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FORUM SELECTION CLAUSES IN STATE COURTS: LIMITATIONS ON ENFORCEMENT AFTER *STEWART* AND *CARNIVAL CRUISE*

Walter W. Heiser[*]

I. INTRODUCTION

Forum selection clauses are increasingly common in interstate commercial and consumer contracts. Motivated by the need for certainty, parties to such agreements often include a clause designating the forum to hear any disputes which may arise out of the construction or operation of the contract. The parties may agree that such disputes will only be heard in the courts of a specific jurisdiction.[1] Alternatively, the parties may

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1. *E.g.*, Carnival Cruise Lines v. Shute, 111 S. Ct. 1522, 1524 (1991) ("It is agreed by and between [the contracting parties] that all disputes and matters whatsoever arising under, in connection

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agree that all disputes must be resolved by arbitration as opposed to any judicial system.[2] Regardless of which type of forum the parties may designate, they often also specify the law to be applied by the designated forum in resolving contract disputes.[3] These provisions serve to contrac-

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with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country."). Some contracts even mandate an individual court or specific county as the exclusive forum. *E.g.*, Stewart Org. v. Ricoh Corp., 487 U.S. 22, 24 n.1 (1988) ("[The contracting parties] agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement . . . ."); Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656, 658 (2d Cir. 1988) ("No action or proceeding shall be commenced by [Koch] against [NYCCDC] except in the Supreme Court of the State of New York, County of New York."). These various exclusive forum agreements are sometimes referred to as "mandatory" clauses.

Other clauses may be nonexclusive in that they consent to jurisdiction in a specific state or court, but do not prohibit litigation in other locations. *E.g.*, Heyco, Inc. v. Heyman, 636 F. Supp. 1545, 1547 (S.D.N.Y. 1986) (construing the following clause to be permissive: "The parties expressly hereby submit to the personal jurisdiction of the courts of . . . New Jersey for resolution of all disputes arising under this Agreement."). These nonexclusive forum agreements are sometimes referred to as "permissive" clauses, or as "submission to jurisdiction" clauses. Finally, some forum selection clauses may be mandatory as to one party to the contract, but permissive as to the other. *E.g.*, Product Components v. Regency Door & Hardware, 568 F. Supp. 651, 652 (S.D. Ind. 1983) ("The parties agree that all controversies arising hereunder may, at Seller's option, be determined in [Indiana] and Buyer hereby expressly consents to the jurisdiction of Indiana courts . . . .").

2. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORD. L. REV. 291, 315-19 (1988). Although this article will focus on clauses designating judicial forums, agreements to arbitrate disputes are also quite common in certain industries. The history of agreements to arbitrate parallels that of judicial forum selection clauses. *Id.* Despite congressional enactment in 1925 of the Federal Arbitration Act, 9 U.S.C. §§ 1-15, for the express purpose of promoting arbitration agreements, courts generally were hostile to arbitration clauses, viewing them as unlawful agreements to oust courts of jurisdiction. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 437 (1953) (rendering an arbitration agreement invalid on grounds that "protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness"). This changed quickly, first at the federal level then at the state level, due to the Supreme Court's endorsement of agreements to arbitrate. *See, e.g.*, Shearson/American Express v. McMahon, 482 U.S. 220 (1987) (stating that the Federal Arbitration Act establishes a federal policy favoring arbitration and requiring that courts rigorously enforce agreements to arbitrate); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (enforcing an agreement to arbitrate before a specified tribunal in an international commercial transaction). As will become evident, if a commercial party really wants certainty as to forum (as opposed to the fuller procedural protections of the judicial system), there are some definite advantages to a forum selection clause which designates arbitration as the forum to resolve contract disputes. *See* Federal Arbitration Act, 9 U.S.C. § 2 (1988) (providing that all contracts with agreements to arbitrate disputes arising from such contracts are "valid, irrevocable, and enforceable" unless invalid on other independent contract grounds). A more detailed explanation of the effect of arbitration agreements on forum selection clause analysis can be found in Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553 (forthcoming Sept. 1993) [hereinafter Heiser, *Federal Courts*].

3. Generally, governing law clauses are upheld by courts, although based on somewhat different considerations than those applicable to forum selection clauses. For example, § 1-105 of the Uniform Commercial Code provides: "Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." U.C.C. § 1-105

tually alter the choices of forum and law otherwise available to the parties. This article will discuss the more problematic issues that currently confront state and federal courts asked to enforce forum selection clauses.[4] The discussion is limited to contracts that designate a court rather than arbitration as the forum to resolve contract disputes, and will focus on agreements between interstate (as opposed to international) parties that designate domestic courts to resolve disputes.

Historically, contractual forum selection clauses faced considerable hostility when parties sought to enforce them, whether in state or federal court.[5] This hostility dramatically evaporated after the United States Supreme Court's landmark decision in *M/S Bremen v. Zapata Off-Shore Co.*[6] Currently, all federal circuits and most state courts endorse the general principle that forum selection clauses are not automatically void.[7] These courts, however, now struggle with a variety of issues in determining whether to actually enforce a forum selection clause in an individual case.

This article will discuss some of the case-specific enforcement issues currently confronting state and federal courts. The article is divided into two general parts which will be published in separate installments. The first part analyzes issues of enforcement of forum selection clauses in state court. State court issues involve the effect of contractual forum selection clauses on personal jurisdiction and on forum non conveniens. The primary inquiry here is whether these traditional restrictions on a plaintiff's choice of forum are waived by a contractual provision designating a particular forum to resolve disputes.

These state court issues, while interesting, are not particularly difficult to resolve. Their analysis is very helpful background, however, for resolving the more difficult issues of enforcement of forum selection clauses in

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(1991). This is similar to the judicially adopted standards for enforcement of such clauses where the U.C.C. does not apply. *See* Michael Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements—New York's Approach*, 1982 U. ILL. L. REV. 207, 213. Also, § 187 of the Restatement (Second) of Conflict of Laws generally endorses choice of law clauses unless the "chosen state has no substantial relationship to the parties or the transaction" or where application of the chosen law would be contrary to a fundamental policy of the state whose law would otherwise apply. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1987).

This article will not discuss enforcement of choice of law clauses generally, but will, where relevant, note their likely impact on the enforcement of forum selection clauses. For a more complete discussion of the complicated relationship between these two types of clauses, see generally Gruson, *supra*, at 207; Mullenix, *supra* note 2, at 346-56.

4. As a matter of terminology, contractual provisions designating a forum are sometimes referred to as "forum selection clauses," "forum designation clauses," "choice of forum clauses," or simply as "forum clauses." These terms are used interchangeably by the courts. Unless otherwise indicated, this article will only refer to clauses which designate a judicial, as opposed to an arbitral, forum.

5. *See infra* note 23.

6. 407 U.S. 1 (1972).

7. *See infra* notes 46-48, 50-54.

federal court. The second part of this article which will appear in the next issue of the *Florida Law Review* will discuss enforcement of forum selection clauses in federal court. The federal court issues are much more complex than those in state courts because of *Erie* doctrine considerations.[8]

This article begins with a general discussion of the evolution of judicial enforcement of forum selection clauses. This history is well documented elsewhere, and will only be briefly discussed here.[9] The discussion will then focus on two separate issues with respect to the enforceability of such clauses in state court. The first issue is whether a forum selection clause precludes a defendant from contesting the contractually designated forum's lack of personal jurisdiction. The second issue is whether such clauses should be viewed as affecting the defendant's right to seek dismissal based on forum non conveniens.[10]

The second half of this article will examine issues of enforcement of forum selection clauses in federal court. The focus of the second half concerns the interrelationship between forum selection clauses and motions to transfer or dismiss on venue grounds. Particularly important is the role of state law in deciding such motions. A number of articles have already been written about this general topic.[11] But these writings are perhaps better at identifying issues than resolving them. The same can be said of the Supreme Court's one recent excursion into this area, *Stewart Organization v. Ricoh Corp.*[12]

The Supreme Court's decision in *Stewart* stated the role of federal and state law in determining 28 U.S.C. § 1404(a) transfers with respect to what law generally applies.[13] The opinion speaks so broadly, however, that it offers little guidance to lower federal courts deciding specific cas-

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8. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The reference here is to the general question of what law applies in federal court, rather than to the more limited ruling in *Erie* itself. Heiser, *Federal Courts, supra* note 2, at 553 (discussing the attendant problems associated with the *Erie* doctrine when analyzing forum selection clauses in a federal court context).

9. *See* ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 41, at 147-53 (1962); James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 7-20 (1976); Gruson, *supra* note 3, at 138-47.

10. A lesser, related issue is whether such clauses waive a defendant's right to transfer venue from one county to another within the same state. *See infra* note 220.

11. *See, e.g.*, Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise: *A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992); Leandra Lederman, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422 (1991); Mullenix, *supra* note 2, at 291; Phoebe Kornfeld, Note, *The Enforceability of Forum-Selection Clauses After* Stewart Organization, Inc. v. Ricoh Corporation, 6 ALASKA L. REV. 175 (1989); Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the* Erie *Doctrine and Federal Common Law:* Stewart Organization v. Ricoh Corporation, 72 MINN. L. REV. 1090 (1988).

12. 487 U.S. 22 (1988).

13. *Id.* at 32.

es.[14] This article will attempt to clarify some of the unresolved federal court issues, and to put *Stewart* into appropriate perspective.

The major federal court issues concern what weight should be given a forum selection clause when a party seeks a transfer of venue pursuant to 28 U.S.C. § 1404(a),[15] dismissal or transfer under 28 U.S.C. § 1406(a),[16] dismissal for lack of venue or personal jurisdiction pursuant to Rules 12(b)(2) and (3) of the Federal Rules of Civil Procedure,[17] or remand to state court after removal. What makes these issues complicated is the question of the proper role of state and federal laws in deciding these motions. As will be discussed later, *Stewart* provides some partial answers but raises some troublesome unresolved questions.

One caveat must be disclosed here. Generally, much of the analysis in the first part of this article assumes that the forum selection clauses discussed are valid under traditional contract formation principles. In other words, most of the discussion assumes the clauses are part of a binding contract and are not the product of fraud, duress, overreaching or unequal bargaining power. The reason for this assumption is to initially focus the analysis on the noncontract problems associated with enforcement of forum selection clauses.[18] However, the Supreme Court's recent endorsement of forum selection clauses in consumer contracts in *Carnival Cruise Lines v. Shute*[19] dictates that discussion should also be devoted to contract validity issues.

Considerable scholarly attention has already focused on the *Carnival Cruise* opinion.[20] These scholarly writings are very critical of the Su-

14. *Id.*

15. 28 U.S.C. § 1404(a) (1988).

16. 28 U.S.C. § 1406(a) (1988).

17. FED. R. CIV. P. 12(b)(2)-(3).

18. This does not mean that the contract grounds are unimportant. In fact, courts have refused to enforce forum selection clauses because they are invalid or void under contract formation principles. For example, courts have rendered clauses void because of fraud, overreaching, or unequal bargaining power. *See, e.g., Scherk*, 417 U.S. at 519 n.14 (finding a forum selection clause unenforceable if inclusion of that clause in the contract was the product of fraud or coercion); Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380 (9th Cir. 1984); Williams v. Illinois State Scholarship Comm'n, 563 N.E.2d 465, 487 (Ill. 1990) (rendering a forum selection clause in a boilerplate adhesion contract invalid); Fairfield Lease Corp. v. Liberty Temple Universal Church of Christ, 535 A.2d 563, 566 (N.J. Super. Ct. Law Div. 1987) (stating that a clause signed due to fraud gives rise to a viable defense); Eads v. Woodmen of the World Life Ins. Soc'y, 785 P.2d 328, 331 (Okla. Ct. App. 1989) (declining to enforce a clause in a form contract which was the result of unequal bargaining power); Reeves v. Chem Indus. Co., 495 P.2d 729 (Or. 1972) (refusing to enforce forum selection clauses which are the product of unfair bargaining as in adhesion contracts).

19. 111 S. Ct. 1522 (1991).

20. *E.g.*, Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992); Jeffrey A. Liesemer, *Carnival's Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine After* Carnival Cruise Lines, Inc v. Shute, 53 U. PITT. L. REV. 1025 (1992); Linda S.

preme Court's nearly wholesale approval of forum selection clauses in standard consumer form contracts, and argue that such clauses in consumer contracts should not be enforced. These writings are critical of the Court's failure to distinguish enforcement of forum selection clauses in consumer contracts from those in commercial contracts. They criticize the Supreme Court's decision, which extended the *Bremen* standards to consumer form contracts, as being incorrect from the viewpoint of economic, social, political, and contract policies.[21] This article, when discussing the significance of *Carnival Cruise*, has a much different focus.

This article has two general goals. The first is to analyze the important procedural issues concerning enforcement of forum selection clauses in state and in federal courts. In order to isolate these procedural issues, much of the discussion will focus on freely negotiated forum selection clauses in commercial contracts.

The second goal is to analyze the likely effect on state and federal courts of the Supreme Court's extension of the *Bremen* doctrine to consumer contracts in *Carnival Cruise*. The focus here is not on whether *Carnival Cruise* was correctly decided as a matter of policy considerations. Instead, the focus is on whether, and to what extent, states which desire to protect consumers from enforcement of forum selection clauses can do so in state and in federal courts despite *Carnival Cruise*. These two goals are not unrelated, as will become evident in the discussion of forum selection clauses in federal courts.

II. HISTORICAL DEVELOPMENT OF FORUM SELECTION CLAUSES

Until fairly recently, most state and federal courts simply refused to enforce forum selection clauses.[22] The usual reason given was that such

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Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992); John M. Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in* Carnival Cruise Lines v. Shute, 70 N.C. L. REV. 888 (1992).

21. *See, e.g.*, Goldman, *supra* note 20, at 730-41 (commenting that concepts like venue and personal jurisdiction are elusive to most law students let alone average consumers); Mullenix, *supra* note 20, at 325-26; Purcell, *supra* note 20, at 511-15 (proposing that enforcement of forum selection clauses in consumer form contracts conflicts with congressional intent under 28 U.S.C. § 1404). These critical writings typically conclude that *Carnival Cruise* is bad law, and that a forum selection clause in a consumer form contract should be presumed invalid and unenforceable. *See, e.g.*, Goldman, *supra* note 20, at 730-41; Mullenix, *supra* note 20, at 325-26; Purcell, *supra* note 20, at 511-15.

