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Contractual Forum Selection in Florida: Toward a New Policy

Amy Johnston

CONTRACTUAL FORUM SELECTION IN FLORIDA: TOWARD A NEW POLICY

I. INTRODUCTION

Commercial contracts often contain provisions designating the courts in which disputes will be litigated.[1] The enforceability of these forum selection clauses has been an evolving area of state[2] and federal[3] law. Historically, most courts

1. *E.g.*, Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 494, 551 P.2d 1206, 1208, 131 Cal. Rptr. 374, 376 (1976) (each party agreed to file suit only in the other party's resident state); Appalachian Ins. Co. v. Superior Court, 162 Cal. App. 3d 417, 431, 208 Cal. Rptr. 627, 628-29 (1984) (insurer agreed to litigate in any forum insured chose); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1122 (Fla. 4th D.C.A. 1984) ("jurisdiction for any litigation arising under this agreement shall lie within the appropriate court in Broward County, Florida"); Credit Francais Int'l, S.A. v. Sociedad Financiera de Comercio, C.A., 128 Misc. 2d 564, 573-74, 490 N.Y.S.2d 670, 674 (Sup. Ct. 1985) (an all-encompassing forum selection clause which included a waiver of the *forum non conveniens* defense).

2. *Compare* Huntley v. Alejandre, 139 So. 2d 911, 912 (3d D.C.A.) (forum selection clauses are unenforceable), *cert. denied*, 146 So. 2d 750 (Fla. 1962) *and* Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 501, 109 S.E.2d 362, 363 (1921) (holding that an agreement fixing the place of suit in advance is void) *with* Abadou v. Trad, 624 P.2d 287, 290 (Alaska 1981) (sanctioning contractual forum selection) *and* Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965) (fair and reasonable forum selection clauses may be given effect by the court).

3. *Compare* Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (agreements in advance of suit are illegal and void) *and* Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958) (forum selection clauses are unenforceable), *cert. dismissed*, 359 U.S. 180 (1959) *with* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (forum selection clauses are prima facie valid) *and* Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d

voided such provisions as against public policy.[4] Since 1949, however, courts have increasingly given these covenants vitality.[5] Most notably, the United States Supreme Court in 1972 completely abandoned its prohibition against contractual forum selection within the federal court system.[6] The Supreme Court's approval of forum selection clauses produced a sharp dichotomy between the states' older prohibitory rules and the new federal standard of validity.[7]

State courts reconsidering forum selection policies have confronted a choice between these two clearly marked paths.[8] Florida courts recently arrived at the

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806, 808 (2d Cir.) (courts should give effect to the reasonable expectations of contracting parties), *cert. denied*, 350 U.S. 903 (1955).

4. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-11 (1972) (brief historical summary of forum selection clauses). *See generally* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 41 (1962); R. LEFLAR, AMERICAN CONFLICTS LAW § 52 (3d ed. 1977).

5. *See, e.g.*, Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965); *accord* Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); Spatz v. Nascone, 364 F. Supp. 967, *motion to vacate denied*, 368 F. Supp. 352 (W.D. Pa. 1973); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121 (Fla. 4th D.C.A. 1984).

In 1949, Judge Learned Hand commented: "In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all. . . ." Krenger v. Pennsylvania, 174 F.2d 556, 561 (2d Cir.) (Hand, C.J., concurring), *cert. denied*, 338 U.S. 866 (1949). One commentator on the *Krenger* opinion, however, argued that Judge Hand's words were improvident in that he was actually discussing *forum non conveniens* and did not intend to expand recognition of contractual forum selection. Bergman, *Contractual Restrictions on the Forum*, 48 CALIF. L. REV. 438, 442-43 (1960).

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

7. *Compare id.* (ruling that forum selection clauses are prima facie valid) *with* Huntley v. Alejandre, 139 So. 2d 911 (3d D.C.A.) (holding forum selection clauses void as against public policy), *cert. denied*, 146 So. 2d 750 (Fla. 1962).

8. For examples of state court decisions proscribing contractual forum selection, see Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985); Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980); Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Huntley v. Alejandre, 139 So. 2d 911 (3d D.C.A.), *cert. denied*, 146 So. 2d 750 (Fla. 1962); Cartridge Rental Network v. Video Entertainment, Inc., 132 Ga. App. 748, 209 S.E.2d 132 (1974); Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 189 S.E.2d 130 (1972); State *ex rel.* Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928 (Mo. Ct. App. 1981); Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983); Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972); International Travelers' Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630 (1919).

For state court decisions sanctioning forum selection see Abadou v. Trad, 624 P.2d 287 (Alaska 1981); Societe Jean Nicolas et Fils, J.B. v. Mousseux, 123 Ariz. 59, 597 P.2d 541 (1979); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976); ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137 (Colo. Ct. App. 1985); United States Trust Co. v. Bohart, 197 Conn. 34, 495 A.2d 1034 (1985); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121 (Fla. 5th D.C.A. 1984); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886 (Minn. 1982); Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 474 A.2d 1020 (1984); Leeper v. Leeper, 116 N.H. 116, 354 A.2d 137 (1976); Reeves v. Chem Indus. Co., 262 Or. 95, 495 P.2d 729 (1972); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965); Green v. Clinic Masters, Inc., 272 N.W.2d 813 (S.D. 1978); Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378 (Tenn. 1983).

crossroads of this issue. Since *Huntley v. Alejandre*,[9] the Third District Court of Appeal has steadfastly adhered to the traditional prohibitory rule. In *Maritime Ltd. Partnership v. Greenman Advertising Associates*,[10] alternatively, the Fourth District Court of Appeal enforced forum selection agreements.[11] The *Maritime* court acknowledged a conflict between its ruling and decisions of the Third District Court of Appeal.[12] If practitioners are to draft such clauses, Florida's Supreme Court must resolve this inconsistency and determine the enforceability of these agreements.

This note will clarify the issues a Florida court should consider in formulating its contractual forum selection policy. The legal issues will first be placed within an analytical framework dictated by principles of contract law, civil procedure and conflict of laws doctrine. Alternative forum selection policies will be evaluated from other states' perspectives.[13] After considering the effectiveness of a

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9. 139 So. 2d 911 (3d D.C.A.), *cert. denied*, 146 So. 2d 750 (Fla. 1962).

10. 455 So. 2d 1121 (Fla. 4th D.C.A. 1984).

11. *Id.* at 1123.

12. *Id.* at 1123-24. The Fourth District Court of Appeal certified the following question, as a matter of great public importance, to the Florida Supreme Court:

> CAN PARTIES TO A CONTRACT AGREE THEREIN TO SUBMIT TO THE JURISDICTION OF A CHOSEN FORUM IN THE EVENT OF SUBSEQUENT LITIGATION ARISING OUT OF SAID CONTRACT WHEN THERE IS NO OVERREACHING, NO CONTRAVENTION OF STATED PUBLIC POLICY AND THE FORUM IS NEITHER REMOTE NOR ALIEN?

Id. at 1124. Neither party pursued this appeal. A subsequent case, however, has certified the following question to the Florida Supreme Court:

> CAN PARTIES TO A CONTRACT AGREE THEREIN TO SUBMIT TO THE JURISDICTION OF A CHOSEN FORUM IN THE EVENT OF SUBSEQUENT LITIGATION ARISING OUT OF SAID CONTRACT?

McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985).

The Florida Second District Court of Appeal approved a forum selection clause in Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351 (Fla. 2d D.C.A. 1986). The *Datamatic* court limited its favorable holding to "permissive" forum selection clauses and did not directly reach the issue whether "mandatory" forum selection clauses were enforceable. 484 So. 2d at 1354. The Second District also stated that its decision did not conflict with either the Third District in *Huntley* or the Fourth District in *Maritime* because both *Maritime* and *Huntley* involved mandatory clauses. *Id.* For a discussion of the distinction between these two types of forum selection clauses, see *infra* text accompanying notes 28-32 and note 29.

The Third District's disapproval of forum selection clauses may also extend to permissive provisions even though the *Datamatic* court suggests otherwise. In Manrique v. Fabbri, 474 So. 2d 844 (Fla. 3d D.C.A. 1985), the Third District implied it might enforce permissive forum selection clauses but declined to decide the issue in that case despite an opportunity to do so. 474 So. 2d at 845. Previously, in Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984), the Third District invalidated contractual forum selection without reference to the permissive/mandatory distinction. Further, in Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873 (Fla. 3d D.C.A. 1968), the court refused to recognize contractual consent as a basis for personal jurisdiction, which is the essence of a permissive forum selection clause.

13. The federal treatment of the forum selection clause issue has been analyzed extensively both before and after the Supreme Court's approval of such clauses in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). For articles discussing forum selection prior to *Bremen*, see Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements"*, 15 RUTGERS L. REV. 414 (1961);

statutory forum selection rule, this note will recommend that the Florida Supreme Court adopt a modified version of the Fourth District Court of Appeal's rule permitting contractual forum selection.

II. The Analytical Foundation of a Forum Selection Policy

Forum selection clauses, establishing the contractual forum, are uncomplicated agreements containing two essential elements: consent to the jurisdiction of the selected forum and an exclusion of all nondesignated forums.[14] Differing from venue fixing agreements, forum selection provisions affect a court's power to hear a case and do not merely predetermine the geographical location of a suit within a competent jurisdiction.[15] Parties frequently choose the substantive

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Reese, *The Contractual Forum: Situation in the United States*, 13 Am. J. Comp. L. 187 (1964) [hereinafter cited as Reese, *Contractual Forum*]; Comment, *Forum Selection and an Anglo-American Conflict — The Sad Case of* The Chaparral, 20 Int'l & Comp. L.Q. 550 (1971). For articles assessing the status of the law after *Bremen*, see generally Farquharson, *Choice of Forum Clauses — A Brief Survey of Anglo-American Law*, 8 Int'l Law. 83 (1974); Reese, *The Supreme Court Supports Enforcement of Choice of Forum Clauses*, 7 Int'l Law. 530 (1973) [hereinafter cited as Reese, *Enforcement*]; Note, *Enforcement of Forum Selection Agreements in Contracts Between Unequal Parties*, 11 Ga. J. Int'l & Comp. L. 693 (1981); Note, *Choice of Forum — Forum-Selection Clause in International Towing Contract Naming London High Court Upheld — Exculpatory Clause Not Dispositive*, 14 Harv. Int'l L.J. 145 (1973); Casenote, *The Enforcement of Forum Selection Provisions In International Commercial Agreements*, 11 Colum. J. Transnat'l L. 449 (1972); Casenote, *International Law — Commercial Contracts — Enforcing Choice of Forum and Exculpatory Clauses*, 58 Cornell L. Rev. 416 (1973); Comment, *The* Chaparral/Bremen *Litigation: Two Commentaries*, 22 Int'l & Comp. L.Q. 329 (1973); Comment, *Contracts — Forum Selection Clauses: Application of the Reasonableness Test in Tennessee*, 14 Mem. St. U.L. Rev. 281 (1984).

The federal system does not uniformly apply state law to this issue, so concerns peculiar to the states are generally not treated in the above commentaries. For articles addressing the state law perspective, see Covey & Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 Den. L.J. 837 (1984) (discussing state decisions circumventing the positive aspects of *Bremen*); Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1 (1976) (a thorough analysis of many state law issues); Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. Ill. L. Rev. 133 (a comprehensive critique of forum selection policy issues, primarily assessing New York state law); Note, *Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?*, 48 Fordham L. Rev. 568 (1980) (addressing the unique problems raised by forum selection clauses that preclude removal to federal diversity courts) [hereinafter cited as *Forum Provisions*].

14. *See, e.g.*, *Huntley*, 139 So. 2d at 911. In *Huntley*, the parties waived the "jurisdictional privilege of any other domicile that they were entitled to," and submitted to the judges and the courts of a particular city "the handling of any judicial or extrajudicial actions and notifications" arising under their contract. *Id.; see also* Model Choice of Forum Act (Nat'l Conference of Comm'rs on Uniform State Laws 1968), *reprinted in* 17 Am. J. Comp. L. 292 (1969). For discussion of the consensual and exclusionary aspects of forum selection clauses, see the introduction by Professor Willis Reese, author of the Model Act. *Id.* at 292-93; see also Gilbert, *supra* note 13, at 5 (discussing the negative and affirmative aspects of forum selection); Lenhoff, *supra* note 13, at 415-16 (defining forum selection clauses in the historical terms "prorogation" and "derogation"). *See generally* A. Ehrenzweig, *supra* note 4, at § 41.

15. *Huntley*, 139 So. 2d at 912. Many courts characterize the difference between jurisdiction and venue as being the contractual designation of a forum either before or after a cause of action arises between the parties. *E.g.*, Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 888 (Minn. 1982); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 500, 109 S.E. 362, 363 (1921); Fidelity Union Life Ins. Co. v. Evans, 468 S.W.2d 869, 871-72 (Civ. App. 1971), *aff'd*, 477 S.W.2d 535 (Tex. 1972). Historically, the distinction was important because some ju-

law to govern their contracts in conjunction with forum selection.[16] However, choice of law provisions are not necessary complements to forum selection clauses.[17]

A. *Forum Selection Clauses as Contractual Covenants*

While easy to define, forum selection clauses generate a myriad of interwoven issues implicating several substantive areas of law.[18] Florida courts must determine whether this relevant substantive law suggests an answer to the enforcement problem. As an initial consideration, forum selection clauses are essentially contractual agreements, and, therefore, general principles of contract law govern their validity.[19]

Historically, courts have focused on the extrinsic circumstances prompting

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risdictions allowed venue fixing agreements in situations where forum selection clauses were prohibited. *E.g.*, Producer's Supply, Inc. v. Harz, 149 Fla. 594, 596, 6 So. 2d 375, 376 (1942); *Gaither*, 182 N.C. at 501, 109 S.E. at 363. *Contra* State *ex rel.* Marlo v. Hess, 669 S.W.2d 291, 294 (Mo. Ct. App. 1984) (questioning the justification for the distinction, and arguing that if no policy is offended by agreements after a dispute has arisen, then none is offended by advance arrangements); International Travelers' Ass'n v. Branum, 109 Tex. 543, 548, 212 S.W. 630, 632 (1919) (all provisions affecting "venue" are void).

Notwithstanding the theoretical and practical importance of this distinction, contracting parties frequently use the term "venue" when they mean "jurisdiction" and, often, decisions are tainted with this confusion. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Travelers Indem. Co., 401 F. Supp. 927, 929-30, (D. Mass. 1975) (conflicting "venue" provisions); Redwing Carriers, Inc. v. Foster, 382 So. 2d 554, 555-56 (Ala. 1980) (noting the parties confused the terms "venue" and "jurisdiction"); McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985) (clause stipulated "venue," but the parties must have meant jurisdiction because it would not otherwise have existed); Zurich Ins. Co. v. Allen, 436 So. 2d 1094, 1095 (3d D.C.A. 1983) (the motion to dismiss cited a lack of "venue"), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); State *ex rel.* Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928, 929-30 (Mo. Ct. App. 1981) (Mosk, J., dissenting) ("venue" agreement unenforceable); D'Aurizio v. Consolidated Rail Corp., 129 Misc. 2d 949, 950, 494 N.Y.S.2d 785, 786 (Sup. Ct. 1984) ("venue" clause valid); *Fidelity Union Life Ins.*, 468 S.W.2d at 871-72 (interpreting a Texas Supreme Court precedent as a "venue" case but prohibiting all forum selection agreements).

