause and the then Fifth Circuit Court of Appeals, sitting en banc, affirmed. It found that the forum-selection clause was contrary to public policy and that “even if it took the view that choice-of-forum clauses were enforceable unless ‘unreasonable’ it was ‘doubtful’ that enforcement would be proper . . . because England was ‘seriously inconvenient’ for trial of the action.” This holding directly contradicted the intent of the parties in entering into the forum-selection clause in the first place: England was chosen by the parties because it was a neutral forum with significant admiralty expertise.

The Supreme Court reversed, finding that the court of appeals had given “far too little weight and effect . . . to the forum clause.” In light of the policy pressures exerted by modern commercial realities and international trade, the Supreme Court held 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.”78 Under this
standard, a forum-selection clause must be enforced unless the resisting
party can make a strong showing that enforcement would be unreasonable
and unjust, or “that the clause [itself is] invalid” due to fraud.79 Likewise, a
forum-selection clause will not be enforced if enforcement would be
contrary to public policy, “whether declared by statute or by judicial
decision.”80

Basic contract law principles were at the foundation of the Court’s
reasoning when it articulated this standard.81 The Court recognized that
forum-selection clauses are frequently freely negotiated and bargained-for
elements of the parties’ exchange82 and thus, like other contractual rights,
should be enforced in all but the most exceptional circumstances.83 One
such circumstance is when the substantive law of the jurisdiction where suit
is brought forbids enforcement.84

Yet, while the Court articulated a standard for determining whether or
not a forum-selection clause is enforceable, it left open the question of what
procedural mechanism should be employed to effectuate such
enforcement.85 Furthermore, in the wake of The Bremen, it was unclear if
the standard articulated by the Supreme Court was applicable only to
“federal district courts sitting in admiralty,”86 or to all cases over which the
federal courts had jurisdiction, including diversity actions.87 Nevertheless,
for some time it was “rare that a federal court even question The Bremen’s
applicability to domestic cases based in federal question or diversity

78. Id. at 10.
79. Id. at 15.
80. Id. at 15 (emphasis added).
81. Indeed, The Bremen is replete with language deferential to private contracts and with
the language of substantive contract law itself. See, e.g., id. at 11 (noting that enforcement of
forum-selection clauses “accords with ancient concepts of freedom of contract”); id. at 12–
13 (“There are compelling reasons why a freely negotiated private international agreement,
unaffected by fraud, undue influence, or overweening bargaining power . . . should be given
full effect.”); id. at 9 (“[E]xpansion of American business and industry will hardly be
encouraged if, notwithstanding solemn contracts, we insist . . . that all disputes must be
resolved under our laws and in our courts.” (emphasis added)).
82. Id. at 16; see JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 2 (6th ed.
2009) (“[T]he economic core of [a] contract is an exchange between at least two
parties . . . .”).
84. Id. at 15 (“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.”).
85. See Borchers, supra note 9, at 68–69.
86. The Bremen, 407 U.S. at 10.
87. See Mullenix, supra note 14, at 313 (“[A]s a case based in admiralty jurisdiction, the
Court could fashion a federal common law rule . . . . [B]ut whether the Supreme Court could
speak more broadly to domestic federal cases is troublesome . . . .”).
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38 jurisdiction,”88 at least until the next time the Supreme Court encountered forum clauses directly.


The Court revisited forum-selection clauses over a decade later in *Stewart Organization, Inc. v. Ricoh Corp.*,89 a nearly unanimous, if flawed, decision.90 In *Stewart*, the Court confronted a straightforward forum-selection dispute.91 There, petitioner Stewart, an Alabama corporation, entered into a distributorship contract with respondent Ricoh, a manufacturer of copier products.92 The contract contained a mandatory forum-selection clause which provided that “any appropriate state or federal district court located in . . . New York City . . . shall have exclusive jurisdiction” over any dispute arising under the contract.93 When relations between the parties went sour, Stewart filed an action, in contravention to the forum-selection clause, in the Northern District of Alabama.94 Relying on the forum clause, Ricoh moved to transfer or dismiss the case to the Southern District of New York pursuant to 28 U.S.C. §§ 1404(a) and 1406.95

The district court refused to enforce the forum-selection clause, reasoning “that the transfer motion was controlled by Alabama law and that Alabama looks unfavorably upon contractual forum-selection clauses.”96 The district court, however, certified its ruling for interlocutory appeal, and the Eleventh Circuit Court of Appeals reversed, holding that “venue in a diversity case is manifestly within the province of federal law”97 and that the standards articulated in *The Bremen* mandated enforcement.98

a. The Majority Opinion

The Supreme Court essentially followed the lead of the Eleventh Circuit99 and addressed the enforcement of a forum-selection clause through a motion to transfer pursuant to 28 U.S.C. § 1404(a) as a matter of

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88. *Id.*
89. 487 U.S. 22 (1988).
90. See Borchers, *supra* note 9, at 67 (“[T]he Court has been more forthcoming with questions than answers.”); *Lee, supra* note 13 at 671–73.
92. *Id.*
93. *Id.* at 24 n.1.
94. *Id.* at 24.
95. *Id.*
96. *Id.*
97. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068 (11th Cir. 1987) (en banc), aff’d, 487 U.S. 22. The Eleventh Circuit reheard the case en banc and essentially adopted the reasoning of the original panel. *See id.* (“As the panel stated[,] . . . ‘If venue were to be governed by the law of the state in which the forum court sat, the federal venue statute would be nugatory.’” (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 649 (11th Cir. 1986))).
99. See *id.* (“We now affirm under somewhat different reasoning.”).
It framed the question as “whether to apply a federal statute such as [28 U.S.C. § 1404(a)] in a diversity action.”\footnote{See generally id. at 24–25.} Rather than applying the Bremen standard to determine if the forum-selection clause was enforceable, the Court drew on its Rules Enabling Act jurisprudence, including Hanna v. Plumer\footnote{380 U.S. 460 (1965).} and its progeny, and interpreted § 1404(a) to resolve the dispute between the parties.\footnote{Stewart, 487 U.S. at 26 (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987); Walker v. Armco Steel Corp., 446 U.S. 740, 759 (1980)).} This allowed the Court to sidestep any possible Erie question because “when the federal law sought to be applied is a congressional statute, the first and chief question . . . is whether the statute is ‘sufficiently broad to control the issue before the Court.’”\footnote{Id. (quoting Walker, 446 U.S. at 749–50).} Setting aside the holding in The Bremen that forum clauses are prima facie valid and should be enforced absent extraordinary circumstances, but not explicitly overruling it, the Court concluded that § 1404(a) controlled the respondent’s request to transfer venue pursuant to the forum-selection clause and that the clause was merely a factor to be considered in deciding whether or not to transfer.\footnote{Id. at 32 (“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.”); see also id. at 29–30 (“The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties’ private expression of their venue preferences.”).} As currently worded, the “Change of venue” statute, 28 U.S.C. § 1404(a), provides, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or . . . to which all parties have consented.” 28 U.S.C. § 1404(a) (2006). It applies when plaintiff has sued in a proper venue, but where “in the interest of justice,” 28 U.S.C. § 1404(a), the case should have been tried in a different district or division. Van Dusen v. Barrack, 376 U.S. 612, 634 (1964). Section 1404(a) was passed into law as part of the Judicial Code of 1948. See 15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3841 (4th ed. 2013). The overall purpose of § 1404(a) “is to prevent the waste ‘of time, energy, and money’ and ‘to protect litigants, witnesses, and the public against unnecessary inconvenience and expense.’” Van Dusen, 376 U.S. at 616 (citing Cont’l Grain Co. v. Barge FBL-585, 364 U.S. 19, 26, 27 (1960)). While the judicial standard used to determine whether to grant a motion to transfer brought pursuant to § 1404(a) is similar to that used in evaluating a motion to dismiss based on the doctrine of forum non conveniens, and though “the statute was drafted in accordance with the doctrine of forum non conveniens, . . . § 1404(a) was intended to be a revision rather than a codification of the common law,” Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981). Compare Piper Aircraft Co., 454 U.S. at 255–61 (indicating that courts should balance the plaintiff’s choice of forum, adequacy of an alternative forum, private interest factors, and public interest factors in deciding to grant forum non conveniens dismissal), with Van Dusen, 376 U.S. at 616 (holding that a district court may grant a motion pursuant to § 1404 “if the transfer is warranted by the convenience of parties and witnesses and promotes the interests of justice”). The inquiry under § 1404(a) is essentially a balancing test of public and private interest factors. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). These interest factors include, but are not limited to: the plaintiff’s choice of forum, the defendant’s preferred forum, the relative physical and financial conditions of the parties as it relates to their ability to litigate in given fora, the availability of witnesses to appear at trial in given fora, where the claim arose, the location of physical evidence relevant
eight that “the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406 because [Ricoh] apparently does business in the Northern District of Alabama,” making the district a proper venue as per § 1391(c). Arguably, the implication of this footnote is that the forum-selection clause at issue did not render venue improper in all but the designated forum, even though the clause, by its terms, was clearly exclusive.

b. Justice Scalia’s Dissent

Justice Antonin Scalia was alone in dissent. The gravamen of his objection was that the Court had answered the wrong question, or at the very least had answered the pertinent questions in the incorrect order. He framed the question before the Court differently: “[T]he initial question before us is whether the validity between the parties of a contractual forum-selection clause falls within the scope of 28 U.S.C. § 1404(a).” He then objected to the court’s interpretation of § 1404(a) as “sufficiently broad to cause a direct collision with state law” and as determinate of the “validity between the parties of the forum-selection clause.” As a dissenter had noted in the Eleventh Circuit below, “The enforceability of contract provisions is typically an issue of substance which a federal court sitting in its diversity jurisdiction must decide according to state law.” Similarly, Justice Scalia pointed out that Congress enacted § 1404(a) “against the background that issues of contract, including a contract’s validity, are nearly always governed by state law.” He observed that when Congress...
intended to preempt state contract law, it did so explicitly, as it had with the Federal Arbitration Act, which was passed just a year before the venue statute that included § 1404(a).\textsuperscript{114} Thus, application of a venue transfer statute to a question of contract validity was inapposite.\textsuperscript{115}

