Florida Law Review

Volume 45 | Issue 4 Article 1

September 1993

Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise

Walter W. Heiser

Florida Law Review

VOLUME 45 SEPTEMBER 1993 NUMBER 4

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

*Walter W. Heiser**

* Professor of Law, University of San Diego. B.A., 1968, University of Michigan; J.D., 1971, University of Wisconsin; LL.M., 1978, Harvard Law School. The author would like to thank Lisa D'Errico, Michael C. Ford, Jerry R. Polansky, and Roanne Shamsky for their assistance in the preparation of this article.

I. FORUM SELECTION CLAUSES IN FEDERAL COURT

One of the ironies in the evolution of forum selection clauses is that their enforcement is now less certain in federal courts than in state courts. The movement toward enforcing forum selection clauses began in federal court with *M/S Bremen v. Zapata Off-Shore Co.*[1] As discussed previously in the first installment of this article, the *Bremen* doctrine quickly spread to state courts even though they were in no way bound by the *Bremen* decision. Today, all but a few states have adopted some variation of the *Bremen* doctrine, and have generally resolved basic issues of forum selection clause enforcement.[2] This is not so true at the federal level. Due primarily to the *Erie* doctrine, federal courts are currently struggling with a variety of enforcement issues. The recent Supreme Court decision in *Stewart Organization v. Ricoh Corp.*[3] resolved some of these issues. However, at the same time, *Stewart* raised new enforcement issues, thereby increasing uncertainty for the lower federal courts.

Bremen was an admiralty case involving international parties and forums. The Supreme Court was faced with a challenge to a Florida federal court's authority to adjudicate claims where the forum selection clause designated the High Courts of London, England as the exclusive forum.[4] These facts are particularly significant in light of the *Erie* doctrine. The fact that *Bremen* was an admiralty case permitted the Court to decide the forum selection clause issue by applying federal common law.[5] Moreover,

1. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); *see also* Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361, 367-68 (1993) (describing the movement towards enforcing forum selection clauses) [hereinafter Heiser, *State Courts*].

2. *See* Heiser, *State Courts*, *supra* note 1, at 370-72.

3. 487 U.S. 22 (1988).

4. *See* Heiser, *State Courts*, *supra* note 1, at 367.

5. As will be discussed in more detail *infra* note 34 and accompanying text, there is little doubt that the Supreme Court could properly resolve this issue in *Bremen* by resorting to federal judge-made law. Admiralty cases, particularly those with international concerns, are traditionally viewed as an example of those limited areas where federal courts can apply federal common law. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); The Lottawanna, 88 U.S. (21 Wall.) 558 (1874).

because the contractually designated forum was in England, 28 U.S.C. § 1404(a), the federal transfer of venue statute, did not apply.[6] Consequently, the Supreme Court could resolve the entire issue based solely on federal common law, without restrictions imposed either by federal statutes or by state laws.

The lower federal courts initially ignored these distinguishing factors when they decided to extend the *Bremen* doctrine to domestic, nonadmiralty federal question cases.[7] These courts did identify an *Erie* problem when parties sought enforcement of forum selection clauses in diversity cases, but were often able to avoid the issue because the potentially applicable state law endorsed the *Bremen* doctrine.[8]

However, the lower federal courts faced an unavoidable conflict in cases where the potentially applicable state law did not fully follow the *Bremen* doctrine or, as in Alabama, where state law declared a forum selection clause void as a matter of state public policy.[9] In such cases the courts confronted a classic *Erie* problem: Whether to apply federal law, the *Bremen* doctrine, which would enforce the clause[10] or whether to apply state law, for example, Alabama and Georgia, which would not enforce the clause. Complicating the *Erie* problem is the fact that parties can raise a forum selection clause enforcement issue through several different procedural mechanisms.[11] The procedural mechanism which the parties

---

6. 28 U.S.C. § 1404(a) (1988) applies only to transfers of venue from one federal district court to another, but not to transfers to a court in a different country as in *Bremen*. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253-54 (1981). The common law doctrine of dismissal based on forum non conveniens applies in such intercountry cases. *See infra* note 40.

7. *See, e.g.*, AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 156 (2d Cir. 1984) (federal securities fraud); Bense v. Interstate Battery Sys. of Am., 683 F.2d 718, 720-21 (2d Cir. 1982) (federal antitrust); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORD. L. REV. 291, 313 nn.88-89 (1988).

8. *See, e.g.*, General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 356-57 (3d Cir. 1986) (holding that state law applies to forum selection clauses in diversity cases); Pelleport Investors, Inc. v. Budco Quality Theatres, 741 F.2d 273, 279 (9th Cir. 1984); Mercury Coal & Coke v. Mannesmann Pipe & Steel Corp., 696 F.2d 315, 317-18 (4th Cir. 1982). Even after *Stewart*, the courts still avoid resolving this *Erie* question. Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993); Interamerican Trade Corp. v. Companhia Fabricadora de Pecas, 973 F.2d 487, 489 (6th Cir. 1992); Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988).

9. *See* Heiser, *State Courts, supra* note 1, at 370 n.48.

10. Most lower federal courts simply assumed that the *Bremen* doctrine was the federal law choice in this *Erie* dilemma. As will be explained later, there is now considerable doubt as to whether the *Bremen* doctrine, as a federal common law doctrine, can properly be extended beyond admiralty cases.

11. Parties may raise interstate forum selection clause enforcement issues, in appropriate cases, through the following procedural devices: A motion to transfer to another district, pursuant to 28 U.S.C. § 1404(a) (1988); a motion to dismiss or transfer, pursuant to 28 U.S.C. § 1406(a) (1988); a motion to dismiss for lack of personal jurisdiction, pursuant to FED. R. CIV. P. 12(b)(2); a motion to dismiss for lack of venue, pursuant to FED. R. CIV. P. 12(b)(3); a motion to dismiss for failure to state a claim, pursuant to FED. R. CIV. P. 12(b)(6); a motion to dismiss based on forum non conveniens;

choose may determine which law, federal or state, applies.

A. *An* Erie *Doctrine Primer for Forum Selection Clause Cases*

Much of the current federal court confusion regarding forum selection clause enforcement centers on the *Erie* doctrine. Although every law student and graduate knows something about *Erie*, a brief review focusing on forum selection clauses may be helpful.

The genesis of the *Erie* doctrine is the Rules of Decision Act,[12] not the *Erie* case itself.[13] The Rules of Decision Act mandates that federal courts apply state law unless a governing federal statute, treaty, or constitutional provision exists.[14] A federal statute will govern an issue in a fed-

---

and a motion to remand to state court after removal, pursuant to 28 U.S.C. § 1447 (1988).

12. 28 U.S.C. § 1652 (1988). The Rules of Decision Act states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

13. The main contribution of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), is the Court's holding that the "laws of the several states" must include state common law as well as state statutes, and that there is no "federal general common law." *Id.* at 78. This holding, although significant, is merely one part of what is typically referred to as the "*Erie* doctrine."

14. *See, e.g.*, Burlington N. R.R. v. Woods, 480 U.S. 1, 4-5 (1987); Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980). A heated scholarly debate continues over the current vitality of the Rules of Decision Act, particularly as to what extent the Act restricts the federal court's authority to develop federal common law. *E.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 906-30 (1986); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766-99 (1989); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 817-18 (1989) [hereinafter Weinberg, *Common Law*]. Professor Redish and others interpret the Act to prohibit all federal common law, except perhaps for certain procedural areas. *E.g.*, Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 704 (1988); Martin H. Redish, *Federal Common Law and the American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853, 858-59 (1989). Professor Weinberg argues that the Act reflects a prepositivist and prerealistic understanding of the common law and is therefore obsolete. Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 875 (1989) [hereinafter Weinberg, *Curious Notion*]. Professor Weinberg believes that the Act itself should not be viewed as imposing any restrictions on the power of the federal courts to apply federal common law. Instead, a federal court should be free to fashion federal common law whenever the judiciary deems the national interest to outweigh the state interest. *Id.* at 874-75.

The Supreme Court follows neither of these divergent interpretations of the Act. Instead, the Court espouses what Professor Weinberg derisively refers to as the "official position," *i.e.*, federal courts lack plenary "general" common law power but have "special" common law powers to fashion common law only in a few discrete, narrow areas where uniquely federal interests are at stake. Weinberg, *Common Law*, *supra*, at 805-09. Although the official position is paradoxical and perhaps contradictory, the Supreme Court's recent decisions indicate little inclination to discard it. *E.g.*, Boyle v. United Technologies Corp., 487 U.S. 500, 504-10 (1988); Rush v. Lucas, 462 U.S. 367, 373 (1983); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 640-44 (1981); *infra* notes 23-25 and accompanying text.

This article adopts the Supreme Court's official position in analyzing the propriety of federal

eral court if it is "sufficiently broad to control the issue before the court."[15] This involves nothing more than a straightforward exercise in statutory interpretation to determine whether the statute covers the point in dispute.[16]

If a federal statute does cover the point in dispute, a federal court must apply the federal statute as opposed to contrary state law, so long as the federal statute is a valid exercise of Congress' authority under the United States Constitution.[17] In determining the constitutional validity of a federal statute, in contrast to a Federal Rule of Civil Procedure, the fact that the statute is substantive as opposed to procedural is not necessarily relevant. What is relevant is whether the federal statute is one which Congress has constitutional authority to enact.[18] If the federal statute is controlling and valid, the federal court must apply it, even in a diversity case.[19]

Where the conflict between state and federal law involves a Federal Rule of Civil Procedure, an additional inquiry is necessary. The Federal Rule must not only be valid under the Constitution, but also must be a valid exercise of Congress' rulemaking authority under the Rules Enabling Act.[20] The Rules Enabling Act prohibits rules which "abridge, enlarge or

---

courts applying federal common law to forum selection clause issues. As will become evident below, even if the Supreme Court officially endorsed the more free-wheeling balancing-of-interests test advanced by Professor Weinberg, the basic conclusions as to the impropriety of utilizing federal common law to resolve certain forum selection clause issues would remain the same.

15. *Stewart*, 487 U.S. at 26.

16. *Id.*

17. *Id.* at 27.

18. The constitutional authority may certainly be broad enough to include substantive law, as any perusal of the United States Code will quickly indicate. Only if the constitutional basis for the federal statute limits Congress' authority to procedural matters will the "substantive/procedural" distinction become relevant. For example, a federal statute whose sole constitutional basis for congressional enactment is Article III, as augmented by the Necessary and Proper Clause, may be invalid if it includes substantive matter. *See id.* at 32.

19. A common misconception regarding the *Erie* doctrine is that its basic distinction is between substantive (state) and procedural (federal) law. Actually, the *Erie* doctrine's most fundamental distinction is between the presence or absence of controlling federal constitutional and statutory law, regardless of whether this federal law is substantive or procedural.

Another common misconception is that *Erie* only applies to diversity cases, such as those whose jurisdictional basis is 28 U.S.C. § 1332 (1988), and not to federal question cases, such as those brought pursuant to 28 U.S.C. §§ 1331, 1343 (1988). Actually, *Erie* applies to all civil cases in federal court. *Erie* problems are most evident in diversity cases, but arise in federal question cases as well. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2778 (1991) (stating that the usual rule, based on the Rules of Decision Act, is that when Congress has failed to provide a statute of limitations for a federal cause of action a federal court should borrow the most analogous state time limitation); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *after the Death of Diversity*, 78 MICH. L. REV. 311, 313-14 (1980).

20. Hanna v. Plumer, 380 U.S. 460, 464 (1965).

modify any substantive right."[21] For the most part, the Federal Rules of Civil Procedure are not a central concern in the *Erie* problems associated with forum selection clauses.

If no federal constitutional provision, federal statute, or Federal Rule of Civil Procedure covers the issue in dispute, a federal court then must proceed with the next level of *Erie* analysis. Despite the relatively clear language of the Rules of Decision Act, a federal court does not automatically apply state law to resolve the issue before the court. Instead, the court must first determine whether the circumstances are proper for the application of federal judge-made law.

Federal judge-made law is appropriate in three related, vaguely defined areas. One area is in cases where federal courts traditionally have applied federal common law.[22] Federal common law is permissible in areas that are so committed by the Constitution and federal laws to federal control that state law is preempted and replaced by federal judge-made law, even in the absence of explicit federal statutory authority to do so.[23] These limited areas are said to involve "uniquely federal interests."[24]

Traditionally, the Supreme Court has defined uniquely federal interests by reference to those limited categories of cases in which the Court has

---

21. 28 U.S.C. § 2072 (1988).

22. After *Erie*, of course, there is "no federal general common law." *Erie*, 304 U.S. at 78. Nevertheless, the Supreme Court continues to recognize the need and authority in some limited cases to formulate what has come to be known as federal common law. *Texas Indus.*, 451 U.S. at 640.

23. *Texas Indus.*, 451 U.S. at 641. In discussing the general parameters of the federal court's authority to formulate federal common law, the Court emphasized that

> the vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law . . . nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.

Id. at 640-41.

24. *Id.* at 640. This power to create federal common law necessary to protect a "uniquely federal interest" is not restricted to procedural law, but unabashedly includes substantive law. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 104-07 (1972) (interstate pollution disputes); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-24 (1964) (international law act of state doctrine); Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961) (contract law in admiralty case); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (rights and duties of the United States on commercial paper); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (apportionment of interstate stream between two states). In such cases, substantive federal common law displaces conflicting state law not only in the federal courts but also, pursuant to the Supremacy Clause, in state courts. Weinberg, *Common Law*, *supra* note 14, at 827, 836, 848-49; *see also Sabbatino*, 376 U.S. at 426; Carnival Cruise Lines v. Superior Court, 272 Cal. Rptr. 515, 519 (Ct. App. 1990), *cert. granted and judgment vacated on other grounds*, 499 U.S. 972 (1991).