16. *See, e.g.*, McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985) ("It is agreed that this Agreement, wherever executed, shall be construed in accordance with the laws of the state of Florida and venue shall be in Palm Beach County, Florida.").

17. *See generally* A. EHRENZWEIG, *supra* note 4, at § 44; R. LEFLAR, *supra* note 4, at § 52; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Although choice of law clauses may not be necessary, parties prefer them because, when executed with a forum selection clause, they provide businessmen with maximum control over the legal consequences of international or interstate trade. Swann, *Choice of Law in International Contracts*, 56 FLA. B.J. 409, 412 (1982). Use of the two types of clauses together may be the only way for international businessmen to avoid litigation in a foreign forum. *Id.; see also* Note, *Enforcement of Forum Selection Agreements in Contracts Between Unequal Parties*, 11 GA. J. INT'L & COMP. L. 693, 697-98 (1981) (suggesting that both types of provisions are a manifestation of an underlying mistrust in foreign tribunals).

18. *See* authorities cited *supra* note 13.

19. ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137, 140 (Colo. Ct. App. 1985) ("Construction of a contract is a question of law for the courts"); Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 607, 386 A.2d 1216, 1226-27 (1978) (interpretation of a forum selection clause is a judicial matter).

a forum selection agreement as reasons for invalidation.[20] Opponents of contractual forum selection note that parties possessing superior bargaining strength often obtain these restrictive clauses in an oppressive manner.[21] In their inception, forum selection clauses were frequently the product of fraud and overreaching, and possibly originated in adhesion contracts.[22] A lingering suspicion predisposes many courts to adopt a blanket rule against all contractual forum selection.[23]

Other jurisdictions suggest these historical infirmities no longer plague forum selection clauses.[24] These courts recognize that experienced businessmen typically negotiate the provisions in commercial transactions by bargaining at arm's length through their attorneys.[25] Parties to interstate and international contracts greatly

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20. *See, e.g.*, Fairfield Lease Corp. v. Romano's Auto Serv., 4 Conn. App. 495, ___, 495 A.2d 286, 289 (1985) (discussing inequality of bargaining power, adhesion, and unconscionability in forum selection context); Reeves v. Chem Indus. Co., 262 Or. 95, 101, 495 P.2d 729, 732 (1972) (adhesion contracts or unfair and unreasonable clauses are unenforceable); Green v. Clinic Masters, Inc., 272 N.W.2d 813, 815-16 (S.D. 1978) (discussing the historical adhesion clause problem with forum selection).

21. *See, e.g.*, Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890 (Minn. 1982) (the remoteness of the forum designated implies that adhesion may have been present in the parties' agreement, and adhesion is probative of unequal bargaining power). *See generally* Note, *supra* note 17, at 697-98, 705-06 (implying these contracts are always questionable between parties from developed and undeveloped countries because of the inferior bargaining position of impoverished nations).

22. *See* A. EHRENZWEIG, *supra* note 4, at § 41. Forum selection clauses presented courts with two different hard case scenarios: those involving unequal bargaining power, such as fineprint litigation restrictions on the backs of bills of lading; and those requiring an American court to send a citizen to litigate in a foreign forum. *Id.*

The fate of forum selection provisions has run parallel to that of arbitration clauses. Both were historically held in judicial disfavor. Courts opposed arbitration clauses because they irrevocably barred resort to courts of competent jurisdiction. *See id.*; Gilbert, *supra* note 13, at 11-19; Note, *Choice of Forum — Forum-Selection Clause in International Towing Contract Naming London High Court Upheld — Exculpatory Clause Not Dispositive*, 14 HARV. INT'L L.J. 145, 154-55 (1973).

23. *See, e.g.*, Fidelity Union Life Ins. Co. v. Evans, 468 S.W.2d 869, 872 (Civ. App. 1971) (as between employers and employees, forum selection clauses are probably not freely given or bargained for because an employee will readily yield procedural rights), *aff'd*, 477 S.W.2d 535 (Tex. 1972).

24. *See* Gaskin v. Stumm Handel, GmbH, 390 F. Supp. 361, 365-70 (S.D.N.Y. 1975) (court enforced a forum selection clause written in German, finding that an English-speaking employee was negligent in not having the terms interpreted); Volkswagenwerk, A.G. v. Klippan, GmbH, 611 P.2d 498, 504-05 (Alaska 1980) (forum selection clause contained in a purchase order designating a German forum was reasonable and not against public policy); Fairfield Lease Corp. v. Romano's Auto Serv., 4 Conn. App. 495, ___, 495 A.2d 286, 289 (1985) (a party cannot escape forum selection clause by merely asserting that the provision was contained in boilerplate language); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 891 (Minn. 1982) (boilerplate language alone does not mean that a contract is one of adhesion); Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 603-04, 474 A.2d 1020, 1022-23 (1984) (forum selection clause was enforceable despite the fact that it was executed on the back of an order acknowledgement form); Green v. Clinic Masters, Inc., 272 N.W.2d 813, 816 (S.D. 1978) (court concluding that, absent unequal bargaining power, among sophisticated businessmen, adhesion generally does not exist).

25. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) ("arm's-length negotiation by experienced and sophisticated businessmen"); Dick Proctor Imports, Inc. v. Sumitomo Corp., 486 F. Supp. 815, 818 (E.D. Mo. 1980) ("sizable business run by men of considerable

value the certainty and predictability of advance forum selection and pressure courts to enforce their reasonable agreements.[26] Because forum selection clauses are no longer boilerplate or fineprint, many courts are persuaded that the parties' contractual expectations should prevail.[27]

A secondary concern is the contractual language by which parties submit to a particular court's jurisdiction in exclusion of others.[28] A recurrent issue is whether the parties intended to designate the contractual forum exclusively.[29]

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business acumen and experience"); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1123 (Fla. 4th D.C.A. 1984) (modern forum selection clauses are commercial agreements bargained for at arm's length); Rokeby-Johnson v. Kentucky Agricultural Energy Corp., 108 A.D.2d 336, 342, 489 N.Y.S.2d 69, 74 (1985) (observing that Lloyds of London, a worldwide insurer with international business, has used these clauses for thirty years); Credit Francais Int'l, S.A. v. Sociedad Financiera de Comercio, C.A., 128 Misc. 2d 564, 567, 490 N.Y.S.2d 670, 674 (Sup. Ct. 1985) (because the agreements are multinational, disputes may arise in a number of jurisdictions and forum selection clauses lend certainty to complex transactions); Green v. Clinic Masters, Inc., 272 N.W.2d 813, 816 (S.D. 1978) (no disparity of bargaining power between parties).

26. *See generally* A. EHRENZWEIG, *supra* note 4, at § 41 (commercial interests demand these clauses be enforced); Swann, *supra* note 17.

27. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 14 n.16 (1972). *Bremen* involved a towing job which created many possible forums. An essential element of the parties' bargain was eliminating that uncertainty. *Id.* at 13 n.15; *see also* United States Trust Co. v. Bohart, 197 Conn. 34, ___, 495 A.2d 1034, 1040 (1985) (forum clause was necessary because of the uncertainty of the location and residences of the remaindermen of a trust at the time of its termination).

28. For examples of troublesome language, see Manrique v. Fabbri, 474 So. 2d 844, 845 (Fla. 3d D.C.A. 1985) (court finding provision that "[t]he laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction" merely established the law which governed the parties' dispute and was not an exclusive forum designation); Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873, 875 (Fla. 3d D.C.A. 1968) (court determining language "any action, legal or otherwise, instituted by either party against the other is to be within the jurisdiction of Dade County, Florida" is ambiguous as to venue or jurisdiction); Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 601-02, 474 A.2d 1020, 1021 (court interpreting contractual language that the parties "shall be subject to the jurisdiction of the English courts").

29. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972) (clause clearly mandatory and all-encompassing); Crowson v. Sealaska Corp., 705 P.2d 905, 911 (Alaska 1985); Manrique v. Fabbri, 474 So. 2d 844, 845 (Fla. 3d D.C.A. 1985) (court hedging on the enforcement of forum selection clauses by finding the clause was merely a non-exclusive waiver of the right to contest the jurisdiction of the contractual forum); Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873, 875 (Fla. 3d D.C.A. 1968); Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 602, 474 A.2d 1020, 1021-22 (1984). The only issue in *Dancart* was the soundness of the interpretation of the contractual language: parties "shall be subject to the jurisdiction of the English courts." *Id.* at 601, 474 A.2d at 1021. Generally, courts will not construe a provision as a grant of power unless the language is clearly exclusive. *See id.* at 602, 472 A.2d at 1022. The majority in *Dancart* held that the clause was non-exclusive. *Id.* at 603-04, 474 A.2d at 1022. The dissent pointed out that "shall" is generally a mandatory directive. *Id.* at 604, 474 A.2d at 1023 (Douglas, J., dissenting).

Some courts make a critical distinction between mandatory (exclusive) clauses and permissive (non-exclusive) forum selection provisions and view the latter more favorably. *See, e.g.*, Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1354-58 (Fla. 2d D.C.A. 1986). A permissive forum selection clause is merely a contractual consent to personal jurisdiction. *Id.* at 1354. A mandatory forum selection clause, on the other hand, guarantees in advance the location of litigation. The element of certainty is by far the most desirable aspect of contractual forum selection. *See id.* This "derogation" dimension of forum selection clauses is also the most difficult legal hurdle to judicial

Some commentators suggest courts apply a presumption in favor of exclusivity.[30] However, courts generally hold that a nonexclusive forum selection clause will not support a motion to dismiss in a noncontractual forum which is of otherwise competent jurisdiction.[31] These courts require that parties unequivocally indicate their intent to exclude all other courts.[32]

Forum selection clauses encounter opposition even when contracts lack these extrinsic and interpretive problems. Opponents argue the agreements restrict litigants' access to courts and alter substantive rights and legal remedies.[33] For this reason, many courts hold that public policy completely constrains an in-

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acceptance of these clauses. Conversely, recognition of permissive forum selection clauses alone is nothing more than an acknowledgement that consent is a constitutionally adequate basis for personal jurisdiction and an avoidance of the more fundamental legal and policy questions posed by exclusive or mandatory clauses. *See id.* at 1358.

A special interpretive problem is whether parties intended to exclude the jurisdiction of federal courts sitting in diversity. *See* Spatz v. Nascone, 364 F. Supp. 967, 974, *motion to vacate denied*, 368 F. Supp. 352 (W.D. Pa. 1973). In *Spatz*, the issue was whether the mere stipulation of a state forum was sufficient proof of intent to exclude the jurisdiction of federal courts. *Id.* The court found that it was. *Id.* Commentators have criticized the result, suggesting the rationale for enforcing forum selection clauses is not present in diversity jurisdiction because removal does not involve changing geographical locations. *See, e.g.*, *Forum Provisions, supra* note 13, at 568.

30. *See* Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193, 201 (1966) (Article 5 of the 1964 Hague Convention on the Choice of Court provides: "Unless the parties have otherwise agreed only the chosen court or courts shall have jurisdiction.").

31. *See* Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 603, 474 A.2d 1020, 1023 (1984) (judges should not speculate about exclusivity when a plaintiff is relinquishing access to the courts of his home state, and forum selection clauses are enforceable only if they provide for exclusive jurisdiction); *accord* Abadou v. Trad, 624 P.2d 287, 290-01 (Alaska 1981) (unless statute provides for exclusivity, contractual forum will prevail over venue statute); Reavis v. Exxon Corp., 90 Misc. 2d 980, 982-84, 396 N.Y.S.2d 774, 777 (Sup. Ct. 1977) (agreement which permitted, but did not compel, jurisdiction in Venezuela was not exclusive).

32. *See* Abadou v. Trad, 624 P.2d 287, 290 (Alaska 1981) (exclusivity must be determined first); *accord* Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 474 A.2d 1020 (1984); Reavis v. Exxon Corp., 90 Misc. 2d 980, 396 N.Y.S.2d 774 (Sup. Ct. 1977).

Another problem is whether third party beneficiaries are bound by forum selection clauses. *See* Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir.) (in dicta, the court suggested third party beneficiaries are bound by forum selection clauses), *cert. denied*, 464 U.S. 938 (1983); Process & Storage Vessels, Inc. v. Tank Serv., Inc., 541 F. Supp. 725, 733 (D. Del. 1982) (holding these clauses bind third parties under the maxim that a party seeking to enforce a contract is bound by its terms and conditions), *aff'd*, 760 F.2d 260 (3d Cir. 1983); Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 830, 189 S.E.2d 130, 131 (1972) (third parties to contract would be bound if these provisions were enforced); Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 381 (Tenn. 1983) (court recognizing the third party beneficiary problem, but declining to rule on the issue).

When parties indicate that disputes "arising under" their contract will be subject to a forum selection clause, whether related torts are included is another issue. *See, e.g.* Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 497, 551 P.2d 1206, 1210, 131 Cal. Rptr. 374, 378 (1976) (tort actions are governed by forum selection clauses); *accord* Coastal Steel Corp v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983).

33. *See* Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 608-09, 386 A.2d 1216, 1230 (1978); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 500, 109 S.E. 362, 364 (1921) (forum selection clauses concern legal remedies created and

dividual's freedom to contract in this area.[34] Questioning this characterization of public policy, other courts conclude the policies reinforcing contractual expectations are more compelling.[35]

B. *Contractual Forum Selection and Traditional Notions of Jurisdiction*

Courts examining the viability of contractual forum selection must also address the troublesome relationship between the jurisdiction-conferring aspects of the agreements and a forum's independent competency to adjudicate claims and render binding judgments.[36] This issue usually arises when a defendant cites a contractual forum selection clause in support of a motion to dismiss.[37] Courts hostile to forum selection reason that dismissing such a suit allows a private agreement to usurp the court's jurisdiction.[38] This characterization of enforcement abruptly ends legal argument because courts jealously guard their jurisdictional power.[39]

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regulated by law, not by private agreement). One court characterized forum selection clauses as tantamount to a private party determination that only one court is competent to hear the parties' claim. Reeves v. Chem Indus. Co., 262 Or. 95, 96, 495 P.2d 729, 730 (1972).

34. *See* Fidelity Union Life Ins. Co. v. Evans, 468 S.W.2d 869, 872 (Civ. App. 1971), *aff'd*, 477 S.W.2d 535 (Tex. 1972); International Travelers' Ass'n v. Branum, 109 Tex. 543, 548, 212 S.W. 630, 632 (1919).

35. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-13 (1972); Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 607-10, 386 A.2d 1216, 1229-31 (1978) (freedom of contract should prevail unless the contract is offensive to the public good); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 889, 891 (Minn. 1982) (courts should honor contracts freely negotiated at arm's length); Green v. Clinic Masters, Inc., 272 N.W.2d 813, 815 (S.D. 1978). One commentator concluded that neither history nor reason support the maxim that these agreements are matters of law not contract nor its corollary prohibiting private parties from legislating. A. EHRENZWEIG, *supra* note 4, at § 41.

36. *See* United States Trust Co. v. Bohart, 197 Conn. 34, ___, 495 A.2d 1034, 1038-40 (1985); McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985).

37. *See* Redwing Carriers, Inc. v. Foster, 382 So. 2d 554, 555-56 (Ala. 1980); Manrique v. Fabbri, 474 So. 2d 844, 845 (Fla. 3d D.C.A. 1985); Zurich Ins. Co. v. Allen, 436 So. 2d 1094, 1095 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873, 874-75 (Fla. 3d D.C.A. 1968).