Furthermore, § 1404(a) did not speak to the enforceability issue, especially because the plain language of § 1404(a)\textsuperscript{116} looks to the present and the future, namely “what is likely to be just in the future, when the case is tried, in light of things as they now stand.”\textsuperscript{117} By requiring that lower courts now consider the parties’ stated forum preference in making the transfer determination, Scalia argued that the Court had introduced “a new retrospective element” of examining the relative position of the parties at the time they contracted.\textsuperscript{118} In light of the types of factors that courts typically analyze in making the discretionary venue-transfer decisions permitted by § 1404(a), consideration of a retrospective element is improper.\textsuperscript{119} Congress clearly did not contemplate § 1404(a) being used to determine contract validity when it passed the venue statute.\textsuperscript{120}

Finally, Justice Scalia noted that the framework established by the majority, whereby the forum clause is to be weighed against other factors in the transfer determination, further implicates the validity issue and raises an important question: “what law governs whether the forum-selection clause is a valid or invalid allocation of any inconvenience between the parties?”\textsuperscript{121} This is because if the forum clause is invalid it should not be entitled any weight at all in the § 1404(a) transfer determination.\textsuperscript{122} Having interpreted § 1404(a) as “simply a venue provision that nowhere mentions contracts or agreements, much less the validity of certain contracts or agreements,” Justice Scalia concluded that there was no federal statute or rule of procedure that governed the validity of forum-selection clauses.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{114} Id. at 36. He further noted that “[i]t is difficult to believe that state contract law was meant to be pre-empted by [§ 1404, which this Court has] said ‘should be regarded as a federal judicial housekeeping measure.’” Id. at 37 (quoting Van Dusen v. Barrack, 376 U.S. 612, 636–37 (1964)).
\item \textsuperscript{115} See id. (“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.”).
\item \textsuperscript{116} Id. at 34 (noting that § 1404(a) “vests the district courts with authority to transfer a civil action to another district ‘[f]or the convenience of the parties and witnesses, in the interest of justice,’” and such “language looks to the present and the future,” but not the past (quoting 28 U.S.C. § 1404(a) (1982)) (alteration in original)).
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. at 34–35.
\item \textsuperscript{119} See id. at 34 (noting that courts consider “the forum actually chosen by the plaintiff, the current convenience of the parties and witnesses, the current location of pertinent books and records, similar litigation pending elsewhere, current docket conditions, and familiarity of the potential courts with governing state law”).
\item \textsuperscript{120} See id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id. at 37. In addition, Justice Scalia argued that it was a fair to assume that “Congress is just as concerned as [the Supreme Court] ha[s] been to avoid significant differences between state and federal courts in adjudicating claims” because such an assumption comports with the “congressional plan underlying the creation of diversity . . .
Thus, the Court was faced with an *Erie*\textsuperscript{124} issue governed by the Rules of Decision Act rather than a question of the constitutional limits on Congress’s power to legislate in a given area.\textsuperscript{125} Justice Scalia argued that resolution of this issue demanded application of *Hanna v. Plumer’s* “relatively unguided *Erie* choice.”\textsuperscript{126} He reasoned that application of a federal judge-made rule for determining validity of a forum-selection clause (i.e., the *Bremen* standard) would violate the twin aims of *Erie* because it would encourage forum shopping between state and federal courts and lead to inequitable administration of state-created contract law.\textsuperscript{127}

3. *Carnival Cruise Lines, Inc. v. Shute*

The Court’s next forum-selection clause case was *Carnival Cruise Lines, Inc. v. Shute*.\textsuperscript{128} *Carnival Cruise*, like *The Bremen*, was an admiralty case.\textsuperscript{129} Unlike that earlier case, the parties in *Carnival Cruise* were not both commercial entities, but two ordinary consumers, the Shutes, and a large cruise ship operator, Carnival.\textsuperscript{130} The Shutes purchased a seven-day cruise aboard one of Carnival’s cruise ships, and while on board the vessel in international waters off the coast of Mexico, Eulalia Shute slipped on the deck and was injured.\textsuperscript{131} When the Shutes, residents of Washington State, brought suit against Carnival in the Western District of Washington, Carnival moved for summary judgment, arguing that the forum-selection

\begin{itemize}
\item [\textsuperscript{124}](304 U.S. 64 (1938)).
\item [\textsuperscript{125}](Stewart, 487 U.S. at 38 (Scalia, J., dissenting) (“Since no federal statute or Rule of Procedure governs the validity of a forum-selection clause, the remaining issue is whether federal courts may fashion a judge-made rule to govern the question.”)).
\item [\textsuperscript{126}](Id. at 26 (majority opinion) (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965))).
\item [\textsuperscript{127}](Id. at 38–41 (Scalia, J., dissenting) (“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 [to get the benefit of the *Bremen* standard of enforceability,’]). It should be noted that although he was resoundingly outvoted on the Supreme Court, some lower federal courts view Justice Scalia’s dissent favorably. See Licensed Practical Nurses, Technicians & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc., 131 F. Supp. 2d 393, 396 (S.D.N.Y. 2000) (Lynch, J.) (expressing “lingering doubt” that Second Circuit precedent following the majority in *Stewart* would prevail if it came before the Supreme Court, and noting that it “is strongly arguable that in a diversity case, the validity of [forum] clauses should be determined by state law, which generally governs substantive questions involving the making and enforcement of contracts”); see also Nw. Nat’l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990) (Posner, J.) (noting a “strong dissent by Justice Scalia . . . particularly [the argument regarding] the spur to forum shopping that is created when the choice of a federal court over a state court determines the validity of a forum selection clause”). The academic response to *Stewart* has likewise been critical. See Mullenix, supra note 14, at 321, 334 (“The Court sheepishly evaded the [forum-selection clause] issues and instead “elected to frame and answer a subtly altered issue of its own choosing’”); Blair, supra note 13, at 810–12; Lee, supra note 13, at 671–73; Wright, supra note 22, at 1636–39.
\item [\textsuperscript{128}](499 U.S. 585 (1991)).
\item [\textsuperscript{129}](Id. at 587).
\item [\textsuperscript{130}](Id. at 588).
\end{itemize}
clause in the Shutes’ tickets required they bring their lawsuit in a court in Florida and that Carnival’s contacts with Washington were insufficient to subject it to personal jurisdiction there.\(^{132}\) The district court granted the summary judgment motion on personal jurisdiction grounds.\(^{133}\) The Ninth Circuit reversed, finding that Carnival’s contacts with Washington were sufficient to sustain the exercise of personal jurisdiction by the district court, and to conclude that under the \textit{Bremen} standard “the forum clause should not be enforced.”\(^{134}\) Key to the Ninth Circuit’s reasoning was evidence “suggest[ing] the sort of disparity in bargaining power that justifies setting aside the forum selection provision,” in contrast to the “complex commercial contract between two sophisticated parties” in \textit{The Bremen}.\(^{135}\) Here, the contract was “presented to the purchaser on a take-it-or-leave-it basis.”\(^{136}\) Even if the Shutes had notice of the forum-selection clause, which was doubtful, the Ninth Circuit noted that there was “nothing in the record to suggest that the Shutes could have bargained over this language,” another important factor distinguishing \textit{The Bremen}.\(^{137}\) Finally, independent from the Shute’s lack of bargaining power, the court of appeals held that the clause was unenforceable on grounds that “enforcement . . . would operate to deprive [the Shutes] of their day in court” because they were incapable of litigating the dispute in Florida.\(^{138}\)

The Supreme Court reversed the Ninth Circuit on the forum clause issue.\(^{139}\) Finding that the Shutes had “essentially . . . conceded that they had notice of the forum-selection provision,” the Court held that the Ninth Circuit has “distorted somewhat” the holding in \textit{The Bremen} “by ignoring the crucial business contexts in which the respective contracts were executed.”\(^{140}\) The majority noted that the fact that the forum provision was not bargained for was inapposite, because “[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”\(^{141}\) The majority reasoned that Carnival had a compelling economic interest in limiting the fora in which it could be sued and that the savings from the forum clause would, in part, be passed on to consumers like the Shutes.\(^{142}\)

\(^{132}\) \textit{Id.}  
\(^{133}\) \textit{Id.}  
\(^{134}\) \textit{Id.} at 589.  
\(^{136}\) \textit{Id.}  
\(^{137}\) \textit{Id.} at 389.  
\(^{138}\) \textit{Carnival Cruise}, 499 U.S. at 589.  
\(^{139}\) \textit{Id.} at 590.  
\(^{140}\) \textit{Id.} at 593.  
\(^{141}\) \textit{Id.}  
\(^{142}\) \textit{Id.} at 593–94.
The Court also rejected the Ninth Circuit’s analysis of the “serious inconvenience of the contractual forum” factor of the *Bremen* enforceability standard. According to the majority, that factor was articulated in the context of a hypothetical situation where two American parties designate a “remote alien forum” for resolution of a local dispute. The forum designated by the ticket here, Florida, was neither remote (Carnival was headquartered there) nor alien. While forum-selection agreements found in form contracts must withstand judicial scrutiny for “fundamental fairness,” the Court seemed to limit its review to rooting out “bad-faith” motives such as using a forum clause “as a means of discouraging cruise passengers from pursuing legitimate claims.”

At least one commentator has questioned “whether anything remains of the reasonableness rule announced in *Bremen*,” because “[t]he principles in *Carnival Cruise* . . . seem to validate [nearly] every agreement” in light of the fact that every large corporation risks being sued in multiple fora and that litigation cost savings resulting from forum clauses can always, in theory, be passed on to consumers in the form of lower prices. Moreover, *Carnival Cruise* did not answer the central question of which law applies to determine the validity and enforceability of forum selection agreements in diversity cases. Instead, lower courts were forced to develop their own patchwork of enforceability standards and mechanisms, creating a complex and multifaceted circuit split.