22. *See* Gruson, *supra* note 3, at 138-39 (citing numerous early state and federal cases); Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404, 409-14 (1984) (citing numerous pre-1972 state court cases that invalidate forum selection clauses because they are contrary to public policy).

clauses ousted courts of their jurisdiction and were therefore void as against public policy.[23] However, the United States Supreme Court in 1972, in *Bremen*,[24] enforced a forum selection clause in an international commercial maritime contract.[25] Although an admiralty case and therefore not binding on federal or state courts generally,[26] the *Bremen* decision had an immediate impact on both the lower federal courts and on state courts.[27]

In *Bremen*, Unterweser, a German corporation, entered into a contract with Zapata, a Texas corporation, to tow Zapata's oil drilling rig from Louisiana to Italy.[28] The contract specified that " '[a]ny dispute arising must be treated before the London Court of Justice.' "[29] A storm damaged the rig in international water, and the tug and rig returned to Florida. Zapata then brought suit in admiralty in a United States District Court in Florida seeking damages for negligent towage and breach of contract.[30]

Unterweser, seeking to enforce the forum selection clause of the towage contract, sought dismissal based on lack of jurisdiction, or based on forum non conveniens.[31] The district court denied Zapata's motion to dismiss or stay the proceedings, because it found that forum selection clauses were void.[32] The court of appeals affirmed.[33] The United States Supreme Court vacated and remanded, concluding that a forum selection clause in an international commercial contract "should control absent a strong showing that it should be set aside."[34]

The Supreme Court held that forum selection clauses are prima facie

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23. *See, e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."); Carbon Black Export v. The Monrosa, 254 F.2d 297 (5th Cir.) (stating that plaintiff's choice of forum should prevail even when a forum selection clause states otherwise), *cert. dismissed*, 359 U.S. 180 (1959); Nashua River Paper Co. v. Hammermill Paper Co., 111 N.E. 678, 681 (Mass. 1916) ("The same rule [of ouster] prevails generally in all states where the question has arisen."); Benson v. Eastern Bldg. & Loan Ass'n, 66 N.E. 627, 628 (N.Y. 1903) ("[N]othing is better settled than that agreements of [this] character . . . are void.").

24. *Bremen*, 407 U.S. at 1.

25. *Id.* at 2.

26. *Id.* at 9-10. The Court emphasized that its judge-made doctrine enforcing the forum selection clause was limited to admiralty cases dealing with international commercial contracts. *Id.*

27. *See infra* notes 46-54 and accompanying text.

28. *Bremen*, 407 U.S. at 2.

29. *Id.*

30. *Id.* at 4.

31. *Id.* at 3.

32. *In re* Unterweser Reederei, GMBH, 296 F. Supp. 733 (M.D. Fla. 1969), *aff'd*, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom.*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

33. *In re* Unterweser Reederei, GMBH, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom.*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

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

valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.[35] Characterizing the argument that such clauses are improper because they oust a court of jurisdiction as "hardly more than a vestigial legal fiction," the Court framed the question as whether a court should decline to exercise its jurisdiction to enforce a freely negotiated forum selection clause.[36] The Court reasoned that the need for certainty in international commercial dealings, as well as the legitimate expectations of the parties in fixing monetary terms, provide compelling reasons to enforce a freely negotiated private agreement.[37] The Court noted, however, that it would not enforce a clause shown to be invalid for reasons such as fraud, undue influence, or unequal bargaining power.[38]

In response to the suggestion that the clause was unreasonable and unenforceable because London was an inconvenient forum for trial, the Court imposed a heavy burden of proof on the party seeking to escape the contract to establish unenforceability.[39] The Court noted that the trial court erroneously placed the burden on Unterweser to show that London would be a more convenient forum when the balance of convenience strongly favored litigation in Florida.[40] More importantly, the Court observed that the trial court's finding fell "far short of a conclusion that Zapata would be effectively deprived of its day in court should it be

35. *Id.* at 11.

36. *Id.* at 12.

37. *Id.* at 12-14.

38. *Id.* at 12-15. The Court noted the importance of freedom of contract in commercial transactions as a basis for its holding, emphasizing the freely negotiated private international agreements should be given full effect. *Id.* at 12-13. The Court specifically found that the contract between Zapata and Unterweser, two commercial entities of equal bargaining power, was not affected by fraud or undue bargaining power, and that the parties explicitly bargained for the forum selection clause because they viewed it as a vital part of the agreement. *Id.* at 12-14 & nn.14-15.

39. *Id.* at 17-18. Specifically, the Court stated:

> Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. In response to the suggestion that a forum selection clause should not be enforced if the chosen forum is seriously inconvenient, the Court commented: "[W]here it can be said with reasonable assurance that at the time they entered the contract, the parties . . . contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the clause unenforceable." *Id.* at 16. The Court's reasoning compels the conclusion that inconveniences foreseeable at the time of contract formation cannot provide a basis for refusing to enforce a forum selection clause. This conclusion has considerable significance in determining forum non conveniens and transfer of venue motions. *See* discussion *infra* part IV.B.

40. *Bremen*, 407 U.S. at 18.

forced to litigate in London."[41] The increased expense of transporting witnesses to London was both foreseeable and could be alleviated by using deposition testimony.[42]

The Supreme Court did not actually enforce the forum selection clause, rather it remanded the case in order to allow Zapata an opportunity "to carry its heavy burden of showing . . . that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court."[43] Nevertheless, the Supreme Court's message was clear. Forum selection clauses are presumed valid and will be enforced unless the resisting party proves exceptional unfairness or unreasonableness.[44]

Despite the Supreme Court's explicit admonishment that the *Bremen* holding was limited to admiralty jurisdiction cases and international commercial contracts,[45] the lower federal courts have not so limited its

41. *Id.* at 18-19.

42. *Id.* at 19.

43. *Id.*

44. *Id.* at 15-19. The Supreme Court did not expressly define the term "unreasonableness" in this context. However, the *Bremen* opinion clearly indicates that three factors will affect the enforceability of a forum selection clause. *Id.* at 12-16. One factor focuses on contract formation concerns, *i.e.*, whether the clause was freely negotiated or the product of fraud, undue influence, or unequal bargaining power. *Id.* at 12. A second factor focuses on the convenience of the chosen forum, *i.e.*, whether it is so gravely inconvenient as to deny a party his day in court. *Id.* at 16. The third factor focuses on public policy concerns of the forum in which the suit is actually brought, *i.e.*, whether enforcement would contravene a strong public policy of that forum, either declared by statute or by judicial decision. *Id.* at 15.

Lower courts have occasionally relied on the first or second of these factors in refusing to enforce a clause. *See, e.g.*, Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380, 382 (9th Cir. 1984) (finding the forum selection clause in an adhesive form contract unreasonable); M.G.J. Indus. v. Davis, 826 F. Supp. 430 (M.D. Fla. 1993) (finding a forum selection clause unenforceable because it was the result of fraud); Eads v. Woodman of the World Life Ins. Soc'y, 785 P.2d 328, 331 (Okla. Ct. App. 1989) (holding a clause unreasonable due to unfair bargaining power); Chase Commercial Corp. v. Barton, 571 A.2d 682 (Vt. 1990) (holding the contractually designated forum of New Jersey no longer reasonable because the defendant had moved to California). However, courts more often rely on the third factor, particularly when the law of the state where suit is actually brought will apply, and a specific substantive statute of that state expresses a strong public policy that the claim be heard in that state's courts. *See, e.g.*, Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgeselischaft MbH, 699 F. Supp. 669 (N.D. Ill. 1988) (stating that the public's interest in enforcing the Sherman Act outweighs litigation of forum selection clauses); Red Bull Assocs. v. Best W. Int'l, 686 F. Supp. 447 (S.D.N.Y.), *aff'd*, 862 F.2d 963 (2d Cir. 1988) (finding the public's interest in enforcing Title VII to prohibit changing venue); ECC Computer Ctrs. v. Entre Computer Ctrs., 597 F. Supp. 1182 (N.D. Ill. 1984) (holding that Illinois Franchise Disclosure Act prohibits clauses specifying a forum outside of Illinois); Haws & Garrett Gen. Contractors v. Panhandle Custom Decorators & Supply, 500 So. 2d 204 (1st DCA 1986), *rev. dismissed*, 501 So. 2d 1282 (Fla. 1987) (refusing to transfer case to Texas because of Texas policy against enforcing forum selection clauses); Cerami-Kote v. Energywave Corp., 773 P.2d 1143 (Idaho 1989) (refusing to transfer to Florida because of Idaho's "strong public policy against enforcement of forum selection clauses").

45. *Bremen*, 407 U.S. at 10.

reach.[46] The circuit courts quickly applied the *Bremen* doctrine to a variety of nonadmiralty cases involving noninternational parties and contracts.[47] Currently, every circuit applies the *Bremen* doctrine in domestic commercial contract cases where jurisdiction is based on a federal question.[48]

Many state courts followed the federal courts' lead. State courts reversed years of hostility to forum selection clauses in purely domestic commercial contracts, relying on *Bremen* and an earlier Supreme Court decision in *National Equipment Rental v. Szukhent*.[49] So complete is this evolution that today nearly every state court that has considered the issue since 1972 has held that purely domestic forum selection clauses are prima facie valid and enforceable.[50] Not all states follow the same test for enforceability as set forth in *Bremen*,[51] but most do.[52]

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46. *See supra* notes 9-11.

47. *See supra* notes 9 & 11; *infra* note 48.

48. Because of *Erie* considerations, the circuits are split on whether the federal *Bremen* doctrine or state law doctrine controls where jurisdiction is based on diversity. *Compare* Jones v. Weibrecht, 901 F.2d 17 (2d Cir. 1990) (applying federal law) *and* Manetti-Farrow, Inc. v. Gucci Am., 858 F.2d 509, 512 (9th Cir. 1988) (holding that federal law governs) *with* General Eng'r Corp. v. Martin Marietta Alumina, 783 F.2d 352, 356-57 (3d Cir. 1986) (applying state law, not federal common law).

49. 375 U.S. 311 (1964).

50. *See infra* note 52. An interesting side note is that neither *Bremen* nor *Szukhent* directly controlled these state court decisions. As mentioned previously, the Court in *Bremen* justified its holding by emphasizing the need for certainty in international commercial contracts, and limited its holding to admiralty cases. *Bremen*, 407 U.S. at 10. Much of the Court's policy explanation does not readily apply to purely domestic contracts. For example, the *Bremen* Court emphasized the adverse consequences of the old rule on the development of international commercial dealings by Americans, with such statements as: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Bremen*, 407 U.S. at 9.

Moreover, despite some often quoted dicta in *Szukhent*, this case has little to do with forum selection clauses. The issue in *Szukhent* was whether parties to a contract could contractually appoint an agent for service of process consistent with Rule 4(d)(1) of the Federal Rules of Civil Procedure. *Szukhent*, 375 U.S. at 313. The Supreme Court answered in the affirmative, but apparently only because the designated agent then notified the defendant of the lawsuit by mail. *Id.* at 317-18. In dicta, the Court observed that "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.* at 316. These two cases, despite their narrow holdings, started the movement toward enforceability of forum selection clauses in state courts.

51. *See infra* notes 56-67 and accompanying text.

52. *E.g.*, Volkswagenwerk, A.G. v. Klippan, GmbH, 611 P.2d 498, 503 (Alaska), *cert. denied*, 449 U.S. 974 (1980); Societe Jean Nicolas et Fils v. Mousseux, 597 P.2d 541, 543 (Ariz. 1979); SD Leasing v. Al Spain & Assocs., 640 S.W.2d 451, 452 (Ark. 1982); Smith, Valentino & Smith, Inc. v. Superior Ct., 551 P.2d 1206, 1209 (Cal. 1976); Funding Sys. Leasing Corp. v. Diaz, 378 A.2d 108, 109 (Conn. 1977); Manrique v. Fabbri, 493 So. 2d 437, 440 (Fla. 1986); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886 (Minn. 1982); Reeves v. Chem Indus. Co., 495 P.2d 729, 730 (Or. 1972); St. John's Episcopal Mission Ctr. v. South Carolina Dep't of Social Servs., 280 S.E.2d 207 (S.C. 1981); Green v. Clinic Masters, 272 N.W.2d 813, 815 (S.D. 1978); International Collection Serv. v. Gibbs, 510 A.2d 1325, 1327 (Vt. 1986).

Today, the vast majority of state courts have held that contractual forum selection clauses are valid and enforceable.[53] A few states have enacted statutes declaring such clauses enforceable.[54] Most of the states have adopted the doctrine set forth in *Bremen*, and will enforce a clause unless it deprives a party of its day in court.[55] Other states have adopted a slightly more flexible test, often referring to the Restatement (Second) of Conflict of Laws.[56] These states will enforce a contractually valid clause which is fair and reasonable.[57] These tests differ from the *Bremen* doctrine by allowing courts more discretion in weighing the inconvenience to the parties, and consequently more discretion in deciding whether or not to enforce the clause.[58]

A few states tenaciously cling to the view that forum selection clauses are per se void and unenforceable.[59] This view is still endorsed by court decisions in Alabama[60] and Georgia,[61] and by statute in other states.[62]

Recent converts include Missouri, North Carolina, Texas, and Virginia. *See* High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 496 (Mo. 1992); Perkins v. CCH Computax, 423 S.E.2d 780, 784 (N.C. 1992); Sarieddine v. Moussa, 820 S.W.2d 837 (Tex. Ct. App. 1991); Paul Business Sys. v. Canon, U.S.A., 397 S.E.2d 804, 807 (Va. 1990).

53. *See supra* note 52.

54. *E.g.*, NEB. REV. STAT. § 25-415 (1989); N.H. REV. STAT. ANN. § 508-A (1983); N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989 & Supp. 1994); N.D. CENT. CODE § 28-04.1 (1991); OHIO REV. CODE § 2307.39 (Anderson Supp. 1992). These states have apparently adopted the Model Uniform Choice of Forum Act. This Act, reprinted in Willis L.M. Reese, *The Model Choice Act of Forum Act*, 17 AM. J. COMP. L. 292 (1969), contains criteria for enforcement similar to those found in *Bremen*. *See* Solimine, *supra* note 20, at 90-91.

55. *See supra* notes 52, 54.

56. *E.g.*, ABC Mobile Sys. v. Harvey, 701 P.2d 137 (Colo. App. 1985); *Hauenstein & Bermeister*, 320 N.W.2d at 886; *Reeves*, 495 P.2d at 729.

57. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, as adopted in 1971, provided: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). The American Law Institute amended § 80 in 1986 to now state: "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1986).

58. *E.g.*, Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.E.2d 432 (Iowa 1982) (finding a forum selection clause neither absolutely binding nor absolutely void, but a factor to help the court decide, in its discretion, to exercise jurisdiction); *Hauenstein & Bermeister*, 320 N.W.2d at 889-90.

59. *See* Richard D. Freer, Erie's *Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1093 n.31 (1989) (citing cases which find such clauses per se invalid).

60. *See* White-Spunner Constr. v. Cliff, 588 So. 2d 865 (Ala. 1991); Keelean v. Central Bank of the South, 544 So. 2d 153 (Ala. 1989); Redwing Carriers v. Foster, 382 So. 2d 554 (Ala. 1980).

61. *See* Cartridge Rental Network v. Video Entertainment, 209 S.E.2d 132 (Ga. Ct. App. 1974). *But see* Stephens v. Entre Computer Ctrs., 696 F. Supp. 636, 640 n.4 (N.D. Ga. 1988) (noting that while such clauses violate Georgia public policy federal procedural rules governed thus allowing the Court to uphold the clause).

62. *E.g.*, Cerami-Kote v. Energywave Corp., 773 P.2d 1143 (Idaho 1989) (holding that public policy expressed in IDAHO CODE § 29-110 prohibits enforcement of forum selection clause); Polaris Indus. v. District Court, 695 P.2d 471 (Mont. 1985) (stating that the public policy expressed in MONT.