38. *See* Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053, 1053 (Ala. 1985); Redwing Carriers, Inc. v. Foster, 362 So. 2d 554, 555-56 (Ala. 1980); Zurich Ins. Co. v. Allen, 436 So. 2d 1094, 1095 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Huntley v. Alejandre, 139 So. 2d 911, 912 (3d D.C.A.), *cert. denied*, 146 So. 2d 750 (Fla. 1962); Cartridge Rental Network v. Video Entertainment, Inc., 132 Ga. App. 748, 748, 209 S.E.2d 132, 133 (1974); Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 839, 189 S.E.2d 130, 131 (1972); Leonard v. Paxson, 654 S.W.2d 440, 441-42 (Tex. 1983); International Travelers' Ass'n v. Branum, 109 Tex. 543, 548, 212 S.W. 630, 632 (1919); Fidelity Union Life Ins. Co. v. Evans, 468 S.W.2d 869, 871-72 (Civ. App. 1971), *aff'd*, 477 S.W.2d 535 (Tex. 1972).

39. *See* Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053, 1053 (Ala. 1985); Redwing Carriers, Inc. v. Foster, 382 So. 2d 554, 556 (Ala. 1980); Manrique v. Fabbri, 474 So. 2d 844, 845 (Fla. 3d D.C.A. 1985); Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873, 875 (Fla. 3d D.C.A. 1968); Cartridge Rental Network v.

More successful litigants argue that forum selection clauses are merely requests for the court to exercise its discretionary powers.[40] The court may decide to give effect to the legitimate expectations of the contracting parties by declining to hear that particular suit.[41] Under this theory, forum selection agreements leave a court's jurisdictional power untouched.[42] An increasing number of courts accept this more flexible view and grant motions to dismiss based on forum selection clauses.[43]

Other jurisdictional challenges test the doctrinal underpinnings of an accommodating definition of forum selection clauses. Nonresident defendants having no minimum contacts with the contractual forum raise different issues by seeking relief pursuant to lack of personal jurisdiction[44] and *forum non conveniens* motions.[45] Courts approach these problems by clarifying the distinctions between types of jurisdiction. For example, state statutes entirely control subject matter jurisdiction and private parties cannot by agreement alter these legislative schemes.[46] Further, state courts are courts of general jurisdiction and can hear

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Video Entertainment, Inc., 132 Ga. App. 748, 748, 209 S.E.2d 132, 133 (1974); Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972).

40. *See, e.g.*, Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 889 (Minn. 1982). This argument is consistent with the English attitude toward judicial discretion. Several authors suggest the liberalizing American trend represents a convergence with the English view of enforcing such clauses. *See* Comment, *The* Chaparral/Bremen *Litigation: Two Commentaries*, 22 INT'L & COMP. L.Q. 329, 330-33 (1973) [hereinafter cited as Comment, *Bremen Litigation*]; Comment, *Forum Selection and an Anglo-American Conflict — The Sad Case of* The Chaparrel, 20 INT'L & COMP. L.Q. 550, 554 (1971).

41. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 866, 889 (Minn. 1982).

42. *See* Abadou v. Trad, 624 P.2d 287, 290 (Alaska 1981); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 495-96, 551 P.2d 1206, 1209, 131 Cal. Rptr. 374, 377 (1976); ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137, 139 (Colo. Ct. App. 1985); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1123 (Fla. 4th D.C.A. 1984); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 889 (Minn. 1982); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133-34, 209 A.2d 810, 816 (1965); Green v. Clinic Masters, Inc., 272 N.W.2d 813, 815 (S.D. 1978); Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380 (Tenn. 1983).

43. *See, e.g.*, Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 887, 891 (Minn. 1982).

44. *See* Redwing Carriers, Inc. v. Foster, 382 So. 2d 554, 555-56 (Ala. 1980); Manrique v. Fabbri, 474 So. 2d 844, 845 (Fla. 3d D.C.A. 1985); Zurich Ins. Co. v. Allen, 436 So. 2d 1094, 1095 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 433-35 (Iowa 1982).

45. *See* Crowson v. Sealaska Corp., 705 P.2d 905, 907-09 (Alaska 1985); Appalachian Ins. Co. v. Superior Court, 162 Cal. App. 3d 427, 433-40, 208 Cal. Rptr. 627, 630-35 (1984); Elia Corp. v. Paul N. Howard Co., 391 A.2d 214, 216 (Del. Super. Ct. 1978); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982).

46. United States Trust Co. v. Bohart, 197 Conn. 34, ___, 495 A.2d 1034, 1038 (1985) (subject matter jurisdiction cannot be conferred by consent, whereas personal jurisdiction may be consensual); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1122-23 (Fla. 4th D.C.A. 1984) ($1,000,000 suit not allowed in county court regardless of parties' agreement); Ed Fanning Chevrolet, Inc. v. Servleaseco., Inc., 70 Ill. App. 3d 311, 315, 388 N.E.2d 454, 457 (1979) (subject matter jurisdiction is a matter of law, not contract); R. LEFLAR, *supra* note 4, at § 48.

any suit absent prohibitive constitutions or statutes.[47]

Similarly, state long-arm statutes enumerate circumstances under which a court obtains personal jurisdiction over a nonresident defendant.[48] Unlike provisions determining subject matter jurisdiction, long-arm statutes do not apply to forum selection clauses.[49] The court exercises jurisdiction on the basis of the defendant's prior contractual consent.[50] The critical issue is the constitutional sufficiency of contractual consent as an independent basis for personal jurisdiction.[51] Courts following the prohibitory rule cite the inadequacy of consent jurisdiction as another reason to disregard such clauses.[52] Rather than find due process limitations dispositive, other courts conclude the consenting parties waived

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Courts frequently speak of "subject matter jurisdiction" when they are actually referring to the court's authority to adjudicate a particular claim and not claims of that general type. This imprecision in language is another confusing aspect of the forum selection issue. *See, e.g.*, Manrique v. Fabbri, 474 So. 2d 844, 845 (Fla. 3d D.C.A. 1985); State *ex rel.* Marlo v. Hess, 669 S.W.2d 291, 294 (Mo. Ct. App. 1984).

47. *See* State *ex rel.* Marlo v. Hess, 669 S.W.2d 291, 293 (Mo. Ct. App. 1984) (actions on a contract are transitory and may be heard wherever court has pesonal jurisdiction over the parties); *cf.* FLA. CONST. art. V, § 5(b); FLA. STAT. § 26.012 (1985).

48. *E.g.*, FLA. STAT. § 48.193 (1985).

49. McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985). In *McRae*, a nonresident defendant contended a forum selection clause did not confer personal jurisdiction over a party absent minimum contacts with the state. The Fourth District Court of Appeal held the forum selection clause did confer, via consent, personal jurisdiction over the defendant and that the long-arm statute was inapplicable. *Id.; see also* United States Trust Co. v. Bohart, 197 Conn. 34, ___, 495 A.2d 1034, 1039-40 (1985) (discussing the distinction between long-arm statutory personal jurisdiction and consent to jurisdiction through a forum selection clause).

50. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-11 (1972); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1122-23 (Fla. 4th D.C.A. 1984). The *Maritime* court noted a paucity of Florida precedent on the consent to jurisdiction issue, but found the forum selection clause enforceable because the contract was partially performed in Florida. 455 So. 2d at 1123-24. The Fourth District Court of Appeal was less equivocal in a subsequent case that expressly held contractual consent a sufficient ground for personal jurisdiction. McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985). For a discussion of consent jurisdiction, see Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1357-59 (Fla. 2d D.C.A. 1986). Historically, courts have recognized consent as a basis for personal jurisdiction in three other situations: cognovit clauses, arbitration agreements, and appointments of agents to accept service of process. *See generally* Reese, *supra* note 30, at 195.

51. Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 892 (Minn. 1982); *see also* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964). Consent as a basis for personal jurisdiction is fundamental to the forum selection clause issue. If courts find that these clauses do not meet due process limitations, judgments rendered on the basis of forum selection clauses would be subject to collateral attack. United Standard Mgt. Corp. v. Mahoning Valley Solar Resources, Inc., 16 Ohio App. 3d 476, 477-78, 476 N.E.2d 724, 725 (1984).

52. *See* Redwing Carriers, Inc. v. Foster, 382 So. 2d 554, 555-56 (Ala. 1980) (jurisdiction cannot be conferred by consent); Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873, 875 (Fla. 3d D.C.A. 1968) (parties cannot confer jurisdiction on a court by contract); Huntley v. Alejandre, 139 So. 2d 911, 912 (3d D.C.A.) (parties cannot grant jurisdiction by contract), *cert. denied*, 146 So. 2d 750 (Fla. 1962). One court suggested that the United States Supreme Court's favorable ruling in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), had no effect on the consent to jurisdiction issue because *Bremen* was not a jurisdiction case. Ed Fanning Chevrolet, Inc. v. Servleaseco, Inc., 70 Ill. App. 3d 311, 316-17, 388 N.E.2d 454, 459-60 (1979).

their constitutional rights to contest the jurisdiction of the contractual forum.[53] These courts reason that a traditional minimum contacts analysis is unnecessary and would destroy the predictability and convenience these contracts afford.[54]

Finally, courts have struggled to define the relationship between *forum non conveniens* and contractual forum selection.[55] Although the two procedures are legally distinct and have different supporting rationales,[56] both apply when the contractual forum is not the residence of either party and has few factual con-

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53. *See* Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 495-96, 551 P.2d 1206, 1209, 131 Cal. Rptr. 374, 377 (1976) (parties can negotiate away court access rights); Fairfield Lease Corp. v. Romano's Auto Serv., 4 Conn. App. 495, ___, 495 A.2d 286, 288-89 (1985) (permitting waiver of constitutional due process rights); State *ex rel.* Marlo v. Hess, 669 S.W.2d 291, 294 (Mo. Ct. App. 1984) (no distinction in waiver of jurisdiction before or after commencement of suit).

54. *See* Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 613-14, 386 A.2d 1216, 1232-33 (1978) (although the court conducted a due process analysis, it noted that the defendant's constitutional rights had been waived); Baldwin v. Heinold Commodities, Inc., 363 N.W.2d 191, 195 (S.D. 1985) (litigant must prove either the requirements of state long-arm statute have been met or consent has been given, but need not do both because these are alternative jurisdictional foundations); *cf.* Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1122 n.1 (Fla. 4th D.C.A. 1984) (court did not discuss due process requirement of minimum contacts, but found that personal jurisdiction existed nonetheless); *see also* Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1359-61 (Fla. 2d D.C.A. 1986) (court acknowledging the lack of forum involvement with the disputed transaction, but refusing to conduct a due process "minimum contacts" analysis); Leflar, The Bremen *and The Model Choice of Forum Act*, 6 VAND. J. TRANSNAT'L L. 375, 383 (1973) (noting consent jurisdiction is necessary to give practical effect to agreements executed in anticipation of a court's due process determination). *Contra* National Equip. Leasing Inc. v. Watkins, 471 So. 2d 1369, 1369 n.1 (Fla. 5th D.C.A. 1985) (Cowart, J., concurring specially) (forum selection clause is a significant, but not dispositive, factor in a court's minimum contacts analysis); United Standard Mgt. Corp. v. Mahoning Valley Solar Resources, Inc., 16 Ohio App. 3d 476, 477-78, 476 N.E.2d 724, 725 (1984) (minimum contacts are necessary even with defendant's prior consent to personal jurisdiction).

Another procedural issue related to the minimum contacts problem is whether service of process is necessary and, if so, what type of service is sufficient. The United States Supreme Court has stated that this procedural right may be waived. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964). Some state courts have agreed. *See, e.g.*, Woods v. Luby Chevrolet, Inc., 402 So. 2d 1316, 1317 (4th D.C.A. 1981), *petition for review denied*, 412 So. 2d 467 (Fla. 1982). Other courts have carefully noted that defendants were "properly" served, implying that such service is necessary. *See* McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1121-22 (Fla. 4th D.C.A. 1984); Baldwin v. Heinold Commodities, Inc., 363 N.W.2d 191, 192-94 (S.D. 1985); *see also* R. LEFLAR, *supra* note 4, at § 21 (notice of commencement of proceedings is required even if formal service of process is not).

55. *See* Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1360-61 (Fla. 2d D.C.A. 1986) (court enforcing a forum selection provision over a *forum non conveniens* objection, but acknowledging that the doctrine might influence some forum selection enforcement decisions); *cf.* Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 889-90 (Minn. 1982); *accord* Crowson v. Sealaska Corp. 705 P.2d 905, 907-09 (Alaska 1985); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 435-37 (Iowa 1982); Credit Francais Int'l, S.A. v. Sociedad Financiera de Comercio, C.A., 128 Misc. 2d 564, 565-68, 490 N.Y.S.2d 670, 673-74 (Sup. Ct. 1985).

56. Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 201 (3d Cir.) (although both doctrines are exercises of judicial discretion, forum selection clauses establish legally enforceable contractual rights, whereas *forum non conveniens* proceedings do not), *cert. denied*, 464 U.S. 938 (1983); *accord* Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890 (Minn. 1982).

tacts with their dispute.[57] A half-hearted commitment to contractual forum selection induced some courts to mingle the two doctrines. By employing *forum non conveniens* factors in forum selection situations, these courts have further complicated applicable procedures.[58] In formulating a workable forum selection rule, the Florida Supreme Court must clarify the interaction between *forum non conveniens* and contractual forum selection.

C. *The Interjurisdictional Implications of Contractual Forum Selection*

When litigants file suit in forums having substantial factual connections to their controversies,[59] courts quickly dispatch forum selection issues by reviewing their own substantive law and discerning the appropriate rules on enforcement.[60] Unfortunately, parties to forum selection contracts frequently complicate matters by designating neutral forums that have no relationship to their disputes or bringing suits into noncontractual forums in breach of their contracts.[61] An automatic application of Florida law, therefore, is not always justified. These circumstances further complicate Florida's task of formulating a forum selection policy.

Whether or not a Florida court enforces forum selection clauses, it must confront several choice of law problems. In most jurisdictions, conflict of laws doctrines direct a court to first determine the law governing the contract.[62] The

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57. *See* R. LEFLAR, *supra* note 4, at § 51 (general discussion of the *forum non conveniens* doctrine); *see also* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 201 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 497-99, 551 P.2d 1206, 1210-11, 131 Cal. Rptr. 374, 378-79 (1976) (Mosk, J., dissenting); Leeper v. Leeper, 116 N.H. 116, ___, 354 A.2d 137, 138 (1976); Rokeby-Johnson v. Kentucky Agricultural Energy Corp., 108 A.D.2d 336, 339-42, 489 N.Y.S.2d 69, 72-73 (1985).

58. *See* Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982) (forum selection clause is merely another factor in the *forum non conveniens* procedure); *see also* Rokeby-Johnson v. Kentucky Agricultural Energy Corp., 108 A.D.2d 336, 340-41, 489 N.Y.S.2d 69, 73 (1985). Commentators have disagreed about the proper relationship between these two doctrines. *Compare* Leflar, *supra* note 54, at 382 (*forum non conveniens* may be used as a half-way approach for states unwilling to enforce fully forum selection clauses) *with* A. EHRENZWEIG, *supra* note 4, at § 41 (forum selection clause enforcement should not be added to the "chaos" of *forum non conveniens* proceedings).

59. *See, e.g.*, Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1122 (Fla. 4th D.C.A. 1984) (although the court did not reach the issue whether the contacts with Florida met due process, it nonetheless noted the many factual connections to Florida).