4. *Atlantic Marine Construction Co. v. U.S. District Court*

The *Bremen*, *Stewart*, and *Carnival Cruise* created massive disarray among lower courts regarding the enforcement of forum selection clauses. First, courts disagreed as to whether to apply state or federal law in determining the validity and enforceability of forum clauses. Moreover, even under federal law, uncertainty ran rampant because courts employed a litany of procedural mechanics to enforce forum clauses, including § 1404(a), § 1406(a), Rule 12(b)(3), Rule 12(b)(6), Rule 12(c), Rule 56, and the federal common law doctrine of forum non conveniens.

The split between courts that used § 1404(a) as opposed to § 1406(a) and Federal Rule of Civil Procedure 12(b)(3) to enforce forum-selection clauses

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143. *Id.* at 594 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)).
144. *Id.*
145. *Id.*
146. *Id.* at 595.
147. *Borchers*, *supra* note 9, at 74; see *Goldman*, *supra* note 15, at 701.
148. *See Borchers*, *supra* note 9, at 80–81.
150. *See generally Wright*, *supra* note 22.
151. *See Blair*, *supra* note 13, at 810–12.
became perhaps the most prominent (the Venue Split). This was because enforcement of a forum-selection clause under § 1404(a), as provided for in Stewart, is discretionary and requires that judges weigh a number of factors, some of which may prove more compelling than the parties’ agreed upon forum, in determining whether or not to enforce the clause and transfer the action. This stood in contrast to the judicial inquiry mandated by the application of § 1406(a), which allows for no judicial discretion at all: if the forum clause renders venue “improper” in the district court where the action was filed, the case must be transferred or dismissed. This difference was not merely technical; it had real consequences for contracting parties, third-party litigants, attorneys, and the judiciary.

Recently, the Supreme Court squarely addressed the § 1404(a) versus § 1406(a) and Rule 12(b)(3) split in Atlantic Marine Construction Co. v. U.S. District Court. This subsection first explores the underlying logic for each side of the Venue Split and then uses the history of the Atlantic Marine litigation to articulate what was at stake and why litigants would argue for the application of § 1404(a) versus § 1406(a) and Rule 12(b)(3). Finally, the section concludes by explaining the Supreme Court’s unanimous rejection of the § 1406(a) and Rule 12(b)(3) approaches in Atlantic Marine, and its clarification of the appropriate inquiry under § 1404 when enforcing a forum-selection clause.

a. The Venue Split: The Discretionary Venue Transfer Approach Versus the Improper Venue Approach

Prior to the Supreme Court’s recent decision in Atlantic Marine, courts that enforced forum-selection clauses through venue transfer motions pursuant to § 1404(a) followed Stewart to the letter (the Discretionary Venue Transfer Approach). Key to their understanding was footnote eight of the majority opinion in Stewart: “The 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 [forum].” Courts that adopted the Discretionary Venue Transfer Approach held that § 1404(a) governs only in the instance where venue is otherwise proper and recognized that “Stewart did not hold that § 1404 is always the proper approach when the parties have entered into a contractual forum-selection clause.” These courts observed that

156. See infra Part I.B.4.a.
“[a] forum-selection clause is properly enforced via § 1404(a) as long as
venue is statutorily proper in the district where suit was originally filed and
as long as the forum-selection clause elects an alternative federal forum.”161
Thus, for courts following the Discretionary Venue Transfer Approach,
whether venue was properly laid, as defined by statute, in the forum where
plaintiff brought the action was a question precedent to choosing the proper
procedural mechanism for the enforcement of the forum-selection clause.162
Just because the forum-selection clause provided for venue in another
district court did not guarantee that the clause would be enforced
when applying § 1404(a).163

Courts that enforced forum-selection clauses through § 1406(a) and Rule
12(b)(3), however, held that an exclusive forum-selection clause rendered
venue “wrong” or “improper” in any court other than that declared by the
agreement (the Improper Venue Approach).164 Courts employing the
Improper Venue Approach cited the general definition of venue as the
“place of litigation” as grounds for their interpretation.165 The courts held
that since parties to a contract that contains a forum clause have set the
place of litigation by their contract, venue was rendered “wrong” or
“improper” in any court other than that set by the terms of the forum
clause.166 Under these circumstances, the judicial inquiry for forum clause
enforceability was then exceedingly simple: read the contract and dismiss
or transfer if venue was “improper” or “wrong” according to the forum-
selection clause.167

b. The Supreme Court Settles the Venue Split

The clash between the § 1404(a) approach on the one hand, and the
§ 1406(a) and Rule 12(b)(3) approach on the other, was sharply illustrated
by the litigation positions of the parties in the Atlantic Marine case.168

161. Id. (emphasis added).
162. See id. (“The choice between § 1404 and § 1406 depends on whether venue was
statutorily proper under § 1391 in the forum where the action was initially filed.”); Id. at 748
n.4 (Haynes, J., concurring) (arguing that the Venue Clarification Act of 2011 “demonstrates
that Congress recognizes that forum-selection clauses may be enforced even where the
chosen venue is not that chosen by federal venue statutes”); Jumara, 55 F.3d at 878.
164. See id. Section 1406(a) mandates dismissal or transfer of a “case laying venue in the
wrong division or district.” 28 U.S.C. § 1406(a) (2006). The district court has discretion to
choose between transfer and dismissal, in evaluating motions pursuant to § 1406(a). Id.
Likewise, Federal Rule of Civil Procedure 12(b)(3) permits a defendant to bring a pre-answer
motion to dismiss for “improper venue.” FED. R. CIV. P. 12(b)(3). Neither the federal venue
statute, nor the Federal Rules of Civil Procedure define “wrong” or “improper” venue. See
2013).
166. Id.
167. Union Elec. Co., 689 F.3d at 970–74. Indeed, the § 1406(a) and Rule 12(b)(3)
inquiries are arguably made even more mechanistic in light of what little remains of the
Bremen standard after Carnival Cruise. See supra note 147 and accompanying text.
168. See generally In re Atl. Marine Constr. Co., 701 F.3d 736 (5th Cir. 2012) rev’d sub
There, Atlantic Marine and J-Crew Management, Inc. contracted for the performance of certain subcontractor duties at a large construction site in Texas.\textsuperscript{169} Their contractual agreement contained an exclusive forum-selection clause providing that “disputes [between the parties] ‘shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.’”\textsuperscript{170} The contract did not contain a choice-of-law provision.\textsuperscript{171}

Atlantic Marine failed to make required payments under the contract and J-Crew filed suit in the Austin Division of the Western District of Texas in violation of the forum clause.\textsuperscript{172} Seeking to enforce the forum clause, Atlantic Marine filed a motion to dismiss pursuant to § 1406(a) and Rule 12(b)(3), arguing that the agreement rendered venue wrong and improper in the Western District of Texas.\textsuperscript{173} In the alternative, Atlantic Marine also moved pursuant to § 1404(a) to transfer to the Eastern District of Virginia.\textsuperscript{174}

Following \textit{Stewart}, the District Court held that § 1404(a) was the proper procedural mechanism to enforce the forum clause.\textsuperscript{175} It rejected Atlantic Marine’s argument that the contract rendered venue “wrong” or “improper” in the Western District of Texas and refused to dismiss or transfer on those grounds.\textsuperscript{176} Instead, the district court balanced a number of factors in its § 1404(a) analysis and found that, notwithstanding the forum clause, the location of the construction site in Texas and the location of third-party witnesses who would be unavailable for trial testimony in Virginia mandated denial of Atlantic Marine’s transfer request.\textsuperscript{177} The Fifth Circuit affirmed: it also followed \textit{Stewart} and adopted the Discretionary Venue Transfer Approach followed by a minority of circuit courts.\textsuperscript{178} It rejected Atlantic Marine’s § 1406(a) argument that the contract had rendered venue improper in Texas\textsuperscript{179} and noted in dictum that Rule 12(b)(3) governed when the “forum-selection clause designates an arbitral, foreign, or state court

\begin{itemize}
\item 169. \textit{In re Atl. Marine Constr. Co.}, 701 F.3d at 737.
\item 170. \textit{Id. at} 737–38.
\item 171. \textit{Id. at} 738.
\item 172. \textit{Id.}
\item 173. \textit{Id.}
\item 174. \textit{Id.}
\item 175. \textit{Id.}
\item 176. \textit{Id.}
\item 179. \textit{Id.}
\end{itemize}
forum . . . because dismissal is the only available option for the district court in those cases.”

The Fifth Circuit then affirmed the district court’s decision not to transfer and its § 1404(a) analysis in three steps. First, it found that the district court did not err in holding that the movant has the burden to prove transfer would be for the convenience of the parties and witnesses and in the interests of justice, even when the parties have entered into a forum-selection agreement. Second, it found no error when the district court considered “the foreseeable inconvenience J-Crew would face if the case were transferred.” The Fifth Circuit held that “Stewart teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts.” Third, it was permissible for the district court to consider the “difficulties J-Crew would face in obtaining depositions from non-party witnesses” if the case were transferred.

The Supreme Court granted Atlantic Marine’s subsequent petition for writ of certiorari. J-Crew and Atlantic Marine argued substantially the same points before the Supreme Court as they had before the Fifth Circuit. An amicus, Professor Stephen E. Sachs, argued that the forum-selection clause should be raised in a Rule 8 responsive pleading or under Rule 12(b)(6), Rule 12(c), or Rule 56 as an affirmative defense to suit—similar to other contract defenses such as waiver, accord and satisfaction, estoppel, and the like.