The stated reason for this traditional view is that a forum selection clause ousts a court of its jurisdiction and is therefore invalid as against public policy.[63] A handful of states have not squarely addressed this question in post-*Bremen* litigation.[64]

One state that has recently addressed the question, Florida, rejected the traditional view that forum selection clauses are void but with an interesting limitation. The Florida Supreme Court in *McRae v. J.D./M.D.*[65] considered the validity of a forum selection clause designating the state courts of Florida as the appropriate forum.[66] The court concluded that such clauses are valid and enforceable, but only if Florida otherwise has some independent basis for personal jurisdiction over the defendant.[67]

III. RECENT DEVELOPMENTS

Most recently the Supreme Court extended the *Bremen* doctrine to domestic consumer form contracts in another admiralty jurisdiction case, *Carnival Cruise*.[68] In *Carnival Cruise*, the Shutes purchased cruise tickets from Carnival Cruise Lines through a travel agent in their home state of Washington.[69] Carnival Cruise Lines sent the Shutes tickets from its headquarters in Miami, Florida.[70] The face of each ticket contained an

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CODE ANN. § 28-2-708 renders forum selection clauses void).

63. *Cliff*, 588 So. 2d at 866. These state court decisions rarely offer any additional explanation or justification for their conclusions that such clauses are void. *See id.*; *Keelean*, 544 So. 2d at 155-56. The most likely explanation for this traditional view is that these states have confused subject matter jurisdiction, which cannot be conferred by consent, with personal jurisdiction and venue. Each state is, of course, free to declare its own doctrine with respect to forum selection clauses because *Bremen* and *Carnival Cruise Lines*, both admiralty jurisdiction cases, are not directly binding on the states. *See supra* note 26; *infra* note 80. However, this traditional view seems particularly outdated in light of *Bremen*'s determination that such clauses do not oust a court of its jurisdiction. *See Bremen*, 407 U.S. at 12.

Federal courts are, of course, courts of limited subject matter jurisdiction. U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1331 (1988). They also have a long tradition of jurisdiction-divesting doctrines (*e.g.*, abstention, exhaustion of administrative remedies) not applicable in state courts. But most states, including Alabama, recognize the doctrine of forum non conveniens. *See* Employers Ins. v. Alabama Ins. Guar. Ass'n, 590 So. 2d 888, 892-93 (Ala. 1991) (stating that the doctrine of forum non conveniens was not available in Alabama until adoption of the 1987 amendment to ALA. CODE § 6-5-430). *But see* Smith v. Board of Regents, 302 S.E.2d 124, 125-26 (Ga. Ct. App. 1983) (noting that Georgia courts have never expressly sanctioned the doctrine of forum non conveniens). However, these states do not explain why a forum selection clause impermissibly divests a court of jurisdiction, whereas forum non conveniens does not. *See Employers Ins.*, 590 So. 2d at 892-93.

64. *See supra* notes 52-54, 60-62 (listing cases from states that have addressed the issue of forum selection clause validity post-*Bremen*).

65. 511 So. 2d 540 (Fla. 1987).

66. *Id.* at 541.

67. *Id.* at 544; *see also infra* notes 166-74 and accompanying text (discussing in detail *McRae*).

68. 111 S. Ct. at 1522.

69. *Id.* at 1524.

70. *Id.*

exclusive forum selection clause requiring all disputes in connection with this contract to be litigated only in Florida courts.[71]

The Shutes boarded the cruise ship in California to sail to Puerto Vallarta, Mexico.[72] While the ship was in international waters, Mrs. Shute was injured when she slipped on a deck mat.[73] The Shutes filed suit in the United States District Court in Washington claiming injuries caused by defendant Carnival Cruise Line's negligence.[74] The defendant moved for summary judgment, contending that the forum selection clause in plaintiff's ticket required the Shutes to bring their suit in a Florida court.[75] The district court granted the motion, but the court of appeals reversed.[76] The court of appeals acknowledged that the *Bremen* doctrine controlled, but concluded that the forum selection clause should not be enforced because it "was not freely bargained for."[77] As an independent justification for refusing to enforce the clause, the court of appeals noted there was evidence in the record to indicate that the Shutes were physically and financially incapable of pursuing their litigation in Florida, and thus, the enforcement of the clause would operate to deprive them of their day in court in contravention of the *Bremen* doctrine.[78]

The Supreme Court reversed, concluding that the court of appeals erred in refusing to enforce the forum selection clause.[79] The Court agreed that the federal common law *Bremen* doctrine applied in an admiralty jurisdiction case,[80] but reached the opposite conclusion regarding enforcement of the clause.[81]

The Court stated three reasons for enforcing the clause. First, the Court found the clause reasonable even though it was not bargained for by the Shutes.[82] Indeed, the Court did not expect there would be any negoti-

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1988), *rev'd*, 111 S. Ct. 1522 (1991). For a complete summary of the numerous lower court decisions which preceded Supreme Court review, see Mullenix, *supra* note 20, at 327-35.
77. *Shute*, 897 F.2d at 389. The court of appeals held that the clause did not represent the express intent of the parties because the provision was printed on the ticket and presented to the purchasers on a take-it-or-leave-it basis. *Id.* at 388-89. The court also doubted that the Shutes had notice of the clause because they apparently had no opportunity to review the terms and conditions printed on the ticket until after the transaction was completed. *Id.* at 389 n.11.
78. *Id.* at 389 (citing *Bremen*, 407 U.S. at 18).
79. *Carnival Cruise*, 111 S. Ct. at 1528.
80. *Id.* at 1525. In delineating the boundaries of its inquiry, the Court noted that the case was in admiralty, and federal common law governed the enforceability of the forum selection clause. *Id.*
81. *Id.* at 1529.
82. *Id.* at 1527.

ation over the terms of the clause:

> Common 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 . . . . [W]e must refine the analysis of *The Bremen* [sic] to account for the realities of form . . . contracts.[83]

Despite the obvious lack of bargaining between unequal parties, the Court found the forum selection clause in a form contract reasonable because of the benefits it conferred on the parties.[84] Carnival Cruise benefited from the certainty and savings established by the clause, and the Shutes benefited, "in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[85]

Second, the Court refused to accept the court of appeals' determination that the clause should not be enforced due to the Shutes' inability to pursue this litigation in Florida because the trial court had made no factual finding regarding whether the Shutes were physically or financially prohibited from pursuing their case in Florida.[86] Furthermore, the Court found that Florida was not a "remote alien forum," and that this case was not essentially a local Washington dispute.[87] Accordingly, the Court held that the Shutes did not satisfy the heavy burden of proof required to set aside the clause on grounds of inconvenience.[88]

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83. *Id.*

84. *Id.* at 1528.

85. *Id.* at 1527. These proffered benefits to Carnival Cruise Lines and to the Shutes have been criticized as illusory. *See, e.g.*, Goldman, *supra* note 20, at 714-30; Mullenix, *supra* note 20, at 342-44. The Court's suggested benefits make some sense, however, in light of the Court's observation in *Bremen* that one party to a contractual forum selection clause receives a price reduction in return for the other party's ability to control the expenses associated with potential litigation. *See Bremen*, 407 U.S. at 13-14.

86. *Carnival Cruise*, 111 S. Ct. at 1527-28. The Court refused to defer to the court of appeals' conclusory reference to the record because the district court in Washington, which actually dismissed the case for lack of personal jurisdiction, made no findings of fact regarding the Shutes' financial and physical capabilities. *Id.* at 1528. By affirming the district court's dismissal, the Court refused to afford the Shutes an opportunity to make such a factual showing on remand. The Court's treatment of this issue seems particularly unfair to the Shutes in light of the fact that the reasonableness of the forum selection clause was apparently not an issue considered by the trial court. *See* Liesemer, *supra* note 20, at 1049-51; Mullenix, *supra* note 20, at 341 n.101.

Because the Court disposed of the "financially and physically incapable" issue in this manner, it did not discuss the extent to which such a trial court finding is relevant to the enforcement of a consumer form contract forum selection clause, nor the appropriate standards a trial court should utilize in determining whether such a finding is appropriate. This omission leaves the lower courts with little guidance on this unreasonableness issue.

87. *Carnival Cruise*, 111 S. Ct. at 1527-28.

88. *Id.* at 1528. The Supreme Court's willingness to force the Shutes, individual consumers and residents of Washington, to litigate in Florida leads to the inescapable conclusion that no domestic

Finally, the Court viewed the clause as fundamentally fair because Carnival Cruise had its principal place of business in Florida, and there was no evidence of fraud or overreaching.[89] The Court emphasized that the Shutes conceded they had notice of the clause, and therefore presumably retained the option of rejecting the contract with impunity.[90] Because the clause was reasonable and fundamentally fair, and the forum was not inconvenient, the Court concluded that the unbargained for forum selection clause was enforceable.[91]

Carnival Cruise makes several important modifications to the forum selection clause doctrine endorsed in *Bremen*. The Court will now enforce a forum selection clause in a consumer contract even if it is a standard form contract between parties of unequal bargaining power, and even though the clause is not the subject of negotiation.[92] The Court presumes that such a clause is valid and enforceable, even though it is between an individual consumer and a large interstate company.[93] The consumer must satisfy a heavy burden to prove that enforcement of the clause will be so inconvenient as to deprive consumers of their day in court.[94] The Court will neither assume such inconvenience exists based on likely physical and financial inability to litigate in the designated forum, nor will it assume that the designated forum is unreasonable simply because of its distant

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forum could be considered so unreasonably remote as to practically deprive the litigants of their day in court within the meaning of the *Bremen* doctrine. *Bremen*, 407 U.S. at 17-18. Before *Carnival Cruise*, this conclusion seemed likely with respect to interstate commercial contracts, but less likely as to consumer contracts. *See* Gruson, *supra* note 3, at 179-83; Mullenix, *supra* note 2, at 359 n.375. Now, after *Carnival Cruise*, even a contract clause which forces a consumer to litigate in the opposite corner of the United States survives the *Bremen* test. *Carnival Cruise*, 111 S. Ct. at 1527-28.

89. *Carnival Cruise*, 111 S. Ct. at 1528-29.

90. *Id.* at 1525, 1528. This was an unfortunate concession. According to the dissenting opinion, not only is it very unlikely that any consumer is aware of such terms contained in a standard form contract, but the Shutes also had no opportunity to read this provision until after they had purchased their tickets. *See id.* at 1529 (Stevens, J., dissenting).

The majority opinion suggests that lack of notice may have some effect on the reasonableness of enforcing a forum selection clause, but does not discuss the nature of that effect. *See id.* at 1527-28. Most commentators argue, and some lower courts have held, that a forum selection clause buried in a standard form consumer contract rarely constitutes sufficient notice and should not be enforced. *See, e.g.*, Berman v. Cunard Line, 771 F. Supp. 1175, 1177-78 (S.D. Fla. 1991) (holding that a forum selection clause in a form passenger ticket is unenforceable when the plaintiff lacked notice of it); Horning v. Sycom, 556 F. Supp. 819, 821 (E.D. Ky. 1983) (holding that a forum selection clause was unenforceable when it was "only one of many clauses in the form contract that together represent[ed] the best job of boiler-plating since the building of the Monitor."); Tandy Computer Leasing v. Terina's Pizza, 784 P.2d 7 (Nev. 1989); Goldman, *supra* note 20, at 716-21; *supra* note 18 (noting situations where forum selection clauses are unenforceable due to violations of general contract formation principles).

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

92. *See supra* notes 79-91 and accompanying text.

93. *See supra* notes 82-85 and accompanying text.

94. *See Carnival Cruise*, 111 S. Ct. at 1528.

geographic location.[95] In other words, the Court will presume a forum selection clause in a consumer contract is valid and enforceable, and will require the resisting party—even if that party is a consumer—to satisfy the heavy burden of proving that enforcement would be unreasonable.[96]

The *Carnival Cruise* opinion has been roundly criticized as unfair, unrealistic, and anticonsumer.[97] These criticisms may well be justified. The full impact of the opinion is difficult to assess, however, because the Court failed to address some key issues. The parties conceded the issue of notice, for example, and the Court therefore saw no need to discuss the effect lack of notice of the forum selection clause would have with respect to its enforcement in a standard consumer form contract.[98] Moreover, the Court did not deem it necessary to explain what facts, if any, were necessary to establish a finding that consumers are financially and physically unable to litigate in the designated forum; nor what effect such a finding should have on clause enforcement.[99] Nevertheless, a reasonably safe characterization of the *Carnival Cruise* opinion is that it is not proconsumer.

Like *Bremen*, *Carnival Cruise* is an admiralty jurisdiction case based on federal common law, and is therefore not generally binding on lower federal courts or state courts.[100] Each state is free to either adopt or reject *Carnival Cruise*, or to formulate rules applicable to forum selection clauses in consumer contracts different from those in commercial ones. However, the current fear is that state and lower federal courts will adopt the Supreme Court's *Carnival Cruise* doctrine favoring enforcement of forum selection clauses in unbargained for standard consumer form contracts for all civil actions just as they adopted the *Bremen* doctrine for commercial contracts.[101] There certainly are a variety of legitimate policy reasons for a state not to enforce forum selection clauses in adhesive consumer contracts with the same vigor as those in freely negotiated commercial contracts.[102]

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95. *Id.*

96. *See supra* notes 79-91 and accompanying text.

97. *See, e.g.*, Goldman, *supra* note 20, at 701; Liesemer, *supra* note 20, at 1028-29; Mullenix, *supra* note 20, at 325-26; Purcell, *supra* note 20, at 430-36; Kirby, *supra* note 20, at 889; Julie H. Bruch, Comment, *Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum*, 23 LOY. U. CHI. L.J. 329, 330 (1992).

98. *See supra* note 90.

99. *See supra* notes 86-88.

100. *See supra* note 26 and accompanying text.

101. *See supra* notes 20, 97.

102. The *Carnival Cruise* Court's federal common law reflects several debatable policy determinations regarding reasonableness, economics, adhesion contracts, notice, and fairness. Each state is free to resolve such determinations in a different manner when developing its standards for enforcement of forum selection clauses in consumer contracts. Liesemer, *supra* note 20, at 1028.

Whatever approach a state adopts may protect consumers in state court. But the important question remains: Will such protective state doctrine be followed by the federal courts? The answer to this question will be discussed in the second installment of this article. First, a look at state court forum selection clause issues is found in Part IV.

IV. FORUM SELECTION CLAUSES IN STATE COURT

As discussed above, the majority of states now have appellate court decisions holding that forum selection clauses are not void per se as against public policy.[103] This part discusses the two main procedural issues now faced by these state courts when asked to enforce forum selection clauses.[104] The first issue is whether a forum selection clause should be enforced when the contractually designated forum otherwise lacks personal jurisdiction over the defendant. The second issue is whether a forum selection clause waives the parties' right to contest the designated forum through a motion to dismiss based on forum non conveniens, and, if not, what weight should be given to the clause when such a motion is made.[105] A subsidiary issue is what effect a court should give to a contractual provision that designates the law applicable to the construction of the contract.[106]

This article will not discuss how a state should decide these policy considerations. For an excellent explanation of why the Supreme Court incorrectly resolved these policy issues in *Carnival Cruise*, and why forum selection clauses in consumer contracts should be prima facie invalid, see generally Goldman, *supra* note 20. Instead, this article will focus on whether any jurisdictional or venue-related doctrines limit the freedom of the state and lower federal courts to develop standards different from those endorsed by *Carnival Cruise* for enforcement of forum selection clauses in consumer contracts.