60. *See, e.g., id.* The *Maritime* court never considered that the law of South Carolina might govern the parties' contract even though ambiguity existed as to the place of contractual execution and much of the performance of the contract was in South Carolina. Additionally, as to the forum selection clause, the court did not determine whether South Carolina law would favor enforcement. *Cf. id.* at 1123.

61. For examples of neutral forum cases, see The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Hall v. Superior Court, 150 Cal. App. 3d 411, 197 Cal. Rptr. 757 (1983). Cases in which parties have brought suit in forums other than those designated in their contracts include *Bremen* and Manrique v. Fabbri, 474 So. 2d 844 (Fla. 3d D.C.A. 1985).

62. Process & Storage Vessels, Inc. v. Tank Serv., Inc., 541 F. Supp. 725, 728-29 (D. Del. 1982), *aff'd*, 760 F.2d 260 (3d Cir. 1985); Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 147 (N.D. Tex. 1979); Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 601, 474

court should adjudicate substantive issues in accordance with that body of law.[63] Courts opposing contractual forum selection consistently treat these clauses preemptively, finding them unenforceable without ever employing the requisite governing law analysis.[64] These courts are reluctant to deny a plaintiff his home

A.2d 1020, 1021 (1984); General Elec. Co. v. Keyser, 275 S.E.2d 289, 292 (W. Va. 1981); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). *See generally* R. LEFLAR, *supra* note 4, at § 96 (listing the considerations affecting courts' choice of law decisions).

63. Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 147 (N.D. Tex. 1979); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). One might assume that choice of law decisions of federal courts sitting in diversity jurisdiction would offer some guidance on the overall governing law issue, particularly because the favorable federal forum selection rule has often been in direct conflict with the older prohibitory rules of the states. The federal circuits, however, have disagreed whether state or federal forum selection rules should apply in diversity cases. Many federal courts have avoided this issue entirely by a cursory determination that state and federal law coincide on the forum selection clause issue. *See* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); Process & Storage Vessels, Inc. v. Tank Serv., Inc., 541 F. Supp. 725, 732-33 (D. Del. 1982), *aff'd*, 760 F.2d 260 (3d Cir. 1985); Spatz v. Nascone, 364 F. Supp. 967, 980, *motion to vacate denied*, 368 F. Supp. 352 (W.D. Pa. 1973); Jack Winter, Inc. v. Koratron Co., 326 F. Supp. 121, 126 (N.D. Cal. 1971). Others have unquestioningly applied federal law on the basis of an unarticulated assumption that these clauses are somehow divorced from the rest of a state's substantive contract law. *See Coastal Steel Corp.*, 709 F.2d at 202. Of those courts acknowledging the governing law problem, some have concluded that forum selection is a matter of state law. *See* Leasewell Ltd. v. Jake Shelton Ford, Inc., 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976); Davis v. Pro Basketball, Inc., 381 F. Supp. 1, 3 (S.D.N.Y. 1974). These courts reason that looking directly to federal law on the forum selection issue bootstraps the federal substantive rule of enforcement into state law. *See, e.g., Leasewell*, 423 F. Supp. at 1014.

Conversely, some federal courts have held the federal rule governs. *See, e.g.* Dick Proctor Imports, Inc. v. Sumitomo Corp., 486 F. Supp. 815, 818 (E.D. Mo. 1980). These courts base their conclusions on two grounds. First, some courts determine that forum selection clauses are matters of "venue" and, hence, are governed by federal procedural rules. *See Dick Proctor Imports*, 486 F. Supp. at 818; Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 147 (N.D. Tex. 1979). This explanation is not reconcilable with the rule that issues concerning the interpretation of contract provisions are matters of state law. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); Griffin v. McCoach, 313 U.S. 498 (1941). Second, some courts base their decisions to apply the federal rule on an unarticulated corollary to the Erie doctrine. They reason that when a federal court is faced with an old state law precedent, it should seek to discover how those state courts would determine the issue if it were before them today. *See, e.g., Dick Proctor Imports*, 486 F. Supp. at 818. The problem with this approach is that federal courts have consistently assumed that the rule of enforcing forum selection clauses is the better rule of law and have also concluded that state courts would agree. *Id.* at 817-18 (court applied the federal rule, and argued that, when Missouri courts addressed the issue, they would do likewise); *see also* State *ex rel.* Marlo v. Hess, 669 S.W.2d 291, 293 (Mo. Ct. App. 1984); State *ex rel.* Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928, 930 (Mo. Ct. App. 1981) (court applied the old rule subsequent to the *Dick Proctor Imports* federal court's pronouncement of a new policy for the state courts of Missouri). Moreover, several state supreme courts have recently reconsidered forum selection and have opted to retain their old prohibitions. *See* Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985); Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983). Finally, some federal courts reason that applying state law will "balkanize" venue rules when a uniform venue rule is preferable. *See, e.g., Taylor*, 474 F. Supp. at 147.

64. *Cf.* Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1122 (Fla. 4th D.C.A. 1984) (court never considered that South Carolina law might govern the forum selection clause enforceability issue); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 888-90 (Minn. 1982).

forum on the basis of an interpretation of another jurisdiction's laws.[65]

Even if a state court employs its own conflict of laws rule, uniformity is not guaranteed.[66] Many jurisdictions apply a rule similar to the *Restatement (Second) of Conflict of Laws*,[67] which permits a court to refuse to apply another jurisdiction's law if that law violates either the forum state's law or its public policy.[68] Courts ascribing to the "ouster theory" hold that other jurisdictions' favorable forum selection rules contravene their public policy.[69] Thus, courts hostile to forum selection retain suits even when the state law governing the contract requires dismissal.[70]

Similarly, courts sanctioning forum selection clauses agree a forum should look to its own law on the enforcement issue if the parties have designated a completely neutral forum.[71] Most jurisdictions protect plaintiffs who sue in derogation of agreements specifying neutral forums.[72] Because courts universally believe a forum interprets its own law better than any other, they question the appropriateness of dismissing a suit only to have the contractual forum resort to another jurisdiction's law.[73] Some courts also refuse to enforce forum selection

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65. *See* Jack Winter, Inc. v. Koratron Co., 326 F. Supp. 121, 127 (N.D. Cal. 1971) ("[A] judge understandably feels that he is shirking his duty when he sends the hapless litigant to some foreign port beyond the Seven Seas where the nature and quality of the justice may well be uncertain and unpredictable."); *cf.* Leeper v. Leeper, 116 N.H. 116, ____, 354 A.2d 137, 138 (1976) reluctance to send an American citizen to a foreign forum).

66. Many jurisdictions follow the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971), which requires consideration of several factors in determining the law governing any particular contract. *But see* Gruson, *supra* note 13, at 158 (arguing that a uniform result would be achieved if all jurisdictions simply looked to their own law, rather than trying to discern that of other courts).

67. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

68. *Id.*; *see also* Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507, 509-12 (Fla. 1981) (discussing conflict of laws and choice of laws in the usury context); Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 601, 386 A.2d 1216, 1228 (1978) (outlining sources of public policy).

69. *See, e.g.*, Hall v. Superior Court, 150 Cal. App. 3d 411, 416-18, 197 Cal. Rptr. 757, 760-63 (1983); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436 (Iowa 1982) ("Comity between states does not require us to enforce a contract or apply a remedy which contravenes or nullifies the settled policy of our own state.").

70. *See, e.g.*, Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436-37 (Iowa 1982).

71. *See, e.g.*, Appalachian Ins. Co. v. Superior Court, 162 Cal. App. 3d 427, 433, 208 Cal. Rptr. 627, 630 (1984); *cf.* D'Aurizio v. Consolidated Rail Corp., 129 Misc. 2d 949, 950-51, 494 N.Y.S.2d 785, 786 (Sup. Ct. 1984) (clause designating California was analyzed under New York law requiring a "rational basis" for suits in neutral forums).

72. *See infra* text accompanying note 193; *see also* Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 498-99, 551 P.2d 1206, 1211, 131 Cal. Rptr. 374, 379 (1976) (Mosk, J., dissenting).

73. *See, e.g.*, Appalachian Ins. Co. v. Superior Court, 162 Cal. App. 3d 427, 433, 208 Cal. Rptr. 627, 630 (1984). *See generally* R. LEFLAR, *supra* note 4, at §§ 51, 90 (a forum's preference for its own law is the dominant theme in choice of law and governing law decisions and courts will almost always find that the better rule of law is their own rule); Reese, *supra* note 30, at 203 (determination of governing law is a judicial convenience factor, and it is not convenient for one forum to apply another's laws).

clauses when they suspect the contractual forum would apply its own disinterested law to the controversy.[74]

Explicit choice of law clauses have not provided a ready-made solution to these problems. Courts will give them effect only if the chosen laws are from jurisdictions having substantial relationships to the contracting parties' disputes.[75] When a court invalidates a choice of law provision executed in tandem with a forum selection clause, new issues emerge.[76] Does the forum selection clause have independent vitality?[77] Should the court consider which law the contractual forum will apply or the substantive implications of that forum's choice of law decision?[78] These deliberations may produce unanticipated results and introduce uncertainty into transactions involving forum selection.[79] Florida courts must map a careful course through the labyrinth of tangled choice of law policies and conflict of laws doctrines.

III. Policy Choices and Alternative Rules of Forum Selection

Opponents and advocates of contractual forum selection both marshal persuasive legal arguments to support their views. However, most courts reconsidering contractual forum selection have not found the solution in these mutually exclusive legal rationales.[80] Instead, their decisions involve fundamental policy

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74. *See, e.g.*, Hall v. Superior Court, 150 Cal. App. 3d 411, 418-19 197 Cal. Rptr. 757, 763 (1983).

In situations involving international contracts, the forum selection rules and conflict of laws doctrines of other countries are of critical importance in determining the effect of staying or dismissing an action. The impact of the various laws of other countries on forum selection is beyond the scope of this note, but see the following for descriptions of how other countries treat this issue: The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11 n.12 (1972) (discussing rules of other countries); Farquharson, *supra* note 13, at 88-93 (surveying the English rule); Gilbert, *supra* note 13, at 20-24 (discussing the treatment of forum selection clauses in other countries); Lenhoff, *supra* note 13 (surveying the laws of other countries); Note, *supra* note 17, at 702, 704 (discussing the English and French rules). Many commentators have characterized a rule of enforcing forum selection clauses as the British view and have seen the developing trend in the United States as a convergence of the law. *See, e.g.*, A. Ehrenzweig, *supra* note 4, at § 41; Farquharson, *supra* note 13, at 99-100; Comment, *Bremen Litigation, supra* note 40, at 329-33.

75. *See* Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507, 510 (Fla. 1981); General Elec. Co. v. Keyser, 275 S.E.2d 289, 293 (W. Va. 1981); *see also* Restatement (Second) of Conflict of Laws § 187 (1971).

76. *See, e.g.*, Hall v. Superior Court, 150 Cal. App. 3d 411, 418-19, 197 Cal. Rptr. 757, 761-73 (1983). *See generally* Gilbert, *supra* note 13, at 57 n.295 (suggesting consolidating the choice of law and choice of forum issues); Leflar, *supra* note 54, at 384 (the absence of a choice of law provision may imply a preference for the law of the contractually-designated forum).

77. *See* Hall v. Superior Court, 150 Cal. App. 3d 411, 422-23, 197 Cal. Rptr. 757, 765 (1983) (Wallin, J., concurring) (choice of forum issue does not require discussion of choice of law issue).

78. *See id.* at 415-19, 197 Cal. Rptr. at 761-63 (whether choice of forum clause is enforceable requires analysis of which law will be applied and public policy considerations).

79. *See id.* at 419, 197 Cal. Rptr. at 763 (California court refusing to enforce clause selecting Nevada as forum for litigation because it determined applicable California law may be avoided and California public policy would be violated).

80. *Compare* Huntley v. Alejandre, 139 So. 2d 911 (3d D.C.A.) (forum selection clauses not enforceable), *cert. denied*, 146 So. 2d 750 (Fla. 1962) *with* Maritime Ltd. Partnership v. Greenman

choices motivated by economic and political forces rather than legal exigencies.[81] An examination of state cases will suggest the policy alternatives Florida should consider in fashioning a contractual forum selection rule. The extent to which these various rules address pertinent legal issues will be a measure of their effectiveness.

A. *A Rule of Per Se Invalidity: An Old Dogma's New Tricks*

Since 1949, a minority of state courts reconsidering contractual forum selection have found continued validity in the old rule against enforcing these clauses.[82] The Florida Third District Court of Appeal is one such jurisdiction.[83] In *Huntley v. Alejandre*,[84] the litigants contractually waived their rights to sue in all jurisdictions except Havana, Cuba.[85] The Third District Court of Appeal nullified the clause and ruled that all agreements limiting jurisdiction in future causes of action were void as against public policy.[86]

Prior to *Huntley*, the Florida Supreme Court held that parties may by agreement determine where they will bring suit.[87] The Third District Court of Appeal restricted that decision to matters of venue, distinguishing the agreement in *Huntley* as one involving jurisdiction.[88] Restating its policy in successive cases,[89] the *Huntley* court dispelled any impression that its rule of per se invalidity was merely the result of prevalent legal views[90] or a reluctance to send an unwilling litigant to Cuba in 1962.[91]

Several other state courts similarly reaffirmed existing precedents against contractual forum selection. The Alabama Supreme Court in 1985 refused to overrule an earlier decision against forum selection despite a forceful legal as-

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Advertising Assocs., 455 So. 2d 1121 (Fla. 4th D.C.A. 1984) (forum selection clauses enforceable). In reaching a result not reconcilable with *Huntley*, the *Maritime* court announced a new policy, not a different legal interpretation. 455 So. 2d at 1122.

81. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 7, 15 (1972).

82. *See, e.g.*, Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985); Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980); Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Huntley v. Alejandra, 129 So. 2d 911 (3d D.C.A.), *cert. denied*, 146 So.2d 750 (Fla. 1962); Cartridge Rental Network v. Video Entertainment, Inc., 132 Ga. App. 748, 209 S.E.2d 132 (1974); Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 189 S.E.2d 130 (1972); Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983); Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972); International Travelers' Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630 (Tex. 1919).

83. *See* Huntley v. Alejandre, 139 So. 2d 911 (3d D.C.A.), *cert. denied*, 146 So. 2d 750 (Fla. 1962); *infra* note 89 and accompanying text.

84. 139 So. 2d 911 (3d D.C.A.), *cert. denied*, 146 So. 2d 750 (Fla. 1962).

85. *Id.* at 911.

86. *Id.* at 912.

87. *See* Producer's Supply, Inc. v. Harz, 149 Fla. 594, 595-97, 6 So. 2d 375, 376 (1942).

88. *Huntley*, 139 So. 2d at 912.

89. *See* Manrique v. Fabbri, 474 So. 2d 844 (Fla. 3d D.C.A. 1985); Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Sausman Diversified Invs., Inc. v. Cobbs Co., 208 So. 2d 873 (Fla. 3d D.C.A. 1968).

90. *Huntley*, 139 So. 2d at 912 (court indicating it was following "the majority rule").