The Supreme Court, in a unanimous opinion written by Justice Samuel Alito, reversed. First, it sided with the minority of circuit courts of appeals in holding that a party may not enforce a forum-selection agreement under § 1406(a) or Rule 12(b)(3). The Supreme Court held that a statutorily proper venue cannot be rendered improper by the parties’ contractual agreement. It reached this interpretation of the venue statutes by relying on their plain language, their structure, and Supreme Court jurisprudence construing the same.

180. Id. at 740 (dictum).
181. See id. at 741–43.
182. See id. at 741–42.
183. Id. at 742.
184. Id.
185. Id. at 743.
187. See generally id.
188. See generally Brief of Sachs, supra note 36 (making this argument).
190. Id. at 1–2.
191. Id. at 4 (“Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is ‘wrong’ or ‘improper.’ Whether venue is ‘wrong’ or ‘improper’ depends exclusively on whether the court in which the case is brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.” (emphasis added)).
192. See id. at 4–6.
193. See id. at 6 (“The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum. . . . [P]etitioner’s approach would mean that
Notably, the Court pointed to footnote eight of *Stewart* to support its interpretation of the venue statute and observed that “[a] contrary view would all but drain *Stewart* of any significance” because under such a view *Stewart*’s “holding would be limited to the presumably rare case in which the defendant inexplicably fails to file a motion under § 1406(a) or Rule 12(b)(3).” Instead, as the Fifth Circuit had ruled below, the Court held that the parties’ forum-selection agreement could be enforced via a motion to transfer pursuant to § 1404(a), at least where the agreement designated a federal court as an available forum. It reasoned that § 1404(a) is an appropriate mechanism for enforcement because, in contrast to § 1406(a) or Rule 12(b)(3), discretionary transfer does not depend on the initial forum being “wrong” or “improper.” In further support of its holding, the Court noted that § 1404(a) “permits transfer to any district where venue is also proper . . . or to any other district to which the parties have agreed by contract or stipulation.”

The Court’s agreement with the Fifth Circuit ended there. First, contrary to the Fifth Circuit’s Rule 12(b)(3) approach, the Supreme Court held that “the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*.” This is because forum non conveniens was codified in § 1404(a), where Congress provided for transfer as an alternative to dismissal. Using forum non conveniens also creates a more uniform standard for enforcement than the Fifth Circuit’s Rule 12(b)(3) approach, “because both § 1404(a) and the *forum non conveniens* doctrine . . . entail the same balancing-of-interests standard.” The Court explicitly left open

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194. *Id.* at 6–8; *see also* *id.* at 7 (“Under the construction of the venue laws we adopted in *Van Dusen*, a ‘wrong’ district is . . . a district other than ‘those districts in which Congress has provided by its venue statutes that the action ‘may be brought.’” (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 618 (1964))).

195. *Id.* at 8.

196. *Id.* at 8–9.

197. *Id.* at 9.

198. *Id.* (emphasis added).

199. *See generally* *id.* at 9–14.

200. *Id.* at 9–10.

201. *See id.* at 10 (“For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of *forum non conveniens* ‘has continuing application in federal courts.’” (quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007))).

202. *Id.* at 10 (“[C]ourts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.”). As an aside, this directive seems to implicitly contradict how the Court previously characterized the forum non conveniens doctrine in *Piper Aircraft* where it noted that, “District courts are given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981).
the prospect of using a Rule 12(b)(6) motion to enforce a forum clause, whereby a defendant would assert the forum clause as an affirmative defense to suit in any fora other than that designated by the parties’ agreement.203

Second, the Fifth Circuit erred “in failing to make the adjustments required in a § 1404(a) analysis when the transfer motion is premised on a forum-selection clause.”204 With the caveat that its “analysis presuppose[d] a contractually valid forum-selection clause,”205 the Supreme Court clarified that, under a properly adjusted § 1404(a) analysis, a case should be transferred to the forum specified in the forum clause except “under extraordinary circumstances unrelated to the convenience of the parties.”206 This stood in contrast to “the typical case” where the trial court balances the convenience of the parties and public interests, but gives some deference to the plaintiff’s choice of forum.207 Instead, “when a plaintiff agrees by contract to bring suit only in a specified forum,” his “choice of forum merits no weight”208 and he bears the burden of establishing that transfer to the agreed upon forum is unwarranted.209 Furthermore, the Court clarified that since the parties have already allocated inconveniences privately via their forum agreement, “the private-interest factors . . . weigh entirely in favor of the preselected forum.”210 Thus, a district court may only consider arguments about public interests,211 and the plaintiff must show that public interest factors “overwhelmingly disfavor a transfer.”212 In so limiting the § 1404(a) and forum non conveniens inquiries, the Court brought greater uniformity to the enforceability standards under those approaches and the Bremen standard used in admiralty cases and adopted by many states.213

Finally, the Court limited Van Dusen v. Barrack.215 Underscoring the federal source of the enforcement determination under § 1404(a), it held that when a plaintiff files suit in violation of a valid forum-selection clause, “a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules” as it usually would.216 In short, the Court declared that the “policies motivating [Van Dusen’s] exception to the Klaxon rule for

203. See Atl. Marine, No. 12-929, slip op. at 11.
204. Id.
205. Id. at 11 n.5.
206. Id.
207. Id. at 12; see also id. at 12 n.6 (“The Court must also give some weight to the plaintiffs’ choice of forum.” (citing Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1995))).
209. Id.
210. Id.
211. Id. at 14.
212. Id. at 16.
214. See supra notes 58–59 and accompanying text.
§ 1404(a) . . . do not support an extension to cases where a defendant’s motion is premised on enforcement of a valid forum-selection clause.”

II. CHOICE OF LAW AND PROCEDURAL MECHANISMS FOR ENFORCEMENT OF FORUM-SELECTION CLAUSES

While Atlantic Marine resolved some of the circuit splits relating to enforcement of forum-selection clauses, at least two remain: (1) the split between courts that apply state versus federal law to determine the validity of forum-selection clauses (the Choice of Law Split); and (2) the split between those circuits that employ § 1404(a) to enforce forum clauses and those that use Rule 12(b)(6) (the Procedure Split). Part II.A looks at the Choice of Law Split. The primary axis of dispute between circuits on either side of this split is that articulated by Justice Scalia’s dissent in Stewart: does federal law or state law govern the question of validity of forum-selection clauses?

Part II.B examines the remaining split among federal courts as to the proper procedural mechanism for enforcement of forum clauses. This split was somewhat simplified by the resolution of Atlantic Marine. Those courts that followed Stewart literally and adopted § 1404(a) as a proper mechanism for enforcing forum-selection clauses have been vindicated, in part, by the holding in Atlantic Marine. These courts, however, will have to develop new decisional law implementing the new modified § 1404(a) and forum non conveniens inquiries. This section also examines courts that treat a forum clause as an affirmative defense to suit and enforce the clause through Rules 12(b)(6), 12(c), and 56 (the Affirmative Defense Approach). These courts opt to sidestep the venue transfer analysis, and their choice of procedural mechanism appears to be animated by the choice-of-law concerns Justice Scalia articulated in his Stewart dissent.

217. Id. at 14–15. The Klaxon rule holds that a federal court sitting in diversity is compelled by the Erie doctrine to apply the choice of law rules of the state in which it sits. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941). Van Dusen provided an exception to this rule, namely, that “where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.” Van Dusen, 376 U.S. at 639.

218. A second axis arises when the contract containing the forum-selection clause also includes a choice of law clause. Should a federal court sitting in diversity apply the law indicated in the contract, the law dictated by choice-of-law rules of the state in which it sits as per Klaxon, or the federal standard articulated in The Bremen? See Mullenix, supra note 14, at 348–49.


220. See supra notes 204–14 and accompanying text.

221. It should be noted that many courts employ a patchwork of approaches, allowing the procedural mechanism chosen by the parties seeking enforcement to dictate the underlying analysis. See, e.g., TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 475 (2d Cir. 2011) (“We have affirmed judgments that enforced forum selection clauses by dismissing cases for lack of subject matter jurisdiction under Rule 12(b)(1), . . . for improper venue under Rule 12(b)(3), . . . and for failure to state a claim under Rule 12(b)(6).” (citations omitted)); Slater v. Energy Servs. Grp. Int’l, Inc., 634 F.3d 1326, 1333 (11th Cir. 2011) (applying Rule
A. The Choice of Law Split: Does Federal or State Law Govern the Validity of Forum-Selection Clauses?

In spite of Justice Scalia’s strong dissent in *Stewart* and the choice-of-law arguments raised by J-Crew at the district court level in *Atlantic Marine*, the Supreme Court has left open the question of whether state or federal law governs the validity of forum-selection clauses in diversity cases. Many courts, even in diversity cases, uncritically assume that since the enforcement of forum-selection clauses is sometimes governed by federal law, the validity must also be a question of federal law. Such a conclusion, however, is not compelled by *Stewart* or *Atlantic Marine*.

While many courts attempt to avoid the issue of deciding whether state or federal law should govern the validity and enforceability of forum-
selection clauses, there are frequent instances where such avoidance will not be possible. For example, many states have passed laws that limit or categorically prohibit forum-selection clauses in certain contexts. The choice of law issue emerges in stark relief in cases where, unlike Stewart, the party seeking to enforce the forum-selection clause (usually the defendant) resorts to a procedural mechanism other than § 1404(a). Without the majority’s interpretation of § 1404(a) in Stewart to guide them, courts are largely in agreement that they are “require[d] . . . to make a ‘relatively unguided Erie choice’” with regard to validity and

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228. IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 437 F.3d 606, 609 (7th Cir. 2006) (Posner, J.) (“It seems that either position is arbitrary. If federal law governs, an arbitrary difference between a federal and a state litigation is created. If state law governs, an arbitrary difference between a dismissal (followed by a refiling) and a transfer is created. Prudence in this situation counsels us to reserve decision and instead consider how the appeal would be decided under either view and hope that the result will be the same.”).