103. *See supra* notes 52-54 and accompanying text.

104. The focus here is on procedural issues and not on the contract formation issues of whether the clause is invalid due to fraud, overreaching, or unequal bargaining power. The procedural issues are currently troubling to state courts. These issues are relatively simple to resolve, however, and should not present serious ongoing problems.

By contrast, the contract formation issues potentially are present in every contract case, and in every forum selection clause case. For reasons discussed later, state courts will eventually devote far more attention to these contract issues than to the procedural ones.

105. A related issue concerns clauses which designate a court in a specific county, and the defendant seeks to transfer venue to another county within the same state. *See infra* note 220.

106. Other forum selection clause issues confronting state courts involve construction and application of the *Bremen*'s reasonableness requirement. *See* Mullenix, *supra* note 20, at 347 (identifying 21 different tests and factors that lower federal courts have evaluated in assessing reasonableness); Mullenix, *supra* note 2, at 356-60 (reviewing several cases that provide nine different definitions of reasonableness, and concluding that any workable test has been largely ignored in favor of "freelance judicial bucaneering").

Other issues involve interpretation of ambiguous contractual language, such as whether the parties intended a forum selection clause to be mandatory or permissive. *See* Mullenix, *supra* note 2, at 298-99 nn.17-19 (citing numerous cases construing ambiguous clauses as either permissive or mandatory). Another issue involving the interpretation of ambiguous language concerns whether the parties

A state court's endorsement of the *Bremen* doctrine, which presumes forum selection clauses are enforceable, means that concern over forum-shopping is no longer an issue. Making these clauses enforceable, particularly exclusive clauses, establishes that parties may contractually waive whatever forum-shopping choices plaintiffs would otherwise have available to them. The plaintiff who contractually agreed to litigate in an exclusive forum gives up the right to choose among several possible states' courts available under the liberal doctrine of personal jurisdiction, as well as tactical forum-shopping choices based on conflict of law principles.[107]

A. *Forum Selection Clauses and Personal Jurisdiction*

Personal jurisdiction concerns the ability of a state court to enter a binding judgment against a nonresident defendant.[108] Together with subject matter jurisdiction and adequate notice, personal jurisdiction is one of the three requirements for a valid judgment.[109] If a defendant properly objects, and the court determines that it lacks personal jurisdiction, the court must dismiss the case because it lacks power to enter a binding judgment against that defendant.[110]

A state court's personal jurisdiction is limited by both the Due Process Clause of the Fourteenth Amendment, and by that state's long-arm statutes defining the court's personal jurisdiction.[111] The Due Process Clause per-

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intended a forum selection clause to govern tort actions arising out of the contractual relationship. *See* Smith, Valentino & Smith, Inc. v. Superior Court, 551 P.2d 1206, 1210 (Cal. 1976).

107. A savvy plaintiff may choose to litigate in a particular state based on that state's choice of law doctrine, in order to capture favorable substantive law or statute of limitations. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that is it constitutionally permissible for a state court, based on the state's choice of law doctrine, to apply its own statute of limitations even though the claims are governed by the substantive law of another state); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (holding that a state may apply its own substantive law when the parties have sufficient contact with the state so that application of its law is not unfair). An exclusive forum selection clause eliminates this strategic litigation option. Of course, a choice of law clause also removes this option by designating which substantive law governs any dispute arising out of the contract, regardless of whether a forum selection clause exists. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (holding that a choice of law provision should be considered in determining whether a party has purposely availed themselves of the state's law for jurisdictional purposes).

108. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Pennoyer v. Neff, 95 U.S. 714 (1877).

109. *See* Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("The validity of an order depends upon that court having jurisdiction over both the subject matter and the parties."); Kulko v. Superior Court, 436 U.S. 84, 91 (1978) (stating that personal jurisdiction and notice are necessary in order for a court to exercise jurisdiction over a nonresident defendant); Mullane v. Central Bank & Trust Co., 339 U.S. 306 (1950) (requiring constitutionally adequate notice as a prerequisite to a valid judgment).

110. Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); McDonald v. Mabee, 243 U.S. 90 (1917); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 465 (1873).

111. *See, e.g., Burger King*, 471 U.S. at 471-73; Helicopteros Nacionales de Columbia, S.A. v.

mits a state court to assert personal jurisdiction over a nonresident defendant if the defendant has "minimum contacts" with the forum state.[112] Conversely, if the defendant does not have minimum contacts with the forum state, and the defendant properly objects, the court cannot constitutionally enter a valid judgment against the defendant.[113]

The Due Process Clause therefore sets forth the outer limits of a state court's personal jurisdiction. But within this constitutional boundary, each state is free to limit its courts' personal jurisdiction as much as it sees fit.[114] In theory, a state could decide to limit its courts' personal jurisdiction only to defendants who are residents of that state. More realistically, a state may choose to limit its jurisdiction over nonresident defendants to occasions that meet a list of specified factors, many of which are less expansive than what due process would permit under the minimum contacts test.[115]

Consequently, a state court seeking to assert personal jurisdiction over a nonresident defendant must do so consistent with both the state's jurisdictional statute and the Due Process Clause.[116] If a state statute extends personal jurisdiction beyond what due process permits, the application of that statute to a nonresident defendant will violate the Due Process Clause and will be deemed invalid.[117]

Hall, 466 U.S. 408, 413-14 (1984).

112. The minimum contacts test originated in *International Shoe*, where the Supreme Court recast the rigid presence test of *Pennoyer* by holding that

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Court concluded that all assertion of state court personal jurisdiction must be evaluated according to the minimum contacts standards of *International Shoe* and its progeny, regardless of whether the litigation is characterized as in personam, in rem, or quasi in rem. *Shaffer*, 433 U.S. at 207-12. Although embellished by concepts of reasonableness and transient jurisdiction, minimum contacts analysis remains the central due process test. *See infra* note 126.

113. *See Helicopteros*, 466 U.S. at 414; *World-Wide Volkswagen*, 444 U.S. at 291; *Shaffer*, 433 U.S. at 216-17.

114. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 440 (1952); Missouri Pac. R.R. v. Clarendon Boat Oar Co., 257 U.S. 533, 535 (1922); RESTATEMENT (SECOND) OF JUDGMENTS § 4, cmts. b & c (1982). *See generally* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954) (discussing the role of federalism in the interplay between federal and state court jurisdiction); Willus L.M. Reese & Nina M. Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 265 (1959) (discussing the background and bases for due process requirements of judicial jurisdiction).

115. *See infra* note 175 and accompanying text (providing examples of states that use specific factors to determine whether personal jurisdiction may be asserted).

116. The scope of a state's personal jurisdiction is typically specified by state statute, and usually referred to as a long-arm statute. *See infra* note 175. For a state-by-state survey of state long-arm statutes, see ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS app. E (2d ed. 1991).

117. *See Shaffer*, 433 U.S. at 186 (rejecting a Delaware sequestration statute as violative of due

A typical forum selection clause will designate that all disputes arising out of the contract must be litigated in the courts of a specific state. Not all forum selection clauses designate an exclusive forum. Many simply state that the parties consent to be sued in the courts of the specific state.[118] Under either type of forum selection clause, a problem develops when a lawsuit is filed in the designated forum and that state has no basis for personal jurisdiction over the defendant other than the forum selection clause.

A hypothetical may help illustrate this issue. Assume that a Florida company and a New York company enter into a commercial contract which designates the state courts of Florida as the exclusive forum to adjudicate any disputes arising out of the contract, and both parties expressly consent to be sued in Florida courts. Assume further that a dispute arises as to whether the New York company has breached the contract, and the Florida company commences an action against the New York company in the appropriate Florida state court. The New York defendant then timely moves to dismiss for lack of personal jurisdiction.

The clause presents no jurisdictional problems in our hypothetical if the Florida court has an adequate basis for personal jurisdiction independent of the forum selection clause. For example, there is no constitutional issue if the defendant has sufficient minimum contacts with the state of Florida;[119] and no statutory issue if the defendant's contacts with Florida provide a basis for personal jurisdiction under Florida's long-arm statute.[120] In such cases, the clause simply operates to designate one specific state forum from among many other permissible state forums.[121] The

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process because it permited state courts to exercise personal jurisdiction despite the absence of a defendant's minimum contacts with the State of Delaware).

118. For example, the contract may provide that the courts of the State of Florida are the exclusive forums to adjudicate contract disputes, or it may simply provide that the parties to the contract consent to be sued in the courts of the State of Florida. For purposes of this personal jurisdiction issue, whether the clause is mandatory (*i.e.*, designates a state as the exclusive forum) or simply permissive (*i.e.*, consents to be sued in a specific state) is of no consequence to the analysis.

119. *See Burger King*, 471 U.S. at 462; Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 503 (1989).

120. FLA. STAT. §§ 48.193-.194 (West Supp. 1993).

121. In the absence of a forum selection clause, our Florida plaintiff may constitutionally bring suit in any state with which the New York defendant has sufficient minimum contacts. This may be New York, or any other state where the defendant has sufficient contacts to satisfy due process and the forum state's long-arm statutes. If the New York defendant is a large company which conducts "continuous and systematic" business in all states, then a court in any state is likely to be able to assert personal jurisdiction over the defendant under the concept of general jurisdiction. *See Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."). In such circumstances, due process requires that the defendant's contacts with the forum state be continuous and systematic. *Id.* at 414-16 (citing Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952)). For a more thorough discussion of general juris-

clause here accomplishes its general purpose, *i.e.*, to provide some certainty if a dispute arises in this commercial contractual relationship.[122] The Florida court should deny the motion to dismiss for lack of personal jurisdiction.

But what if the only basis for asserting personal jurisdiction over the defendant is the forum selection clause? In other words, in the hypothetical, there is no constitutional or statutory basis for the Florida court to assert personal jurisdiction over the New York defendant absent the forum selection clause. The New York defendant has no meaningful contacts of any kind with the State of Florida.[123]

This issue is really quite simple to analyze, but does merit some explanation. Surprisingly, few state courts have squarely addressed this issue. In order to understand the resolution, it is important to understand the nature of a defendant's personal jurisdiction right.

As previously mentioned, we know from *International Shoe Co. v. Washington*[124] and its progeny that a state can assert personal jurisdiction under the Due Process Clause if the defendant has sufficient minimum contacts with the forum state.[125] If the defendant lacks minimum contacts with the forum state, that state lacks the ability to enter a valid, binding judgment against the defendant.[126] A defendant can waive this due pro-

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diction, see Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097 (1990); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

122. This also assumes, of course, that Florida is a state which does not view forum selection clauses per se void as contrary to public policy. *See supra* notes 59-63 and accompanying text. In fact, until fairly recently there was some doubt as to where Florida courts stood on this public policy question. *Compare* Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (Fla. 3d DCA 1983) (declaring forum selection clauses void) *with* Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121 (Fla. 4th DCA 1984) (declaring forum selection clauses enforceable under certain conditions). The Florida Supreme Court settled the issue in Manrique v. Fabbri, 493 So. 2d 437 (Fla. 1986), and held that forum selection clauses are not per se void on public policy grounds. *Id.* at 440.

123. The contract with the Florida company is a contact, but not necessarily sufficient by itself to provide the requisite minimum contacts. *See Burger King*, 471 U.S. at 478-79. Perhaps an easier, but less realistic, hypothetical is where the Florida and New York companies contractually designate a neutral forum such as North Carolina in their forum selection clause, and the defendant has no contacts with North Carolina.

124. 326 U.S. 310 (1945).

125. *See supra* notes 111-13 and accompanying text.

126. The minimum contacts analysis first developed in *International Shoe* remains the central due process test for evaluating all assertions of state court personal jurisdiction over nonresident defendants. *See Shaffer*, 433 U.S. at 136. However, the Supreme Court has also developed some subsidiary considerations. In appropriate cases, a state should not assert personal jurisdiction over a nonresident defendant, even one who has purposely established minimum contacts in the forum state, where the exercise of jurisdiction would be unreasonable. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987). This so-called reasonableness consideration includes evaluation of several factors: The burden on the defendant, the interests of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining relief, "the interstate judicial system's interest in obtaining the most

cess right. Traditionally, for example, a defendant can waive this constitutional right by simply not raising it by proper objection at the relevant time in a lawsuit.[127] In typical state court terminology, this type of waiver is known as a "general appearance."[128]

A general appearance waiver is not very difficult to accomplish, in part because the rules for properly making a "special appearance" can be quite technical. Even an unintentional failure to raise an objection to personal jurisdiction will result in a waiver of the defendant's due process right.[129] A defendant who has no contacts with the forum state can waive

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efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U.S. at 292.

Another constitutional basis for personal jurisdiction is transient jurisdiction. Burnham v. Superior Court, 110 S. Ct. 2105, 2115 (1990). The doctrine of transient jurisdiction depends solely on service of the complaint and summons on the defendant while present in the forum state, regardless of whether the defendant otherwise has any minimum contacts with the forum state. *Id.*

127. When and how such a waiver occurs varies from state to state and is usually specified by statute or court rule. For example, in California defendants waive any right to contest personal jurisdiction unless they file a timely motion to quash as their first and only appearance. CAL. CIV. PROC. CODE § 418.10(a)(1) (West 1973 & Supp. 1992). If this motion is not made at the first appearance (except where defending against a temporary restraining order application), or is combined with any other motion (except one to dismiss based on forum non conveniens), the appearance will constitute a general appearance. CAL. CIV. PROC. CODE §§ 418.10(a), 418.11, 1014 (West 1973 & Supp. 1992); *see also* California Dental Ass'n v. American Dental Ass'n, 590 P.2d 401 (Cal. 1979) (stating that a defendant must appear specially to challenge personal jurisdiction only and waives the right to object if simultaneously appearing for some other purpose or to answer to the merits).

In many states, if the defendant combines any other objection in the first appearance—even to the court's subject matter jurisdiction or venue—the appearance will be considered general. *See* CASAD, *supra* note 116, § 3.01[5][a], at 3-44 to -48 nn.138-52 (citing numerous cases from several states). Until 1962, Texas permitted no special appearances, and even today authorizes only their limited use. *See* W. Frank Newton & Jeremy C. Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 560-78 (1986).

By contrast, in those states that have adopted rules based on the Federal Rules of Civil Procedure, a defendant does not waive the right to object so long as raised in the first appearance, even when combined with other motions or stated in an answer which also responds to the merits. *See* FED. R. CIV. P. 12(g)-(h). Approximately one-half of the states have appearance rules which replicate the Federal Rules, and require only that the objection be raised in the defendant's first appearance, whether by motion or answer. *See generally* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (analyzing those states whose rules track the Federal Rules).