One wing of this doctrine may be limited to procedural common law because it is based on the need to protect the "essential character or function of a federal court." Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 539 (1958) (stating that a federal court should not follow a state rule which disrupts the judge-jury relationship in the federal courts). But the other categories of cases usually involve substantive federal common law.

previously found such interests. These narrow categories are identified as

> those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.[25]

Quite clearly, no uniquely federal interest exists when a federal court sitting in diversity determines the enforceability of a forum selection clause in a contract between private parties. A private forum selection agreement in no way affects the rights and obligations of the United States as sovereign. Nor does such an agreement involve an interstate dispute between states or an international one between foreign nations. Furthermore, a diversity case by definition is not an admiralty jurisdiction case. Consequently, the authority to develop federal common law to protect a uniquely federal interest does not apply to forum selection clause cases generally.[26] If federal judge-made law is to govern, the authority for it must come from elsewhere.

A second recognized area of authority to formulate federal common

---

25. *Texas Indus.*, 451 U.S. at 641. Recently the Supreme Court in *Boyle* expanded this list to include disputes between private parties which directly affect the United States' interests in federal military contracts, where there is a significant conflict between an identifiable federal policy or interest and the operation of state law. *Boyle*, 487 U.S. 504-07. This recent application of federal common law is an expansion of this area of federal judge-made law to litigation between private parties, but only where the litigation will have a direct effect on the United States as sovereign. Although *Boyle* broadened the categories of uniquely federal interest, the Court still adhered to the official position for its authority to fashion federal common law. *Id.*; Weinberg, *Common Law*, *supra* note 14, at 848-51.

26. Nor does the enforcement of a forum selection clause appear to implicate an "essential character or function of a federal court," within the meaning of *Byrd*, 356 U.S. at 539. However, the meaning of this *Byrd* prerequisite is uncertain because the Supreme Court has never applied it beyond the judge-jury allocation issue in *Byrd* itself. *See* Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 362-72, 384-401 (1977); Allen E. Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 449-53 (1962). Most lower courts and commentators view *Byrd* as endorsing a balancing of interests test applicable whenever an important judge-made federal court practice conflicts with state law. *Id.* at 454-65.

As will be discussed below, even when viewed in this broad manner, the *Byrd* balancing test cannot provide the authority for the general displacement of state law with respect to all forum selection clause issues. The *Byrd* test may, however, provide a proper basis for use of federal judge-made law in one specific area, *i.e.*, enforcement of forum selection clauses with respect to motions to dismiss for lack of venue pursuant to FED. R. CIV. P. 12(b)(3). *See infra* notes 28, 159.

law is where Congress by statute has expressly or impliedly given the federal courts the power to develop substantive law.[27] This legislative source of authority does not apply generally to forum selection clause inquiries. No federal statute gives the federal courts authority to formulate substantive law regarding validity or enforcement of judicial forum selection clauses in nonadmiralty civil cases.[28]

The Supreme Court has recognized a third area of permissible federal judge-made law to govern procedural issues in federal court. If no federal statute, constitutional provision or Federal Rule of Civil Procedure covers the point in dispute, a federal court must then evaluate whether the application of federal judge-made procedural law would disserve the "twin aims" of the *Erie* rule: "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[29] A federal court should apply

---

27. The leading case in which the Supreme Court found such a congressional delegation is Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957), where the Court read § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1988), not only as granting jurisdiction over defined areas of labor law but also as vesting in the federal courts the power to develop a common law of labor-management relations within that jurisdiction. *See* Musick Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085, 2086 (1993) (holding that federal courts have the authority to imply a right of contribution in a private 10b-5 action, which action itself is an implied right of action under § 10(b) of the Securities Act); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978) (holding that the Sherman Act, 15 U.S.C. §§ 1-2 (Supp. IV 1992), authorizes federal courts to give shape to that statute's broad language by drawing on common law tradition); Wheeldin v. Wheeler, 373 U.S. 647, 651-52 (1963) (reviewing instances in which Congress has authorized courts to develop federal common law).

28. A federal statute, 9 U.S.C. § 2 (1988), does authorize the use of substantive common law with respect to the enforcement of arbitral forum selection clauses. *See infra* note 117. However, a related notion arguably does apply to judicial forum selection clauses. The Supreme Court often recognizes that because of the inevitable incompleteness of federal legislation, a basic responsibility of the federal courts is to fill the interstices of federal legislation through use of common law where uniform national rules are necessary. *E.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-40 (1979); United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

This principle may well apply with respect to enforcement of a forum selection clause when challenged by a motion to dismiss for lack of venue, pursuant to FED. R. CIV. P. 12(b)(3). Because federal venue is the subject of an extensive federal statutory scheme designed to assure uniform venue standards for all federal district courts, 28 U.S.C. §§ 1391-1412 (1988 & Supp. IV 1992), the federal courts may have authority to formulate common law when determining whether a forum selection clause establishes federal venue. *See infra* note 159. However, this principle may have limitations even in the venue area. *See* M.K.C. Equip. Co. v. M.A.I.L. Code, Inc., 843 F. Supp. 679, 683 (D. Kan. 1994) (applying state contract law to determine whether a forum selection clause materially altered the original agreement, for purposes of deciding Rule 12(b)(3) motion to dismiss for improper venue). The Supreme Court has instructed the federal courts to fill such interstices by incorporating state law as the federal rule of decision unless application of the particular state law in question would frustrate specific objectives of the federal statutory scheme. *Kimbell Foods*, 440 U.S. at 728. The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties entered in legal relationships, such as commercial transactions, with the expectation that their rights and obligations would be governed by state law standards. Kamen v. Kemper Fin. Servs., 111 S. Ct. 1711, 1722 (1991).

29. *Hanna*, 380 U.S. at 468.

state law where application of federal judge-made law would denigrate these two policies.[30] Generally, this part of the *Erie* doctrine requires a federal court to apply state law whenever the use of federal judge-made law would encourage a litigant to choose federal court because of some important foreseeable advantage to a litigant under the federal law not available under the conflicting state law.[31] Does this comprehensive twin aims approach provide the authority for a federal court to formulate judge-made procedural law to resolve forum selection clause issues?

For example, assume a commercial contract designates a New York State court as the exclusive forum for resolution of contract disputes. A breach occurs and the plaintiff, a citizen of Alabama, sues the defendant in an Alabama state court. The defendant removes to the United States District Court in Alabama, seeking to enforce the forum selection clause. If the federal court applies Alabama state law, the forum selection clause will be ignored as void. However, if the court applies the federal judge-made *Bremen* doctrine, the court will likely enforce the clause.

Assuming no federal statute is applicable, the federal court must examine the twin aims of *Erie*. The defendant undoubtedly chose federal court with the hope of gaining the benefit of the *Bremen* doctrine, an option made possible only because of removal jurisdiction based on diver-

---

30. *Stewart*, 487 U.S. at 27 n.6. The *Hanna* Court's twin aims discussion was dictum; the *Stewart* Court majority found it unnecessary to apply the twin aims test because § 1404(a) controlled the analysis. *Id.* at 28. One of the few Supreme Court cases to actually apply the twin aims test is Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980). The *Walker* Court concluded that a federal court must apply state law because application of the federal rule, although not creating any problem of forum shopping, would nevertheless result in an inequitable administration of the law. *Id.* The *Walker* Court appears to require application of state law whenever federal law would disserve either one of the twin aims policies. *See* Chambers v. NASCO, 111 S. Ct. 2123, 2137 (1991) (concluding that neither of these twin aims is implicated by the assessment of attorney's fees as a sanction for bad faith conduct before the Court, where imposed based on a federal court's inherent authority).

31. The *Hanna* Court explained the considerations underlying this so-called twin aims test as follows:

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

Hanna, 380 U.S. at 468 n.9.

For extended discussions of the meaning and scope of the *Hanna* twin aims test, see John C. McCoid, II, Hanna v. Plummer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884, 888-901 (1965) (noting that opposition to forum shopping is based on unfairness which results from the opportunity of some litigants to choose advantageously between two court systems applying different laws); Redish & Phillips, *supra* note 26, at 373-77 (characterizing twin aims as a modified outcome determinative test concerned with fairness to litigants).

sity of citizenship. The validity of the forum selection clause is one of great importance to the litigation. The predictable difference in outcome with respect to enforcement of the clause suggests that the defendant would choose federal court to escape the effect of state law. Consequently, the federal court is likely to conclude that the application of the judge-made *Bremen* doctrine would disserve the twin aims of *Erie*, and apply Alabama state law.[32]

The decisions in *Bremen* and in the more recent case of *Carnival Cruise Lines v. Shute*[33] are properly viewed as permissible instances of federal common law. *Bremen*'s forum selection clause doctrine does not draw upon any federal or state statutes, but is purely an exercise of judge-made law. This is permissible because *Bremen* is an admiralty case,[34] dealing with international commercial matters. Although *Carnival Cruise* involved a consumer contract between domestic parties, that case was also in admiralty and governed by federal common law.[35] Consequently, the *Bremen* doctrine does not directly apply to the vast array of forum selection clause cases in federal court which involve interstate commercial or consumer contracts in a nonadmiralty setting.[36]

---

32. *See, e.g.*, Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 918-19 (11th Cir. 1989); Rindal v. Speckler Co., 786 F. Supp. 890, 893 (D. Mont. 1992). *Alexander Proudfoot* illustrates another typical fact pattern which raises this issue. The plaintiff files in a federal court in Florida, pursuant to the forum selection clause. The defendant moves to dismiss for lack of personal jurisdiction. If Florida state law applies, the clause will not confer jurisdiction and the case must be dismissed. If federal common law applies, the clause will confer jurisdiction and the motion will be denied.

33. 111 S. Ct. 1522 (1991). The Supreme Court in *Carnival Cruise* enforced a nonnegotiated forum selection clause contained in a cruiseline passenger ticket. *Id.* at 1529. The *Carnival Cruise* holding is discussed in detail in the first installment of this article. *See* Heiser, *State Courts, supra* note 1, at 372-77.

34. Article III, § 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2. The Supreme Court has continuously construed this grant of judicial power as authorizing the federal courts to develop a substantive body of federal common law which, in the absence of some preemptive federal legislation, is applicable to all cases within the admiralty and maritime jurisdiction. *E.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917); *see also* Archawski v. Hanioti, 350 U.S. 532, 535-36 (1956) (giving an example of the Court developing federal common law). The Court has construed Art. III, § 2, as intending a uniform system of admiralty and maritime law, and as not intending to make the rules of admiralty law subject to the regulation of the several states. *E.g.*, *The Lottawanna*, 88 U.S. (21 Wall.) at 574-75.

The *Bremen* Court's application of substantive contract law derived from federal common law is clearly authorized under the federal court's admiralty jurisdiction powers. Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961) (holding that federal common law displaces contrary state statute of frauds in determining validity of contract where a case is properly within admiralty jurisdiction).

35. In noting the boundaries of its analysis, the Supreme Court in *Carnival Cruise* specifically acknowledged that "this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize." *Carnival Cruise*, 111 S. Ct. at 1525.

36. Federal common law developed under admiralty jurisdiction is not freely transferable to a diversity jurisdiction setting. *See Stewart*, 487 U.S. at 28.

The issue of forum selection clause enforceability may arise in several different procedural contexts in federal court. This fact greatly complicates the application of basic *Erie* concepts to the enforceability issue. The most likely way the issue will arise is by a motion to transfer pursuant to 28 U.S.C. § 1404(a). But the issue can also arise totally independent of a section 1404(a) transfer motion through a straightforward motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), or lack of venue pursuant to Rule 12(b)(3). Potentially the issue can also be raised by a motion to dismiss or transfer pursuant to 28 U.S.C. § 1406(a) or through a motion to remand to state court after removal to federal court, pursuant to 28 U.S.C. § 1447. The precise procedural manner by which the parties raise the issue of forum selection clause enforceability may dictate whether federal or state law applies. Whether federal or state law governs may determine whether, and to what extent, the clause is enforced. These odd results are all due to the *Erie* doctrine.

B. *Forum Selection Clauses and Section 1404(a) Motions to Transfer*

1. Introduction to Section 1404(a) Motions to Transfer

The most common procedural method through which federal courts encounter a forum selection clause is a motion to transfer venue from one federal district to another pursuant to 28 U.S.C. § 1404(a).[37] Generally, section 1404(a) applies when a party seeks transfer from one otherwise proper federal district to another, based on considerations of convenience and fairness.[38] Section 1404(a) is a codification and revision of the common law forum non conveniens doctrine set forth in *Gulf Oil Corp. v. Gilbert*.[39] A federal court can order transfer under the statute on a lesser showing of inconvenience than was necessary for dismissal under the common law doctrine, and can exercise broader discretion than under the old doctrine.[40]

---

37. 28 U.S.C. § 1404(a) (1988). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

38. Section 1404(a) applies where both districts are proper from the standpoint of venue and personal jurisdiction. *See* Van Dusen v. Barrack, 376 U.S. 612, 616-26 (1964); Hoffman v. Blaski, 363 U.S. 335, 344 (1960). There is considerable debate as to whether § 1404(a) applies where the transferor court has proper venue but lacks personal jurisdiction, but a majority of circuits now hold that it does. *See, e.g.*, Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1104 (5th Cir. 1981); United States v. Berkowitz, 328 F.2d 358, 361 (3d Cir. 1964). *Contra* Martin v. Stokes, 623 F.2d 469, 474 (6th Cir. 1980); *infra* notes 165-66 and accompanying text.

39. *See* Heiser, *State Courts, supra* note 1, at 393-94. The provision in § 1404(a) for transfer of venue eliminated the harshest part of the common law doctrine of forum non conveniens, *i.e.*, dismissal of the action. *See infra* notes 40, 86.

40. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955). A § 1404(a) motion and a motion to dis-

The issue of whether to enforce a forum selection clause may arise in two general circumstances involving section 1404(a) motions. The following hypothetical illustrates the most common factual situation. Assume that a New York company and an Alabama company enter into a commercial contract which contains a forum selection clause designating New York federal or state courts as the exclusive forums to resolve contract disputes. Both companies are corporations with substantial business contacts in Alabama. After some business dealings, the parties' contractual relations sour. The Alabama company then files a breach of contract action in the United States District Court in Alabama based on diversity jurisdiction. The New York defendant seeks to transfer the case to a New York federal district, the contractually designated forum, pursuant to section 1404(a).[41]

Alabama state law provides that the forum selection clause is void per se as against public policy. The federal *Bremen* doctrine provides that such clauses are not only valid but are generally enforced except in rare cases. In deciding the section 1404(a) motion, should the federal court follow *Bremen* and enforce the clause, or should it apply Alabama state law and ignore the forum selection clause? This first hypothetical presents essentially the same facts as those in *Stewart* discussed at length below.

The second way in which the forum selection clause enforceability issue can be raised in a section 1404(a) motion is where a plaintiff files the lawsuit in the contractually designated forum, but the defendant seeks transfer despite the mandatory clause. Assume in the hypothetical that the New York company files the breach of contract lawsuit first, in a United States District Court in New York. The Alabama defendant then moves to transfer to an Alabama federal court pursuant to section 1404(a) because it is more convenient for witnesses, parties, and the courts. The New York federal court will apply New York state substantive law to the case; New York has adopted by statute the *Bremen* doctrine. Should the federal court apply the *Bremen* doctrine—either as a matter of federal common law or state statutory law—and deny the motion to transfer? Should the court also

---

miss for forum non conveniens involve similar, but by no means identical, criteria. Parsons v. Chesapeake & Ohio Ry., 375 U.S. 71, 72 (1963). The common law doctrine of forum non conveniens has largely been superseded in federal courts by the adoption of § 1404(a); forum non conveniens applies only where the alternative forum is a court in another country. *E.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260-61 (1981). In rare cases, it may apply when the state court is the alternative forum. *E.g.*, TUC Elecs. v. Eagle Telephonics, 698 F. Supp. 35, 38 (D. Conn. 1988).

41. Note in this hypothetical that a § 1404(a) transfer is the only procedural device available to the defendant to enforce the forum selection clause. Dismissal pursuant to FED. R. CIV. P. 12(b)(2)-(3) is not available because, due to the defendant's business contacts with Alabama, the Alabama federal court has both proper venue and personal jurisdiction. *See* 28 U.S.C. § 1391(a), (c) (1988 & Supp. IV 1992); *infra* notes 147-49 and accompanying text. For the same reason, dismissal pursuant to 28 U.S.C. § 1406(a) (1988) is probably inappropriate. *See infra* part I.D. (discussing § 1404(a)).

deny the motion because, due to the exclusive forum selection clause, an Alabama federal court is not a district where the action "might have been brought" within the meaning of section 1404(a)?

This second hypothetical presents issues related to those present in the first hypothetical, but also raises some different considerations. The answers to both hypotheticals begin with an analysis of the Supreme Court's decision in *Stewart*. To fully appreciate *Stewart*, a brief discussion of pre-*Stewart* lower court decisions is helpful.

2. Pre-*Stewart* Lower Federal Court Decisions

Prior to the 1988 Supreme Court decision in *Stewart*, lower federal courts disagreed on whether state or federal law should govern when determining whether to enforce forum selection clauses through section 1404(a) transfer motions. Some courts interpreted the *Erie* doctrine to require application of state law to the clauses.[42] These courts therefore would not enforce a forum selection clause if it was void under the applicable state law.[43] Other courts applied the federal *Bremen* doctrine and enforced forum selection clauses despite contrary state law.[44] Courts that followed federal law did so for different reasons. Some simply applied the *Bremen* doctrine as a matter of permissible procedural federal common law.[45] Others followed federal law because of the existence of an applicable federal statute, section 1404(a), and construed the statute as incorporating the *Bremen* test.[46]

The lower federal courts which applied state law usually denied transfer to the contractually designated forum where state law voided the clause.[47] In contrast, those applying federal law usually granted the section 1404(a) transfer to the designated forum.[48] After several years of conflict among the circuits, the Supreme Court in *Stewart* directly addressed the issue of which law applies. Surprisingly, the Supreme Court adopted none of the various approaches taken by the lower courts.

---

42. *E.g.*, Farmland Indus. v. Frazier-Parrott Commodities, 806 F.2d 848, 852 (8th Cir. 1986); General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 357 (3d Cir. 1986).

43. *E.g.*, *Farmland Indus.*, 806 F.2d at 852.

44. Stewart Org. v. Ricoh Corp., 810 F.2d 1066, 1069-70 (11th Cir. 1987) (en banc), *aff'd on other grounds*, 487 U.S. 22 (1988).

45. *See id.*

46. *E.g.*, Plum Tree, Inc. v. Stockment, 488 F.2d 754, 758 n.5 (3d Cir. 1973).

47. See generally various cases cited in Mullenix, *supra* note 7, at 315-19; and in Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-47.

48. For a list of cases in which federal law was applied resulting in a § 1404(a) transfer to the designated forum, see generally Gruson, *supra* note 47, at 138-47; Mullenix, *supra* note 7, at 315-19.

3. The Supreme Court Decision in *Stewart*

The Supreme Court finally resolved this *Erie* issue in *Stewart*. In *Stewart*, the Court rejected all of the major rationales adopted by the lower federal courts and held that neither the federal judge-made *Bremen* doctrine nor state law applied.[49] The Court concluded instead that the forum selection clause issue is controlled by section 1404(a) itself, and that a clause should receive the consideration for which Congress provided in section 1404(a).[50]

The facts in *Stewart* are essentially the same as those in the hypotheticals. The Stewart Organization, an Alabama corporation, entered into a commercial agreement with Ricoh Corporation, a nationwide manufacturer with its principal place of business in New Jersey.[51] The agreement contained a forum selection clause providing that any appropriate state or federal court located in Manhattan would have exclusive jurisdiction of any lawsuit arising out of the contract.[52] When business relations between the parties soured, the Stewart Organization filed a breach of contract action against Ricoh in the United States District Court for the Northern District of Alabama basing its federal jurisdiction claim on diversity of citizenship.[53] Defendant Ricoh then moved to transfer the case to New York, pursuant to section 1404(a).[54]

The district court, applying Alabama law which holds forum selection clauses void per se as against public policy, denied the motion and then certified its ruling for an interlocutory appeal.[55] On appeal, the Court of Appeals for the Eleventh Circuit applied the *Bremen* doctrine and, concluding that the forum selection clause was enforceable, reversed the trial court.[56] Deciding whether state or federal law applies to forum selection clauses, the Supreme Court undertook an *Erie* analysis.[57] The plaintiff argued that Alabama state law applied, and therefore the clause should be ignored by the federal court. However, the defendant argued that federal common law applied, and that the question of enforceability is therefore governed by the *Bremen* doctrine. The Supreme Court rejected both arguments. Instead, the Court ruled that section 1404(a) itself governs the question of enforceability of the forum selection clause.[58]

---

49. *Stewart*, 487 U.S. at 27-29.
50. *Id.* at 29-30.
51. *Id.* at 24 n.1.
52. *Id.* at 24.
53. *Id.* at 24-25.
54. *Id.* at 24.
55. *Id.*
56. *Id.* at 25.
57. *Id.* at 27-29.
58. *Id.* at 28.

The Court held that because section 1404(a) is sufficiently broad to control the issue of whether to transfer the case to a court in Manhattan in accordance with the forum selection clause, section 1404(a) governs.[59] The Court reasoned that section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according them "individualized, case-by-case consideration of convenience and fairness."[60] According to the Court, the flexible and individualized analysis Congress prescribed in section 1404(a) encompasses "consideration of the parties' private expression of their venue preferences."[61]

The Court stated that the presence of a forum selection clause will be a significant factor that figures centrally in a district court's discretionary resolution of a section 1404(a) motion.[62] Directly addressing the *Erie* question of whether Alabama or federal law applies, the Court concluded that Alabama's categorical policy disfavoring forum selection clauses is inconsistent with Congress' intent behind section 1404(a) and therefore does not apply.[63] The Court reasoned that Congress intended a district court to weigh the forum selection clause as a factor in considering a section 1404(a) motion.[64] Consequently, a federal court must accord the clause some weight although state law would not.[65]

The Supreme Court majority in *Stewart* seems generally correct in concluding that section 1404(a), a federal venue statute, is broad enough to govern the issue of what weight a forum selection clause should receive

---

59. *Id.* at 28-29. The Supreme Court indicated that *Bremen* may prove instructive in resolving the parties conflict, but noted that federal common law developed under admiralty jurisdiction is not freely transferable to a diversity setting. *Id.* (citing Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641-42 (1981)).

60. *Id.* at 29 (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)).

61. *Id.* at 30.

62. *Id.* at 29.

63. *Id.* at 30.

64. *Id.* The Court also held that this application represents a valid exercise of Congress' authority under Article III of the Constitution, as augmented by the Necessary and Proper Clause. *Id.* at 32.

65. *Id.* at 31 n.10. This is certainly a defensible, though debatable, construction of § 1404(a), but perhaps not the most accurate. Justice Scalia in his dissent in *Stewart* effectively argues that § 1404(a) is not broad enough to cover the specific issue of whether a forum selection clause is an enforceable contract provision. *Id.* at 35 (Scalia, J., dissenting). Justice Scalia views § 1404(a) as not preempting state contract law because Congress' intent is ambiguous at best, particularly in light of the clear preemptive language utilized by Congress in the Federal Arbitration Act, 9 U.S.C. § 2 (1988) ("A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid . . . and enforceable. . . ."). *Id.* at 36-38 (Scalia, J., dissenting). In addition, application of federal judge-made law validating the clause would disserve *Erie*'s twin aims, state law governs the validity of a forum selection clause. *Id.* at 38-41 (Scalia, J., dissenting). Consequently, Justice Scalia concludes that if the applicable state law voids such clauses as against public policy, the forum selection clause should not be accorded any weight by the federal court in the § 1404(a) determination. *Id.* at 35 (Scalia, J., dissenting).

as part of a venue transfer motion.[66] The Rules of Decision Act requires federal courts to consider state law only if there is no federal statute or constitutional provision applicable to the issue in dispute.[67] The key statutory language in section 1404(a) is that a district court may order a venue transfer "[f]or the convenience of parties and witnesses."[68] This statutory language is certainly broad enough to evince Congress' intent to federalize the assessment of the various private convenience factors relevant to a transfer of venue, including those factors controlled by the parties through a forum selection clause.[69]

In other words, a reasonable construction of the language in section 1404(a) is that Congress intended this federal statute, not state law, to govern whenever a district court assesses the private convenience factors relevant to the parties in each individual venue transfer case. The Rules of Decision Act not only requires a federal court to apply this federal statutory law, but obviously permits it to further interpret the statutory language in resolving disputes arising pursuant to section 1404(a).[70] In *Stewart*, the dispute as to what weight a court should give a forum selection clause necessitated an interpretation of Congress' intent as to the enforceability of such clauses.[71] Although Congress did not address the specific issue of forum selection clauses in enacting section 1404(a), Congress did designate the "convenience of the parties" as a primary statutory factor to be considered by a federal court in resolving a venue transfer motion.[72]

Consequently, a reasonable conclusion is that federal law, not state law, governs in determining what weight a court should give a private agreement that deals with the convenience of the parties.[73] The more gen-

66. *See supra* notes 49-65 and accompanying text.

67. *See supra* notes 13-17 and accompanying text (discussing the *Erie* doctrine).

68. 28 U.S.C. § 1404(a) (1988).

69. *See* Heiser, *State Courts, supra* note 1, at 399-95.

70. *See supra* notes 13-17 and accompanying text.

71. *Stewart*, 487 U.S. at 29-30.

72. *Id.* A court will also need to examine such issues as the convenience of the forum in light of the expressed preference for it, fairness of transfer in light of the clause, and the parties' relative bargaining power. *Id.* at 29. Other factors to be considered are convenience to witnesses and public interest factors of systemic integrity and fairness. *Id.* at 30.

73. The dissent in *Stewart* concludes that § 1404(a) is not broad enough to govern the issue of the validity of a forum selection clause, and that such validity questions must be determined by state law pursuant to the *Erie* doctrine. *Id.* at 37-41 (Scalia, J., dissenting); *see also supra* note 65 (discussing Justice Scalia's dissent). The dissent uses the term "validity" to include both the issue of whether the clause is void per se as a matter of state policy and the issue of whether the clause is voidable due to fraud, unequal bargaining power, or overreaching. *Stewart*, 487 U.S. at 37-41 (Scalia, J., dissenting).

The dissent takes an unnecessarily narrow view of the scope of § 1404(a). As explained above, the statutory language is broad enough to "federalize" the issue of whether or not a forum selection clause is void per se for venue transfer purposes. *See supra* notes 62-72 and accompanying text. But the § 1404(a) language is not broad enough to govern issues of contract validity due to fraud, unequal bargaining power, or overreaching. *See infra* text accompanying notes 79-80.

eral purpose behind section 1404(a) is also reasonably clear, as the Court in *Stewart* points out repeatedly: to allow courts the flexibility to make case-by-case determinations of motions to transfer venue.[74]

The Supreme Court's general holding in *Stewart* is probably correct and is certainly defensible. Generally speaking, the broad language of section 1404(a) does preempt state law on the issue of enforceability of forum selection clauses. However, the Supreme Court determined this issue at a very general level of analysis and did not construe section 1404(a) more specifically, leaving the lower courts to grapple with at least three unresolved issues.