91. Since Cuba had strained relations with the United States in 1962, some may interpret this decision as an instance where a hard case made "bad" law.

sault.[92] The Texas Supreme Court also reasserted the traditional prohibitory rule.[93] Courts in Missouri,[94] Illinois,[95] and Iowa[96] have likewise resisted the current trend toward liberalizing forum selection rules. These courts all based their decisions on the solid ground of precedent.[97] Courts proscribing contractual forum selection share an attitude of jurisprudential formalism that impels them to reaffirm their old rules without questioning the validity of underlying rationales.[98]

Despite sparse analysis, a common policy argument against forum selection emerges from these cases.[99] The cornerstone of this policy is the ouster doctrine.[100] Courts reiterate that agreements attempting to confer or divest a jurisdiction of its power are void *ab initio*.[101] Courts opposing forum selection do not recognize the carefully drawn distinction between divestiture of jurisdiction and a discretionary presumption of validity.[102] The price of forum shopping by

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92. Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053, 1053 (Ala. 1985), *reaff'g*, Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980).

93. Leonard v. Paxson, 654 S.W.2d 440, 441 (Tex. 1983) (citing prohibitory rule in Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972), as controlling).

94. *See* State *ex rel.* Marlo v. Hess, 669 S.W.2d 291 (Mo. Ct. App. 1984); State *ex rel.* Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928 (Mo. Ct. App. 1981). These courts followed the old rule set out in Reichard v. Manhattan Life Ins. Co., 31 Mo. 518 (1862).

95. *See* Ed Fanning Chevrolet, Inc. v. Servleaseco, Inc., 70 Ill. App. 3d 311, 318-19, 388 N.E.2d 454, 459-60 (1979). In dicta, the *Ed Fanning Chevrolet* court opposed enforcing forum selection clauses: "[W]hile we think contracts should be honored as between private parties, we are inclined to agree . . . that since a private agreement cannot give a court jurisdiction it would not otherwise have, neither can a private agreement take away the jurisdiction a court would otherwise have." *Id.*

96. *See* Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982). After a skeptical analysis of the Supreme Court's rule of prima facie validity in *The Bremen v. Zapata Off-Shore Co.*, this Iowa court ruled that forum selection clauses may be enforced only under certain circumstances. *Id.* at 436-37. In essence, the court subsumed forum selection under the *forum non conveniens* doctrine, holding that the presence of a forum selection clause is merely one factor to be considered in *forum non conveniens* proceedings. *Id.*

97. *See, e.g.*, Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053, 1053 (Ala. 1985); Leonard v. Paxson, 654 S.W.2d 440, 441 (Tex. 1983).

98. *See, e.g.*, Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985); Zurich Ins. Co. v. Allen, 436 So. 2d 1094 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984); Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983); Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972).

99. A possible explanation for the absence of analysis is that these courts believed they were merely applying a long-standing majority rule. *See Huntley*, 139 So. 2d at 912.

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

101. For a history of the ouster doctrine, see The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-12 (1972); Jack Winter, Inc. v. Koratron Co., 326 F. Supp. 121, 123-26 (N.D. Cal. 1971); A. EHRENZWEIG, *supra* note 4, at § 41; Reese, *supra* note 30, at 198-99. Several commentators suggest the real reasons for the emergence of the ouster doctrine were extralegal. Some of the explanations include: a reluctance to send a local party to a foreign court; an early disfavor of legally analogous arbitration clauses; the use of forum selection clauses in adhesion contracts; and finally, expansion of courts' jurisdiction to accommodate judges whose salaries were based on the number of cases they heard. *See* Gilbert, *supra* note 13, at 8-9; Reese, *Contractual Forum, supra* note 13, at 188-89.

102. *See, e.g.*, Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 498, 551

prearrangement is that litigants may not be heard in courts of competent jurisdiction.[103] According to these courts, the result of enforcing forum selection clauses is an unreasonable judicial accommodation of such extralegal considerations as economy, convenience, and certainty.[104]

Hostile courts advance additional policy arguments to support their fundamental ouster objection to contractual forum selection. Some courts observe that state venue statutes presume a random distribution of cases contingent on where these actions naturally accrue.[105] They conclude that agreements fixing the forum in advance subvert the orderliness of venue schemes and disturb the symmetry of the law.[106] Some courts oppose contractual forum selection on broader grounds and argue the public has paramount interests in forum decisions.[107] These interests include guaranteeing the unassailability of the plaintiff's choice of forum and ensuring forum residents access to home courts.[108]

An examination of the countervailing policy arguments advanced in recent decisions upholding forum selection is conspicuously absent from most contemporaneous state court opinions disregarding these clauses.[109] In *Ed Fanning Chev-*

P.2d 1206, 1210, 131 Cal. Rptr. 374, 378 (1976) (Mosk, J., dissenting) (dismissing this distinction as "gossamer thin"); *cf.* Ed Fanning Chevrolet, Inc. v. Servleaseco, Inc., 70 Ill. App. 3d 311, 317, 388 N.E.2d 454, 459 (1979) (court recognizing the United States Supreme Court ruling in *The Bremen v. Zapata Off-Shore Co.*, but making no mention of judicial discretion regarding forum selection clauses).

103. *See* Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 497-99, 551 P.2d 1206, 1210-11, 131 Cal. Rptr. 374, 378 (Mosk, J., dissenting). Some authors argue an automatic presumption of prima facie validity results in an ouster of jurisdiction. *Forum Provisions, supra* note 13, at 569-70. This view manifests a misconception of the legal theory on which forum selection enforcement rests. Advocates of forum selection respond that ouster never occurs under any circumstances; consequently, ouster cannot be reinstated a presumption favoring enforcement. Favorable forum selection rules are applied at the court's discretion and do not affect its jurisdiction. *See* Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 889 (Minn. 1982); Exum v. Vantage Press, Inc., 17 Wash. App. 477, 478-79, 563 P.2d 1314, 1315-16 (1977).

104. Courts reaffirming prohibitions against contractual forum selection after the Supreme Court's policy decision in *The Bremen v. Zapata Off-Shore Co.*, did not consider the rationale that motivated the *Bremen* Court. *Compare* The Bremen v. Zapata Off-Shore Co. 407 U.S. 1, 8-14 (1972) *with, e.g.*, Zurich Ins. Co. v. Allen, 436 So. 2d 1094, 1095 (3d D.C.A. 1983), *petition for review denied*, 446 So. 2d 100 (Fla. 1984).

105. *See, e.g.*, Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 830, 189 S.E.2d 130, 131 (1972).

106. *See id.* (forum selection clauses are in conflict with public policy supporting venue statutes); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 499-500, 109 S.E. 362, 363-64 (1921) (clauses limiting venue subvert the "will of the legislature"); International Travelers' Ass'n v. Branum, 109 Tex. 543, 543-45, 212 S.W. 630, 630-32 (1919) (contracts clauses depriving courts of jurisdiction are against public policy); Fidelity Union Life Ins. Co. v. Evans, 468 S.W.2d 869, 871-72 (Civ. App. 1971) (venue best determined by legislation not contract), *aff'd*, 477 S.W.2d 535 (Tex. 1972). The older cases make reference to prohibiting advance venue determination when they mean forum selection clauses, so their policies are relevant. *See supra* note 15 and accompanying text.

107. *See, e.g.*, Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 497-99, 551 P.2d 1206, 1210-11, 131 Cal. Rptr. 374, 378-79 (1976) (Mosk, J., dissenting).

108. *Id.*, 551 P.2d at 1210, 141 Cal. Rptr. at 378 (Mosk, J., dissenting).

109. *Cf.* Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985) (no discussion of recent changes and developments); Zurich Ins. Co. v. Allen, 436 So. 2d

rolet Inc. v. Servleaseco, Inc.,[110] however, an Illinois appellate court, in dicta,[111] questioned the applicability of the United States Supreme Court's prima facie valid rule to interstate contracts.[112] The *Ed Fanning Chevrolet* court noted vast differences between the policy considerations in an admiralty case and those in the case before it.[113] The Supreme Court's rule grew out of an international contract that contained a negotiated provision for a neutral forum having special expertise in admiralty issues.[114] In *Ed Fanning Chevrolet*, the defendant merely designated his home state on the back of a printed equipment lease form.[115] The court implied that desires for certainty and predictability in the context of interstate litigation are less compelling than in international transactions.[116]

The procedural issues raised in *Ed Fanning Chevrolet* implicitly suggest a final justification for disregarding forum selection clauses.[117] A rule of per se invalidity is easy to administer judicially, whereas thorny procedural problems spring up in the wake of decisions to enforce these clauses.[118] In the *Huntley* rule, therefore,

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1094 (3d D.C.A. 1983) (listing, without comment, many cases enforcing forum selection clauses, but concluding they are not enforceable), *petition for review denied*, 446 So. 2d 100 (Fla. 1984).

110. 70 Ill. App. 3d 311, 388 N.E.2d 454 (1979).

111. The *Ed Fanning Chevrolet* court did not directly address the broader forum selection clause issue because it held that a previous judgment entered against the defendant was impervious to subsequent attack because the earlier court had obtained personal jurisdiction over the defendant despite a forum selection clause designating another forum. *Id.* at 317-18, 388 N.E.2d at 459-60.

112. *Id.* at 314-17, 388 N.E.2d at 457-59.

113. *Id.* at 317, 388 N.E.2d at 459.

114. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).

115. 70 Ill. App. 3d at 312-13, 388 N.E.2d at 455-56.

116. *See id.* at 317, 388 N.E.2d at 458-59.

117. *See id.* at 317-19, 388 N.E.2d at 459-60. The issue in *Ed Fanning Chevrolet* was whether a party could collaterally attack the judgment of another court when, in the first action, the party defaulted and did not appear to assert the forum selection clause. *Id.* at 319, 388 N.E.2d at 460. The court held that the prior judgment was binding because the other court had personal jurisdiction over the defendant, and he did not challenge the suit by appearing and asserting the forum selection clause. *Id.* To hold otherwise, the court concluded, would give forum selection clauses an impermissible, post-judgment effect amounting to an ouster of jurisdiction. *Id.*

118. Following are examples of the many procedural problems that have arisen in connection with forum selection clauses. May a court treat the forum selection clause as an affirmative defense, so that a defendant waives a lack of jurisdiction defense by appearing and interposing the forum selection claim? *See* Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 892 (Minn. 1982) (holding the forum selection claim was not an affirmative defense). Should a court treat motions to dismiss for lack of personal jurisdiction based on a forum selection clause and *forum non conveniens* motions requesting discretionary dismissal as alternative motions? *See* Berard Constr. Co. v. Municipal Court, 49 Cal. App. 3d 710, 718-23, 122 Cal. Rptr. 825, 830-33 (1975) (parties must make a "Hobson's choice" and either challenge the suit on lack of personal jurisdiction grounds or waive the personal jurisdiction issue and make a *forum non conveniens* motion). If a litigant invokes the jurisdiction of a court on one issue of a dispute, may that party then request removal to a forum contractually designated by the parties for other issues in the same dispute? *See* Societe Anonyme Belge D'Exploitation de la Navigation Aerienne v. Feller, 112 A.D.2d 837, 839, 492 N.Y.S.2d 756, 758 (1985) (proper to deny the request for removal). Should a court dismiss a cause of action and enforce a forum selection clause if the forum selection clause is one of two conflicting and competing clauses? *See* St. Paul Fire & Marine Ins. Co. v. Travelers Indem. Co., 401 F. Supp. 927, 929-30 (D. Mass 1975) (refusing to dismiss the suit because the contractual forum might not accept jurisdiction in light of the competing clauses). What should a noncontractual forum do in response to a motion to dismiss if it suspects that the contractual forum may not be

Florida courts have a viable option of nonenforcement sustained by both practical considerations and policy determinations.[119]

B. *The United States Supreme Court's Rule of Prima Facie Validity*

Notwithstanding these persuasive policy arguments, most courts reject the historical prohibitory rule as a vestigial legal fiction.[120] Since the United States Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*,[121] the enforcement of fair and reasonable forum selection clauses has gained widespread acceptance in state courts.[122] The *Bremen* decision was in admiralty jurisdiction

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able to obtain personal jurisdiction and/or service of process over the defendant? *See* Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380-81 (Tenn. 1983) (staying the action rather than dismissing it); *accord* Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 495-96, 551 P.2d 1206, 1209, 131 Cal. Rptr. 374, 377 (1976); Elia Corp. v. Paul N. Howard Co., 391 A.2d 214, 216 (Del. Super. Ct. 1978); *see also* Reese, *supra* note 30, at 201 (arguing a stay should be granted if it is not possible for the defendant to get relief or an adjudication on the merits in the contractual forum). Must a court inquire into the merits of a case when one party claims that a forum selection clause was obtained by fraud? *See* Crowson v. Sealaska Corp., 705 P.2d 905, 911-12 (Alaska 1985) (party alleging fraud must be able to produce sufficient evidence to prove the clause itself was obtained fraudulently before the contractual forum should dismiss the suit).

119. *See Huntley*, 139 So. 2d at 912.

120. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972); *see also* Dick Proctor Imports, Inc. v. Sumitomo Corp. 486 F. Supp. 815, 818 (E.D. Mo. 1980) (describing old rule as "protectionist"); Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 609, 386 A.2d 1216, 1230 (1978) (the old rationale no longer comports with contemporary modes of extra-legal dispute resolution); Reeves v. Chem Indus. Co., 262 Or. 95, 100-01, 495 P.2d 729, 732 (1972) (ouster evidences a "paucity of reasoning").

121. 407 U.S. 1 (1972).

122. *See, e.g.*, Abadou v. Trad, 624 P.2d 287 (Alaska 1981); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976); ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137 (Colo. Ct. App. 1985); United States Trust Co. v. Bohart, 197 Conn. 34, 495 A.2d 1034 (1985); Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121 (Fla. 4th D.C.A. 1984); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886 (Minn. 1982); Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 474 A.2d 1020 (1984); Leeper v. Leeper, 116 N.H. 116, 474 A.2d 137 (1976); Reeves v. Chem Indus. Co., 262 Or. 95, 495 P.2d 729 (1972); Green v. Clinic Masters, Inc., 272 N.W.2d 813 (S.D. 1978); Dyersburg Mach. Works v. Rentenbach Eng'g Co., 650 S.W.2d 378 (Tenn. 1983).

The states' application of the Supreme Court's rule is the culmination of a long developmental movement in the common law. The Pennsylvania Supreme Court was one of the first state courts to sanction forum selection, calling a rule of enforcement "the modern and correct rule." Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965). Before *Bremen*, state courts were reluctant to adopt a strong presumption in favor of forum selection clauses. Their ambivalence is reflected in the pre-*Bremen* language of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971): "The parties agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."