229. See V. Frederic Lyon & Douglas W. Ackerman, Controlling Disputes by Controlling the Forum: Forum Selection Clauses in Construction Contracts, CONSTRUCTION LAW., Fall 2002, at 15, 18 (“[P]ractitioners in Idaho, Iowa, Michigan, Montana, and Texas and their corresponding federal circuits must be particularly careful because of the potential Erie problem that may arise. If the forum selection clause is deemed substantive, the state law of Idaho, Iowa, Michigan, Montana, and Texas will apply and the clause will be void; however, if the forum selection clause is deemed procedural, federal law will apply and the clause generally will be enforceable. Federal courts addressing this issue generally have tried to avoid this vexing problem.”).

230. See Lien, supra note 48, at 30 (“[A]t least 24 states have enacted” statutes that “prohibit . . . enforcement [of forum clauses] in certain industries, including the construction industry.”).

231. See Preferred Capital, Inc. v. Sarasota Kennel Club, Inc., 489 F.3d 303, 306 (6th Cir. 2007) (“When deciding to apply federal or state law to a forum selection clause, the context in which the clause is asserted can be determinative. For example, when a party moves to transfer a case on the basis of a forum selection clause, the federal statute governing transfer motions controls the clause’s interpretation.”) (citing Stewart, 487 U.S. at 29–30)); Blair, supra note 13, at 815 (suggesting that a court may or may not enforce a forum-selection clause “depending on which procedural motion the defendant chooses”); Wright, supra note 22, at 1916 (noting that “whether [the defendant] would be successful in moving litigation [pursuant to the forum-selection clause] would turn on the procedural device it employed to enforce the clause,” because if the defendant “files a motion to dismiss, the district court . . . would likely apply state [as opposed to federal] law in its determination as to dismissal”).
In making this choice, courts also seem to agree that they “should strive for uniformity of outcomes between federal and state courts,” 233 and that “when deciding what is procedural and what is substantive . . . [they must] apply a functional test based on the ‘twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.’” 234

What, then, explains the split between courts that apply federal law and those that apply state law? The disagreement is rooted in two distinct qualities of forum-selection clauses: (1) they are agreements relating to the forum for adjudication which may or may not be enforceable; 235 and (2) they are contractual agreements which may or may not be valid. 236 Courts that dwell on the first quality reason that forum-selection clauses are simply venue agreements, i.e., they indicate the parties’ agreed-upon venue for adjudication of their disputes. 237 Then, eliding the distinction between validity and enforceability, these courts assert that, since venue is manifestly a question of federal procedural law, enforcement and validity of such clauses is a question also governed by federal law. 238 Thus, the *Bremen* standard as modified by *Carnival Cruise* determines whether a

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234. *Preferred Capital*, 489 F.3d at 306 (quoting *Hanna*, 380 U.S. at 471); *Manetti-Farrow*, 858 F.2d at 513 (same).

235. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067–68 (11th Cir. 1987), aff’d en banc, 810 F.2d 1066 (11th Cir. 1987), aff’d, 487 U.S. 22 (1988) (applying federal law to determine “whether these two parties may choose the courts of Manhattan as the appropriate venue to try the controversy arising from this contract” because “venue in a diversity case is manifestly within the province of federal law”).

236. *Stewart*, 487 U.S. at 36 (Scalia, J., dissenting) (“[I]ssues of contract, including a contract’s validity, are nearly always governed by state law.”).

237. See *Manetti-Farrow*, 858 F.2d at 513 (“We conclude that the federal procedural issues [of venue] raised by forum selection clauses significantly outweigh the state interests, and the federal rule announced in *The Bremen* controls enforcement of forum clauses in diversity cases. Moreover, because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum clauses.” (citation omitted)); *Stewart*, 810 F.2d at 1067–68 (“Our decision as to the choice of forum clause boils down to whether these two parties may choose . . . the appropriate venue to try the controversy arising from this contract. . . . [W]e hold that venue in a diversity case is manifestly within the province of federal law. . . . [F]ederal law . . . must be applied to determine the effect of forum selection clauses. . . . Venue is a matter of federal procedure . . . .”); see also *Gruson*, supra note 227, at 158 (“Characterization of the issue as one of ‘venue’ . . . probably has influenced the decision of some courts to apply federal rather than state law . . . .”)

238. See *Manetti-Farrow*, 858 F.2d at 513; *Stewart*, 810 F.2d at 1068–69; *Brahma Grp.*, Inc. v. *Benham Constructors, LLC*, No. 2:08-CV-970TS, 2009 WL 1065419, at *3–4 (D. Utah Apr. 20, 2009) (applying federal law and enforcing a forum-selection clause in spite of a Utah statute that made the forum clause void and unenforceable); see also *Martinez v. Bloomberg LP*, 740 F.3d 211, 222 (2d Cir. 2014) (noting that courts also have a “tendency to blur the distinction between enforceability and interpretation”).
clause is valid and enforceable and Stewart determines whether the clause will be enforced when it is raised in the context of § 1404(a).239

Courts that dwell on the second quality, i.e., the fact that forum clauses are contractual provisions whose validity is determined by substantive law, recognize that the “construction of contracts is usually a matter of state, not federal, common law,” and that the “policies behind Erie [demonstrate an absence of] a federal interest that displaces the state’s interest in formulating its own laws.”240 Under this interpretation, the validity of forum-selection clauses is a question of state law.241 Accordingly, these courts look to the states’ substantive contract law to make the validity determination.242 Thus, while the difference in the application of state or federal law to the validity question is often immaterial,243 it can lead to vastly inconsistent results where, for example, state statutes make forum clauses voidable or where the state’s common law validity standard deviates materially from The Bremen.244

B. The Procedural Split

While the Procedural Split was at one time extraordinarily complicated and multifaceted,245 it has been simplified by the Court’s holding in Atlantic Marine. Section 1404(a) and the doctrine of forum non conveniens are now firmly established as appropriate procedural mechanisms for enforcement of forum-selection clauses.246 But the Court has explicitly left open the possibility that using Rule 12(b)(6), and other means of raising forum clauses as an affirmative defense, may be “ultimately correct.”247 Since the Court’s § 1404(a) approach, as modified when enforcing a valid forum-selection clause (the Atlantic Marine Approach), has been explored

239. See IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 437 F.3d 606, 609–10 (7th Cir. 2006); Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) (“Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature. . . . In short, we find nothing in Stewart or anywhere else that would compel us to reject the well established rule of this Circuit that Bremen applies with equal force in diversity cases.”).
240. Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356–57 (3d Cir. 1986); see also Preferred Capital, Inc. v. Sarasota Kennel Club, Inc., 489 F.3d 303, 308 (6th Cir. 2007) (“[State] law should apply to the interpretation of this forum selection clause. To apply federal law would undercut both aims of the Erie test—it would encourage forum shopping by providing differing outcomes in federal and state court.”).
241. Preferred Capital, 489 F.3d at 308; Stewart, 810 F.2d at 1076–77 (Godbold, J., dissenting) (“The fallacy in characterizing the problem as ‘just a dispute over venue’ is that it leads [one] to conclude that because there is a federal venue statute the dispute is a procedural matter and therefore a federal matter. . . . This case is not about what court is suitable. It is about an agreement to choose between suitable courts.”).
243. See IFC Credit Corp., 437 F.3d at 612–13.
244. Preferred Capital, 489 F.3d at 308; Gen. Eng’g Corp., 783 F.2d at 356–57.
247. Id. at 11 n.4.
in detail above, this section focuses on explaining the Affirmative Defense Approach, as employed by the First, Third, and Sixth Circuits and as articulated by Professor Sachs in his amicus brief submitted in *Atlantic Marine*. It concludes by identifying the reasons why litigants might choose one procedure over the other.

1. The Affirmative Defense Approach

Advocates of the Affirmative Defense Approach and courts that have adopted it extend the reasoning of *Stewart*’s footnote eight and recognize that “[t]o argue . . . that [a] forum selection clause . . . deprives [a] federal district court . . . of jurisdiction and venue is simply off the mark.” Instead, they understand an exclusive forum-selection clause as a contractual agreement to resolve disputes in the designated forum to the exclusion of all others and is thus a type of contractual waiver.

Hence, if a party files a lawsuit in violation of its obligations under a forum-selection agreement, the defendant can seek dismissal of the suit for “failure to state a claim upon which relief can be granted” pursuant to Rule 12(b)(6) because the plaintiff has waived his right to maintain suit anywhere but the forum designated by the clause.

Under the logic of this interpretation, a defendant is not limited to Rule 12(b)(6) for relief. If an exclusive forum-selection clause is a form of contractual waiver then it must be raised in the same manner as other affirmative defenses: a defendant must include the forum-selection clause defense in its Rule 8 answer and may move to enforce the clause through a motion for judgment on the pleadings pursuant to Rule 12(c) or even a motion for summary judgment pursuant to Rule 56. In fact, there is support for the Affirmative Defense Approach in the Supreme Court’s forum-selection clause jurisprudence. For example, the forum-selection

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248. See *supra* notes 200–17 and accompanying text.


250. Brief of Sachs, *supra* note 36, at 12 (“An exclusive forum-selection clause is . . . a contractual agreement that consents to litigation in a particular forum.”).