4. Forum Selection Clause Issues After *Stewart*

a. *Forum Selection Clauses and Section 1404(a) Motions: The Problem of What Weight to Give a Forum Selection Clause*

Stewart provided no real guidance as to how much weight federal courts should give forum selection clauses in section 1404(a) transfer motions. The Court merely stated that such clauses "should receive neither dispositive consideration nor no consideration, . . . but rather the consideration for which Congress provided in § 1404(a)."[75] However, the Court never stated what consideration Congress intended. Unfortunately, the language and legislative history of section 1404(a) provide no meaningful clues.[76] Consequently, after *Stewart*, a district court still must determine

---

The dissent suggests that there is nothing unusual about having the applicability of § 1404(a) depend on the content of state law. *Stewart*, 487 U.S. at 35 (Scalia, J., dissenting). A similar argument concerning a different part of § 1404(a) was rejected in Van Dusen v. Barrack, 376 U.S. 612 (1964). In *Van Dusen*, the court construed the § 1404(a) language that a district court may transfer an action to any other district "where it might have been brought." *Id.* at 616-26. The Court held that this language creates a federal standard for determining where a case might have been brought, not a state law standard. *Id.* at 624. Therefore, in *Van Dusen*, the plaintiff's lack of capacity to sue under the state law applicable in the transferee court was not a relevant § 1404(a) consideration. *Id.* at 624-26.

The majority in *Stewart* extended this *Van Dusen* reasoning to another part of § 1404(a) by holding that "the convenience of parties" intends that a federal, not state, standard will apply to the enforceability of forum selection clauses for venue transfer purposes. *Stewart*, 487 U.S. at 29-32. The dissent denies the validity of this relatively straightforward extension of *Van Dusen*. *See id.* at 33-41 (Scalia, J., dissenting) (reasoning that § 1404(a) is not broad enough to govern the validity of forum selection clauses). Nevertheless, the dissent is correct that state law must govern the question of whether a forum selection clause is voidable based on general contract formation principles. *See infra* notes 100-32 and accompanying text.

74. *Stewart*, 487 U.S. at 30-31. Section 1404(a) directs a district court to also consider the convenience of witnesses, and to consider those public interest factors of systemic integrity and fairness that come under the heading of "the interest of justice." 28 U.S.C. § 1404(a) (1988).

75. *Stewart*, 487 U.S. at 31.

76. The legislative history for § 1404(a) is scant. *See* H.R. REP. NO. 308, 80th Cong., 1st Sess. 132 (1947); H.R. REP. NO. 2646, 79th Cong., 2d Sess. 127 (1946). What there is indicates that §

how much weight to give a forum selection clause when assessing the parties' respective private convenience factors and other private and public interest factors considered in a section 1404(a) motion.[77] Although *Stewart* provides no clear guidelines here, the opinion does indicate that a district court must give the clause *some* weight. Here is where our prior discussion of forum non conveniens in state court is helpful.[78]

The Supreme Court never expressly stated that a district court should determine the parties' private convenience interests by applying the *Bremen* doctrine. Yet, the Court seemed to suggest this result by noting that the presence of a forum selection clause "will be a significant factor that figures centrally in the district court's calculus."[79] Likewise, the Supreme Court stated that in resolving a section 1404(a) motion the district court must address issues such as the convenience of the designated forum given the parties expressed preference for that venue, the fairness of permitting a transfer in light of the forum selection clause, and the relative bargaining power of the parties.[80] This language suggests that the court interpreted section 1404(a) to include a *Bremen*-like standard, *i.e.*, a forum selection clause will be a valid resolution of the parties' convenience concerns unless the clause is unreasonable and unjust, or invalid due to fraud or overreaching.[81]

As a matter of statutory construction, nothing in section 1404(a) indicates that Congress specifically intended to incorporate the *Bremen* doctrine into the section 1404(a) calculus.[82] However, such an interpretation is reasonable in light of the statutory directive to consider "the conve-

---

1404(a) was intended to codify the federal common law doctrine of forum non conveniens, and to provide courts with great flexibility in determining whether venue transfer is necessary for convenience and in the interests of justice. *See Ex parte* Collett, 337 U.S. 55, 58, 68-70 (1949). The specific historical concern that prompted Congress to enact § 1404(a) was the perceived exploitation of liberal federal venue provisions by plaintiffs who selected forums with little connection to the claim in order to use geography as a litigation weapon. *See* Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 478-83 (1992).

77. Some lower federal courts have followed *Stewart*'s lead, and have simply made a forum selection clause one factor of unspecified weight in a flexible formula of discretion. *See, e.g.*, Red Bull Assocs. v. Best W. Int'l, 862 F.2d 963, 987 (2d Cir. 1988); Standard Office Sys. v. Ricoh Corp., 742 F. Supp. 534, 537 (W.D. Ark. 1990); Fibra-Steel, Inc. v. Astoria Indus., 708 F. Supp. 255, 257 (E.D. Mo. 1989). Others have assigned the clause considerable weight, usually sufficient to result in its effectuation through a § 1404(a) transfer. *See infra* note 94.

78. *See* Heiser, *State Courts, supra* note 1, at 393-401.

79. *Stewart*, 487 U.S. at 29.

80. *Id.*

81. *Bremen*, 407 U.S. at 13-14.

82. This is, of course, to be expected. Section 1404(a) was enacted in 1948, 24 years before the Supreme Court's *Bremen* decision. *See* Judiciary and Judicial Procedure, ch. 87, 62 Stat. 869 (1948). At the time § 1404(a) was enacted, forum selection clauses were generally not enforced by either state or federal courts. *See* Heiser, *State Courts, supra* note 1, at 366-67.

nience of parties" in a section 1404(a) motion. Furthermore, as with the enforcement of clauses in state court, the *Bremen* doctrine is consistent with contemporary contract and venue principles.[83] Justice Kennedy expressly endorsed this interpretation of section 1404(a) in his concurring opinion in *Stewart*.[84] Several lower courts have adopted Justice Kennedy's view since *Stewart*.[85]

A second question unanswered by *Stewart* is, what weight should a district court give a forum selection clause *vis-à-vis* the other private and public interest factors considered in a section 1404(a) motion? Here is where our prior discussion of forum non conveniens in state court is helpful.[86] Private parties in a contract may waive only those rights which they have the power to waive. Those rights include any personal considerations of party convenience and, in many cases, witness convenience.[87] But, as with forum non conveniens, a section 1404(a) transfer motion requires a court to consider a variety of public interest factors pursuant to the statutory directive that the transfer be "in the interest of justice."[88] These public interest factors cannot be waived by private parties in a contract, and must be taken into account by a court despite the existence of a forum selection

---

83. *See* Heiser, *State Courts, supra* note 1, at 368-69.

84. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring). Justice Kennedy suggested that the *Bremen* standards should be understood to guide a district court's analysis under § 1404(a), such that "a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33 (Kennedy, J., concurring).

85. Ironically, some lower federal courts since *Stewart* have preferred the concurring opinion's view to the more ambiguous approach taken by the majority. *E.g.*, Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 912 (3d Cir. 1988), *cert. denied*, 490 U.S. 1001 (1989); National Micrographics Sys. v. Canon U.S.A., Inc., 825 F. Supp. 671, 680 (D.N.J. 1993); Page Constr. Co. v. Perini Constr., 712 F. Supp. 9, 12 (D.R.I. 1989). Justice Kennedy's concurring view was specifically endorsed by the court of appeals on remand in *Stewart* itself. *In re* Ricoh Corp., 870 F.2d 570, 573-74 (11th Cir. 1989).

86. *See* Heiser, *State Courts, supra* note 1, at 393-401. The state court forum non conveniens analysis is helpful, but not dispositive. Because transfer to an alternative forum has fewer adverse consequences than dismissal, § 1404(a) permits transfer on a lesser showing than would warrant dismissal for forum non conveniens. *See* discussion *supra* part I.B.1. Accordingly, a district court may order transfer under § 1404(a), despite a valid forum selection clause, based on very flexible notions of third-party convenience or interests of justice. *See* Heiser, *State Courts, supra* note 1, at 393-401.

A state court, when confronted with the same situation, may normally deny a motion to dismiss for forum non conveniens. *E.g.*, Cal-State Business Prods. & Servs. v. Ricoh Corp., 16 Cal. Rptr. 2d 417, 422 (Ct. App. 1993) (noting a federal court's broader discretion because of the power to transfer). These differences in treatment in similar factual situations will change if the states adopt the Uniform Transfer of Litigation Act, 14 U.L.A. 87-108 (Supp. 1993). This model act, approved in 1991, would authorize transfer (as opposed to dismissal) to an appropriate state forum based on concepts of private and public interest factors similar to those of common law forum non conveniens.

87. *See* Heiser, *State Courts, supra* note 1, at 398-99 (discussing circumstances in which parties can contractually waive concerns for witness convenience).

88. *Stewart*, 487 U.S. at 30-31; Heiser, *State Courts, supra* note 1, at 394; *supra* notes 39-40 and accompanying text.

clause. Likewise, some private interest factors, particularly the convenience of certain independent witnesses in limited circumstances, may be beyond party control and be considered regardless of a forum selection clause.[89]

Following the approach of a forum non conveniens analysis would result in the effectuation of a forum selection clause in most section 1404(a) motions.[90] Generally, the private convenience considerations of the parties and witnesses appear to be the determining factors in section 1404(a) transfers.[91] If a forum selection clauses resolves these considerations, a court will likely give effect to the clause in deciding the motion. While a court must also consider the public interest factors, the nature of these factors is such that they usually will not outweigh the central factor of party and witness convenience.[92] Therefore, this approach not only

89. *See* Heiser, *State Courts, supra* note 1, at 398-99.

90. This is certainly the case with respect to mandatory forum selection clauses in interstate commercial contracts, so long as the contractually designated forum is not so inconvenient that it deprives a party of its day in court. *See* Heiser, *State Courts, supra* note 1, at 368-69. As discussed previously, this notion of unreasonableness is essentially inapplicable to cases involving domestic commercial contracts and, after *Carnival Cruise*, is very unlikely even in cases involving interstate consumer contracts. *Id.* at 368, 374, 397.

The courts may follow a more flexible approach in dealing with interstate consumer contracts because of the inherent imbalance in bargaining power and litigation resources. *See Stewart*, 487 U.S. at 29. A district court should be less willing to view a forum selection clause as entirely removing party and witness convenience from the § 1404(a) equation, unless the consumer exercised free choice in agreeing to the clause. *See, e.g.*, Nelson v. Master Lease Corp., 759 F. Supp. 1397, 1402 (D. Minn. 1991) (not giving a forum selection clause substantial weight in § 1404(a) motion because of the defendant's undue bargaining power); New Medico Assocs. v. Kleinhenz, 750 F. Supp. 1145, 1146 (D. Mass. 1990) (holding that a forum selection clause in a standard form contract is valid but given less weight in a § 1404(a) motion than a fully negotiated provision). In a typical adhesion contract setting, the court should retain the authority to transfer based on a showing of clear inconvenience to parties and witnesses, despite a mandatory forum selection clause. The burden of proving such inconvenience, however, remains on the consumer. *See Carnival Cruise*, 111 S. Ct. at 1526-28.

The Supreme Court's *Carnival Cruise* decision does not foreclose this more flexible approach to forum selection clauses in consumer contracts and § 1404(a). The *Carnival Cruise* Court utilized the *Bremen* standards in determining that forum selection clauses in consumer forum contracts are presumed valid and enforceable. *See* Heiser, *State Courts, supra* note 1, at 372-75. However, the parties in *Carnival Cruise* did not raise the forum selection clause issue through a § 1404(a) motion to transfer venue. *See Carnival Cruise*, 111 S. Ct. at 1524-25. Therefore, although the forum selection clause forced the *Carnival Cruise* plaintiffs to refile in a Florida court, they are not precluded from seeking a transfer back to Washington through a § 1404(a) motion. And, if these plaintiffs make a better factual "interest of justice" showing than already in the record, the district court may, in its discretion, grant the motion to transfer venue.

91. *See* ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 5.06[1] (2d ed. 1991); 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3849, 3851 (West 1986 & Supp. 1993).

92. *See generally* Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 131-37 (1965); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 488 (1990). However, the public interests of justice factors will outweigh the private convenience factors encompassed by a forum selection clause

gives appropriate weight to a forum selection clause, but would also greatly simplify the determination of section 1404(a) motions by lower federal courts when these clauses are present.[93]

This analytical approach is not specifically set forth by the Court in *Stewart*, but nevertheless is consistent with the Court's broad language. This approach means that district courts will make a case-by-case determination of section 1404(a) motions. These courts would neither ignore forum selection clauses nor find them dispositive. Instead, these courts would simply view the clauses as resolving one set of private factors during the weighing of interests process, albeit the major factors. The other factors not controlled by the forum selection clause would still be relevant and, in rare but appropriate cases, might outweigh the forum selection clause.[94]

---

in appropriate cases. *See generally* CASAD, *supra* note 91, § 5.06[1], at 5-83 to -86. One such public factor—a related action pending in an appropriate alternative forum—frequently results in a § 1404(a) transfer even where the private interest factors weigh against transfer. *E.g.*, Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960); American Tel. & Tel. Co. v. MCI Communications Corp., 736 F. Supp. 1294, 1312 (D.N.J. 1990) (citing numerous cases); CASAD, *supra* note 91, § 5.06[1], at 5-84 & n.277.

93. For discussions of the confusion in the lower federal courts when dealing with forum selection clauses and § 1404(a) after *Stewart*, see generally Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise: *A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 86-88 (1992); Leandra Lederman, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, N.Y.U. L. REV. 422, 435-38, 455-58 (1991); Mullenix, *supra* note 7.

94. Because of the district court's broad discretion in determining § 1404(a) transfer motions, it is more difficult to predict the likelihood of forum selection clause enforcement in federal court than in state court. *See supra* notes 39-40, 76, 86 and accompanying text. However, most recent decisions seem to enforce a forum selection clause as the result of a § 1404(a) motion, unless some key public interest factor clearly outweighs clause enforcement. A survey of 44 recently reported district court decisions applying *Stewart* to forum selection clauses in § 1404(a) motions indicates that in the vast majority (31) of cases, the court decided the § 1404(a) motion so as to effectuate the forum selection clause. *E.g.*, P & J G Enters. v. Best W. Int'l, 845 F. Supp. 84, 90 (N.D.N.Y. 1994); Weiss v. Columbia Pictures Television, 801 F. Supp. 1276, 1282 (S.D.N.Y. 1992); Detroit Coke Corp. v. NKK Chem. U.S.A., 794 F. Supp. 214, 220 (E.D. Mich. 1992); KFC Corp. v. Lilleoren, 783 F. Supp. 1022, 1025 (W.D. Ky. 1992); Brock v. Entre Computer Ctrs., 740 F. Supp. 428, 432 (E.D. Tex. 1990).