The crosscurrents within the law have caused confusion as to which rule is currently "the majority rule." *See* Huntley v. Alejandre, 139 So. 2d 911, 912 (3d D.C.A.) (court following the "majority rule" prohibiting forum selection clause enforcement), *cert. denied*, 146 So. 2d 750 (Fla. 1962); Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 830, 189 S.E.2d 130, 131 (1972) (enforcement is the minority view); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436 (Iowa 1982) (enforcement is the minority view); Ernest & Norman Hart Bros., Inc. v. Town Contractors, Inc., 18 Mass. App. Ct. 60, ___, 463 N.E.2d 355, 359

and, thus, is not binding on federal courts in diversity jurisdiction or state courts.[123] Nonetheless, some state decisions precisely track the Supreme Court's language and strictly adhere to the *Bremen* holding.[124] Other courts change the rule when applying it to interstate conflicts. These alterations manifest significant concerns peculiar to the states and suggest policy considerations for Florida.[125]

In *Bremen*, a German company agreed to tow the drilling rig of a Texas corporation to Italy.[126] The contract contained a provision requiring disputes between parties to be heard by the London Court of Justice.[127] While en route, a storm damaged the rig, and the Bremen's captain sought refuge in Tampa, Florida.[128] The Texas corporation brought suit in United States federal court in derogation of the parties' agreement.[129] The federal district court refused to dismiss the suit under *forum non conveniens* because the relative conveniences did not strongly favor the German company.[130] On appeal, a divided panel affirmed the lower court's decision that a forum selection clause should only be enforced if the contractual forum is more convenient than the court in which the suit is brought.[131] The United States Supreme Court disagreed and reversed, finding the lower courts gave far too little weight to the forum selection clause.[132]

The *Bremen* Court held that forum selection clauses are prima facie valid and should be enforced absent fraud or overreaching, or if enforcement would otherwise be unreasonable or unjust.[133] Although the Supreme Court relied

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(1984) (court questioned whether the older rule was still valid, but was constrained to follow a Massachusetts Supreme Court precedent), *review denied*, 392 Mass. 1102, 465 N.E.2d 262 (1984); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 888 (Minn. 1982) (court noted that jurisdictions following the old rule are diminishing); State *ex rel.* Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928, 930-31 (Mo. Ct. App. 1981) (court held ouster doctrine is the majority rule of Texas and Missouri and courts must follow the law not create it); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 501, 109 S.E. 362, 364 (1921) (court stating that overwhelming case authority holds these clauses unenforceable); *see also* A. EHRENZWEIG, *supra* note 4, at § 41 (cases contrary to hornbook law have existed for many years); R. LEFLAR, *supra* note 4, at § 52 (present rule is that forum selection clauses are neither absolutely binding nor absolutely void).

123. 407 U.S. at 10, 17-18. For the history of the federal rule and its expansion into diversity jurisdiction, see Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 148-49 (N.D. Tex. 1979); Spatz v. Nascone, 364 F. Supp. 967, 975-78 (discussion of the federal court system extension of *Bremen* beyond admiralty), *motion to vacate denied*, 368 F. Supp. 352 (W.D. Pa. 1973). *See generally* Gilbert, *supra* note 13, at 67-71; Gruson, *supra* note 13, at 149-50.

124. *See, e.g.*, Volkswagenwerk, A.G. v. Klippan, GmbH, 611 P.2d 498, 503-04 (Alaska 1980); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890 (Minn. 1982); Baldwin v. Heinold Commodities, Inc., 363 N.W.2d 191, 195 (S.D. 1985).

125. *See, e.g.*, Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982).

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

127. *Id.*

128. *Id.* at 3.

129. *Id.* at 3-4.

130. *Id.* at 6.

131. *Id.* at 7.

132. *Id.* at 8-9.

133. *Id.* at 15.

extensively on freedom of contract legal theory, it unequivocally departed from precedent on the basis of public policy.[134] Primarily, the Court recognized the commercial realities of American international trade.[135] A parochial attitude requiring all disputes to be litigated in United States courts under American laws does not encourage the expansion of American business.[136]

Florida's Fourth District Court of Appeal recently decided to follow the Supreme Court's policy-oriented approach.[137] *Maritime Ltd. Partnership v. Greenman Advertising Associates*[138] involved related contracts for consulting and advertising services between two Florida corporations and a South Carolina limited partnership.[139] The pertinent forum selection clause provided that courts of Broward County, Florida had jurisdiction over subsequent litigation.[140] The defendants objected to the clause as a basis for *in personam* jurisdiction.[141] Citing a lack of jurisdiction, the trial court granted a motion to dismiss.[142] The appellate court reversed and held that the forum selection clause was an adequate basis for personal jurisdiction.[143]

The Fourth District Court of Appeal rejected the previously uncontradicted *Huntley* court pronouncement, finding the existing prohibition against contractual forum selection was not state policy.[144] Instead, the *Maritime* court announced a broad policy of accommodating the reasonable expectations of parties to interstate contracts.[145] Specifically, the Fourth District Court of Appeal will enforce forum selection clauses if they meet three requirements. First, the parties must not have selected a particular forum because of one party's overwhelming bargaining power.[146] Second, enforcement of the clause must not contravene strong public policy in either the contractual forum or an excluded forum.[147] Finally,

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134. *Id.* at 9-10, 15.

135. *Id.* at 15.

136. *Id.* at 9.

137. *See* Maritime Ltd. Partnership v. Greenman Advertising Assocs., 455 So. 2d 1121, 1123 (Fla. 4th D.C.A. 1984).

138. 455 So. 2d 1121 (Fla. 4th D.C.A. 1984).

139. *Id.* at 1122.

140. *Id.* The transactions between these parties involved several contracts, one of which contained a forum selection clause designating a forum "midway between Myrtle Beach [South Carolina] and Hollywood [Florida]." The court dismissed this "oceanic" alternative as absurd. *Id.*

141. *Id.* at 1122-23.

142. *Id.* at 1124.

143. *Id.* Although properly raised on appeal, the jurisdictional issue was actually mooted because the trial court had obtained *in personam* jurisdiction over the defendants in one of two consolidated trials, pursuant to FLA. STAT. § 48.193 (1981), the Florida long-arm statute. Accordingly, the appellate court affirmed that portion of the lower court's ruling. *Id.*

144. *Id.* at 1123.

145. *Id.* An additional policy reason for enforcing these contracts is that they facilitate alternate dispute resolution by giving parties rights to tailor the location of subsequent litigation to fit their needs. Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 889 (Minn. 1982). Other courts suggest that these provisions free the dockets of congestion. *See, e.g.*, Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 609-10, 386 A.2d 1216, 1230-31 (1978).

146. *Maritime*, 455 So. 2d at 1123.

147. *Id.*

the forum selection clause must not transfer an essentially local dispute to a remote and alien forum to seriously inconvenience one or both parties.[148]

These limitations appear similar to the two-pronged *Bremen* test for invalidity.[149] The *Maritime* court, however, added a significant qualification to its holding. The court's approval was restricted to contracts partially performed in the contractual forum and designating the home state of one of the parties.[150] Because these were the precise facts in *Maritime*, the court did not reach several important issues.[151] Initially, the court failed to specify the nature of the burden of proof on a party challenging a forum selection clause under its standard of serious inconvenience.[152] Further, the decision does not indicate whether parties may choose Florida as a neutral forum.[153] Finally, the court did not discuss the relationship between choice of law provisions and forum selection clauses.[154] These interrelated issues involve policy decisions critical to the structure of a workable forum selection rule.

1. Burden of Proof

Judicial rules permitting forum selection are cast as rebuttable presumptions in favor of litigation in the contractual forum.[155] Jurisdictions differ on the issue of overcoming these presumptions.[156] Generally courts agree a party must show more than mere inconvenience or additional expense to avoid litigation in the contractual forum.[157] To give full effect to its rule of prima facie validity, the Supreme Court imposes a heavy burden on a party contesting a forum selection clause.[158] The opponent must clearly show that suit in the contractual forum is so gravely inconvenient as to afford no legal remedy.[159] The *Maritime* standard

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148. *Id.*

149. *See supra* text accompanying note 133. *Compare Bremen*, 407 U.S. at 15 *with Maritime*, 455 So. 2d at 1123.

150. *Maritime*, 455 So. 2d at 1123.

151. *See id.*

152. "Moreover, the forum is obviously neither remote nor seriously inconvenient . . . ." *Id.*; *see infra* text accompanying notes 155-78.

153. "[W]e can perceive no public policy against the contracting parties designating the home state of one of two corporations as the forum for ensuing litigation." 455 So. 2d at 1123; *see infra* text accompanying notes 179-208.

154. "[I]f one can choose the law of the forum, we fail to understand how arms [sic] length choice of the forum itself is anything other than a distinction without much of a difference." 455 So. 2d at 1123; *see infra* text accompanying notes 209-31.

155. *See, e.g., Bremen*, 407 U.S. at 15-17.

156. *Compare id.* at 17-18 (party claiming inconvenience must show that "he will for all practical purposes be deprived of his day in court") *with* Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436-37 (Iowa 1982) (forum selection clause is simply one factor in court's determination whether forum is inconvenient).

157. *See, e.g.*, Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 496, 551 P.2d 1206, 1209, 131 Cal. Rptr. 374, 377 (1976); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965).

158. *Bremen*, 407 U.S. at 17-18.

159. *Id.* at 18. "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." *Id.*

must be clarified because placement and weight of the burden of proof inevitably determine who prevails in many forum selection disputes.[160]

Some state courts have adopted the Supreme Court's heavy burden of proof. In *Societe Jean Nicolas et Fils, J.B. v. Mousseux*,[161] the Arizona Supreme Court held this standard required an Arizona resident to prove litigating in a French forum would effectively deprive him of his day in court.[162] Courts imposing this strict standard also preclude litigants from raising issues relevant to witness convenience and the accessibility of records in alternative *forum non conveniens* motions.[163] According to these courts, such matters are both foreseeable at the time of contracting and fundamental to the parties' agreement.[164] The provisions of the contract presumptively resolve inconvenience issues at trial.[165]

Many courts are reluctant to foreclose judicial inquiry into convenience matters. Instead, they adopt a more moderate burden of proof and only require a litigant to prove serious inconvenience to overcome a forum selection clause.[166] These courts entertain inconvenience motions predicated on factors foreseeable at the time of contracting.[167] In *Baldwin v. Heinold Commodities, Inc.*,[168] for example, the South Dakota Supreme Court suggested four factors to guide forum selection clause decisions: the law which governs the contract, the residency of the parties, the place of execution and performance of the contract, and the location of parties and witnesses.[169]

A recent decision of the Iowa Supreme Court completely rejects both the

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160. *Cf. Bremen*, 407 U.S. at 15 (noting, under the new burden of proof, nothing in the record indicated that the lower court on remand could find that the plaintiff could avoid suit in the contractual forum). *See generally* Leflar, *supra* note 54, at 383 n.36 (placement and weight of the burden of proof usually determines who prevails in a lawsuit).

161. 123 Ariz. 59, 597 P.2d 541 (1979).

162. *Id.* at 61, 597 P.2d at 543; *accord* Abadou v. Trad, 624 P.2d 287, 290 (Alaska 1981); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890 (Minn. 1982).

163. *See, e.g.*, Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890-91 (Minn. 1982); Rokeby-Johnson v. Kentucky Agricultural Energy Corp., 108 A.D.2d 336, 340-41, 489 N.Y.S.2d 69, 73 (1985); Green v. Clinic Masters, Inc., 272 N.W.2d 813, 816 (S.D. 1978).

164. Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890-91 (Minn. 1982); Green v. Clinic Masters, Inc., 272 N.W.2d 816, 816 (S.D. 1978).

165. Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890-91 (Minn. 1982); Green v. Clinic Masters, Inc., 272 N.W.2d 816, 816 (S.D. 1978); *see also Bremen*, 407 U.S. at 16-17.

166. *See, e.g.*, ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137, 139 (Colo. Ct. App. 1985).

167. *See, e.g.*, Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380 (Tenn. 1983); *cf.* Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1360 (Fla. 2d D.C.A. 1986) (implying that in extreme circumstances a court may consider *forum non conveniens* factors in an enforcement decision).

168. 363 N.W.2d 191 (S.D. 1985).

169. *Id.* at 194; *see also* Gaskin v. Stumm Handel, GmbH, 390 F. Supp. 361, 365 (S.D.N.Y. 1975); Elia Corp. v. Paul N. Howard Co., 391 A.2d 214, 216 (Del. Super. Ct. 1978); Hauenstein & Bermeister Inc. v. Met-Fab Indus., 320 N.W.2d 886, 890 (Minn. 1982). Note that these factors are the same factors that did not sway the United States Supreme Court. *See Bremen*, 407 U.S. at 7-8, 15. Some commentaries refer to these convenience factors as defenses. *See, e.g.*, Gruson, *supra* note 13, at 164; Casenote, *The Enforcement of Forum Selection Provisions in International Commercial Agreements*, 11 COLUM. J. TRANSNAT'L L. 449, 454-55 (1972).

moderate and strict burden of proof standards.[170] In *Davenport Machine & Foundry Co. v. Adolph Coors Co.*,[171] the Iowa Supreme Court grudgingly recognized forum selection clauses, but gave them minimal deference in enforcement decisions.[172] *Davenport* directs courts to consider forum selection clauses merely as one of several *forum non conveniens* factors.[173]

The Iowa Supreme Court's approach ignores the fundamentally different functions of burden of proof assignment under *forum non conveniens* and contractual forum selection.[174] Under *forum non conveniens*, the defendant bears a heavy burden to justify upsetting the plaintiff's choice of forum, whether or not he seeks removal to or escape from a contractual forum.[175] Furthermore, most courts agree that *forum non conveniens* has little or no applicability when a resident plaintiff files suit in home court.[176] Therefore, parties to forum selection contracts can avoid litigation in the contractual forum by simply filing suit first in resident state courts.[177] As a practical matter, the *Davenport* rule provides Iowa litigants with a *forum non conveniens* escape hatch.[178]

2. Neutral Forums

An additional ambiguity in *Maritime* is whether that court's enforcement rule is contingent on sufficient factual connections between the selected forum and the contractual dispute.[179] Should a Florida court hear a suit between parties who intentionally designate this state as a completely neutral forum? Arguably, the Fourth District Court of Appeal responded negatively by substantially restricting the scope of its forum selection rule.[180] The court requires partial contractual performance in the forum state and selection of one of the parties' home state.[181] Clearly, the *Maritime* court did not envision trial courts adjudicating numerous claims in which Florida has no interests.[182]

While the United States Supreme Court in *Bremen* wholeheartedly endorsed neutral forums,[183] state courts adopting its rule almost unanimously rejected this

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170. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436-37 (Iowa 1982).

171. 314 N.W.2d 432 (Iowa 1982).

172. *Id.* at 436-37.

173. *Id.* at 437.

174. R. LEFLAR, *supra* note 4, at § 51; *see Bremen*, 407 U.S. at 17-18; Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1360 (Fla. 2d D.C.A. 1986).

175. Crowson v. Sealaska Corp., 705 P.2d 905, 908 (Alaska 1985).

176. *See, e.g., id.*

177. *Cf. Davenport*, 314 N.W.2d at 437 (Iowa courts relegated forum selection to *forum non conveniens* determinations, and *forum non conveniens* does not apply when the plaintiff has filed suit in his resident state).

178. *Cf. id.*

179. *Cf. Maritime*, 455 So. 2d at 1123 (in listing its reasons for enforcing the clause in question, the court noted that partial contractual performance was required in Florida and that Florida was the "home" state of one of the corporate parties).