128. General appearance as used here simply means any activity taken by a defendant in a lawsuit which, pursuant to relevant state law, has the effect of waiving that defendant's right to contest personal jurisdiction. What constitutes a general appearance varies from state to state. *See* CASAD, *supra* note 116, § 3.01[5][a]; *supra* note 127. Litigation activity which preserves the right to object is usually referred to as a special appearance. Although use of these terms has fallen out of favor, they still provide a useful distinction between litigation involvement which will—or will not—waive an objection to personal jurisdiction.

129. Regardless of the defendant's desire not to consent to a court's jurisdiction, many litigation activities will constitute a general appearance. For example, in many states filing an answer is a general appearance even though it raises an objection to personal jurisdiction. *See* CASAD, *supra* note 116, § 3.01[5][a] (citing numerous cases from various states). Even a motion for a continuance or for an extension of time to plead may constitute a general appearance. *Id.* § 3.01[5][a], at 3-46 to -47 nn.146-

the right to object to personal jurisdiction by simply failing to raise this objection in a timely or proper manner.[130]

The concept of a general appearance waiver existed long before the Supreme Court linked personal jurisdiction to the Due Process Clause.[131] When personal jurisdiction became a constitutional doctrine in 1877 by virtue of *Pennoyer v. Neff*,[132] the Court reiterated the traditional concept that a state court could obtain personal jurisdiction solely by a defendant's general appearance in the lawsuit.[133] Even though the Court occasionally struggled with this waiver concept because it was unsure of the basis of the defendant's due process right in personal jurisdiction, the Court never questioned a defendant's ability to submit to a court's personal jurisdiction through an appearance.[134]

The Supreme Court finally clearly defined the nature of a defendant's personal jurisdiction right in *Insurance Corp. v. Compagnie des Bauxites de Guinee*.[135] The Court emphasized that personal jurisdiction flows from the Due Process Clause and not from some other part of the Constitution.[136] Moreover, the Court announced that the "personal jurisdiction requirement recognizes and protects an individual liberty interest."[137] Finally, the Court noted that because personal jurisdiction represents an individual right, it can, like other such rights, be waived.[138] This right can be

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130. *See supra* note 127.

131. *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 719 (1838) ("An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue."); Loomis v. Wadhams, 74 Mass. (8 Gray) 557, 561 (1857) ("Any defect of service or of jurisdiction, so far as the person of the defendant was concerned, had been waived by his appearance and answer."); Grantier v. Rosecrance, 27 Wis. 488, 491 (1871) ("Coming into court and moving that the judgment be set aside . . . was a general appearance in the case, and cured all irregularity in the service of process.").

132. 95 U.S. 714 (1877).

133. *Id.* at 720.

134. Under *Pennoyer*, personal jurisdiction was based on principles of state sovereignty over persons and property within its territory. *Id.* at 722. This basis for personal jurisdiction seemed inconsistent with waiver through general appearance. Even when the Court announced the modern doctrine of personal jurisdiction (*i.e.*, minimum contacts) in *International Shoe*, it did not clearly indicate whether this doctrine fully repudiated state sovereignty as the basis for personal jurisdiction. *See supra* note 112; *infra* note 159. Nevertheless, throughout the post-*Pennoyer* period, the Court continuously indicated that a general appearance confers personal jurisdiction. *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938) (noting that the plaintiff, by filing a complaint in state court, submits to the jurisdiction of the court voluntarily for purposes of the defendant's counterclaim); Sherrer v. Sherrer, 334 U.S. 343, 351-52 (1947); Sugg v. Thornton, 132 U.S. 524, 530 (1889).

135. 456 U.S. 694 (1982).

136. *Id.* at 702.

137. *Id.* at 702-03. Personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.*

138. *Id.* at 703.

intentionally waived by submitting to a court's jurisdiction by appearance,[139] or, as in *Insurance Corp.*, it can be impliedly waived through failure to comply with a court's discovery orders.[140]

There is simply no question that the constitutional requirement of personal jurisdiction is an individual right that can be waived by a defendant at the time of litigation.[141] A defendant who waives this right through a general appearance provides the court with personal jurisdiction even in the absence of minimum contacts.[142] Is there any reason why a defendant cannot waive this individual liberty interest in advance of litigation by contractually consenting to suit in a forum state with which the defendant has no minimum contacts? The Court has not directly answered this question, although it has approved similar contractual waivers.

The most dramatic contractual waiver upheld by the Supreme Court was the confession of judgment provision in *D.H. Overmyer Co. v. Frick Co.*[143] In *Overmyer*, two commercial parties agreed to a contract which included a provision waiving several rights by debtor Overmyer in the event of a contract breach.[144] This provision authorized creditor Frick to designate an attorney to appear in Ohio court for debtor Overmyer, to waive service on Overmyer, and to confess judgment against Overmyer for the principal and interest on a related note.[145] The Ohio cognovit note statute authorized such contractual waivers.[146]

The Court upheld this application of the Ohio statute, noting that parties can make voluntary, knowing, and intelligent waivers of their constitutional rights.[147] The Court was not troubled by the fact that this waiver was by contract in advance of litigation and rejected Overmyer's argument that this fact was constitutionally significant.[148] The Court

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139. *Id.*

140. *Id.* at 705-09.

141. *Id.* at 703-05.

142. *See id.* at 703.

143. 405 U.S. 174 (1972).

144. *Id.* at 183.

145. *Id.* at 180-81.

146. *See id.* at 175.

147. *Id.* at 187 (citing National Equip. Rental v. Szukhent, 375 U.S. 311 (1964)). The Court also observed that the due process rights to notice and a hearing prior to civil judgment are subject to waiver. *Id.* at 185. The Court noted that such waivers contained in a commercial contract will be enforced so long as the contract was not one of adhesion, not the result of a great disparity in bargaining power or fraud, and not one where the debtor received nothing in return for the cognovit provision. *Id.*

148. *Id.* at 184. Overmyer argued that the question of whether a defendant's appearance was voluntary must be determined at the time of the court proceeding, not at an earlier date. *Id.* Overmyer also argued that it is unconstitutional to waive, in advance, the right to present a defense in an action on the note. *Id.* These arguments were rejected by the Court, quoting the dicta from *Szukhent* that "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.* at

therefore left no doubt that even the most essential due process rights—the right to notice and an opportunity for a hearing prior to judgment—can be waived in advance by contract.[149]

Despite these clear indications that the Supreme Court will uphold personal jurisdiction based solely on a forum selection clause, some forceful arguments can be made against such a contractual waiver. One argument focuses on the timing of the waiver and includes a mixture of policy and empiricism. This argument distinguishes between a waiver during litigation and one made in advance of litigation. Although waiver is permitted by an appearance during litigation, waiver should not be permitted by a contract in advance of litigation.

This argument is based on the assumptions that many commercial and consumer contracts are entered into without attorney involvement, and that a party may agree to a forum selection clause without really understanding that they are waiving an important due process right. At the time the contract is negotiated, the parties do not expect to end up in court and therefore do not really focus on whatever litigation rights they are waiving in the contract. Their focus at the time negotiation is on commerce, not litigation.

By contrast, according to this argument, when a defendant enters a general appearance in a lawsuit and thereby waives any objection to personal jurisdiction, this waiver is usually accomplished by the defendant's attorney. Presumably, this attorney is well trained in law and in litigation tactics. Moreover, this general appearance waiver takes place at a time when the defendant is focused on litigation (not commerce), having been served with a complaint and summons. Consequently, the argument is that the general appearance waiver is knowingly made by the defendant at a more meaningful time than a waiver made in advance at the time of the contract.[150]

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185 (citing *Szukhent*, 375 U.S. at 315-16).

149. The contractual waiver must, however, be valid under general contract principles. *See* Swarb v. Lennox, 405 U.S. 191, 198-99, 201 (1972) (stating that a cognovit provision would not be enforced where it was an unbargained-for clause in an adhesion contract); *supra* notes 38, 44.

150. This argument is a combination of several arguments advanced by Edward L. Rubin. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981). Mr. Rubin argues that waivers in civil cases should be governed by the same principles applicable to waivers in criminal cases. *Id.* at 541. Accordingly, waivers must be voluntarily and knowingly made, as defined in criminal cases. *Id.* at 491-512, 531-38. Mr. Rubin argues that a contractual waiver should be void if it does not amount to the functional equivalent of a judicial determination by an impartial decisionmaker. *Id.* at 539. Accordingly, "[e]ach party must be aware of the right that is being waived, and there must be some process of negotiation or bargaining connected with that right." *Id.* Forum selection clauses must be bargained for in a way that is equivalent to a judicial hearing; thus, "[t]he parties must deal directly with each other, discuss the waiver in explicit terms, and have the opportunity to obtain professional representation." *Id.* at 559. Mr. Rubin's argument essentially is that contractual waiver of due process rights must be closely scrutinized and enforced only where there has been the functional equivalent of

This argument certainly has some force and may provide the kind of policy basis that would lead a state legislature to enact a jurisdictional statute which prohibits the enforcement of forum selection clauses where minimum contacts are absent.[151] However, as a justification for an absolute prohibition on contractual due process waivers, the argument finds little support in constitutional reasoning. This argument would mean that a defendant could never consent to personal jurisdiction in advance, and such a proposition simply runs counter to the reasoning of *Overmyer*, *Szukhent*, and *Bremen*.[152] Consequently, such a blanket prohibition on contractual waivers is not appropriate for civil cases.

First, the argument assumes facts regarding general appearance waivers which are not necessarily true. General appearance waivers are enforced whether made by a defendant with counsel or by a defendant *pro se*,[153] whether made intentionally or through inadvertence,[154] and whether made by express waiver or by implied waiver.[155] Second, ignorance of the precise legal impact of a contract provision is usually not

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a judicial determination during adjudication. *Id.* at 539. Professor Mullenix makes similar arguments. Mullenix, *supra* note 2, at 366-73. *But see* Solimine, *supra* note 20, at 64-69, 80-81 ("While important, the rights waived by most forum-selection clauses do not demand a higher degree of perfection than that already provided by contract law . . . . [T]he rights involved, personal jurisdiction protections and the ability to forum shop, are largely personal rights with relatively few structural attributes.").

151. *See* MICH. COMP. LAWS ANN. § 600.745(2) (West 1981) (imposing restrictions on enforcement of forum selection clauses which provide the only basis of jurisdiction in Michigan courts); McRae v. J.D./M.D., 511 So. 2d 540 (Fla. 1987) (construing Florida's long-arm statute); *infra* notes 165, 182-83 and accompanying text (discussing U.C.C. § 2A-106).

152. *Bremen*, 407 U.S. at 11; *Overmyer*, 405 U.S. at 185; *Szukhent*, 375 U.S. at 315-16. In *Overmyer*, the defendant argued that whether a defendant's appearance is voluntary must be determined at the time of the court proceeding, not at the earlier date when an agreement is signed. *Overmyer*, 405 U.S. at 184. The Supreme Court framed the question as whether the Ohio cognovit statute was unconstitutional in that it conferred a " 'contract waiver, before suit has been filed, before any dispute has arisen' " in a context " 'whereby a party gives up in advance his constitutional right' " to present a defense. *Id.* (quoting Petitioner's Brief). By affirming the validity of the Ohio cognovit statute and quoting *Szukhent*'s dicta with approval, the Court directly rejected this argument. *Id.* at 185. The Court in *Bremen* viewed the enforcement of the forum selection clause as "merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent*." *Bremen*, 407 U.S. at 10-11. The Court pointed out "that parties to a contract may agree in advance to submit to the jurisdiction of a given court." *Id.* at 11 (quoting *Szukhent*, 375 U.S. at 315-16).

153. *See supra* notes 127-28.

154. *See supra* notes 127-28.

155. *See* CASAD, *supra* note 116, § 3.01[5][a], at 3-42 to 3-54 nn.139-61. After reviewing numerous states' cases which apply this recognized traditional basis of waiver to various litigation activities, Professor Casad observed:

> It may seem anomalous to describe some of the acts that have been held to constitute a general appearance as expressing consent to jurisdiction, for the defendant may have no intent to submit to jurisdiction generally in doing such acts. Nevertheless, by their performance, the party is deemed to waive or be estopped from asserting objections to personal jurisdiction.

Id. § 3.01[5][a], at 3-53.

grounds for relief from the contractual obligation, at least where the parties knowingly agreed to the provision.[156] Knowledge of the provision's existence may be required, but not knowledge of its legal effect.

Third, the argument puts a defendant's individual liberty interest on a higher level than the defendant's desire to exchange that interest for some commercial or consumer benefit. Although this may sound appropriate because personal jurisdiction involves a constitutional right, it ignores the fact that personal jurisdiction is a very waivable constitutional right.[157] Not only is personal jurisdiction waivable, but the possessor of this right obtains something in return for its waiver in a contract. For example, the defendant may receive a lower contract price, some other reciprocal concession, or perhaps the very existence of the contract itself. Private contractual agreements to submit to a court's jurisdiction may represent a genuine exchange benefiting both parties. There would seem to be little justification for a rule which permits a defendant to benefit twice from an individual liberty interest: Once when the contract is negotiated and a second time when used to void the contract's forum selection clause.[158] Moreover, the argument that parties cannot contractually consent to personal jurisdiction implies that the defendant's constitutional right is somehow infused with overriding public concerns, thereby preventing a state from asserting personal jurisdiction based solely on a forum selection clause.[159]

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156. *See* Paper Express v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992) (upholding a forum selection clause despite its being in fine print and in German and stating "[i]t is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them . . . . Mere ignorance will not relieve a party of her obligations and she will be bound by the terms of the agreement."); Leasing Serv. Corp. v. Graham, 646 F. Supp. 1410, 1415 (S.D.N.Y. 1986) (stating that failure to read a contract or hire a lawyer to interpret consequences of a forum selection clause is lack of diligence by the defendant, not misconduct by the plaintiff); Scholz v. Montgomery Ward & Co., 468 N.W.2d 845 (Mich. 1991) (noting that failure of a party to obtain an explanation of a contract term is negligence and not grounds for avoidance). *See generally* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 607 (1960 & Supp. 1993) (commenting that one who signs an agreement without reading it will be bound by its terms); E. ALLEN FARNSWORTH, CONTRACTS §§ 4.26-.28, at 310-39 (2d ed. 1990) (explaining that one who voluntarily signs an agreement may be bound by it even though he never considers the legal consequence of signing it); 13 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1577 (3d ed., 1970 & Supp. 1993).

157. *Insurance Corp.*, 456 U.S. at 706 ("This argument again assumes that there is something unique about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights.").

158. In this sense express consent to a state's jurisdiction through private agreement is much less troubling than implied consent through public implied consent agreements imposed by the state based on the defendant's relations with the state. *See generally* Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989) (providing an interesting discussion of the distinction between private and public agreements to submit to a court's jurisdiction).