The forum selection clause was not enforced in 13 cases. In seven of these cases the court gave the clause very little weight in the transfer calculus because the clause was in unbargained-for boilerplate or the product of alleged fraud. *E.g.*, M.G.J. Indus. v. Greyhound Fin. Corp., 826 F. Supp. 430, 432 (M.D. Fla. 1993); *Nelson*, 759 F. Supp. at 1397; *Kleinhenz*, 750 F. Supp. at 1145; Hoffman v. Minuteman Press Int'l, 747 F. Supp. 552 (W.D. Mo. 1990). In five other cases the court determined the clause was permissive, and consequently entitled to no real weight in the transfer motion. *E.g.*, Utah Pizza Serv. v. Heigel, 784 F. Supp. 835 (D. Utah 1992); National Union Fire Ins. Co. v. Turtur, 743 F. Supp. 260 (S.D.N.Y. 1990). In only two cases, Falconwood Fin. Corp. v. Griffin, 838 F. Supp. 836 (S.D.N.Y. 1993), and Standard Office Sys. v. Ricoh Corp., 742 F. Supp. 534 (W.D. Ark. 1990), did the court decide not to enforce the contractually mandated forum solely because of factors external to a valid forum selection clause, *i.e.*, the interests of justice or the convenience of nonparty witnesses. In *Falconwood*, the plaintiff filed the action in the contractually mandated forum, and the defendants moved to transfer to the only district which could obtain jurisdiction over a necessary third party who

This approach seems so logical and simple that it is difficult to understand why the Supreme Court did not explicitly adopt it in *Stewart*.[95] Perhaps the court saw no need to be more specific in its analysis once it decided the basic *Erie* issue raised by the parties.[96] At any rate, this view of the relationship between forum selection clauses and section 1404(a) is consistent with, and follows logically from, the broad reasoning by the Court in *Stewart*.[97] Not surprisingly, a number of lower federal court decisions have interpreted *Stewart* in precisely this manner.[98]

b. *Forum Selection Clauses and Section 1404(a) Motions: The Problem of Which Law Governs Forum Selection Clause Validity Issues*

There is another problem with *Stewart*'s general analysis. The majority decision held that federal law, not state law, applies in determining the weight assigned a forum selection clause in a section 1404(a) motion.[99] This holding seems generally correct under the Rules of Decision Act.[100] Justice Scalia argued in his *Stewart* dissent that the clause's enforceability should be determined by state law, not federal.[101] In dealing with certain specific aspects of forum selection clauses, neither the majority nor the dissent got it quite right. Forum selection clause-related questions of contract validity and of clause enforceability should not both be judged by the same law in a section 1404(a) motion. The reason for this is the *Erie* doc-

---

defendants sought to join. *Falconwood*, 838 F. Supp. at 838-39. The court granted the transfer and noted that this was a "very rare case where, in spite of defendants' agreement to the exclusive jurisdiction of this court, a motion to transfer in the interests of justice will prevail." *Id.* at 843. In *Standard Office Sys.*, a tort case, the Arkansas court denied a § 1404(a) motion to transfer to the designated forum in New York because all the witnesses were located in states other than New York. *Standard Office Sys.*, 742 F. Supp. at 537-38.

95. This approach was well established long before *Stewart* was decided. Beginning with Plum Tree, Inc. v. Stockment, 488 F.2d 754 (3d Cir. 1973), a line of cases holds that a forum selection clause resolves only one of the three factors listed in § 1404(a), *i.e.*, the convenience of parties. *Id.* at 757-58. The other § 1404(a) factors are "third party or public interest" factors, and are not "automatically outweighed by purely private agreement between the parties." *Id.* at 758; *accord* Full-Sight Contact Lens Corp. v. Soft Lenses, Inc., 466 F. Supp. 71, 73-74 (S.D.N.Y. 1978); Aamco Automatic Transmissions v. Bosemer, 374 F. Supp. 754, 757-58 (E.D. Pa. 1974).

96. *See Stewart*, 487 U.S. at 25-28.

97. *Id.* at 31 ("The forum-selection clause . . . should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).").

98. *See, e.g.*, *Brock*, 933 F.2d at 1257-58; Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990); Heller Fin. v. Midwhey Powder Co., 883 F.2d 1286, 1291 (7th Cir. 1989); *P & J G Enters.*, 845 F. Supp. at 87-90; *Falconwood*, 838 F. Supp. at 839-40; Creditors Collection Bureau, Inc. v. Access Data, Inc., 820 F. Supp. 311, 313 (W.D. Ky. 1993).

99. *Stewart*, 487 U.S. at 28, 31-32.

100. *See supra* text accompanying notes 67-73.

101. *Stewart*, 487 U.S. at 36-40 (Scalia, J., dissenting).

trine.[102] A look at how state courts handle forum selection clauses is instructive.

A state court goes through a two-step process in determining whether to effectuate an exclusive forum selection clause in an individual case.[103] The first step is to determine whether the clause is valid as a matter of contract formation law generally. This determination includes traditional contract law considerations of fraud,[104] overreaching,[105] duress,[106] unequal bargaining power,[107] and perhaps unconscionability.[108] A state court may avoid a forum selection clause in an individual case as invalid due to one of these traditional contract formation principles.[109] However, if the clause is valid as a matter of contract formation law, the court next determines whether the clause is *enforceable*.[110] This second step does not involve the application of general contract law, but specific factors

102. *See supra* notes 13-17 and accompanying text.

103. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 1-11 (3d ed. 1987); Mullenix, *supra* note 7, at 357 (citing Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361, 364-65 (S.D.N.Y. 1975)).

104. *See, e.g., Bremen*, 407 U.S. at 15 (stating that forum selection clauses may be "invalid for such reasons as fraud or overreaching"); Fairfield Lease Corp. v. Liberty Temple Church of Christ, 535 A.2d 563, 566 (N.J. Super. Ct. Law Div. 1987). An allegation that the entire contract is fraudulent will not invalidate a forum selection clause; rather, the clause is invalid where "the *inclusion of that clause in the contract* was the product of fraud or coercion." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974); *see also* Crowson v. Sealaska Corp., 705 P.2d 905 (Alaska 1985) (determining whether the forum selection clause was invalid due to fraud and bribery).

105. *See Bremen*, 407 U.S. at 15; Mullenix, *supra* note 7, at 357.

106. *Cf.* CIT Group/Credit, Fin. v. Lott, No. 93-C0548, 1993 WL 157617, at *2 (N.D. Ill. May 13, 1993) (citing *Bremen*, 407 U.S. at 15; *Heller Fin.*, 883 F.2d at 1290-91) (subjecting a contract to scrutiny to see if it was the product of duress).

107. *See, e.g.*, Williams v. Illinois State Scholarship Comm'n, 563 N.E.2d 465, 487 (Ill. 1990) (holding a forum selection clause in a boilerplate adhesion contract invalid); Personalized Mktg. Serv. v. Stotler & Co., 447 N.W.2d 447, 452 (Minn. Ct. App. 1990) (determining whether a forum selection clause was the product of unequal bargaining power and adhesive); Tandy Computer Leasing v. Terina's Pizza, Inc., 784 P.2d 7, 8 (Nev. 1989) (holding a fine print forum selection clause buried in an adhesive contract not valid).

108. *See* Jeffrey A. Liesemer, Note, Carnival's *Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine After* Carnival Cruise Line, Inc. v. Shute, 53 U. PITT. L. REV. 1025, 1037-40 (1992); *infra* notes 111-25.

109. Generally speaking, a contract is voidable and will be considered invalid upon proper proof where it is the product of fraud, duress, undue influence, procedural, or substantive unconscionability. *See generally* U.C.C. § 2-302 (1991); RESTATEMENT (SECOND) CONTRACTS §§ 164, 175, 177 (1981) CALAMARI & PERILLO, *supra* note 103, at 336-409; E. ALLEN FARNSWORTH, CONTRACTS 246-339 (2d ed. 1990).

110. CALAMARI & PERILLO, *supra* note 103, at 18-19. This two-step process is somewhat incomplete. Another step may well be to determine the intent of the parties in adopting the forum selection clause. *Id.* at 173 n.55. This occurs most frequently when the contractual language is unclear and the court must determine, for example, whether the parties intended a designated forum to be mandatory or permissive. *See* Heiser, *State Courts, supra* note 1, at 377. Another preeminent step may be to determine whether, as a matter of state public policy, the forum selection clause is per se void and therefore unenforceable. *See id.* at 371-72.

unique to forum selection clauses.[111] These factors include concepts of unreasonableness, unfairness, and public policy, and may lead a court to not enforce an otherwise contractually valid forum selection clause.[112] This second step basically addresses the convenience of the parties ("unreasonableness") and the interest of justice ("unfairness" and "public policy").

Because, the language of section 1404(a) is broad enough to cover the issues of unreasonableness, unfairness, and public policy, federal law governs the question of enforceability under the *Erie* doctrine.[113] This is consistent with the general holding in *Stewart*. However, the first step—determining the contract formation validity of the clause—involves questions of general contract law.[114] These case-specific questions should be resolved by reference to state contract law because no federal statutory law exists that is broad enough to govern the validity issue, and because no authority exists for applying federal judge-made law.[115]

The "for the convenience of the parties" language of section 1404(a) can be broadly construed to govern questions of party convenience embodied in forum selection clauses.[116] Stretching this language to encompass federal statutory authority for a general contract formation doctrine, however, seems unreasonable. There simply is no indication that Congress intended section 1404(a) to govern not only the weight to be given forum selection clauses but also the traditional contract principles necessary to test the clause's contractual validity.[117] In other words, it seems unlikely

111. *See* Mullenix, *supra* note 7, at 357. Generally, when an ordinary contract clause is found valid as a matter of contract formation principles, the clause is considered binding and enforceable. CALAMARI & PERILLO, *supra* note 103, at 18-19. However, forum selection clauses are treated differently. Even if valid, a court will not enforce a forum selection clause unless the clause is reasonable. *See* Heiser, *State Courts*, *supra* note 1, at 368-69. This reasonableness requirement includes numerous fairness and convenience notions which are similar to the general procedural and substantive notions underlying the doctrine of unconscionability. *See* Liesemer, *supra* note 108, at 1040-49; Julie H. Bruch, Comment, *Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum*, 23 LOY. U. CHI. L.J. 329, 334-36 (1992).

112. *See, e.g.*, Volkswagenwerk A.G. v. Klippan, GmbH, 611 P.2d 498, 503 (Alaska 1980) (applying a reasonableness test in determining whether to enforce a forum selection clause); Societé Jean Nicolas et Fils v. Moussenx, 597 P.2d 541, 543 (Ariz. 1979) (upholding a forum selection clause as "fairly bargained for"); Fidelity & Deposit Co. v. Gainesville Iron Works, 189 S.E.2d 130, 131 (Ga. App. 1972) (disallowing a forum selection clause in an insurance case as violating public policy where Georgia law fixed the venue for actions against insurers).

113. *See Stewart*, 487 U.S. at 29-30 ("The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.").

114. *See supra* notes 103-08 and accompanying text.

115. *See supra* notes 12-17 and accompanying text.

116. *See supra* notes 67-74 and accompanying text.

117. Contrast the language of § 1404(a), which makes no reference to contract principles, with that of the Federal Arbitration Act (F.A.A.), 9 U.S.C. §§ 1-307 (1988 & Supp. IV 1992), which provides

that section 1404(a) is broad enough to control the issue of whether a forum selection clause is valid under traditional contract formation principles.

Because section 1404(a) is not broad enough to encompass traditional contract formation principles, a federal court, pursuant to *Stewart*, must proceed to evaluate whether judge-made federal contract law would disserve the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[118] Little discussion of these twin aims seems necessary.[119] Traditionally, general contract formation validity questions in diversity cases are resolved by reference to appropriate state law,[120] not by federal judge-made law.[121]

---

that agreements to arbitrate "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (1988) (emphasis added). Unlike § 1404(a), the F.A.A.'s statutory language evinces Congress' intent to federalize the contract principles applicable when determining the validity of arbitral forum selection clauses. *See* Southland Corp. v. Keating, 465 U.S. 1, 11 (1984). However, even this relatively clear federal statutory language has been construed by the Supreme Court to require federal courts to apply state law in determining the validity of arbitration agreements when challenged on contract formation grounds, such as unconscionability, applicable to contracts generally within the state. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); *Southland*, 465 U.S. at 16 n.11.

The F.A.A. does, however, preempt contrary state law with respect to the policy toward enforcement of a contractually valid arbitration clause. *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 16 n.11. Therefore, 9 U.S.C. § 2 (1988) preempts any conflicting special state contract formation law which determines the validity of arbitration agreements in a manner different from contracts generally under state law. *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 16 n.11.

118. The Supreme Court in *Stewart* noted that "[i]f no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called 'twin aims of the *Erie* rule.' " *Stewart*, 487 U.S. at 27 n.6 (citing Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

119. Certainly it would encourage forum-shopping and constitute inequitable administration of laws if a federal court sitting in a diversity case were to apply a different doctrine of fraud, duress, adhesion, or unconscionability than would be applicable to the same case in state court. Even using a balancing-of-interest analysis, there is simply no basis for a federal court to formulate a federal common law of fraud, adhesion, and the like applicable to forum selection clauses in private contracts which would displace state law in both federal and state courts.