180. *See id.*

181. *Id.*

182. *Id.*

183. *Bremen*, 407 U.S. at 12, 17-18. On neutral forums in general, see Gilbert, *supra* note 13, at 65-66; Gruson, *supra* note 13, at 183 n.217.

aspect of forum selection.[184] In *Appalachian Insurance Co. v. Superior Court*,[185] a California appellate court articulated some of the policy objections to neutral forums.[186] The court began its critical analysis by stressing the public's overriding interests in the forum selection process.[187] A neutral forum's taxpayers must bear the administrative expense of such litigation.[188] In addition to noting increased jury duty requirements for residents, the *Appalachian* court observed that desirable forums may become unnaturally congested and less accessible to taxpayers.[189] The court further reasoned that residents of non-neutral forums have important interests in viewing such litigation as matters of local concern.[190] The court weighed these societal impositions against the contracting parties' expectations and concluded that California should not open its courthouse doors to neutral forum shoppers.[191]

A state's position is reversed, however, when a defendant requests dismissal to a contractually designated neutral forum. The issue is no longer whether a state should admit litigants to its courts despite insufficient factual connections. Instead, a court decides whether to eject plaintiffs from interested state courts in favor of foreign, neutral forums.[192] Generally, the likelihood that a court will dismiss such a suit is directly related to the depth of that jurisdiction's commitment to contractual forum selection.[193] The *Bremen* decision sanctioned fair and reasonable forum selection clauses without reservations and approved dismissals to neutral forums.[194] According to the *Bremen* Court, international businessmen seek forums that have special expertise in the subject matter of their contracts[195] and ensure that neither party has the litigation advantage of being a forum resident.[196]

Minnesota is one of the few states to endorse neutral forums in conjunction with a favorable forum selection policy.[197] In *Hauenstein & Bermeister, Inc. v. Met-Fab Industries*,[198] the Minnesota Supreme Court affirmed a trial court's dismissal

184. *See, e.g.*, Appalachian Ins. Co. v. Superior Court, 162 Cal. App. 3d 427, 438-39, 208 Cal. Rptr. 627, 634 (1984); D'Aurizio v. Consolidated Rail Corp., 129 Misc. 2d 949, 951, 494 N.Y.S.2d 785, 786 (Sup. Ct. 1985). *Contra* Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc., 320 N.W. 2d 886, 891 (Minn. 1982) (in dicta, the court approved neutral forums).

185. 162 Cal. App. 3d 427, 208 Cal. Rptr. 627 (1984).

186. *Id.* at 435-37, 208 Cal. Rptr. at 630-33.

187. *Id.* at 433-35, 208 Cal. Rptr. at 630-31.

188. *Id.* at 433, 208 Cal. Rptr. at 630.

189. *Id.*

190. *Id.* at 434, 208 Cal. Rptr. at 630.

191. *Id.* at 433, 438, 208 Cal. Rptr. at 630, 634.

192. *See, e.g.*, Hall v. Superior Court, 150 Cal. App. 3d 411, 417-19, 197 Cal. Rptr. 757, 761-63 (1983) (parties selected Nevada as a neutral forum, but the plaintiff sued in California in derogation of the contract).

193. *Compare Bremen*, 407 U.S. at 12, 17-18 *with* Hall v. Superior Court, 150 Cal. App. 3d 411, 418, 197 Cal. Rptr. 757, 763 (1983).

194. *Bremen*, 407 U.S. at 12, 17-18.

195. *Id.*

196. *Id.* at 17.

197. *See* Hauenstein & Bermeister, Inc. v. Met-Fab Indus., 320 N.W.2d 886 (Minn. 1982).

198. 320 N.W.2d 886 (Minn. 1982).

of a suit to a neutral Florida forum experienced in resolution of commercial sales litigation.[199] The *Hauenstein* court extrapolated the United States Supreme Court's international policy to interstate contracts and reasoned that neutral forums were a further manifestation of litigants' desires for certainty and predictability.[200]

Although state courts may in principle acknowledge the legitimacy of such expectations, most jurisdictions condemn neutral forums.[201] Courts do so primarily because of the conflict of laws ramifications of enforcement.[202] Courts equivocate on enforcing forum selection clauses when dismissal will result in a neutral forum interpreting their substantive laws.[203] Moreover, the same courts invariably disregard a forum selection clause if they suspect a neutral forum will apply its own disinterested law.[204] They argue that applications of neutral law violate a state's conflict of laws doctrines and public policy.[205]

The Florida Fourth District Court of Appeal's rule in *Maritime* contains a public policy exception to forum selection clause enforcement.[206] The limitation prohibits litigants from avoiding a state's laws by impermissibly designating a forum with conflicting or nullifying substantive provisions.[207] Parties often attempt to evade governing laws by executing explicit choice of law provisions in conjunction with forum selection clauses that designate neutral forums.[208] A state court's resolution of the neutral forum issue, therefore, is inextricably tied to its treatment of contractual choice of law provisions.

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199. *Id.* at 891. Although the court referred to Florida as a "neutral" forum, defendant Met-Fab Industries was a Florida corporation and, therefore, Florida did have some interest in the parties' litigation. *Id.* at 887.

200. *Id.* at 891.

201. *See, e.g.*, D'Aurizio v. Consolidated Rail Corp., 129 Misc. 2d 949, 950, 494 N.Y.S.2d 785, 786 (Sup. Ct. 1985) (court struggled to approve designation of California as a neutral forum by finding that a "rational basis" existed for "venue" there). *D'Aurizio* was decided prior to a New York law that expressly approved of New York as a neutral forum. *See infra* text accompanying notes 256-59.

202. *See, e.g., Appalachian*, 162 Cal. App. 3d at 433, 208 Cal. Rptr. at 630; Hall v. Superior Court, 150 Cal. App. 3d 411, 418-23, 197 Cal. Rptr. 757, 763-65 (1983).

203. *Appalachian*, 162 Cal. App. 3d at 433, 208 Cal. Rptr. at 630.

204. Hall v. Superior Court, 150 Cal. App. 3d 411, 418-23, 197 Cal. Rptr. 757, 763-65 (1983). *Contra Bremen*, 407 U.S. at 14 n.15 (application of neutral British law to a German and American shipping dispute was permissible). The *Bremen* Court has been accused of abruptly reaching its conclusion on the English choice of law question. *See* Reese, *Enforcement*, *supra* note 13, at 538. The Court commended British courts for their experience and expertise in admiralty litigation, but also noted that there would be a significant difference if British law were applied to the exculpation clause in that the clause would be unenforceable in the United States. *Bremen*, 407 U.S. at 15-16.

205. *See, e.g.*, Hall v. Superior Court, 150 Cal. App. 3d 411, 418-23, 197 Cal. Rptr. 757, 763-65 (1983).

206. *Maritime*, 455 So. 2d at 1123. "Enforcement would not contravene a strong public policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, or the forum from which the suit has been excluded." *Id.*

207. *See, e.g.* Hall v. Superior Court, 150 Cal. App. 3d 411, 421, 197 Cal. Rptr. 757, 764-65 (1983) (Wallin, J., concurring).

208. *Id.* ("The only purpose which I can discern from this record for choosing a Nevada forum is an attempt to avoid a California forum and possible application of California law.").

3. Choice of Law Provisions

The *Maritime* court commented favorably on contractual choice of law, but did not discuss the relationship between these provisions and forum selection clauses.[209] Florida courts have traditionally permitted contracting parties to designate the body of substantive law governing disputes arising from their agreements.[210] Courts advance the same policies supporting contractual forum selection on behalf of choice of law provisions.[211] Most courts condition their recognition of choice of law clauses on two factors. First, application of the chosen law must not contravene a fundamental public policy.[212] Second, the parties may only designate the law of a state having a substantial relationship or real and vital connection to either the parties or their transaction.[213]

The relevant question is whether a Florida court should enforce a forum selection clause if that court finds a corresponding choice of law provision invalid. While choice of law provisions are frequently used in conjunction with forum selection clauses, the two devices are functionally distinct and courts consistently address them separately.[214] These analytical distinctions are cast aside, however, when parties seek enforcement of forum selection clauses despite the invalidation of related choice of law provisions.[215]

In *Hall v. Superior Court*,[216] a California appellate court refused to sanction the selection of a Nevada forum after finding the parties' choice of law provision violated both a California securities statute and that state's public policy.[217] The *Hall* court ruled that contracts designating both the forum and the governing law require an enforceable choice of law provision as a prerequisite to litigation

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209. *Cf. Maritime*, 455 So. 2d at 1123. The court apparently assumed that choice of forum implied choice of law: "[I]f one can choose the law of the forum, we fail to understand how arms [sic] length choice of the forum is anything other than a distinction without being much of a difference." *Id.*

210. *See* Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507, 510-12 (Fla. 1981); Jemco, Inc. v. United Parcel Serv., 400 So. 2d 499 (Fla. 3d D.C.A. 1981).

211. United Standard Mgt. Corp. v. Mahoning Valley Solar Resources, Inc., 16 Ohio App. 3d 476, 478, 476 N.E.2d 724, 726 (1984).

212. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(b) (1971); *see, e.g.*, General Elec. Co. v. Keyser, 275 S.E.2d 289, 293 (W. Va. 1981) (discussing the *Restatement* and choice of law).

213. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(a) (1971).

214. *See* General Elec. Co. v. Keyser, 275 S.E.2d 289, 292 n.2 (W. Va. 1981): "The factors to be weighed in determining the effectiveness of a forum selection clause are materially different from the factors a court will consider in determining the effectiveness of a choice of laws clause and speak to very different problems." *Id., citing* Leasewell, Ltd. v. Jake Shelton Ford, Inc., 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976). Moreover, many jurisdictions which permit choice of law prohibit contractual forum selection. *Compare* Jemco, Inc. v. United Parcel Serv., 400 So. 2d 499 (Fla. 3d D.C.A. 1981) (holding that choice of law clauses are enforceable) *with Huntley*, 139 So. 2d at 912 (forum selection clauses are void and unenforceable); *compare* Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983) (fixing "venue" by contract is void) *with* Hi Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust, 579 S.W.2d 300 (Tex. Civ. App. 1979) (parties to a contract may choose governing law).

215. *See* Hall v. Superior Court, 150 Cal. App. 3d 411, 419, 197 Cal. Rptr. 757, 763 (1983).

216. 150 Cal. App. 3d 411, 197 Cal. Rptr. 757 (1983).

217. *Id.* at 418-19, 197 Cal. Rptr. at 762-63.

in the contractual forum.[218] The majority's decision did not turn on apprehension that a Nevada forum might impermissibly apply Nevada law to the controversy.[219] Instead, the court deemed choice of law and forum selection an interdependent package.[220]

In a cogent concurring opinion, Justice Wallin disagreed with the majority's rationale.[221] According to Justice Wallin, the validity of the choice of law provision was not properly before the appellate court at that preliminary juncture.[222] Justice Wallin questioned conditioning the validity of the forum selection clause on the enforceability of the choice of law provision.[223] This method allows courts to ignore the procedural aspects of the forum selection clause and to preemptively address the substantive merits of the underlying cause of action.[224]

Although Justice Wallin would preserve the independent vitality of contractual forum selection, he agreed the clause in *Hall* was unenforceable.[225] Nevada, he observed, had little, if any, connection to the stock transaction involved in that case.[226] He suspected the parties designated Nevada as a neutral forum with the impermissible motive of evading California securities regulations.[227]

The *Hall* majority, on the other hand, was not concerned with the conflict of laws and public policy aspects of neutral forums.[228] Instead, the court was skeptical of contractual forum selection in general and viewed these clauses merely as vehicles to facilitate questionable choice of law provisions.[229] The *Hall* court discounted the nonsubstantive factors that motivate parties to use these clauses, such as geographical conveniences and procedural preferences.[230] These complex cases ultimately force a court to decide whether it will place primary emphasis upon the procedural aspects or the substantive implications of contractual forum selection. Since Florida courts permit choice of law, they will confront these difficult decisions if they elect to extend their recognition to forum selection clauses.[231]

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218. *Id.*

219. *Id.* The court only commented on the application of Nevada law after reaching its decision not to enforce the choice of law clause. The court found that by selecting a Nevada forum, the parties had violated a California statute which prohibited waiver of the protective provisions of California securities regulations. *Id.*

220. *Id.* at 416, 418-19, 197 Cal. Rptr. at 761, 762-63.

221. *Id.* at 419, 197 Cal. Rptr. at 763 (Wallin, J., concurring).

222. *Id.* at 422, 197 Cal. Rptr. at 765 (Wallin, J., concurring).

223. *Id.*

224. *Id.* "[The majority] confuse[s] the choice of forum issue with the choice of law issue and conclude[s] the public policy and statute against waiving the protections of California securities law somehow invalidates the choice of forum provision." *Id.*

225. *Id.* at 420, 197 Cal. Rptr. at 764 (Wallin, J., concurring).

226. *Id.* at 421, 197 Cal. Rptr. at 764 (Wallin, J., concurring).

227. *Id.*, 197 Cal. Rptr. at 764-65 (Wallin, J., concurring).

228. *Id.* at 419, 197 Cal. Rptr. at 763. The court, in essence, applied California securities law to the choice of forum issue. *See id.*

229. *See id.* at 416-18, 197 Cal. Rptr. at 761-63.

230. *Id.*

231. *See Maritime*, 455 So. 2d at 1123; Jemco, Inc. v. United Parcel Serv., 400 So. 2d 499, 500 (Fla. 3d D.C.A. 1981); Hirsch v. Hirsch, 309 So. 2d 47, 49-50 (Fla. 3d D.C.A. 1975).

C. *A Statutory Solution to a Common Law Problem*

Florida courts will resolve the burden of proof, neutral forum, and choice of law issues as they determine the precise contours of the Fourth District Court of Appeal's *Maritime* rule.[232] Unfortunately, a court's opportunity to address these matters is contingent on an unpredictable flow of cases. Given the ineffectiveness of this case-by-case process, a statutory solution to the problem of forum selection would be more appropriate.

If Florida decides against contractual forum selection, the legislature may consider codifying a rule of per se invalidity.[233] Historically, states have not found codification of such rules necessary.[234] The nature of these traditional prohibitory rules explains the absence of forum selection statutes.[235] They are easily administered, require little interpretation and apply without exception.[236] On the other hand, courts define rules favoring forum selection in broad, discretionary terms and carve out significant exceptions.[237] Therefore, if Florida decides to permit contractual forum selection, the legislature must carefully consider the efficacy of a statutory enforcement rule.

The Model Choice of Forum Act[238] is an ideal starting point for such an inquiry. Approved by the National Conference on Commissioners of Uniform State Laws in 1968, the Act is a short and straightforward codification of the rule that forum selection clauses should be enforced if they are fair and reasonable.[239] Its authors extracted the Act's major provisions from the rules and

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232. *See, e.g.*, Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1354 (Fla. 2d D.C.A. 1986) (clarifying the mandatory/permissive aspect of forum selection "overlooked" by the *Maritime* court); McRae v. J.D./M.D., Inc., 481 So. 2d 945, 946 (Fla. 4th D.C.A. 1985) (explaining that the basis for personal jurisdiction in forum selection cases is consent and not the state's long-arm statute).

233. *See, e.g., Huntley*, 139 So. 2d at 912. Under *Huntley*, agreements limiting future causes of action to specific courts are void as attempts to oust the jurisdiction of competent courts. *Id.*

234. No such statutes have been passed even in states recently reaffirming old prohibitory rules. *See, e.g.*, Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985); Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983).

235. For examples of absolute rules, see Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980), and *Huntley*, 139 So. 2d at 912.

236. *See, e.g.*, Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053, 1053 (Ala. 1985) (despite a "forceful, but ultimately unpersuasive" attack on its precedent, the Alabama Supreme Court succinctly applied its rule to the parties' dispute in one sentence).

237. *See, e.g., Maritime*, 455 So. 2d at 1123.

238. MODEL CHOICE OF FORUM ACT, (Nat'l Conference of Comm'rs on Uniform State Laws 1968), *reprinted in* 17 AM. J. COMP. L. 292 (1969) (with an introduction and prefatory note by its author, Willis Reese).