251. *Id.* (“The exclusive nature of the clause makes it a form of waiver, ‘the intentional relinquishment or abandonment of a known right.’” (quoting Wood v. Milyard, 132 S. Ct. 1826, 1835 (2012)) (internal quotation mark omitted)).


clause in Carnival Cruise was raised on a motion for summary judgment, and the Court addressed the validity and enforcement of the clause without comment, suggesting that the procedural mechanism chosen by the defendant was appropriate.256

2. Implications of the Atlantic Marine and Affirmative Defense Approaches

While recognizing that the Affirmative Defense Approach may be "ultimately correct," the Supreme Court observed in Atlantic Marine that "defendants would have sensible reasons to invoke § 1404(a) or the forum non conveniens doctrine in addition to Rule 12(b)(6)."257 Perhaps the most obvious is that the Affirmative Defense Approach "may lead to a jury trial . . . if issues of material fact relating to the validity of the forum-selection clause arise."258 In contrast, treating enforcement as a venue-transfer inquiry is purely judicial and does not require presentation to the factfinder.259 Thus, a defendant seeking swift enforcement of a forum-selection clause would likely prefer relief under § 1404(a) transfer or the doctrine of forum non conveniens.260 Moreover, courts may also be more willing to enforce forum clauses via the doctrine of forum non conveniens and § 1404(a) because they are permitted to condition these dismissals and transfers on the defendant’s consent to jurisdiction in the alternative forum and waiver of certain affirmative defenses like the statute of limitations.261

Rule 12(b)(6) dismissals, Rule 12(c) judgments on the pleadings, or Rule 56 grants of summary judgment, however, also carry with them certain procedural advantages which may be compelling to defendants. First, courts do not condition these dismissals on defendants’ waiver of statute-of-limitations defenses and consent to jurisdiction. Second, in diversity actions, such dismissals have res judicata effect to the extent a state court dismissal would.262 Finally, courts that follow the Affirmative Defense Approach do not engage in the balancing of public and private interests mandated by the § 1404(a) and forum non conveniens inquiries.263 Instead,
their inquiry focuses primarily on the validity of the forum-selection clause as a matter of substantive law—if the clause is valid it will be enforced.\textsuperscript{264} This could make enforcement more predictable, because plaintiffs would not have the opportunity to argue that “extraordinary circumstances unrelated to the convenience of the parties” mandate nonenforcement.\textsuperscript{265}

III. ANALYZING \textit{ATLANTIC MARINE}: RESOLVING THE CHOICE OF LAW SPLIT, THE TROUBLE WITH FORUM NON CONVENIENS, AND WHY COURTS SHOULD ADOPT THE AFFIRMATIVE DEFENSE APPROACH TO ENFORCE FORUM-SELECTION CLAUSES

This Part explores the implications of \textit{Atlantic Marine} for the remaining choice-of-law and procedural circuit splits. The choice-of-law circuit split as to validity of forum-selection clauses raises serious concerns about disuniformity of enforcement of forum-selection clauses in diversity cases.\textsuperscript{266} Likewise, the procedural circuit split leaves defendants with a number of confusing options for enforcing forum-selection clauses.\textsuperscript{267}

Part III.A argues that \textit{Atlantic Marine} has implicitly provided a mechanism for resolution of the choice of law circuit split discussed \textit{supra} in Part II.A. It proposes that the judicial inquiry underlying enforcement of forum-selection clauses should proceed as a validity-enforceability two-step. Step one is to determine the validity of the forum-selection clause. Part III.A.1 argues that \textit{Atlantic Marine} implies that validity should be determined according to state substantive law. Step two is to decide whether to enforce the forum-selection clause, i.e., enforceability. Part III.A.2 argues that \textit{Atlantic Marine} has firmly established that enforceability of forum-selection clauses in diversity cases should be determined as a matter of federal procedural law. Part III.A.3 discusses the application of the validity-enforcement two-step to a hypothetical partially based on the facts of \textit{Atlantic Marine}.

\textbf{A. Choice of Law and the Validity-Enforcement Two-Step}

Many courts conflate the questions of validity and enforceability of forum-selection clauses.\textsuperscript{268} This is unfortunate because such conflation is at least partly to blame for the existing choice-of-law split.\textsuperscript{269} To remedy this split, courts and litigants should treat the two concepts as distinct with

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\item \textsuperscript{264} See Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 357–58 (3d Cir. 1986) (holding that the “interpretation of forum selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law” and reversing the denial of a motion for summary judgment).
\item \textsuperscript{266} See \textit{supra} notes 227–44 and accompanying text.
\item \textsuperscript{267} See \textit{supra} notes 256–62 and accompanying text.
\item \textsuperscript{268} See \textit{supra} note 238 and accompanying text.
\item \textsuperscript{269} See \textit{supra} notes 238–44 and accompanying text.
\end{itemize}
each worthy of its own legal analysis.\footnote{270} In other words, the enforcement analysis should proceed in two steps.

1. Step One: Validity

Step one is to determine the validity of the forum-selection clause between the parties and its scope.\footnote{271} Logically, the validity question should be addressed first, because if the forum-selection clause at issue is invalid then there is likely no reason to enforce it.\footnote{272} Both Justice Scalia’s dissent in \textit{Stewart} and the Supreme Court’s opinion in \textit{Atlantic Marine} support this proposition.\footnote{273} Indeed, the Court’s analysis in \textit{Atlantic Marine} presupposed a valid forum-selection clause\footnote{274}: if the forum clause in that case were invalid there would have been no reason for the Court to alter the typical § 1404(a) analysis.\footnote{275} Likewise, there would be no reason for a district court to engage in \textit{Atlantic Marine}’s modified forum non conveniens analysis if the forum-selection clause is invalid.\footnote{276} \textit{Atlantic Marine} would not apply.

Courts sitting in diversity should apply substantive state law in determining the answer to the validity question.\footnote{277} The continued application of a federal common law standard to the validity question is improper. The reasoning of those courts that apply federal law has been significantly undermined by \textit{Atlantic Marine} generally and its narrow interpretation of federal venue laws particularly.

First, as noted above, courts that apply federal law to the validity question conflate the concepts of validity and enforceability.\footnote{278} The fact that the Supreme Court’s analysis in \textit{Atlantic Marine} presumes a valid

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    \item \textit{Stewart Org., Inc. v. Ricoh Corp.}, 487 U.S. 22, 35 (1988) (Scalia, J., dissenting); \textit{The Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1, 15 (1972) (“The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.” (emphasis added)).
    \item \textit{Cline v. Carnival Corp.}, 2014 WL 550738, at *2 (N.D. Tex. Feb. 12, 2014) (“[T]he Court must first determine whether the forum selection clause is valid and enforceable under applicable contract law, and assuming it is, the Court must next evaluate whether to enforce the clause under \textit{Atlantic Marine}’s analytical framework.”).
    \item \textit{Stewart}, 487 U.S. at 35 (Scalia, J., dissenting).
    \item \textit{id.} (“If [the clause] is invalid, \textit{i.e.}, should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination.”); \textit{see also} Atl. Marine Constr. Co. v. U.S. Dist. Court, No. 12-929, slip op. at 11 (U.S. Dist. Ct., Dec. 3, 2013) (“When the parties have agreed to a \textit{valid} forum-selection clause, a district court should ordinarily [enforce it].” (emphasis added)).
    \item \textit{Atlantic Marine}, No. 12-929, slip op. at 11 n.5 (“Our analysis presupposes a \textit{contractually valid} forum-selection clause.” (emphasis added)).
    \item \textit{id.} at 11–12 (“The presence of a \textit{valid} forum-selection clause requires district courts to adjust their usual § 1404(a) analysis . . . .” (emphasis added)).
    \item \textit{supra} notes 200–12 and accompanying text.
    \item \textit{infra} notes 279–98 and accompanying text; \textit{see also} Martinez v. Bloomberg LP, 740 F.3d 211, 217–22 (2d Cir. 2014).
    \item \textit{supra} note 238 and accompanying text.
\end{itemize}
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forum-selection clause demonstrates that validity and enforceability are distinct concepts that demand separate legal inquiries.\textsuperscript{279}

Second, those courts that apply federal law to the validity question do so because they interpret forum-selection clauses to be matters of venue, which is “manifestly within the province of federal law.”\textsuperscript{280} This interpretation is not supported by Supreme Court precedent.

In \textit{Stewart}, the Supreme Court recognized that a forum-selection clause is partly an expression of the parties “venue preference” and held that the inquiry under § 1404(a) “encompasses consideration of the parties’ private expression of their venue preferences” where one party has moved to transfer.\textsuperscript{281} Its holding, however, was narrow: § 1404(a) “governs the District Court’s decision \textit{whether to give effect to the parties’ forum-selection clause}” and transfer.\textsuperscript{282} In other words, § 1404(a) governs enforceability, not validity.\textsuperscript{283} Furthermore, § 1404(a) is a transfer statute writ large, which includes transfer to “any other district or division where it might have been brought,” i.e., a proper venue, “or to any district or division to which all parties have consented.”\textsuperscript{284} Thus, making an enforceability determination with regard to a forum-selection clause via § 1404(a) transfer is manifestly within the province of federal law,\textsuperscript{285} but this is not the same thing as calling a forum-selection clause a \textit{venue} matter and declaring that every aspect of that provision, including whether it is \textit{valid}, is subject to federal law.\textsuperscript{286}

The Supreme Court confirmed this narrow interpretation of federal venue laws with respect to forum clauses in \textit{Atlantic Marine}.\textsuperscript{287} There, it held that “forum,” the place of litigation, is a broader term than “venue,” a term of art.\textsuperscript{288} It followed that an interpretation of the venue statutes that “conflates