120. *E.g.*, Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380, 382 (9th Cir. 1984) (applying Oregon law, the court found a take-it-or-leave-it clause in a form contract invalid); *see also* General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 356 (3d Cir. 1986) (applying state law to forum selection clause). Generally, contract issues in diversity cases are resolved by application of state law. *E.g.*, Anderson v. Eby, 998 F.2d 858, 861 (10th Cir. 1993); Lambert v. Kysar, 983 F.2d 1110, 1114 (1st Cir. 1993); C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 855 (9th Cir. 1977); Lipsky v. Commonwealth United Corp., 551 F.2d 887, 895 (2d Cir. 1976). Even in federal question cases, a federal court will normally apply state law, not federal common law, to resolve contract issues. *E.g.*, United States v. Kimbell Foods, 440 U.S. 715, 740 (1979); Miree v. DeKalb County, 433 U.S. 25, 28-33 (1977); American Int'l Enters. v. FDIC, 3 F.3d 1263, 1268-69 (9th Cir. 1993); Morgan v. South Bend Community Sch. Corp., 797 F.2d 471, 475 (7th Cir. 1986).

121. The *Bremen* opinion does include a reference to contract validity principles when it states that a forum selection clause will be invalid if it is the product of "fraud, undue influence, or overweening bargaining power." *Bremen*, 407 U.S. at 12-15. The *Carnival Cruise* opinion applied these principles to standard form consumer contracts. *Carnival Cruise*, 111 S. Ct. at 1527-28; Heiser, *State Courts,*

Although theoretically Congress *could* enact a federal statute under the Commerce Clause which would provide a uniform contract validity doctrine for interstate contracts, it has not chosen to do so.[122] Congress also *could* have intended to incorporate contract validity principles for forum selection clauses in section 1404(a), but this interpretation seems to stretch the "convenience of the parties" beyond any normal meaning.[123]

Consequently, a federal court should apply state law in determining whether a contractual forum selection clause is valid as a matter of general contract formation principles.[124] This would include challenges to the validity of a forum selection clause based on fraud, undue influence, overreaching, overweening bargaining power, adhesion, and unconscionability.[125] But a federal court must apply federal law to determine whether an otherwise contractually valid forum selection clause should be enforced (*i.e.*, given weight), as part of a section 1404(a) transfer motion. This division of applicable law is consistent with *Erie* principles so long as the court applies federal law to those areas controlled by section 1404(a). As discussed above, these areas include challenges to the enforcement of a forum selection clause based on unreasonableness (severe inconvenience),

---

supra note 1, at 372-76. The Supreme Court in both cases had authority to fashion these general contract principles based on federal common law because the Court was sitting in admiralty. *See supra* note 34 and accompanying text.

122. Congress did enact a statute specific to agreements to arbitrate in interstate contracts, 9 U.S.C. § 2 (1988); *see also supra* note 117 and accompanying text; but has not done so with respect to interstate contracts generally. Precisely because Congress has chosen not to enact such general legislation there has been a need for uniform commercial contract laws, such as Articles 2 and 2A of the Uniform Commercial Code, which could be adopted by each state.

123. This is particularly evident when the language of § 1404(a) is contrasted with that of the Federal Arbitration Act, 9 U.S.C. § 2 (1988). *See supra* note 117.

124. Which state's contract law should be applied is not always easy to decide, particularly when the contract also contains a choice of law provision. However, these choice of law questions are no more difficult for forum selection clause issues than they are for ordinary contract issues. *See infra* note 132.

125. These validity factors all have one thing in common: they focus on the relationship between the contracting parties at the time the contract is entered into, and not the content of the contract. Liesemer, *supra* note 108, at 1037-40 (stating that the *Bremen* doctrine distinguishes between problems in the process of bargaining and the substance of the forum selection clause; between unfairness in the contract-making process and unfairness in forum selection clause terms). The enforceability factors focus on the content of the clause and to relational factors at the time litigation is commenced. *Id.* Admittedly, these relationship and content factors sometimes become blurred, particularly in unconscionability cases where the oppressive content of the contract suggests fraud or unequal bargaining power. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448-49 (D.C. Cir. 1965); Weaver v. American Oil Co., 276 N.E.2d 144, 147-48 (Ind. 1971); A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120-25 (Ct. App. 1982). For a general discussion of substantive and procedural unconscionability, see Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 748-85 (1982); Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 PA. L. REV. 485, 489-528 (1967) (stating that procedural unconscionability is unfairness in the bargaining process; substantive unconscionability is unfairness in the bargaining outcome).

unfairness (the interest of justice), or any other relevant private and public interest factor appropriate under section 1404(a). Section 1404(a) does not displace the traditional contract formation principles found in state law. Section 1404(a) and state contract law "can exist side by side, therefore, each controlling its own sphere of coverage without conflict."[126]

This approach is not only required by the *Erie* doctrine but is also consistent with *Stewart*.[127] In *Stewart*, no challenge was made to the validity of the forum selection clause based on general contract formation principles.[128] The only issue presented was whether the clause should be enforced based on public policy grounds, even though the contract was otherwise valid under general contract principles.[129] The enforceability issue is controlled by section 1404(a), so federal law properly applies.[130]

Surprisingly, the Court did not even make reference to the validity-enforceability dichotomy in *Stewart*. The Supreme Court may not have focused on the validity issue, or may have wanted to keep the analysis simple. Alternatively, the *Stewart* Court may possibly have intended to permit federal law to govern in all these contract formation issues when raised in conjunction with a section 1404(a) motion. Such an intention would be a simple way of dealing with these issues[131] but, as discussed

126. Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980) (holding that FED. R. CIV. P. 3 was not broad enough to displace state law in determining when an action is commenced in federal court for purposes of tolling the state statute of limitations). Because § 1404(a) is not broad enough to control contract formation issues, that federal statute can exist side by side along with the applicable state contract law. No conflict exists between the state contract law and § 1404(a) because each law controls its own sphere of coverage without interfering with the other, *i.e.*, state law determines whether a forum selection clause is contractually valid, and § 1404(a) determines the weight to be given a valid clause for venue transfer purposes.

127. At least one post-*Stewart* lower court decision has adopted this approach. In General Bank, N.Y. Branch v. Wassel, 779 F. Supp. 310 (S.D.N.Y. 1991), the court considered a forum selection clause as part of a § 1404(a) transfer motion. *Id.* at 313-14. The defendant alleged that the clause was invalid because it was procured through fraudulent misrepresentation. *Id.* at 312. The court first found, per *Stewart*, that "federal law controls the role of the forum selection clause in the section 1404(a) inquiry." *Id.* at 314. But the court viewed *Stewart* as only addressing "the weight that a forum clause should receive in the section 1404(a) inquiry, and does not mandate creation of a body of federal common law concerning fraudulent procurement of forum selection clauses." *Id.* Therefore, the court, relying on the Rules of Decision Act, held that "state law controls whether the forum selection clause was fraudulently procured." *Id.* The court ultimately upheld the clause based on New York fraud and adhesion law. *Id.* at 315; *see also* General Ins. Co. of Am. v. Fort Lauderdale Partnership, 740 F. Supp. 1483, 1487 (W.D. Wash. 1990) (stating that the validity of a forum selection clause for purposes of a personal jurisdiction motion must be determined by state fraud and coercion laws); Van's Supply & Equip. v. Echo, Inc., 711 F. Supp. 497, 503 (W.D. Wis. 1989) (holding that a forum selection clause should not be enforced under § 1404(a) because state law presumes it was the result of unequal bargaining).

128. *See Stewart*, 487 U.S. at 24-27.

129. *See id.* at 29.

130. *Id.*

131. In light of Ferens v. John Deere Co., 494 U.S. 516 (1990), simplicity in the use of § 1404(a)

above, would do violence to established *Erie* principles. At any rate, nothing in *Stewart* precludes this side-by-side application of federal and state law.[132]

Requiring state contract formation law to govern forum selection clause validity questions in section 1404(a) transfer motions has important implications for diversity jurisdiction cases involving consumer contracts. As discussed previously, the Supreme Court in *Carnival Cruise* did not take a proconsumer approach to forum selection clause validity issues when dealing with standard consumer form contracts.[133] However, the *Carnival Cruise* Court's adhesion contract doctrine, while properly formulated as federal common law based on the Court's admiralty jurisdiction authority, is not binding on the states or the federal courts in nonadmiralty cases.[134] Consequently, an individual state is free to develop general contract formation law of adhesion, unequal bargaining power, and fraud, which, when applied to a forum selection clause, would invalidate the clause under contract formation circumstances similar to those in *Carnival Cruise*.[135]

A state may adopt such contract formation principles for all contracts, but the doctrine is more likely to affect the validity of consumer contracts than commercial ones. For example, state law might be more likely to invalidate an unbargained-for forum selection clause in a standard consumer form contract than in a negotiated commercial contract, or may be more likely to invalidate such a consumer clause based on fraud or overreaching. A state that wishes to take a consumer protection approach to general

---

appears to be an important goal of the Supreme Court when dealing with *Erie*-related questions. In *Ferens*, the Court held that after a § 1404(a) transfer initiated by a plaintiff, the transferee court must apply the choice of law doctrine of the transferor court. *Id.* at 525. Rejecting arguments that more sophisticated choice of law rules were called for by *Erie*, the Court observed that applying the law of the transferor forum "effects the appropriate balance between fairness and simplicity." *Id.* at 532.

However, applying state law to forum selection clause contract formation issues and federal law to § 1404(a) transfer issues is no more complicated than the analogous application of both state and federal law to arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 2 (1988). *See supra* note 117.

132. The issue becomes even more complicated when the contract also contains a choice of law clause designating that the contract be governed by the laws of a specific state. If the forum selection clause's validity is attacked, the federal court should apply state law. But which state's law? This is not an easy conflicts problem, but again is no different than any other contract case in state court. Generally, when a contract containing a choice of law clause is challenged as invalid, a state court must determine whether it will apply its choice of law doctrine or the law designated in the contract. When the court is a federal district court, the choice is between applying the state law designated in the contract or the state law mandated by the choice of law doctrine of the state where the district court is located. *See* Gruson, *supra* note 47, at 185-87; Lederman, *supra* note 93, at 461-64; Mullenix, *supra* note 7, at 346-47.

133. *See* Heiser, *State Courts*, *supra* note 1, at 373-76.

134. *See supra* notes 34-35 and accompanying text.

135. *See* Heiser, *State Courts*, *supra* note 1, at 376.

contract formation may do so through state statute or through case law.

A party seeking to enforce a forum selection clause cannot avoid such proconsumer state contract formation law by use of a section 1404(a) transfer of venue motion in federal court. Based on *Erie* dictates, a federal court must apply the contract formation law of the state in which the federal court sits to determine the contract validity of the forum selection clause.[136] If the court finds the clause valid as a matter of state contract law, the federal court must then apply section 1404(a) to determine how much weight to give the forum selection clause.[137] In contrast, if the federal court determines that state contract law invalidates the forum selection clause, the court must then determine the section 1404(a) transfer motion as if the clause did not exist and base the decision on the relevant private and public interest factors.[138] This treatment of the clause is mandated by the *Erie* doctrine, and is consistent with both *Stewart* and *Carnival Cruise*. More importantly for consumers, this treatment permits a state to ameliorate the harsh impact of *Carnival Cruise* in both state and federal courts.

c. *Forum Selection Clauses and Section 1404(a) Motions: The Problem of Determining Where the Action "Might Have Been Brought"*

Motions to transfer pursuant to section 1404(a) may involve a third issue, although perhaps not a common one. Assume that a federal action is filed in a New York federal district court pursuant to a forum selection clause designating New York federal courts as the exclusive forums. The clause clearly makes the New York federal courts the exclusive forums for purposes of venue and personal jurisdiction. Defendant seeks to transfer the case to a Michigan district court under section 1404(a). The New York court, relying on a number of relevant public interest factors, believes a transfer to a Michigan federal court is "in the interest of justice" within the meaning of section 1404(a)..

But section 1404(a) also requires that the transferee district be one where the action originally "might have been brought."[139] Does the forum selection clause designating New York as the exclusive forum preclude a federal court in Michigan from qualifying as a transferee district? Probably not. This language in section 1404(a) has already been construed by the Supreme Court to mean that the transferee district must be proper as a matter of federal venue law, rather than state law.[140] Furthermore, in

136. *See supra* notes 104-30 and accompanying text.
137. *See supra* notes 75-98 and accompanying text (discussing *Stewart*).
138. *See* cases cited *supra* notes 90, 94.
139. *See* 28 U.S.C. § 1404(a) (1988).
140. Van Dusen v. Barrack, 376 U.S. 612, 620-24 (1964). The Supreme Court found the purpose

Stewart, the Court made it clear that a forum selection clause is not dispositive and therefore cannot be solely determinative of whether a district does or does not have venue.[141] Moreover, the *Stewart* Court seemed to apply notions of venue and personal jurisdiction in the transferor court independent of the forum selection clause.[142] If the *Stewart* Court had viewed Alabama as an improper forum based on venue or personal jurisdiction due to the forum selection clause, a motion to dismiss or transfer pursuant to section 1406(a) would have been appropriate.[143] The Supreme Court specifically noted that section 1406(a) was not applicable because the Alabama court had proper venue pursuant to section 1396(c).[144]

As to personal jurisdiction in the transferee court, forum selection clauses are now generally viewed as not ousting a court of jurisdiction.[145] Consequently, a transferee court which has personal jurisdiction over the defendant does not somehow lose it because the transferor court is the contractually mandated exclusive forum. For all these reasons, a transferee court which is otherwise proper from the standpoint of personal jurisdiction and venue is one where the action "might have been brought" within the meaning of section 1404(a) even though the transferor court is the contractually designated exclusive forum.