159. Mullenix, *supra* note 2, at 366-73. Professor Mullenix argues that traditional jurisdictional principles relating to forum access should govern forum selection clause enforceability,

> When a plaintiff seeks to enforce a forum-selection clause against a defendant, proper regard should be given to the defendant's due process rights to be sued in a particular fo-

Finally, the argument against contractual waiver conclusively presumes that the parties did not knowingly waive their due process rights in the contract. This presumption makes little sense in commercial contracts between parties of relatively equal bargaining power, but it has some force in typical consumer contracts. However, the individual liberty interest possessed by a consumer is no different than that of a commercial entity, and certainly a consumer can knowingly waive this due process interest. There is no reason to conclusively presume a consumer cannot knowingly waive this interest. The better approach is to presume that the parties knowingly waived the right to object to the designated court's jurisdiction, unless the party challenging the designated court can prove otherwise.[160]

There is no due process justification for refusing to enforce a forum selection clause where the designated forum has no other basis for personal jurisdiction. The parties should be permitted to contractually consent to a court's jurisdiction in advance without violating the Due Process Clause even if the defendant has no minimum contacts with the forum state. The

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rum . . . . Litigants may choose their forum . . . so long as the choices comport with articulated [due process] notions of justice and fair play."

Id. at 368-69; *see also* Edward P. Gilbert, Comment, *We're All in the Same Boat:* Carnival Cruise Lines, Inc. v. Shute, 18 BROOK. J. INT'L L. 597, 622-25 (1992) (discussing the Court's misapplication of *Bremen*). Essentially, this suggestion seeks to portray personal jurisdiction as at least somewhat analogous to subject matter jurisdiction. Subject matter jurisdiction is based on public state sovereignty interests, and not on private interests. *See Insurance Corp.*, 456 U.S. at 701-03. Consequently, private parties cannot waive subject matter jurisdiction limitations and confer jurisdiction by consent. *Id.*

If personal jurisdiction likewise involves public or state interests at the constitutional level, then private parties could not consent to personal jurisdiction where none otherwise existed. The quick answer is that personal jurisdiction is not like subject matter jurisdiction; it involves only a private liberty interest that can be waived by private parties. The more involved answer recognizes that there are certain public or state interests involved in the constitutional doctrine of personal jurisdiction.

These state interests show up in two ways in the constitutional analysis. First, state sovereignty provides the ultimate authority for jurisdiction over a person. This authority is the traditional basis for jurisdiction over state residents and over nonresidents who are served while present in the state. *See* Burnham v. Superior Court, 110 S. Ct. 2105, 2114-15 (1990). However, state sovereignty is limited by the Due Process Clause when a state seeks to assert its authority over a nonresident not present within the state and is expressed as an individual liberty interest of the defendant. *Insurance Corp.*, 456 U.S. at 702-03 n.10. Consequently, the individual defendant can waive this limitation and submit to the state's sovereign power, if the defendant so chooses. *Id.*

The second way the state's interest is involved is in the due process reasonableness test. *See supra* note 126. These reasonableness factors serve as a limitation on a state's personal jurisdiction over nonresidents in addition to the minimum contacts test. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1986). Presumably, these limitations are waivable by the defendant, or general appearance waivers would be constitutionally prohibited.

160. This is the approach taken by the Supreme Court in Carnival Cruise Lines v. Shute, 111 S. Ct. 1522 (1991). The Court extended the *Bremen* doctrine to a forum selection clause in a standard consumer form contract. *Id.* at 1527-28. In *Carnival Cruise*, the contractually designated forum clearly had personal jurisdiction over the defendant. *See id.* 1525. There is no reason to presume that the forum selection clause is valid as knowingly made when the forum would otherwise have personal jurisdiction, but to presume that it is invalid when the forum otherwise lacks personal jurisdiction.

forum selection clause should be enforced so long as the clause itself is valid under general contract principles.[161]

The concerns expressed through this argument, though, need not be totally ignored. They may be recognized not as a matter of due process, but as a matter of legislative policymaking through state statute. A state's authority to assert personal jurisdiction over a nonresident defendant is limited by both due process and state statute. Each state is free to extend its courts' jurisdiction to the extent it sees fit, so long as it does not extend personal jurisdiction further than due process permits.[162] Additionally, a state certainly may limit personal jurisdiction far short of what due process permits. In fact, a state is under no constitutional obligation to recognize any waiver of personal jurisdiction by a defendant.[163] If a state adopts some type of waiver doctrine, it may still define and limit the manner by which a waiver of personal jurisdiction is accomplished.[164] Consequently, a state, by statute, can simply decline to extend personal jurisdiction over defendants where the only basis for personal jurisdiction is a contractual forum selection clause.[165] This is the position taken by the State of Florida, as illustrated in *McRae v. J.D./M.D.*[166]

In *McRae*, a New Jersey plaintiff entered into a contract with Mississippi defendants which designated Florida as the exclusive forum for any contract dispute litigation.[167] Pursuant to this clause, plaintiff sued defen-

161. *See supra* notes 38, 44. If the forum selection clause is the product of fraud, unequal bargaining power, or undue influence, it will be considered invalid. *See supra* notes 38, 44. If invalid, the clause cannot constitute a valid waiver of the defendant's due process rights, and if there exists no other basis for the court's personal jurisdiction, the designated forum must dismiss the action. *See supra* notes 38, 44. Also, to be enforced the clause must be reasonable such that it does not deny the defendant his day in court. *See supra* notes 38, 44.

162. *See supra* note 111 and accompanying text.

163. *See* Keelean v. Central Bank, 544 So. 2d 153, 156 (Ala. 1989). All states do, of course, recognize waiver by general appearance. *See supra* notes 127-29. There is, however, nothing that requires a state to do so, except common sense. Those states that still void forum selection clauses do not recognize any contractual waiver of personal jurisdiction concerns. *E.g.*, *Keelean*, 544 So. 2d at 156 (holding that parties may not confer personal jurisdiction by contractual consent).

164. *See supra* note 127 (discussing how each state is free to define what litigation activity will constitute a general appearance).

165. A state which seeks to vindicate a policy of protecting consumers could even enact legislation which would not enforce a forum selection clause in a consumer contract unless an independent basis of personal jurisdiction existed, although it would enforce the clause under the same circumstances in a contract between two commercial parties. Such consumer legislation would seem unlikely, however, because such a statute would benefit nonresident defendant-consumers to the detriment of resident plaintiff-retailers. However, this is precisely the approach taken in new Article 2A of the Uniform Commercial Code. U.C.C. § 2A-106(2) (1991) (dealing with enforcement of forum selection clauses in consumer leases of goods); *see also* infra notes 182-83 and accompanying text (discussing U.C.C. § 2A-106(2)). Over 40 states have now adopted § 2A-106(2) as their state law. *See infra* notes 182-83 and accompanying text.

166. 511 So. 2d 540 (Fla. 1987).

167. *Id.* at 541.

dants in a Florida court alleging a contract breach.[168] The defendants objected to the Florida court's assertion of personal jurisdiction because they had no contacts with Florida and because no basis for personal jurisdiction over them existed under Florida's long-arm statute.[169] The plaintiff argued that the defendants waived their constitutional and statutory personal jurisdiction rights when they agreed to the forum selection clause.[170]

The Florida Supreme Court held that a contractual forum selection clause cannot serve as the sole basis for asserting personal jurisdiction in Florida over an objecting, nonresident defendant.[171] The court noted that the Florida long-arm statutes set forth the boundaries concerning when Florida courts can exercise personal jurisdiction over nonresident defendants and do not contain any provision for submission to personal jurisdiction merely by contractual agreement.[172] The court rejected the plaintiff's contractual waiver argument by observing that it elevates contract enforceability over the requirements of the state long-arm statute.[173] Therefore, Florida will only enforce an otherwise valid contract clause designating Florida as the forum when there exists an independent statutory basis for a Florida court to assert personal jurisdiction over the nonresident defendant.[174]

Many states have statutory schemes similar to Florida's. These states authorize personal jurisdiction only in a limited set of statutorily enumerated circumstances.[175] Interestingly, some of these states enforce forum se-

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168. *Id.*

169. *Id.*

170. *Id.* at 542.

171. *Id.*

172. *Id.* at 543.

173. *Id.* at 543-44.

174. *See id.* at 542-43. The Florida Supreme Court also concluded that, as a matter of due process, a Florida court could not assert personal jurisdiction based solely on a forum selection clause where the defendant had no contacts with Florida. *Id.* at 543. For the reasons discussed earlier, the court's constitutional ruling is incorrect. *See supra* notes 135-61 and accompanying text. However, the court's statutory ruling is correct. Because a state retains authority to define the limits of its courts' personal jurisdiction, the state can limit its definition of waiver in a manner that is more restrictive than due process would permit. *See supra* notes 111, 127-29 and accompanying text. Implicit in the *McRae* court's analysis is a finding that the legislature intended the Florida long-arm statute not to permit waiver in all circumstances where due process would permit it. Also implicit in the court's interpretation of the Florida long-arm statute is the state public policy of not permitting the defendants to waive their statutory personal jurisdiction rights prior to litigation through a contractual forum selection clause.

175. *E.g.*, ARK. CODE ANN. § 16-4-101 (Michie Supp. 1993); COLO. REV. STAT. ANN. § 13-1-124 (West Supp. 1993); CONN. GEN. STAT. ANN. § 52-596 (West 1991); DEL. CODE ANN. tit. 10, § 3104 (Supp. 1992); KAN. STAT. ANN. § 60-308(b) (Supp. 1992); MINN. STAT. ANN. § 543.19 (West 1988); MO. ANN. STAT. § 506.500 (Vernon Supp. 1993); N.C. GEN. STAT. § 1-75.4 (1983); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68 (N.Y. 1965) (holding that N.Y. CIV. PRAC. L. & R. 302 does not confer the full complement of personal jurisdiction constitutionally permitted); Wright v. Automatic Valve Co., 253 N.E.2d 771 (Ohio 1969) (stating that the Ohio legislature

lection clauses but do not have specific statutory authority to do so.[176] In these states, a forum selection clause by itself may not be sufficient to confer personal jurisdiction where the clause is the only basis for such jurisdiction. Unless their existing state statutes can be broadly construed to permit jurisdiction based solely on a contract clause, these states should follow the *McRae* reasoning. Until their state legislatures enact appropriate legislation, courts in these states should refuse to assert personal jurisdiction where the sole basis is a forum selection clause.[177]

This right of each state to define and limit the types of personal jurisdiction waivers it will recognize has important implications in the wake of *Carnival Cruise*.[178] In *Carnival Cruise*, the Supreme Court enforced a forum selection clause in a standard consumer form contract based on federal common law.[179] The federal common law adopted by the Court has been roundly criticized as anticonsumer.[180] Because *Carnival Cruise* was an admiralty jurisdiction case, the Court's federal common law is not binding on state courts generally.[181]

An individual state can choose not to follow *Carnival Cruise* by simply developing state law which disfavors enforcement of forum selection clauses in consumer contracts. One way a state might accomplish this is by enacting legislation which limits recognition of personal jurisdiction waivers in consumer contracts. This is precisely what many states have done by recently enacting Uniform Commercial Code section 2A-106, which applies to leases of goods.[182] Section 2A-106(2) states: "If the ju-

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did not intend jurisdiction in OHIO REV. CODE ANN. § 2307.382 to extend to the limits of due process).

A few states, such as Arizona, California, Wyoming, and Rhode Island, have statutes which simply extend their courts' jurisdiction to the full extent authorized by the U.S. Constitution. *E.g.*, ARIZ. R. CIV. P. 4.2(a); CAL. CIV. PROC. CODE § 410.10 (West 1973); R.I. GEN. LAWS § 9-5-33 (1985); WYO. STAT. § 5-1-107 (1992). These states can therefore authorize personal jurisdiction based solely on forum selection clauses because contractual waiver is constitutionally permissible. *See supra* notes 135-61.

176. *E.g.*, National Union Fire Ins. Co. v. Weir, 517 N.Y.S.2d 141, 142 (App. Div. 1987); Baldwin v. Heinold Commodities, 363 N.W.2d 191 (S.D. 1985) (noting that a forum selection clause confers personal jurisdiction regardless of whether the state long-arm statute otherwise grants it).

177. The general assumption is that a state can only assert personal jurisdiction to the extent authorized by state statute, as opposed to court rules or judge-made law; but this approach is not mandated by anything external to the state, so long as the Due Process Clause is not contravened. A state could decide to establish personal jurisdiction authority by court rule. *See, e.g.*, ARIZ. R. CIV. P. 4.2(a); TEX. R. CIV. P. 108. Theoretically, a state could do so solely by court-made law. Most states do not, however, use this route and rely instead on state statutes as their sole basis for personal jurisdiction. *See* CASAD, *supra* note 116, at app. E (surveying long-arm statutes state by state).

178. 111 S. Ct. at 1522.

179. *Id.*

180. *See supra* note 97.

181. *See* Heiser, *Federal Courts*, *supra* note 2, at 553.

182. The National Conference for Commissioners on Uniform State Laws and the American Law

dicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable."[183] As was the *McRae* court's restrictive interpretation of the Florida long-arm statute, a state's adoption of section 2A-106(2) is a valid exercise of the state's authority to statutorily define its courts' personal jurisdiction. In order to ameliorate the anticonsumer common law trend started by *Carnival Cruise*, many states will undoubtedly enact U.C.C. § 2A-106(2) as well as other similar legislation restricting enforcement of forum selection clauses in consumer contracts.[184]

Institute presented U.C.C. Art. 2A, which governs leases of personal property, in 1987. Since then, at least 40 states have adopted Article 2A (including § 2A-106(2)) as their state law. *See, e.g.*, U.C.C. § 2A-106 (1991). If Article 2A receives the same reception as the other articles of the U.C.C., nearly all states will likely adopt it in the near future. *See generally* Fred H. Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957 (1988) (discussing Article 2A).

183. U.C.C. § 2A-106(2) (1991). The official comment to § 2A-106(2) explains its purpose as follows:

> Subsection (2) prevents enforcement of potentially abusive jurisdictional consent clauses in consumer leases. By using the term judicial forum, this section does not limit selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, "prima facie valid". The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

Id. § 2A-106 cmt.

184. The most likely cases involving a forum selection clause in a consumer contract are ones commenced by a retail company against a defendant consumer for breach of contract (*e.g.*, default in installment payments). In such litigation, a state statute restricting contractual personal jurisdiction waivers, such as U.C.C. § 2A-106(2), would provide some protection to consumers in interstate consumer transactions. However, if a state court would otherwise have personal jurisdiction over a defendant consumer, then the consumer could be sued there regardless of the state's position on enforcement of forum selection clauses generally or specifically as to consumers. *Cf.* Burnham v. Superior Court, 110 S. Ct. 2105 (1990) (allowing jurisdiction when a party is served a summons within the forum state).

Less typical are cases where the consumer is the plaintiff, perhaps suing the defendant company for not adequately performing the contract or, as in *Carnival Cruise*, for injuries due to tortious conduct arising out of the contractual relationship. *See Carnival Cruise*, 111 S. Ct. at 1524-25. State statutes designed to limit personal jurisdiction waivers by consumers will not prevent enforcement of a forum selection clause here because such statutes only apply to consumers who are defendants. A state which wishes to preclude enforcement of forum selection clauses when a consumer is the plaintiff must adopt a different approach.