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\item[279] See Atl. Marine, No. 12-929, slip op. at 11 n.5; Martinez, 740 F.3d at 217–22; see also Bright v. Zimmer Spine, Inc., No. 14-CV-00095-WMA, 2014 WL 588051, at *2 (N.D. Ala. Feb. 14, 2014) (noting that in \textit{Atlantic Marine} “the Court was meticulous in specifying that its holding was that a district court should transfer a case “[w]hen the parties have agreed to a valid forum-selection clause,” . . . qualifying ‘forum-selection clause’ with the word ‘valid’ eleven times” and hypothesizing that “[i]f a court must determine that a forum-selection clause is valid before the clause is enforced with a § 1404 transfer order, it follows that the court must look to state contract law to determine the validity of the clause before it applies § 1404” (first alteration in original) (citations omitted)).
\item[280] Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1067–68 (11th Cir. 1987) (en banc), \textit{aff’d}, 487 U.S. 22 (1988); see also \texttt{supra} notes 227, 237, 239 and accompanying text.
\item[281] Stewart, 487 U.S. at 29–30.
\item[282] \textit{Id.} at 33 (emphasis added).
\item[283] See \texttt{id.; supra} note 227, 237 and accompanying text.
\item[285] See \texttt{supra} notes 200–17 and accompanying text.
\item[286] See Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1068–70 (11th Cir. 1987) (en banc), \textit{aff’d}, 487 U.S. 22; see also Bright v. Zimmer Spine, Inc., No. 14-CV-00095-WMA, 2014 WL 588051, at *2 (N.D. Ala. Feb. 14, 2014) (“In such a case, the state issue, [validity], is first and separate from the federal issue, and federal law could not be said to preempt applicable state law.”).
\item[287] See \texttt{supra} notes 190–98 and accompanying text.
\item[288] \textit{Atl. Marine}, No. 12-929, slip op. at 5.
\end{enumerate}
\end{footnotesize}
the special statutory term ‘venue’ and the word ‘forum’ is improper.\textsuperscript{289} Hence, the Court’s unequivocal holding with respect to § 1391, § 1406, and Rule 12(b)(3): those venue provisions do not implicate forum-selection clauses.\textsuperscript{290} In short, because these federal venue laws “say nothing about a forum-selection clause”\textsuperscript{291} and § 1404(a)’s application is limited to enforceability via transfer, federal law cannot be fairly construed to govern the validity of such clauses.\textsuperscript{292}

Without a broad interpretation of federal venue laws, district courts must engage in a complicated \textit{Erie} analysis.\textsuperscript{293} As many have noted, the application of federal law to the validity question creates a host of messy \textit{Erie} concerns.\textsuperscript{294} They have also noted that \textit{Erie} points to the application of state law, as “nothing authorizes the federal courts to create federal common law contract principles to govern the essentially private contractual relationship between private citizens” in diversity cases.\textsuperscript{295} The Third, Sixth, and, arguably, the Second Circuit agree.\textsuperscript{296} Substantive state law should also govern the interpretation of the scope of a forum-selection clause—there is no compelling reason “why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.”\textsuperscript{297} Justice Scalia agreed that \textit{Erie} requires application of state law to the validity question.\textsuperscript{298}

Thus, the court should first look to substantive state law to determine if the forum-selection clause at issue is valid and interpret its scope.

2. Step Two: Enforceability

Step two is to determine whether the forum-selection clause should be enforced—the enforceability question. If \textit{Stewart} and \textit{Atlantic Marine} stand for anything, it is the proposition that federal law governs the enforcement of valid forum-selection clauses—at least in the context of a motion to transfer pursuant to § 1404(a) or a motion to dismiss pursuant to

\textsuperscript{289} See \textit{id.} at 5–8.
\textsuperscript{290} \textit{Id.} at 4.
\textsuperscript{291} See \textit{id.} at 4–8.
\textsuperscript{292} See \textit{id.; supra} notes 227, 237 and accompanying text.
\textsuperscript{293} See \textit{supra} note 232 and accompanying text.
\textsuperscript{294} See \textit{generally} Brief of Sachs, \textit{supra} note 36, at 30–31; Blair, \textit{supra} note 13; de By, \textit{supra} note 13; Wright, \textit{supra} note 22.
\textsuperscript{295} Mullenix, \textit{supra} note 14, at 363–64 & n.397.
\textsuperscript{296} See \textit{supra} notes 226, 240.
\textsuperscript{297} Phillips v. Audio Active Ltd., 494 F.3d 378, 386 (2d Cir. 2007); see also Martinez v. Bloomberg LP, 740 F.3d 211, 220–21 (2d Cir. 2014) (noting both that “distinguishing between the enforceability and the interpretation of forum selection clauses . . . accords with the traditional divide between procedural and substantive rules developed under [the \textit{Erie} Doctrine],” and that “[c]ontract law—including the rules governing contract interpretation—is quintessentially substantive for \textit{Erie} purposes, and therefore primarily the realm of the states”).
the doctrine of forum non conveniens. Thus, in the context of a motion to enforce a forum-selection clause through a § 1404(a) transfer, the district court should engage in the modified inquiry dictated by Atlantic Marine. That is, if step one determined that the forum-selection clause is valid as a matter of state law, then private-interest factors should be deemed to weigh entirely in favor of the requested transfer. Transfer will only be denied in extraordinary circumstances where public-interest factors unrelated to the convenience of the parties weigh heavily against a transfer. Furthermore, the party resisting the forum-selection clause will bear the burden of proving that enforcement is unwarranted. The same inquiry applies to a forum non conveniens dismissal motion seeking to enforce a forum-selection clause which designates a state or foreign court system as the exclusive forum.

Under the Affirmative Defense Approach, the inquiry under step two is much simpler: if step one has determined that the forum-selection clause is valid as a matter of state law, then the clause should be enforced in nearly all circumstances. A Rule 12(b)(6) motion to dismiss for failure to state a claim or Rule 12(c) motion for judgment on the pleadings should be granted unless the plaintiff has plausibly pleaded facts alleging a legally valid reason to avoid enforcement, for example, if the defendant waived its right to enforce or should be estopped from enforcing the otherwise valid clause on account of undue delay. The same can be said for a motion for summary judgment pursuant to Rule 56—relief is appropriate unless the plaintiff can prove there are disputed issues of material fact as to whether enforcement is warranted as a matter of law.

3. The Validity-Enforceability Two-Step Applied

The validity-enforceability two-step will be easy for a court to apply. A hypothetical loosely based on the Atlantic Marine case can be used to illustrate how the two-step should proceed. Suppose a Virginia prime contractor enters into a subcontracting agreement with a Texas subcontractor for construction work to be performed on private property in Dallas, Texas. The agreement contains no choice-of-law clause, but has a

299. Atl. Marine Constr. Co. v. U.S. Dist. Court, No. 12-929, slip op. at 8 (U.S. Dec. 3, 2013) (“[A forum-selection] clause may be enforced through a motion to transfer under section 1404(a) . . . . [Section 1404(a)] permits transfer to any district where venue is also proper . . . or to any other district to which the parties have agreed by contract or stipulation. Section 1404(a) therefore provides a mechanism for enforcement.” (emphasis added)).
300. See supra notes 200–17 and accompanying text.
302. See id. at 11.
303. See id. at 13.
304. See id. at 12; see also id. at 15 n.8 (“[T]he same standards should apply to motions to dismiss for forum non conveniens in cases involving valid forum-selection clauses pointing to state or foreign forums.”).
305. See Brief of Sachs, supra note 36, at 12–27.
306. See Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 359 (3d Cir. 1986) (noting that the district court held an evidentiary hearing and “predicated its conclusions . . . on two findings of fact”).
forum-selection clause that designates the federal or state courts sitting in Norfolk, Virginia, as the exclusive fora for litigation of any disputes between the parties.\textsuperscript{307} Section 272.001 of the \textit{Texas Business and Commerce Code}, however, permits any person “obligated by the contract to perform the construction or repair” to void the forum-selection clause.\textsuperscript{308} The subcontractor performs the work, but the prime contractor fails to make payments required by the contract.\textsuperscript{309} The subcontractor files suit in Texas state court and argues that he is exercising his right under Texas law to void the forum-selection clause.\textsuperscript{310} The contractor removes to federal court and, pursuant to § 1404(a), moves to enforce the forum-selection clause and transfer to the Eastern District of Virginia under \textit{Atlantic Marine}.\textsuperscript{311}

Under step one of the validity-enforceability two-step, the district court in Dallas should first look to Texas state law to determine the validity of the forum-selection clause and its scope.\textsuperscript{312} Step one would lead the district court to section 272.001 of the \textit{Texas Business and Commerce Code} and the court would have to decide if that statutory provision applied to the case at bar.\textsuperscript{313} It would have to determine if the contract at issue was “principally for the construction or repair of an improvement to real property” in the State of Texas.\textsuperscript{314} In the actual \textit{Atlantic Marine} case, the district court decided that section 272.001 did not govern because the work was performed on Fort Hood, which was a federal enclave.\textsuperscript{315} In our hypothetical case, however, the construction work was performed on private property in Dallas. Thus, assuming the contract was principally for the construction of an improvement to real property under Texas law, section 272.001 would govern and the scope of the forum-selection clause would be limited by the subcontractor’s right to void the clause.\textsuperscript{316} Our hypothetical plaintiff-subcontractor has exercised this right and voided the clause.

Now the question becomes: what weight should the voided forum-selection clause be given in step two, the enforceability determination? The
prime contractor is likely to argue that the clause should still weigh heavily in favor of a transfer to Virginia. It was voided on a technicality of Texas law after all and still represents the parties’ “venue preferences.” The prime contractor is likely to point to Stewart where the Supreme Court found the forum-selection clause enforceable under § 1404(a) despite the policy of the Alabama court system of refusing to enforce forum-selection clauses. The subcontractor is likely to point to the Supreme Court’s disclaimer in Atlantic Marine that the section 1404(a) “analysis presupposes a contractually valid forum-selection clause” and Justice Scalia’s dissent in Stewart arguing that if the forum-selection clause “is invalid, i.e., should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination.”

The subcontractor probably has the stronger argument, and is likely to prevail even if the district court gives the voided forum-selection clause some weight. Atlantic Marine specifically conditioned its analysis on the presence of a valid forum-selection clause and reasoned that, “enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.” Here, the forum-selection clause is not valid, but void, and given that it was voided pursuant to Texas statutory law governing construction contracts it cannot be said that enforcement would protect the legitimate expectations of the parties. The contractor’s expectation of enforcement is not legitimate where statutory law of the state where the work is performed gives the subcontractor the right to void and the contractor failed to bargain for a choice-of-law provision or arbitration clause in the contract.

B. Applying Federal Common Law Forum Non Conveniens Standards to Forum-Selection Clauses May Raise Concerns Under the Erie Doctrine

Atlantic Marine holds that forum non conveniens is an appropriate mechanism for enforcement when a forum-selection clause designates the courts of a particular state or foreign country as the exclusive forum. While the Court was likely trying to avoid having a different enforcement standard for forum clauses that designate a federal court versus those that designate a state or foreign court, application of forum non conveniens in this context is potentially problematic because it arguably violates the Erie Doctrine.