C. *Personal Jurisdiction and Forum Selection Clauses in Federal Court*

The enforceability of a forum selection clause can be raised through another common procedural device, a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2). In a typical diversity action, this procedure does not involve any federal statute. For example, assume that a forum selection clause designates Florida as a permissible forum. Plaintiff files suit in a United States District Court in Florida, pursuant to

---

of § 1404(a) to warrant a generous reading of this language, and not to narrow the range of permissible federal forums beyond those permitted by federal venue statutes. *Id.* at 622-23. In Hoffman v. Blaski, 363 U.S. 335 (1960), the Court interpreted this language to require that the transferee district be one which has proper venue and personal jurisdiction over the defendant at the time the action is commenced, and not to authorize transfer to a district which acquires jurisdiction only through the defendant's subsequent waiver. *Id.* at 343-44.

141. If the *Stewart* Court viewed venue as only proper in New York because of the exclusive forum selection clause, the Court could not have even entertained the possibility that the case could remain in Alabama.

142. *Stewart*, 487 U.S. at 29-31.

143. Section 1406(a) authorizes a federal district court to dismiss or transfer when the court lacks personal jurisdiction or proper venue. *See infra* note 181 and accompanying text.

144. *Stewart*, 487 U.S. at 28 n.8.

145. *See* Heiser, *State Courts*, *supra* note 1, at 368.

the clause. Assume that the defendant has no contacts with Florida, but freely and knowingly entered into the forum selection clause. Defendant nevertheless contests personal jurisdiction by a motion to dismiss, pursuant to Rule 12(b)(2).[146] Should the motion be denied based on the forum selection clause? The answer depends on whether the district court must apply state or federal law.

Where there is an absence of either a federal rule or statute that establishes a federal basis for personal jurisdiction, the law of the forum state determines the personal jurisdiction of the district courts in diversity cases.[147] The federal court must apply the long-arm statute of the state in which it sits and has no authority to apply federal common law.[148] The Supreme Court has determined that a district court should apply the appropriate state long-arm statutes even in federal question cases.[149] The Court has specifically declined to authorize the development of a federal common law of personal jurisdiction.[150]

The federal court in our hypothetical must apply the Florida long-arm statute, as well as the Due Process Clause, in deciding the Rule 12(b)(2) motion.[151] As discussed previously, the contractual forum selection clause waives any due process objection the defendant may have to the personal jurisdiction.[152] However, the federal court must also have a *statutory* basis for its assertion of personal jurisdiction. Because state statutory law, not federal law, provides the statutory authority for the district court's personal jurisdiction,[153] the federal court in our hypothetical must apply Florida's long-arm statute. The Florida long-arm statute, as construed in

146. FED. R. CIV. P. 12(b)(2). Rule 12(b)(2), without elaboration, authorizes a motion to dismiss for "lack of jurisdiction over the person." *Id.*

147. *See, e.g.*, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 711-12 (1982) (Powell, J., concurring); Payne v. Motorists' Mut. Ins. Cos., 4 F.3d 452, 455-56 (6th Cir. 1993); English & Smith v. Metzger, 901 F.2d 36, 38 (4th Cir. 1990); Wilkerson v. Fortuna Corp., 554 F.2d 745, 747-48 (5th Cir.), *cert. denied*, 434 U.S. 939 (1977); Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1963).

148. *See, e.g.*, FED. R. CIV. P. 4(e)-(f); Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 916-19 (11th Cir. 1989); General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 356-57 (3d Cir. 1986); *supra* note 147.

149. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 105 (1987). The state long-arm statute applies, unless some special federal personal jurisdiction statute governs. *Id.*; *see also* Mylan Labs. Inc. v. AKZO, N.V., 2 F.3d 56, 60-61 (4th Cir. 1993) (applying a state long-arm statute). See *infra* note 172 for examples of such statutes.

150. *Omni Capital Int'l*, 484 U.S. at 109-10. The Supreme Court considered it "unwise for a court to make its own rule authorizing service of summons. . . . [A] legislative grant of authority is necessary." *Id.* at 109.

151. The ability of a federal court to assert personal jurisdiction over a nonresident defendant is ultimately limited by the Due Process Clause. *See, e.g.*, Burger King Corp. v. Rudzewics, 471 U.S. 462, 464 (1985); Sun Bank v. E.F. Hutton & Co., 926 F.2d 1030, 1033 (11th Cir. 1991).

152. *See* Heiser, *State Courts, supra* note 1, at 383-88.

153. *See supra* notes 147-48 and accompanying text.

McRae v. J.D./M.D.,[154] requires something more than simply a forum selection clause as the basis for personal jurisdiction. Consequently, the district court in our hypothetical would have to grant the motion to dismiss. That is, unless the federal court has some authority to formulate federal law, such as the *Bremen* doctrine,[155] which would displace the Florida long-arm restriction on forum selection clauses conferring jurisdiction, the motion must be granted.

No federal statute or rule authorizes the Florida court to utilize federal law.[156] Does the court have the authority to formulate federal common law which, based on the forum selection clause, would uphold personal jurisdiction despite the Florida long-arm statute? Or would application of such a judge-made procedural rule disserve the twin aims of the *Erie* rule, *i.e.*, discouraging forum-shopping and avoiding inequitable administration of the laws?

As discussed previously, the twin aims answer is reasonably clear.[157] If the Florida long-arm statute applies, the federal district court would dismiss for lack of personal jurisdiction. However, if the federal district court formulates a federal common law rule that a forum selection clause confers personal jurisdiction, the court would deny the motion. Obviously, a plaintiff would choose federal court to obtain personal jurisdiction over the defendant in Florida, a result that the plaintiff could not obtain in state court. Consequently, applying the federal judge-made law would not only encourage the type of forum shopping that *Erie* sought to eliminate, but would also result in inequitable application of the extremely important personal jurisdiction determination.[158] If the twin aims test means anything at all, the federal court must apply the state statute under such circumstances.[159] Therefore, the federal district court sitting in Florida must

---

154. 511 So. 2d 540 (Fla. 1987); *see also* Heiser, *State Courts*, *supra* note 1, at 389-90 (discussing the *McRae* decision).

155. *See supra* notes 1-2 and accompanying text.

156. Arrowsmith v. United Press Int'l, 320 F.2d 219, 225 (2d Cir. 1963) (en banc) ("No federal statute or Rule of Civil Procedure speaks to the issue either expressly or by fair implication.").

157. *See supra* notes 31-32 and accompanying text.

158. The court in *Alexander Proudfoot*, 877 F.2d at 919, reached the same twin aims conclusion on facts very similar to our hypothetical. *See supra* note 32. A similar conclusion was reached by the court in Rindal v. Seckler Co., 786 F. Supp. 890, 893-95 (D. Mont. 1992), in applying the twin aims analysis to a motion to dismiss for lack of personal jurisdiction and venue. *Id.* at 893-95.

159. Courts have reached the opposite conclusion with respect to forum selection clauses and motions to dismiss for lack of venue pursuant to FED. R. CIV. P. 12(b)(3). *See, e.g.*, Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988) (stating that federal common law governs a Rule 12(b)(3) motion to dismiss for improper venue); *Stewart*, 810 F.2d at 1068-69 (stating that "[v]enue is a matter of federal procedure"). *Contra Rindal*, 786 F. Supp. at 894 (applying state law with respect to forum selection clauses in denying a motion to dismiss for improper venue).

This federal common law treatment of a forum selection clause in a Rule 12(b)(3) venue motion is perhaps appropriate, but is nevertheless consistent with state law governance in a Rule 12(b)(2)

dismiss for lack of personal jurisdiction, despite the forum selection clause.[160] The result would be the same where the applicable state statute voids all forum selection clauses or, as in U.C.C. § 2A-106(2), prohibits enforcement of clauses in certain consumer contracts in the absence of an independent basis of personal jurisdiction over the defendant consumer.[161]

This personal jurisdiction analysis has considerable significance for states which, in light of *Stewart* and *Carnival Cruise*, wish to impose restrictions on forum selection clause enforcement in both federal and state courts. As discussed previously, each state may develop case law or legislation which restricts enforcement of forum selection clauses in state court.[162] Such restrictions may apply to forum selection clauses in all contracts or, as in the case of states which have adopted U.C.C. § 2A-106(2), may apply only to consumer contracts.[163] If the state enacts such restrictions as part of its long-arm statutes, the restrictions will protect defendants in federal court as well as state court. Unless special federal personal jurisdiction legislation preempts the state long-arm statutes, the state personal jurisdiction restrictions govern the issue of forum selection clause enforcement in federal court when the defendant raises the issue as part of a Rule 12(b)(2) motion to dismiss. As discussed below, these state long-arm statutes will govern even when the defendant raises the forum selection clause enforcement question as part of a motion to transfer venue

---

personal jurisdiction motion. Unlike personal jurisdiction determinations, federal venue determinations are governed by a comprehensive federal statutory scheme. *See* 28 U.S.C. §§ 1391-1412 (1988 & Supp. IV 1992). By providing specific provisions rather than allowing federal venue to be governed by state law, Congress clearly intended that federal court venue questions be resolved by uniform federal rules. Consequently, whether based on a *Byrd* balancing of interests test, *Mannett-Farrow*, 858 F.2d at 513, or as a matter of interstitial federal lawmaking, Moretti & Perlow Law Offices v. Aleet Assocs., 668 F. Supp. 103, 105 (D.R.I. 1987), federal courts are probably justified in utilizing judge-made procedural law to resolve federal venue questions. *See supra* note 28.

The requirement that a federal court have proper venue is separate and distinct from the personal jurisdiction requirement. *See infra* note 174 and accompanying text. As discussed in the text above, no authority for use of federal judge-made law applies to the resolution of personal jurisdiction questions involving forum selection clauses. *See supra* note 156 and accompanying text. Moreover, because the test for federal venue is now largely subsumed by that for personal jurisdiction, federal venue restrictions are of little significance to forum selection clause issues in federal court.

160. However, if the clause designated New York courts and the case were filed there, the federal court would have personal jurisdiction despite the defendant's lack of contacts with New York. This is because New York law permits personal jurisdiction based solely on a forum selection clause. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977); *In re* Ultracashmere House, Ltd., 534 F. Supp. 542, 545 (S.D.N.Y. 1982). The result would be the same in most other federal courts where the relevant state law authorizes personal jurisdiction based solely on a forum selection clause, or where the state long-arm statute simply incorporates the due process test. *See* Heiser, *State Courts, supra* note 1, at 390.

161. *See* Heiser, *State Courts, supra* note 1, at 391.

162. *See id.* at 371, 376.

163. *See id.* at 391.

pursuant to section 1404(a).[164]

D. *Section 1404(a) Revisited: Personal Jurisdiction, Forum Selection Clauses, and Transfer of Venue*

Section 1404(a) authorizes transfer of actions from one permissible district to another based on inconvenience. The courts of appeals, however, construe section 1404(a) in conflicting manners when a party seeks transfer from a district which has proper venue but lacks personal jurisdiction over the defendant. Most circuits authorize use of section 1404(a) where the transferor court has proper venue but lacks personal jurisdiction.[165] Some circuits restrict section 1404(a) to transfers of actions commenced in a district court possessing both personal jurisdiction and proper venue.[166] In these latter circuits, a party must base transfers from a district court which lacks personal jurisdiction on section 1406(a), not section 1404(a).[167]

Section 1404(a) is a transfer of venue statute; it says nothing about personal jurisdiction.[168] Consequently, in most circuits a district court can order a transfer of venue under section 1404(a) regardless of whether that transferor court has personal jurisdiction over the defendant.[169] However, in all cases where a district court lacks personal jurisdiction, that court also lacks the option under section 1404(a) to *retain* the case. Thus, the only available options are transfer pursuant to section 1404(a), or dismissal or transfer pursuant to section 1406(a). This has significant implications for use of section 1404(a) in forum selection clause cases, particularly those which involve consumer contracts.

Assume that the parties to a contract designate Florida courts as the exclusive forums to litigate contract disputes. A dispute arises, and the plaintiff brings suit in a federal district court sitting in Florida. The Florida court has no independent basis of personal jurisdiction over the defendant, a resident of New York, other than the forum selection clause. If the defendant files a timely motion to dismiss pursuant to Rule 12(b)(2), the court must dismiss the action for lack of personal jurisdiction.[170] Howev-

164. *See* discussion *infra* part I.D.

165. Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1107 (5th Cir. 1981); United States v. Berkowitz, 328 F.2d 358, 361 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964); Koehring Co. v. Hyde Constr. Co., 324 F.2d 295, 298 (5th Cir. 1963).

166. Martin v. Stokes, 623 F.2d 469, 474 (6th Cir. 1980); *see also* Mayo Clinic v. Kaiser, 383 F.2d 653, 654 (8th Cir. 1967) (finding that § 1406(a) authorized transfer when the transferor court lacks personal jurisdiction).

167. See cases cited *supra* note 166.

168. *See supra* note 37 (providing the text of § 1404(a)).

169. *See supra* note 165 and accompanying text.

170. Dismissal is necessary because the Florida court lacks personal jurisdiction despite the forum

er, if the defendant (or plaintiff) also files a motion to transfer pursuant to section 1404(a), does the federal court, based on *Stewart*, have the option to either retain or transfer the action rather than dismiss it?[171] In other words, does the *Stewart* Court's holding mean that section 1404(a) authorizes a federal court to give a forum selection clause appropriate weight when considering a transfer motion despite limitations on such clauses imposed by the applicable state personal jurisdiction statute?

The resolution of this question depends on whether Congress intended section 1404(a) to govern not only issues of venue transfer for convenience, but also issues of personal jurisdiction in the federal courts.[172] No such intent is evident in the language of section 1404(a), nor in its legislative history.[173] The only intent evident is that section 1404(a) codifies and revises the common law doctrine of forum non conveniens by permitting transfer of venue, instead of dismissal, to a more convenient forum. There is no indication that section 1404(a) in any way affects the requirement of personal jurisdiction in the federal courts. Indeed, the federal courts have always treated personal jurisdiction as an inquiry separate from venue, and separate from transfer of venue under section 1404(a).[174] The separateness of these inquiries has created a division

---

selection clause. The federal court must apply Florida's personal jurisdiction statutes. *See supra* notes 157-60 and accompanying text. The Florida Supreme Court has construed these statutes as requiring an independent basis of personal jurisdiction, other than a forum selection clause. *See* Heiser, *State Courts, supra* note 1, at 389-90.