One approach is simply to prohibit enforcement of all forum selection clauses in consumer contracts. Because *Bremen* and *Carnival Cruise* are not binding on the states generally, each state is free to adopt such a protective consumer policy. *Cf. The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-75 (1874) (noting that the uniform federal common law governing admiralty and maritime law is not binding on the states). Indeed, as discussed previously, a state is under no obligation to adopt a policy which enforces any forum selection clauses whether in a consumer or commercial contract. *See supra* notes 60-63 and accompanying text.

A more circuitous and less comprehensive approach is to adopt a state "door-closing" statute which prohibits a nonresident plaintiff from maintaining an action against a foreign corporation when the cause of action arises outside of the forum state. *E.g.*, S.C. CODE ANN. § 15-5-150 (Law. Co-op 1977). Such door-closing statutes are viewed as limiting the state courts' subject matter jurisdiction and consequently are not waivable by the parties. *See, e.g.*, Rosenthal v. Unarco Indus., 297 S.E.2d

In summary, the Due Process Clause does not preclude a state from establishing personal jurisdiction over a nonresident defendant based solely on a forum selection clause. This is so because the due process individual liberty interest is waivable by a defendant.[185] Waiver in advance through a contractual forum selection clause does not violate due process so long as the clause is valid under general contract principles.

A problem does arise in those states which do not extend personal jurisdiction over defendants to the full extent permitted by due process but instead limit their courts' jurisdictional reach to a set of specific statutorily defined circumstances.[186] A court in such a state should not assert personal jurisdiction over a nonresident defendant where the only basis is a contractual forum selection clause; there must also be some independent statutory basis for the court's assertion of jurisdiction.[187]

B. *Forum Selection Clauses and Forum Non Conveniens*

A second major issue in state courts concerns the interplay between forum selection clauses and the doctrine of forum non conveniens. This issue arises when a plaintiff has filed an action in a state court designated by a contractual forum selection clause, and the defendant then seeks dismissal based on forum non conveniens.[188] The court must determine

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638 (S.C. 1982) (holding that lower court properly dismissed an action for subject matter jurisdiction where the claim fell within door-closing statute); Eagle v. Global Assocs., 356 S.E.2d 417, 419 (S.C. Ct. App. 1987) (holding that South Carolina's door-closing statute rendered any action within the statute's scope absolutely void).

A forum selection clause which forces a consumer to sue in a state in contravention of such a door-closing statute could not be enforced because the parties cannot confer subject matter jurisdiction by consent. *See supra* note 159. Such state statutes may even preclude diversity jurisdiction in federal court. *See, e.g.*, Proctor & Schwartz, Inc. v. Rollins, 634 F.2d 738, 739 (4th Cir. 1980) (holding that federal district court lacked diversity jurisdiction because South Carolina lacked jurisdiction pursuant to a door-closing statute). However, existing door-closing statutes apply to foreign corporations, not to ones created under the laws of the forum state. *E.g.*, S.C. CODE ANN. § 15-5-150 (Law. Co-op. 1977).

185. *See supra* text accompanying note 138.

186. *See supra* text accompanying note 175.

187. A court in another state should not enforce a judgment obtained without such an independent statutory basis for personal jurisdiction. Recently in Loyd & Ring's Wholesale Nursery v. Lang & Woodley Landscaping & Garden Ctr., 431 S.E.2d 632 (S.C. Ct. App. 1993), for example, the court relying on *McCrae* held that a South Carolina court should not give full faith and credit to a Florida default judgment whose only basis for personal jurisdiction in Florida was a forum selection clause.

188. An example is where a California company negotiates a lease with a New York company for heavy equipment to be used in New York. The lease specifies California state courts as the exclusive forum to resolve any disputes regarding the lease. The equipment breaks down once transported to New York and the New York lessee refuses to pay anything more on the lease. The California lessor then sues in California Superior Court and properly obtains personal jurisdiction over the defendant. The New York defendant then moves to dismiss based on forum non conveniens, on the grounds that New York is far more convenient for witnesses and parties. The California court applies California state law to the action, based on choice of law principles. California law enforces forum selection clauses, basically adopting the *Bremen* doctrine. Should the California court consider the motion to

whether the defendant's motion is precluded by the clause.[189] If not precluded, the court must then determine what effect the clause has on the court's determination of whether to grant the dismissal. The answers to these questions are relatively simple once the doctrine of forum non conveniens is examined more closely.

The doctrine of forum non conveniens permits a court to decline to exercise its jurisdiction if the forum chosen by the plaintiff is a seriously inconvenient place to conduct the litigation.[190] The doctrine varies somewhat from state to state, but most states adopt an approach similar to that set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert*.[191] The doctrine may apply when the forum chosen by the plaintiff has proper jurisdiction over the claim and parties. The defendant seeks dismissal of the action not because jurisdiction is lacking but because there is an alternative forum in another state which also has jurisdiction and, in addition, is far more convenient.[192] The determination of the motion is typically addressed to the court's discretion and can only be overturned on appeal for abuse of discretion.[193]

The doctrine of forum non conveniens endorsed by the Supreme Court in *Gilbert* is fairly typical of the doctrine adopted in most states.[194] A court, in deciding whether to grant a motion to dismiss for forum non conveniens, must consider a variety of factors. These factors include the private interests of the litigants and the various public interests associated

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dismiss, or should it simply deny it based on the forum selection clause? If it does consider the motion, what weight should the court give the forum selection clause?

189. Here is a situation where the nature of the forum selection clause is important. A clause which designates a specific state's courts as the exclusive forum to resolve contract related disputes presents the most difficult forum non conveniens issue. A clause which simply consents to suit in one state, but does not preclude suit in others, merely presents the same issues as in any typical forum non conveniens determination. *See, e.g.*, Carvel Corp. v. Ross Distribution, 524 N.Y.S.2d 469, 470 (N.Y. App. Div. 1988) (holding that the forum non conveniens doctrine could still be applied because defendants had not consented to New York as the only forum, but merely as a permissible forum).

190. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

191. 330 U.S. 501 (1947).

192. *Id.* at 506-09; *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-56 (1981) (stating that convenience is "the central purpose of any *forum non conveniens* inquiry").

193. *Piper Aircraft*, 454 U.S. at 257; *Gilbert*, 330 U.S. at 508-09.

194. *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 831-40 (1985); *infra* note 198. *Gilbert* dealt with forum non conveniens in federal courts; the Court's holding was not directly binding on state courts. Most states did, however, adopt the two-step doctrine set forth in *Gilbert*. *See infra* note 198. Ironically, *Gilbert*'s federal common law doctrine is no longer used in domestic federal court litigation because it has been codified and replaced by 28 U.S.C. § 1404(a). *See* 28 U.S.C. § 1404(a) (1988); Parsons v. Chesapeake & Ohio Ry., 375 U.S. 71 (1963) (using § 1404(a)). The federal common law doctrine is still applicable to international litigation where the alternative forum is not in the United States, *e.g.*, *Piper Aircraft*, 454 U.S. at 253-54, and in rare cases where the alternative forum is a state court, *e.g.*, Hammond N. Assocs. v. ABG Fin. Servs., 708 F. Supp. 334 (S.D. Fla. 1989).

with the litigation.[195] The private interests identified in *Gilbert* include such factors as:

> [T]he relative ease of access to sources of proof; [the] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [the] possibility of [a] view of premises [where relevant]; and all other practical problems that make trial of a case easy, expeditious and inexpensive."[196]

The public interest factors identified in *Gilbert* include: "Administrative difficulties . . . for courts when litigation is piled up in congested centers instead of being handled at its origin[; the burden of jury duty] imposed upon the people of a community which has no relation to the litigation[;] . . . [the] local interest in having localized controversies decided at home"; and the appropriateness of courts applying substantive law with which they are familiar.[197]

Nearly all states, by statute or case law, have incorporated *Gilbert*'s private and public interest factors into their forum non conveniens doctrine.[198] None of these public interest factors, and only some of the private interest factors, have anything to do with the convenience of the parties. Instead these factors deal generally with concerns external to the plaintiff's or defendant's desire to litigate in a specific forum. Most of these factors deal with convenience in the broadest sense of the word, *i.e.*, the convenience of witnesses, jurors, judges, and state judicial systems, as well as of the parties.[199]

In contrast, a forum selection clause deals only with the negotiated convenience of the parties to the contract. The parties bargained for a designated forum as a way of allocating and controlling litigation inconveniences to each party and determining contract price. Each party to the

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195. *Gilbert*, 330 U.S. at 508-09.

196. *Id.* at 508.

197. *Id.* at 508-09.

198. ALA. CODE § 6-5-430 (1993); N.Y. CIV. PRAC. L. & R. 327 (McKinney 1990); 42 PA. CONS. STAT. ANN. § 5322(e) (1981); Stangvik v. Shiley, Inc., 819 P.2d 14 (Cal. 1991); Goodwine v. Superior Court, 407 P.2d 1 (Cal. 1965); Union Carbide Corp. v. Aetna, Casualty & Surety, Co., 562 A.2d 15 (Conn. 1989); Parvin v. Kaufmann, 236 A.2d 425 (Del. 1967); Bland v. Norfolk & W. Ry., 506 N.E.2d 1291 (Ill. 1987); MacLeod v. MacLeod, 383 A.2d 39 (Me. 1978); Varkonyi v. S.A. Empresa de Viacao A.R.G., 239 N.E.2d 542 (N.Y. 1968); Chambers v. Merrell-Dow Pharmaceuticals, 519 N.E.2d 370 (Ohio 1988); Zurick v. Inman, 426 S.W.2d 767 (Tenn. 1968). For citations to additional state court cases, see CASAD, *supra* note 116, §1.04, at 1-26 to 1-42.

199. For example, California courts have identified 25 factors which should be considered in determining the applicability of forum non conveniens. *E.g.*, Appalachian Ins. Co. v. Superior Court, 208 Cal. Rptr. 627, 631 n.2 (Ct. App. 1984); Great N. Ry. v. Superior Court, 90 Cal. Rptr. 461, 466-67 (Ct. App. 1970), *cert. denied*, 401 U.S. 1013 (1971).

contract therefore generally waives its right to unfettered choice of forum if litigation should arise. The precise scope of what each party waives, however, is not as clear.

As discussed previously, a party can waive the individual liberty interest which constitutes its due process personal jurisdiction right.[200] Similarly, a party can waive whatever else it has the power to contractually waive. This would clearly include each side's respective concern for its own personal convenience as parties if litigation should arise from the contractual relationship. However, the parties certainly have no power to waive the litigation convenience concerns of those not a party to the contract. Using forum non conveniens terminology, the parties lack authority to contractually reallocate the various public interest factors, or those private ones of third parties not related to the contract.

Consequently, the existence of a contract provision designating one state's courts as the exclusive forum should not prevent the defendant from seeking dismissal based on forum non conveniens.[201] A forum selection clause cannot preclude this motion, even though the effect of the motion may be to dismiss the case from the contractually mandated forum.[202] The parties to a contract simply have no power to waive interests

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200. *See supra* note 138 and accompanying text.

201. An interesting issue does exist where the contract contains not only an exclusive forum selection clause but also an express agreement not to raise a motion for transfer or dismissal based on the inconvenience of the designated forum. Forum non conveniens motions are generally raised by defendants, and therefore brought to a court's attention by the parties. A clause specifically waiving this right to bring the motion would probably not be enforced because of the public interest factors, but this issue can be avoided by the court raising forum non conveniens on its own motion. Most states authorize their courts to raise the doctrine sua sponte, as is recognized in *Gilbert*. *See, e.g.*, Country Pride Foods v. Medina & Medina, 648 S.W.2d 485 (Ark. 1983) Bongards' Creameries v. Alfa-Laval, Inc., 339 N.W.2d 561 (Minn. 1983); List v. List, 540 A.2d 916 (N.J. Super. Ct. Ch. Div. 1988). *Contra* VSL Corp. v. Dunes Hotels & Casinos, 519 N.E.2d 617 (N.Y. 1988) (stating that under CPLR 327(a), a court does not have authority to invoke forum non conveniens on its own motion). A defendant could certainly urge the court to consider the doctrine sua sponte, even if the contract precludes the defendant itself from actually moving for dismissal.

202. Despite some confusion about the relationship between forum selection clauses and forum non conveniens, see, *e.g.*, Mullenix, *supra* note 2, at 326, an increasing number of state courts have concluded that forum selection clauses cannot preclude such motions. *See, e.g.*, *Appalachian Ins.*, 208 Cal. Rptr. at 633 (holding that various public interest factors cannot be automatically outweighed by the existence of a purely private agreement); W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214, 218-19 (Mass. 1990) (commenting that a forum selection clause cannot bar the use of forum non conveniens because it involves public as well as private interests); Sarieddine v. Moussa, 820 S.W.2d 837, 839 (Tex. Ct. App. 1991). *Contra* Concord Assets Fin. Corp. v. Radebaugh, 568 N.Y.S.2d 950, 952 (App. Div. 1991) (stating that a forum non conveniens motion was misplaced because the contract contained a New York forum selection clause).

> [A] trial court is not bound by the forum selection clause agreement if the interests of the witness and of the public strongly favor transferring the case to another forum. While the forum selection clause might confer personal jurisdiction, we hold that it does not preclude consideration of a motion to dismiss on the theory of forum non conveniens.

possessed not by them, but by the public or by third parties.

A more difficult question remains, however, as to the weight a court should give to a forum selection clause when considering a forum non conveniens motion. The answer to this question is complicated by the fact that different states have different doctrines regarding such motions, but a general answer is possible. The existence of a forum selection clause should remove the individual parties' convenience or inconvenience from the court's consideration of the various private and public interest factors.[203] The court should assume that the bargained-for forum selection clause exists as the result of the parties' desire to place certainty of forum on a higher level than the parties' personal convenience interests relative to litigation.[204] The parties should be viewed as having given up their respective private interests for the most convenient forum in the event of litigation in exchange for whatever benefits each obtained in return for the concession.[205]

Courts may find it difficult to determine which of the other forum non conveniens factors are properly waivable by the parties to a contract and those which cannot be waived. Clearly, the various public interest factors are not subject to contractual waiver. By contrast, waivable factors would likely include any notions of inconvenience to the parties themselves in conducting the litigation, such as the cost of attorneys, discovery, and transporting parties or documents to trial.[206] More difficult to categorize

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Sarieddine, 820 S.W.2d at 839 (citation omitted).

203. This, of course, assumes that the relevant state law does not render the forum selection clause per se void as against public policy, *see supra* notes 60-64 and accompanying text; nor invalid under basic contract principles such as fraud, overreaching, or unequal bargaining power. *See supra* note 18.

204. The intent behind the forum selection clause may be not only certainty of forum, but perhaps the quid pro quo for entering into a contract. Using the example of the California lessor and the New York lessee, *supra* note 188, the lessor may have been unwilling to even enter into the lease agreement with a New York customer unless the designated forum was California. Without the clause, the California lessor may have decided that it is not worth doing business with a New York party or may have demanded a higher rental amount.