318. Id. at 30–31.
320. Stewart, 487 U.S. at 35 (Scalia, J. dissenting).
321. Atl. Marine, No. 12-929, slip op. at 12 (quoting Stewart, 487 U.S. at 33 (Kennedy J., concurring)).
322. See TEX. BUS. & COM. CODE ANN. § 272.001 (West 2012).
324. See supra note 200 and accompanying text.
325. See Atl. Marine, No. 12-929, slip op. at 10.
This is because the doctrine of forum non conveniens is a federal common law principle and thus is not subject to the same Hanna analysis grounded in statutory interpretation as articulated by the Supreme Court in Stewart with respect to § 1404(a).

While Congress has, via § 1404(a), codified “the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal court system, [for the remaining cases] the residual doctrine of forum non conveniens ‘has continuing application in federal courts.’”

Yet, because it is a federal common law principle, its application to forum-selection clauses must, arguably, satisfy the “twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”

In light of the fact that many state courts have adopted the Bremen standard to determine both validity and enforceability of forum-selection clauses, the application of forum non conveniens in federal court actions could lead to inequitable administration of states’ substantive contract law and encourage forum shopping in the rare event that plaintiff prevails under Atlantic Marine’s modified analysis.

These concerns are valid, but likely overstated. First, as noted by the Court in Atlantic Marine, Congress has expressed implicit approval of the forum non conveniens doctrine by codifying it at § 1404(a). Such approval provides support for the proposition that federal courts should have control over which litigants will have access to the courtroom and which will not. Thus, because the “[f]orum non conveniens doctrine concerns the administration and self-management of the federal courts, [it] does not implicate state-created substantive rules of decision.”

Moreover, after Atlantic Marine, it is not clear that the forum non conveniens inquiry as modified for enforcement of forum-selection clauses would deviate materially from most existing state law standards. Before Atlantic Marine, it was unclear whether a federal court sitting in diversity was permitted more discretion by the forum non conveniens inquiry, which

326. Lee, supra note 13, at 674–79; see also Brief of Sachs, supra note 36, at 28–31 (noting that there is “much uncertainty over which body of law governs”).


329. See Lee, supra note 13, at 674–79; see also Schertenleib v. Traum, 589 F.2d 1156, 1162 n.13 (2d Cir. 1978) (declining to “decide the intriguing question . . . whether, in diversity cases[,] . . . state law or federal law is the source of the rules governing the forum non conveniens doctrine”); Gruson, supra note 227, at 153–63 (explaining the problematic application of the federal common law Bremen standard before Stewart in diversity cases).


331. See generally Dougherty, supra note 55.

332. See Atl. Marine, No. 12-929, slip op. at 11–16; Lee, supra note 13, at 674–79.

333. See Atl. Marine, No. 12-929, slip op. at 10 (“Section 1404(a) is merely a codification of the doctrine of forum non conveniens . . . ”).

334. See id.; Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1313–14 (11th Cir. 2002) (citing § 1404(a) as evidence supporting the application of federal forum non conveniens standards in diversity cases).

335. 14D WRIGHT & MILLER, supra note 105, § 3828.5 (3d ed. 2007).
required the court to consider balancing of public, private, and third-party interests, than the *Bremen* standard adopted by many states.\(^{336}\) Additionally, “the presumption underlying any *forum non conveniens* determination is the fundamental respect accorded the plaintiff’s original choice in forum,” a presumption in no way shared with *The Bremen*.\(^{337}\) If a federal court considers these interests instead of the limited *Bremen* factors, then there could be a strong possibility of inequitable administration of the laws and corresponding forum shopping, and enforcement would be far less certain in federal court.\(^{338}\) However, the newly articulated § 1404(a) and *forum non conveniens* inquiry under *Atlantic Marine* brings enforcement via these mechanisms into greater uniformity with the *Bremen* standard adopted by many states.\(^{339}\) The presence of a valid forum-selection clause transforms the analysis because all private interests will weigh in favor of dismissal and only overwhelming public interests will prevent it.\(^{340}\) Furthermore, the Supreme Court has now declared in *Atlantic Marine* that the plaintiff’s original choice of forum merits no consideration at all when there is a valid forum-selection clause.\(^{341}\) This significantly decreases the risk of violating the twin aims of *Erie*, at least with respect to those states that have adopted the *Bremen* standard. These concerns will remain, however, for situations where states have adopted limitations on the validity and enforceability of forum-selection clauses in certain contexts.\(^{342}\) In these situations, the *forum non conveniens* inquiry under *Atlantic Marine* is likely to produce wildly different outcomes, especially if the choice-of-law circuit split as to validity is not resolved in favor of applying state law.\(^{343}\)

**C. Raising the Forum-Selection Clause As an Affirmative Defense Is a Superior Procedural Mechanism for Enforcement**

In light of these *Erie* concerns and the strained interpretation of § 1404(a) in *Stewart*, the Supreme Court gave too little consideration in *Atlantic Marine* to the Affirmative Defense Approach followed by the First, Third, and Sixth Circuits and as articulated by Professor Sachs.

In addition to the arguments raised by the circuit courts and Professor Sachs in his amicus brief before the Court in *Atlantic Marine*,\(^{344}\) enforcing a forum-selection clause via the Affirmative Defense Approach avoids the *Erie* concerns raised by enforcement using *forum non conveniens*. This is because Rule 12 and Rule 56 are federal rules and are thus permissible

\(^{336}\) See Lee, *supra* note 13, at 688 & n.161 (“[T]he *Bremen* holding was produced under a motion to dismiss for lack of jurisdiction or on *forum non conveniens* grounds, [but] the Court made no mention of a determination under *forum non conveniens* and thus did not establish a place for forum selection clauses in the federal *forum non conveniens* standard.”).

\(^{337}\) *Id.* at 689.

\(^{338}\) See id. at 674–89.

\(^{339}\) See *supra* notes 200–17 and accompanying text.

\(^{340}\) See *supra* notes 200–17 and accompanying text.

\(^{341}\) See *supra* notes 200–17 and accompanying text.

\(^{342}\) See *supra* notes 229–30 and accompanying text.

\(^{343}\) See *supra* Parts II.A.1, III.A.1.

\(^{344}\) See generally *supra* Part II.B.1.
exercises of authority so long as they comport with the Rules Enabling Act.\(^{345}\) Evaluating the forum-selection clause as an affirmative defense under Rules 12 and 56 would require the court to examine substantive state contract law to determine whether the plaintiff had plausibly pleaded avoidance of the forum-selection clause\(^{346}\) or raised sufficient disputed issues of material fact to avoid the clause.\(^{347}\) As noted above, the Affirmative Defense Approach could also substantially avoid the enforceability determination required by § 1404(a) and forum non conveniens approaches under \textit{Atlantic Marine}.\(^{348}\) It is also superior to those solutions that propose statutory reform or the promulgation of a new Federal Rule of Civil Procedure, because it does not depend on legislative action.\(^{349}\)

Finally, concerns that defendants will have to commit significant resources litigating in the noncontractual forum are overstated. Defendants are permitted, indeed required, to bring a Rule 12(b)(6) motion before answering the complaint and the court may, pursuant to Rule 12(d), convert such a motion to one for summary judgment if it must consider matters outside the pleadings.\(^{350}\) Furthermore, even if a plaintiff’s defense to enforcement requires discovery, a court is permitted to favor jurisdictional discovery and thus can proceed with discovery related to the forum-selection clause before that relating to the more substantive merits of the case at bar.\(^{351}\) After this discovery, the district court can conduct an evidentiary hearing and make relevant findings of fact.\(^{352}\) Finally, a defendant may be able to file a breach of contract action of its own and obtain damages, i.e., its litigation costs in the noncontractual forum.\(^{353}\)

\(^{345}\) See supra notes 326–32, 342 and accompanying text.


\(^{347}\) See \textit{FED. R. CIV. P.} 56(a).

\(^{348}\) See supra Part II.B.2; supra notes 200–17 and accompanying text.

\(^{349}\) See supra note 40.

\(^{350}\) See \textit{FED. R. CIV. P.} 12(d).

\(^{351}\) See \textit{id.} R. 16(b)(3)(B)(i)–(ii) (permitting the judge to “modify the timing of disclosures [and] the extent of discovery”); Brief of Sachs, supra note 36, at 22.

\(^{352}\) See \textit{supra} note 306.

CONCLUSION

Enforcement of forum-selection clauses in federal court has come a long way since the era of the ouster doctrine. Federal courts now strongly recognize the ability of parties to contract for rights relating to the forum where they will litigate disputes. The disuniformity of approaches to enforcement of such clauses in federal courts raises a threat that litigants will see different results in state and federal courts. In *Atlantic Marine*, the Supreme Court explicitly put to rest some of the circuit splits regarding the proper procedural mechanisms for enforcement. Furthermore, *Atlantic Marine*’s narrow reading of federal venue and transfer provisions provides implicit guidance to lower courts as to the question of whether federal or state law should govern the validity of forum-selection clauses—state law should apply.

In adjudicating a motion to enforce a forum-selection clause, a district court should first address the question of the clause’s validity under state law. Only after determining the clause’s validity should a district court engage in the enforceability inquiry dictated by *Atlantic Marine* with respect to § 1404(a) transfer and forum non conveniens dismissal.

The Supreme Court has left open the question as to whether a forum-selection clause may be raised as an affirmative defense and a defendant may then seek dismissal under Rule 12(b)(6), Rule 12(c), and Rule 56. This approach is superior to other available methods. It avoids the problematic *Erie* concerns of using forum non conveniens and promotes uniform enforcement of forum-selection clauses by ensuring that they are treated in the same manner courts treat other contractual rights.