239. In pertinent part, the Act provides:

> SECTION 1. [*Definitions.*] As used in this Act, "state" means any foreign nation, and any state, district, commonwealth, territory or insular possession of the United States.
>
> SECTION 2. [*Action in This State by Agreement.*]
>
> (a) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if
>
> (1) the court has power under the law of this state to entertain the action;
>
> (2) this state is a reasonably convenient place for trial of the action;

rationales of seminal cases favoring forum selection.[240] The resulting statute is, therefore, remarkably similar in substance to the forum selection rule announced by the Fourth District Court of Appeal in *Maritime*.[241]

In several key respects, the Act stops short of the United States Supreme Court's rule of prima facie validity enunciated in *Bremen*.[242] The Model Choice of Forum Act contains a much broader grant of judicial discretion than the *Bremen* Court's rule.[243] The Act does not channel the exercise of discretion by a prima facie presumption of validity.[244] Comments to the Act indicate a party could avoid litigating in the contractual forum on a moderate showing of inconvenience.[245] The authors of the Model Choice of Forum Act also presumed these clauses were the natural complement of choice of law provisions and would ordinarily be used to effectuate application of the chosen law.[246]

The Act's originators intended to positively influence a developing area of law in the direction of what they perceived to be the better rule.[247] These legal scholars intended legislatures and courts to use the Act only as a guide in structuring their rules.[248] Consequently, the Model Choice of Forum Act is couched in extremely broad terms. The concepts of unfairness and unreasonableness are introduced without further definition and are left to the vicissitudes

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(3) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and

(4) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by registered [or certified] mail directed to his last known address.

(b) This section does not apply [to cognovit clauses] [to arbitration clauses or] to the appointment of an agent for the service of process pursuant to statute or court order.

Id. at 294. For a history of the Model Choice of Forum Act, see Leflar, *supra* note 54, and Reese, *supra* note 30.

240. MODEL CHOICE OF FORUM ACT, *supra* note 238, at 293. In his introduction and prefatory note, Professor Reese cites Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3d Cir. 1966), and Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965).

241. *Compare* MODEL CHOICE OF FORUM ACT, *supra* note 238 *with Maritime*, 455 So. 2d at 1123.

242. *See* MODEL CHOICE OF FORUM ACT, *supra* note 23, § 3 comment, at 295 (litigation in the contractual forum could be avoided if it is "substantially less convenient for trial" than the non-contractual forum). Most commentators agree that the Model Choice of Forum Act gives a court more discretion to allow litigants to avoid a choice of forum clause. *See, e.g.*, Casenote, *supra* note 169, at 459. *But see* Leflar, *supra* note 54, at 377-81 (comparing *Bremen* with the Model Choice of Forum Act and concluding they are the same on the inconvenience issue).

243. *Compare Bremen*, 407 U.S. at 17-18 *with* MODEL CHOICE OF FORUM ACT, *supra* note 238, §§ 2-3, at 294-95.

244. *See* MODEL CHOICE OF FORUM ACT, *supra* note 238, § 3, at 294-95.

245. MODEL CHOICE OF FORUM ACT, *supra* note 238, § 3 comment, at 295 (interpreting § 3(3) court need only find that the contractual forum would be substantially less convenient than the place in which suit is brought).

246. MODEL CHOICE OF FORUM ACT, *supra* note 236, prefatory note, at 294. Professor Reese states that forum selection clauses are the "best insurance" that the chosen law will be correctly applied. *Id.*

247. Leflar, *supra* note 54, at 375. The Act is "uniform" rather than "model" and this reflects its authors' desire that it would not only be codified in some form, but also incorporated in the common law by judicial application. *Id.*

248. *Id.*

of judicial interpretation.[249] Moreover, the Act does not address the most difficult procedural aspects of forum selection clause enforcement.[250]

For these reasons, state courts have not adopted the Model Choice of Forum Act, nor have state legislatures enacted laws resembling it.[251] The absence of such statutes is probably more attributable to the inexact nature of forum selection rules than to particular shortcomings of the Model Choice of Forum Act.[252] Rules that can be stated in absolute terms are more amenable to codification.[253] Historically, the only clearcut forum selection rules were the prohibitory ones.[254] One jurisdiction, however, recently codified an absolute rule favoring contractual forum selection.[255]

In 1984, the New York legislature enacted several interrelated statutory provisions that make up a comprehensive forum selection rule.[256] These laws permit contracting parties whose transactions reach certain monetary thresholds to designate New York as a neutral forum and to insure that New York law will govern their disputes.[257] The statutes do not require a relationship between the parties' agreement or transaction and the State of New York.[258] The New York legislature also eliminated the *forum non conveniens* loophole by expressly precluding inconvenience dismissals in situations covered by the forum selection statute.[259]

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249. MODEL CHOICE OF FORUM ACT, *supra* note 238, § 3(5), at 295 (suits in derogation can be entertained by a court if "it would for some other reason be unfair or unreasonable to enforce the agreement").

250. *See supra* text accompanying note 118.

251. The Model Choice of Forum Act has, as its authors intended, influenced case law. *See, e.g.*, Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380 (Tenn. 1983); *see also* Gilbert, *supra* note 13, at 30 n.164. Gilbert claims the Model Choice of Forum Act has been "adopted" by four states, Illinois, Nebraska, New Hampshire, and North Dakota. *Id.* But as statutes do not exist in those states, adoption was by case law only.

252. The influence of a uniform act is not measured entirely by the number of states adopting it. Reese, *supra* note 30, at 193.

253. *See supra* text accompanying note 236.

254. *See supra* text accompanying note 235.

255. *See infra* notes 256-59 and accompanying text.

256. Act of July 19, 1984, ch. 421, 1984 N.Y. Laws 1406 (McKinney) (codified by N.Y. GEN. OBLIG. LAW §§ 5-1401, 5-1402; N.Y. CIV. PRAC. R. 327).

257. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney Supp. 1986).

> 1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding . . . any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

258. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney Supp. 1986): "The parties to any contract . . . covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract . . . bears a reasonable relation to this state."

259. N.Y. CIV. PRAC. RULE 327(b) (McKinney Supp. 1986):

In *Credit Francais International, S.A. v. Sociedad Financiera de Comercio, C.A.*,[260] a New York trial court discussed the policy considerations motivating the legislature to enact this pathbreaking law.[261] According to the *Credit* court, the legislature's primary purpose was to enhance the status of New York law and make it the standard bearer for the legal community.[262] These lawmakers also sought to perpetuate New York as a leading commercial and financial center by providing a service to the world business community.[263] The law's supporters acknowledged an extra dividend: multinational interests will be attracted to New York and many attendant industries will reap resulting financial benefits.[264]

Other commentators note that the speculative benefits of this law may not outweigh the significant burdens it places on New York's taxpayers.[265] The administrative costs of major litigation having no New York connections will substantially drain state resources.[266] By permitting complete neutrality in the interest of attracting business, the legislature may have undercut the statute's beneficial commercial effect.[267] The old common law rule furthered this goal more effectively by making New York business contacts a prerequisite to litigation.[268]

Finally, critics charge this law is an unreasonable impediment on the judicial discretion courts exercise to protect the public's paramount interests.[269] The New York legislature, however, has already determined that these suits are in the public's best interests, and the statute prohibits the judiciary from inadvertently undermining this policy by ad hoc discretionary decisions.[270] Most jurisdictions are reluctant to express a favorable forum selection rule in such absolute, nondiscretionary terms.[271] As a practical matter, therefore, a statutory solution is only feasible in those jurisdictions willing to routinely enforce or absolutely prohibit forum selection clauses.

IV. A Workable Forum Selection Rule For Florida

Florida needs a uniform statewide forum selection policy whether it emanates

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Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

260. 128 Misc. 2d 564, 490 N.Y.S.2d 670 (Sup. Ct. 1985).

261. *Id.* at 570-73, 490 N.Y.S.2d at 676-78.

262. *Id.*

263. *Id.*

264. *Id.; see also* Note, *Survey of New York Practice*, 59 St. John's L. Rev. 411, 415-16 (1985).

265. Note, *supra* note 264, at 416.

266. *Id.*

267. *Id.*

268. *Id.* at 417-19.

269. *Id.* at 417 (the state's interests are better served by the traditional balancing test).

270. *See Credit*, 128 Misc. 2d at 572-73, 490 N.Y.S.2d at 678; Casenote, *supra* note 169, at 459 (an automatically applied forum selection rule will encourage Congress or state legislatures to codify exceptions to the common law rules, thus yielding less judicial discretion and less freedom of contract).

271. *See supra* text accompanying note 237.

from legislative action or judicial fiat. Practitioners draft these provisions in direct proportion to the amount of foreign investment capital entering the state and the increasing number of complex interstate commercial transactions.[272] Forum selection rules represent fundamental policy choices and enforcement results should not substantially differ among judicial districts.[273] Florida courts must satisfy demands for legal consistency and commercial practicality.

The legal arguments favoring and opposing contractual forum selection are equally persuasive. Courts reconcile principles of contract law, civil procedure and conflict of laws doctrine both to rules of per se invalidity and presumptions of prima facie validity. Ultimately, policy considerations will dictate Florida's new forum selection rule. The relevant policy choices are explained in the case law of other states.

A cursory review of these cases reveals two possible courses of action. One path is taken by the Third District Court of Appeal in *Huntley* and Florida's neighbors, Alabama and Georgia.[274] Despite repeated legal assaults, these jurisdictions steadfastly adhere to prohibitory rules.[275] The question is whether Florida can afford to be inhospitable to contracting parties who expand the state's interstate and international commerce. The nature of Florida's diversifying economy suggests the answer is "no". Forum selection clauses are justifiable primarily as convenient devices for Florida businessmen who engage in transactions elsewhere and seek to assure litigation in a Florida forum.[276]

If Florida decides to enforce forum selection clauses to give effect to reasonable desires for convenience and predictability, the courts must determine the precise limitation of this state's accommodation. New York marked a course to promote its law as the world commercial standard.[277] To that end, New York is willing to subject its residents to increased taxes and administrative burdens occasioned by lawsuits having no connections to the state.[278] Florida legislators cannot afford to be so generous with already scarce public resources because of overcrowded court dockets and the legal strain created by the importation of crime from other states and countries.

Florida courts must strike a path somewhere between these two extremes. Fair and reasonable forum selection clauses should be enforced to the extent

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272. *Credit,* 128 Misc. 2d at 570, 573, 490 N.Y.S.2d at 676, 678. Many of these suits arise in the context of multinational transactions. *See, e.g.*, Manrique v. Fabbri, 474 So. 2d 844 (Fla. 3d D.C.A. 1985).

273. In Florida, enforcement currently depends upon where a litigant files suit. *Compare Huntley*, 139 So. 2d at 912 (contractual forum clauses invalid) *with Maritime*, 455 So. 2d at 1123 (forum selection clauses enforceable) *and* Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351, 1353, 1361 (Fla. 2d D.C.A. 1986) (permissive forum selection clauses enforceable unless they fall within the *Bremen* exceptions).

274. *See* Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980); *Huntley*, 139 So. 2d at 912; Fidelity & Deposit Co. v. Gainesville Iron Works Inc., 125 Ga. App. 829, 189 S.E.2d 130 (1972).

275. *See, e.g.*, Conticommodity Servs., Inc. v. Transamerica Leasing, Inc., 473 So. 2d 1053 (Ala. 1985).

276. *Maritime*, 455 So. 2d at 1123.

277. *Credit,* 128 Misc. 2d at 570, 573, 490 N.Y.S.2d at 676, 678.

278. *See supra* text accompanying notes 256-69; *see also* Note, *supra* note 264, at 416.

they neither contravene public policy nor compromise paramount public interests. A moderate approach to contractual forum selection is an ongoing exercise of judicial discretion and not amenable to statutory expression. Shaping the contours of Florida's forum selection policy is a judicial task for Florida's Supreme Court.

In fairness to parties who bargain in good faith for these provisions, the court must set standards to promote consistency and guide lower courts in the exercise of judicial discretion. The Florida Supreme Court should adopt the substantive provisions of the Fourth District Court of Appeal's *Maritime* rule, with modification.[279] Specifically, a step-by-step analysis of a forum selection clause should begin by deciding the law governing the contract.[280] Forum selection enforcement decisions should then be made in accordance with that body of substantive law.[281] Designation of Florida as a neutral forum should be expressly precluded.[282]

Further, Florida courts should determine the validity of a forum selection clause without reference to the enforceability of a related choice of law provision.[283] Parties seeking to avoid forum selection clauses should bear a heavy burden of proving that grave inconvenience will follow suits in the contractual forum.[284] Parties must be irrevocably barred from litigating matters of convenience foreseeable at the time of contracting.[285] Allowing subsequent adjudication of convenience factors makes forum selection clauses nothing more than invitations to litigation.[286] Finally, forum selection clauses should not prevent courts from conducting *forum non conveniens* analysis to determine if litigating in the contractual forum is in the state's best interests.[287] The modified *Maritime* rule is a functional balance between demands for legal consistency and commercial practicality.

V. Conclusion

The Florida Supreme Court must examine the continued validity of the historical rule against contractual forum selection in light of a changed legal and economic environment. Enforcement of these provisions violates no fun-

279. *Cf. Maritime*, 455 So. 2d at 1121.

280. *See supra* text accompanying note 62.

281. *See supra* text accompanying note 63.

282. *See supra* text accompanying note 184.

283. *See supra* text accompanying note 223.

284. *See supra* text accompanying note 158. Contracts between developed and undeveloped countries are a possible exception to the prima facie valid rule, because of the inherent inequities in such bargains. However, shifting the burden of proving the fairness of these clauses to their proponents and giving courts a wider grant of discretion in these cases would remedy this problem. Note, *supra* note 17, at 707.

285. *See supra* text accompanying note 163.

286. Forum selection clauses are used to avoid the uncertainties of judicially applied rules (such as "minimum contacts"). If courts perform investigations similar to those required in the absence of such clauses and have the discretion to ignore the parties' decisions at the time of contracting, then forum selection clauses become substantially less valuable.

287. *See supra* text accompanying note 187.

damental legal principles and encourages business development. Florida courts should strive to create an environment conducive to economic growth because all Florida residents reap resulting benefits. In addition to giving effect to the reasonable expectations of contracting parties, courts enforcing forum selection clauses also interject predictability and certainty into the legal process. The Florida Supreme Court should structure a forum selection rule that accommodates private interests within the limitations of public policy. Without throwing its courthouse doors open to forum shopping, Florida will usher in a new era of expanding interstate and international commerce.†

AMY JOHNSTON

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†On August 21, 1986, the Supreme Court of Florida ruled in Manrique v. Fabbri, 493 So.2d 437 (Fla. 1986), that forum selection clauses are enforceable unless enforcement would be unreasonable or unjust or the clause is otherwise invalid because of fraud or overreaching. The court rejected the ouster of jurisdiction argument espoused by the Third District Court of Appeal in *Huntley* and adopted the exercise of discretion theory advocated by the Fourth District Court of Appeal in *Maritime*. The court refused to read the language of the *Manrique* clause as merely a choice of law provision and completely ignored the mandatory/permissive distinction which was central to the Second District Court of Appeal's analysis of the Florida jurisdictional conflict in Datamatic Servs. Corp. v. Bescos, 484 So. 2d 1351 (Fla. 2d D.C.A. 1986). While the Supreme Court of Florida expressly adopted a strict presumption in favor of litigation in the contractual forum, the *Manique* opinion leaves unanswered many other questions the *Maritime* decision raised. Specifically, the court did not address the adequacy of consent as a basis for personal jurisdiction, the relationship between choice of law and forum selection, the validity of neutral forums or the applicability of the *forum non conveniens* doctrine to forum selection cases.