205. *See In re* Hilliard, 533 N.E.2d 543, 545 (Ill. App. Ct. 1989). In *Hilliard*, for example, the parties agreed that Illinois would be the exclusive forum for any postdissolution decree proceedings. *Id.* at 544. The plaintiff resided in Illinois at the time of this agreement, but defendant had already moved to California. *Id.* at 544-45. Subsequently, the plaintiff filed a petition to modify the dissolution judgment in an Illinois court, and the defendant moved to dismiss on grounds of forum non conveniens. *Id.* at 544. The trial court denied the motion based on the parties' agreement, and the appellate court affirmed, stating, "If both parties freely entered into the agreement contemplating such inconvenience should there be a dispute, one party cannot successfully argue inconvenience as a reason for rendering the forum clause unenforceable." *Id.* at 545.

206. *See, e.g.*, Furda v. Superior Court, 207 Cal. Rptr. 646 (Ct. App. 1984). This is not inconsistent with that part of *Bremen* which states that a forum selection clause will not be enforced if the designated forum is so gravely difficult and inconvenient that the defendant "will for all practical purposes be deprived of his day in court." *Bremen*, 407 U.S. at 18. The *Bremen* Court limited this concept to rare instances where the inconvenience of the particular controversy was unforeseen by the

would be the convenience of witnesses. Decisions to grant forum non conveniens motions often turn on this factor.[207]

In many contexts, the convenience of the witnesses factor is really only a part of the overall private convenience concerns of each party. Such is the case, for example, where the witnesses are employees of the party calling them or are experts retained by the party.[208] Whenever a party simply complains that the designated forum will result in greater expense in bringing its witnesses to trial, the proper response is that this is a private convenience factor bargained away in the contract.

Nevertheless, there may be cases where a party is unable to compel key witnesses to attend trial in the designated forum, not because of expense, but because of lack of subpoena power. Many courts simply dismiss this factor entirely by ruling that depositions can be taken of witnesses and that the moving party waived the right to live testimony from these witnesses when it agreed to the forum selection clause.[209] Other courts

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parties at the time of the contract. *Id.* at 16-18. This *Bremen* statement was made in the context of an international commercial admiralty dispute. *See id.* at 2. It is difficult to see how this "denial-of-day-in-court" concept would ever apply to interstate commercial disputes. *See supra* note 88.

In Smith, Valentino & Smith, Inc. v. Superior Court, 551 P.2d 1206 (Cal. 1976), for example, the California Supreme Court enforced a clause under which each contracting party, one from California and the other from Pennsylvania, agreed to bring an action only in the other's home state. *Id.* at 1206. The *Smith* court found that "both [parties] reasonably [could] be held to have contemplated in negotiating their agreement the additional expense and inconvenience attendant on the litigation of their respective claims in a distant forum; such matters are inherent in a reciprocal clause of this type." *Id.* at 1209.

207. Generally speaking, these motions are usually decided by reference to the convenience of parties and witnesses, and not on the various other private and public factors. *See, e.g., Gilbert*, 330 U.S. at 508; Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 928 (W.D. Mo. 1985) (noting that the convenience of witnesses is said to be a primary, if not the most important, factor); Cambridge Filter Corp. v. International Filter Co., 548 F. Supp. 1308, 1311 (D. Nev. 1982) (stating that a primary concern is the convenience of witnesses); Saminsky v. Occidental Petroleum Corp., 373 F. Supp. 257, 259 (S.D.N.Y. 1974) (commenting that the most significant factor is the convenience of party and nonparty witnesses); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3849, 3851 (West 1976 & Supp. 1993) (citing cases emphasizing convenience of witnesses). Because a forum selection clause removes the parties' private convenience interests from consideration, a court's main focus will likely be on the convenience of witnesses factor.

208. *See, e.g.*, Bland v. Norfolk & W. Ry., 506 N.E.2d 1291, 1296 (Ill. 1987) (stating that a party should not frustrate forum choice by picking an expert from an inconvenient location); Safeway Stores v. Martin, 530 P.2d 131, 133 (Okla. 1974) ("[T]he residence or inconvenience of possible medical witnesses is not a determinative factor. Such witnesses are usually selected for their reputation and special knowledge without regard to their residences."); Norman v. Norfolk & W. Ry., 323 A.2d 850, 855-56 (Pa. 1974) ("[E]xperts are *selected* by the parties and are available virtually anywhere in the United States. To give controlling weight to this factor would allow any [party] to easily circumvent the forum non conveniens doctrine by choosing an expert in an inconvenient forum.").

209. *See, e.g., Smith*, 551 P.2d at 1209-10 (enforcing a forum selection clause designating a Pennsylvania forum, despite defendant's forum non conveniens motion, although plaintiff's witnesses resided in California); Calanca v. D. & S. Mfg. Co., 510 N.E.2d 21, 24 (Ill. App. Ct. 1987); Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97, 99-100 (Ky. Ct. App. 1979) (holding a forum selection clause reasonable despite the fact that one party's witnesses were not able to appear personally in the

have stressed the importance of live testimony as an aid to the jury or judge as factfinder, particularly when credibility of that witness was a key issue.[210] These latter courts characterize this interest as a public one, not waivable by the parties to the contract.[211]

The better approach would seem to be that the convenience of witnesses factor should result in dismissal from a contractually mandated forum only in rare cases. An example would be where the designated forum is inconvenient to all witnesses for both sides, presumably because the specific dispute was unforeseen by the parties at the time of contract.[212] Otherwise, this factor should be viewed as a private one, foreseeable at the time of contract. The right to present live testimony at trial is then simply another private right bargained away when the forum selection clause was negotiated.[213]

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designated forum, because the witness' evidence could be presented by deposition and the witness' credibility was not an important aspect of the information elicited); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890 (Minn. 1982) (enforcing a forum selection clause despite inconvenience to a party's witnesses because their testimony could be presented by deposition without disadvantage); Arthur Young & Co. v. Leong, 383 N.Y.S.2d 618, 619 (App. Div.) (stating that the parties, by agreeing to a forum, "obviated considerations of inconvenience to a party or a witness"), *appeal dismissed*, 390 N.Y.S.2d 927 (1976).

210. *See Gilbert*, 330 U.S. at 501. The Supreme Court in *Gilbert* observed that "to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to [the] court, jury or most litigants." *Id.* at 511. More recent federal court decisions have likewise expressed disfavor with use of depositions, even videotape depositions, as a substitute for the ability to compel live testimony. *E.g.*, Rouse Woodstock, Inc. v. Surety Fed. Sav. & Loan Ass'n, 630 F. Supp. 1004, 1012 (N.D. Ill. 1986) (stating that although videotape depositions mitigate the need, live testimony of an essential witness is of greater importance in cases of fraud where the result may turn on the credibility of the witness); Paul v. International Precious Metals Corp., 613 F. Supp. 174, 179 (S.D. Miss. 1985) (noting that in view of the importance of credibility determinations of a key fraud witness, testimony presented through videotape deposition is particularly unappealing). *But see infra* note 213 (discussing videotape depositions).

211. *See, e.g., Rouse Woodstock*, 630 F. Supp. at 1004.

212. The action may be a tort action, for example, and all the witnesses may be in a state other than that of the designated forum. *See, e.g.*, Standard Office Sys. v. Ricoh Corp., 742 F. Supp. 534, 537-38 (W.D. Ark. 1990).

213. Even in the absence of a forum selection clause, the importance of "compulsory process" for witnesses has greatly diminished in the forum non conveniens calculus due to videotape depositions. In Picketts v. International Playtex, 576 A.2d 518, 522-23 (Conn. 1990), for example, the trial court granted a motion to dismiss for forum non conveniens because several of the defendant's key witnesses were beyond the compulsory process of the forum. *Id.* at 522-23. The Connecticut Supreme Court reversed, concluding that the trial court abused its discretion when it found this private interest factor sufficient to overcome plaintiff's choice of forum. *Id.* at 529.

The Connecticut Supreme Court criticized the trial court for losing sight of modern technological innovations since the United States Supreme Court's 1947 decision in *Gilbert*, noting that, "the advent of the videotaped deposition [has] greatly transformed the meaning of compulsory process in a forum non conveniens calculus. 'Videotaped depositions frequently make corporeal transportation of foreign witnesses unnecessary.' " *Id.* (quoting Rudetsky v. O'Dowd, 660 F. Supp. 341, 347-48 (E.D.N.Y. 1987)).

Other courts have taken a similarly favorable view of videotape depositions. *E.g.*, Monsanto

Generally speaking, a state court should remove these private convenience factors (of parties and witnesses) from its forum non conveniens deliberations. The court should assume that the defendant agreed to waive the right to assert these private interests as part of the contractual bargain.[214] This is the approach taken by many state courts confronted with this issue.[215] Other state courts give the contractually mandated choice of forum less weight and instead balance the parties' various interests as if the clause did not exist.[216] This latter approach seems clearly wrong and ignores the bargained-for trade-offs made by the parties to the contract. This approach gives the defendant an unwarranted double benefit: The contract benefits obtained in exchange for agreeing to the forum selection clause plus the benefit of the undiminished power to challenge the designated forum through forum non conveniens.

The net effect is that dismissal from a contractually mandated forum for forum non conveniens should be extremely rare. Even where there is no forum selection clause, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum."[217] Where a mandatory clause does exist, the two most important factors—convenience of the parties and witnesses—are essentially removed from the court's consideration.[218] A court can still

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Co. v. Aetna Casualty & Sur. Co., 559 A.2d 1301 (Del. Super. Ct. 1988); *see also* Travelers Indem. Co. v. Monsanto Co., 692 F. Supp. 90, 92 (D. Conn. 1988) ("The litigants here are corporations which do business nationwide and face litigation in many states . . . . [A]ir travel, express mail, electronic data transmission, and videotaped depositions are part of the normal course of business for companies such as these."); Brinderson-Newberg Joint Venture v. Pacific Erectors, 690 F. Supp. 891, 896 n.6 (C.D. Cal. 1988) (noting that although the defendant may prefer live testimony of essential witnesses, "the use of video depositions is often quite effective with juries"); Somerville v. Major Exploration, 576 F. Supp. 902, 907 (S.D.N.Y. 1983) (stating that while deposition testimony is generally unsatisfactory in fraud cases where credibility takes on added importance, the use of videotape depositions can make demeanor evidence available to a jury even when witnesses are not physically present at trial); Bolton v. Tesoro Petroleum Corp., 549 F. Supp. 1312, 1317 (E.D. Pa. 1982) (commenting that videotaped despositions allow the jury to assess an absent witness' demeanor).

214. *See supra* notes 153-61. This, again, assumes the clause is otherwise valid under contract formation principles. *See supra* note 18.

215. *See, e.g.*, Cal-State Business Prods. & Servs. v. Ricoh, 16 Cal. Rptr. 2d 417, 427 (Ct. App. 1993); Rokeby-Johnson v. Kentucky Agric. Energy Corp., 489 N.Y.S.2d 69, 73-74 (App. Div. 1985). *Cf.* W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214 (Mass. 1990) (upholding a service of suit clause due to parties' contractual agreement despite a convenience objection).

216. *See, e.g.*, Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982); Package Express Ctr. v. Snider Foods, 788 S.W.2d 561 (Tenn. Ct. App. 1989).

217. *Piper Aircraft*, 454 U.S. at 255. Moreover, as stated in *Gilbert*, "unless the balance [of interests] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508. Most states have adopted this deferential view of the plaintiff's choice of forum. *See supra* note 194 and accompanying text. However, the plaintiff's choice deserves less deference when the plaintiff is not a resident of the forum state. *See Piper Aircraft*, 454 U.S. at 256.

218. A court should remove these private convenience interests from consideration when the fo-

fully consider the various other interest factors, mostly public, before ruling on the motion,[219] but the expected result is that very few of these motions would be granted.[220]

In summary, the existence of a mandatory forum selection clause should not preclude the contractually designated state court from entertaining a motion to dismiss based on forum non conveniens. However, a valid forum selection clause should remove the most important factors from the court's calculus and, therefore, should usually result in denial of the motion. The next question, discussed in the second installment of this article is whether a forum selection clause should receive the same treatment in similar motions in federal court.[221]

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rum selection clause is valid. If not valid for some reason, then the court's forum non conveniens deliberation would ignore the clause. But if the clause is enforceable and mandatory, the deference normally given the plaintiff's choice of forum plus the impact of the clause on the private convenience interests should almost certainly result in a denial of the motion.

219. *See supra* text accompanying note 197. One public interest factor that receives substantial weight, even where a forum selection clause is present, is the pendency of a prior filed action involving the same issues and parties which is capable of ensuring prompt and complete justice. *See, e.g., Monsanto*, 559 A.2d at 1308 ("Delaware law practically requires the existence of another pending action, in an appropriate forum, for a party to succeed on a motion to dismiss based on *forum non conveniens*."); Stankunas v. Stankunas, 582 A.2d 280, 281-82 (N.H. 1990). Another such factor is the prevention of court congestion due to the trial of multiple cases involving complex foreign causes of action. *E.g.*, Stangvik v. Shiley, Inc., 819 P.2d 14, 17 (Cal. 1991).

220. A related, although relatively minor, issue arises in an intrastate setting. Some contracts designate a specific county within a state as the exclusive venue for litigation. When suit is filed in the contractually designated county, a defendant may seek to transfer the case to a different county within the state. Conversely, when suit is initiated in another county, the defendant may seek to enforce the forum selection clause by an intrastate motion to transfer.

There is little question that parties can waive the right to object to venue within a state's system. But whether a contractual venue designation clause will automatically preclude a motion to transfer to another county depends on the state's transfer of venue doctrine. If that doctrine embodies an intrastate notion of forum non conveniens such that the court must consider both private and public interests, the parties can contractually waive only their respective private interests. *Cf. supra* notes 200-02 and accompanying text. If, however, a state's doctrine encompasses only private rights regarding venue, the forum selection clause may be conclusive. *See, e.g.*, Bechtel Civil & Minerals v. South Carolina Basin Irrigation Dist., 752 P.2d 395, 398 (Wash. Ct. App. 1988).

A surprising number of courts, however, take the opposite view of intrastate venue and construe state venue statutes as embodying public policy. These courts hold intrastate clauses that designate an exclusive county as unenforceable if they attempt to fix venue in contravention of their state's statutory venue provisions. *E.g.*, Williams v. Illinois State Scholarship Comm'n, 563 N.E.2d 465, 486 (Ill. 1990) (holding that a forum selection clause designating a county contravenes policy underlying Illinois' general venue statute, and is therefore invalid); *see also* Perkins v. CCH Computax, 423 S.E.2d 780, 782 (N.C. 1992) (distinguishing intrastate venue clauses, which contravene state venue statutes, from interstate forum selection clauses which are not governed by any state statute); Rose v. Etling, 467 P.2d 633 (Or. 1970) (en banc) (invalidating a contractual attempt to place venue in a particular county). Using *Bremen* terminology, these courts invalidated intrastate clauses because they violated public policy as expressed in a state venue statute. *Cf. Bremen*, 407 U.S. at 15 (stating that a forum selection clause should not be enforced when it would violate a state statute).

221. Heiser, *Federal Courts, supra* note 2, at 553.