171. The *Stewart* Court had no occasion to address this question because the district court had personal jurisdiction based on the fact that the defendant was doing business in Alabama. *Stewart*, 487 U.S. at 28 n.8; *see also supra* part I.B.3. (discussing the *Stewart* decision).

172. Congress certainly has the authority to enact federal legislation which defines the personal jurisdiction of the federal courts and has done so in a few specific areas. *E.g.*, Commodities Exchange Act, 7 U.S.C. §§ 13a-1, 13a-2(4), 18(d) (1988 & Supp. IV 1992); The Clayton Act, 15 U.S.C. § 22 (1988) (world-wide service of process for antitrust actions); Securities Exchange Act, 15 U.S.C. § 78aa (Supp. IV 1992); 28 U.S.C. § 2361 (1988) (nationwide service of process in federal statutory interpleader actions). But in the absence of such a federal statute, a federal district court must determine its personal jurisdiction by application of the appropriate state long-arm statute. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 108 (1987); *supra* notes 146-49 and accompanying text.

173. The language of § 1404(a) speaks only of venue transfers for convenience. *See supra* note 37. So does its scant legislative history: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." 28 U.S.C. § 1404 Historical and Revision Notes (1988). For a detailed discussion of this legislative history, see *Ex parte* Collett, 337 U.S. 55 (1949); Purcell, *supra* note 76, at 478-83.

174. The requirements that a court have proper jurisdiction and venue have always been separate, although related, inquiries for a federal district court. Venue is based on legislative policy assumptions of convenience, as reflected in the various general and special federal venue statutes which indicate the proper federal districts to bring an action. *See, e.g.*, 28 U.S.C. § 1391 (1988 & Supp. IV 1992) (general venue statute); 28 U.S.C. § 1397 (1988) (interpleader venue); 28 U.S.C. § 1402 (1988) (United States as defendant). In contrast, personal jurisdiction recognizes and protects a constitutional individual liberty interest held by the defendant. *See* Heiser, *State Courts, supra* note 1, at 383. A federal court usually determines whether it has personal jurisdiction by reference to state long-arm statutes, subject ultimately to due process limitations. *See supra* notes 147-50 and accompanying text.

among the circuits as to whether section 1404(a) or section 1406(a) is the appropriate vehicle to effectuate a transfer from a federal district court which has proper venue but lacks personal jurisdiction.[175] In addition, the separateness of the two inquiries has important consequences for section 1404(a) venue transfer motions which involve forum selection clauses.

After *Stewart*, a federal district court must give a forum selection clause some weight in assessing the private convenience factors under section 1404(a) for purposes of transfer of venue. However, a forum selection clause will not necessarily provide the federal district court with a basis for personal jurisdiction over the defendant. Only where the applicable state long-arm statute recognizes that a forum selection clause, by itself, waives a defendant's objection to statutory personal jurisdiction will such a clause confer personal jurisdiction where no other statutory basis exists.

Under state long-arm statutes which require an independent basis for personal jurisdiction other than a forum selection clause, such as Florida's long-arm statute, a different section 1404(a) determination must take place. In such instances, section 1404(a) provides a basis for venue *transfer*, but does not authorize the federal district court to *retain* the case. Section 1404(a) performs the same function as section 1406(a) in such instances.[176]

A state which wishes to protect consumers can therefore adopt legislation which limits the personal jurisdiction waiver impact of a forum selection clause.[177] Such a long-arm limitation permits a state to vindicate its

---

Although separate inquiries, Congress largely equated the test for venue with that of personal jurisdiction when it amended the general venue statute in the Judicial Improvements Act of 1990. Pub. L. No. 101-650, 104 Stat. 5114 (codified as amended at 28 U.S.C. § 1391 (Supp. IV 1992)). *See generally* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991) (discussing the changes made by the Judicial Improvement Acts). Prior to this recent conflation of the two standards, their separateness was more evident. The pre-1990 version of § 1391(a), for example, permitted venue in diversity cases "in the judicial district where all plaintiffs . . . reside." Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (amended 1990). Consequently, before 1990 a federal district court often had proper venue based on the plaintiff's residence even though it had no personal jurisdiction due to the defendant's lack of contacts with the forum. *See supra* note 165.

175. *See supra* notes 165-66 and accompanying text.

176. This explains why in some circuits the courts construe § 1404(a) as applicable only where the transferor court has both proper venue and personal jurisdiction, and construe § 1406(a) as applicable where the transferor court lacks either venue or personal jurisdiction. *See supra* note 165 and accompanying text. However, despite the apparent redundancy, several circuits hold that § 1404(a), as well as § 1406(a), provides the basis for a transfer of venue where the transferor court has proper venue but lacks personal jurisdiction. *See supra* note 166 and accompanying text.

177. For example, a state may adopt U.C.C. § 2A-106(2) (1991), which provides that if the forum designated in a consumer lease would not otherwise have personal jurisdiction over the lessee, the clause is unenforceable. *See* Heiser, *State Courts*, *supra* note 1, at 391. A state may also adopt a long-arm statute which applies this limitation to all consumer contracts; or a more general long-arm statute,

consumer protection policy in federal courts as well as in its own state courts. Even though *Stewart* construes section 1404(a) as displacing a state's general policy which per se voids forum selection clauses for venue transfer purposes, *Stewart* does not displace a state's personal jurisdiction limitation in federal courts. The *Stewart* Court's holding is fully operative where the transferor court has some basis for personal jurisdiction independent of the forum selection clause or where the applicable state long-arm statute authorizes personal jurisdiction based solely on the clause. But, the flexibility to retain a case under section 1404(a), as opposed to transfer it, is eliminated where the transferor court lacks personal jurisdiction due to limitations imposed by the relevant state long-arm statute.[178]

This *Erie*-mandated use of state personal jurisdiction restrictions complicates the role of forum selection clauses in section 1404(a) transfer motions, thereby complicating the simplicity the Supreme Court sought in *Stewart*. This complication, at least for those who favor principles of uniformity and simplicity, is disadvantageous as it sacrifices both principles. However, after *Carnival Cruise*, the benefits of the *Erie*-mandated use of state personal jurisdiction restrictions are obvious. A state seeking to protect defendant consumers from unfettered enforcement of forum selection clauses can do so through the vehicle of personal jurisdiction legislation.[179] Additionally, despite *Stewart* and *Carnival Cruise*, such

---

as in Florida, designed to protect all defendants by making forum selection clauses unenforceable absent an independent statutory basis for personal jurisdiction. *See id.* at 389-90.

178. The interplay between personal jurisdiction and § 1404(a) also has choice of law ramifications. A federal court sitting in diversity, when determining the substantive law that governs the case, must apply the choice of law doctrine of the state where the federal court is located. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). After a case is transferred pursuant to § 1404(a) from one permissible federal district to another in a different state, the transferee court must apply the choice of law doctrine of the transferor court's state, regardless of who initiates the transfer. Ferens v. John Deere Co., 110 S. Ct. 1274, 1284 (1990) (transfer initiated by a plaintiff); Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (transfer initiated by a defendant). This choice of law transfer rule applies where the action was commenced in a district court where both personal jurisdiction and venue were proper. However, if either personal jurisdiction or venue was not present in the transferor court, then the choice of law doctrine of the transferee court's state applies, regardless of who initiates the transfer or whether the transfer is pursuant to § 1404(a) or § 1406(a). *See* Gonzales v. Volvo of Am. Corp., 734 F.2d 1221, 1227-29 (7th Cir. 1984); *Ellis*, 646 F.2d at 1107.

A state's limitation on the conferral of personal jurisdiction by a forum selection clause therefore affects not only choice of forum but also the applicable substantive law. What substantive law governs is obviously important to all concerned, whether consumers or commercial parties. Of course, parties may eliminate these choice of law problems by inclusion of a governing law clause in the contract. *See* Moses v. Business Card Express, 929 F.2d 1131, 1139-40 (6th Cir. 1991); Gruson, *supra* note 47, at 133; Michael Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements—New York's Approach*, 1982 U. ILL. L. REV. 207.

179. Such state-endorsed protection, because it is based on personal jurisdiction, is limited to defendants. Consequently, this protection would not benefit plaintiffs, such as the consumer plaintiffs in *Carnival Cruise*, who are compelled by a mandatory forum selection clause to commence litigation in the contractually designated forum. *Carnival Cruise*, 111 S. Ct. at 1528.

protection will generally apply in a federal court as well as in state court cases.[180]

E. *Forum Selection Clauses and Section 1406(a)*

The *Stewart* Court did not directly deal with a section 1406(a) motion to dismiss or venue transfer. Section 1406(a) applies where the initial forum is improper because it lacks venue or personal jurisdiction.[181] Unlike section 1404(a), when section 1406(a) applies the filing court has no discretion to retain the case. The court must either dismiss or transfer the case to a district possessing proper venue and personal jurisdiction.[182] The focal inquiry in a section 1406(a) motion is whether the initial filing court lacks either venue or personal jurisdiction.

The hypothetical below illustrates that a forum selection clause may complicate a section 1406(a) determination in several ways. Assume that the parties have entered into a valid commercial contract designating courts in Alabama as the appropriate forum to resolve contract disputes. A contract dispute arises, and plaintiff files in a federal district court sitting in Alabama. Defendant files a motion to dismiss pursuant to section 1406(a) because, except for the forum selection clause, no basis exists for venue or personal jurisdiction over defendant in Alabama.[183]

---

180. This is certainly true as to diversity jurisdiction cases, and federal question cases where personal jurisdiction is not governed by a special federal long-arm statute. *See supra* notes 147-50 and accompanying text. Because *Bremen* and *Carnival Cruise* were both admiralty jurisdiction cases, the effect of such state long-arm limitations on forum selection clauses in other admiralty cases is less clear. *Carnival Cruise*, 111 S. Ct. at 1524; *Bremen*, 407 U.S. at 3-4. However, even the *Carnival Cruise* Court recognized that basic personal jurisdiction issues should be resolved by reference to state long-arm statutes. *Carnival Cruise*, 111 S. Ct. at 1525.

181. 28 U.S.C. § 1406(a) (1988). Section 1406(a) states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *Id.*

The lower federal courts have construed the "laying venue in the wrong division or district" language of § 1406(a) to apply when the initial filing court lacks venue, and when venue is proper but personal jurisdiction is lacking. *See* Porter v. Groat, 840 F.2d 255, 257-58 (4th Cir. 1988); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 79-80 (2d Cir. 1978); Taylor v. Love, 415 F.2d 1118, 1120-21 (6th Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970); Mayo Clinic v. Kaiser, 383 F.2d 653, 655-56 (8th Cir. 1967); Dubin v. United States, 380 F.2d 813, 816 (5th Cir. 1967). These courts cited and relied on Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962). Likewise, many lower federal courts have construed § 1404(a) as applying when the transferor court has proper venue but lacks personal jurisdiction. Thus, some courts find that § 1404(a) and § 1406(a) may overlap. *See supra* note 165. Generally, however, only § 1404(a) applies when the transferor court possesses proper venue and personal jurisdiction. *See supra* note 38.

182. *See supra* notes 37, 181.

183. This hypothetical is somewhat unrealistic. Given Alabama's well-known and almost singular state doctrine invalidating forum selection clauses, it is unlikely a forum selection clause would specify Alabama as the exclusive forum. *But see* American Performance, Inc. v. Sanford, 749 F. Supp. 1094, 1094 (M.D. Ala. 1990) (holding that a forum selection clause designating Alabama state court as the

This hypothetical raises the same basic issue raised in *Stewart*: Does Alabama state law or federal law apply in determining the weight the court must give to the forum selection clause? If Alabama state law applies, the clause will be invalid and the federal district court sitting in Alabama will lack venue and personal jurisdiction. If federal law applies, a different view of the clause may prevail. The central *Erie* inquiry here, as in *Stewart*, is whether section 1406(a) is broad enough to cover the point in dispute.

This is a knotty problem. If the defendant had simply filed a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), state law would apply in determining the validity of the forum selection clause.[184] Did Congress intend a different result in enacting section 1406(a)? There is no indication that Congress intended section 1406(a) to provide a federal statutory basis for personal jurisdiction.[185] State law would therefore apply.[186] Consequently, in our hypothetical, the federal district court sitting in Alabama would lack personal jurisdiction despite the forum selection clause because the clause is void per se under Alabama law, and a section 1406(a) disposition would be necessary.

As to venue, the analysis is more difficult. The relevant inquiry is whether Congress intended section 1406(a) to federalize contractual venue waivers by forum selection clause. This seems unlikely, when the language of section 1404(a) is compared to the language of section 1406(a). Section 1406(a) contains no reference to the convenience of the parties which might indicate congressional intent to federalize the convenience factors. In other words, section 1406(a) appears to evidence a congressional intent to authorize transfer as opposed to dismissal but evidences no intent to broaden venue beyond what other federal venue statutes provide.[187] Thus, in the rare case where there is no federal statutory basis for venue and applicable state law invalidates a forum selection clause,[188]

---

exclusive forum is valid); White-Spunner Constr. v. Cliff, 588 So. 2d 865, 866 (Ala. 1991) (holding that a forum selection clause specifying Alabama law as governing and Alabama court as the exclusive forum is valid). A contract could, however, contain a clause in which the parties consent to suit in Alabama. Such a permissive clause presents the same § 1406(a) problem. More realistically, a contract could designate forums in a state whose long-arm statute does not recognize forum selection clauses as waiving statutory requirements for personal jurisdiction. *See* Heiser, *State Courts*, *supra* note 1, at 389-90.

184. *See supra* notes 157-63 and accompanying text.

185. *See supra* note 181.

186. *See supra* notes 157-63 and accompanying text.

187. Venue is determined by 28 U.S.C. § 1391 (1988 & Supp. IV 1992). Generally speaking, pursuant to § 1391(a)-(c), a civil action may be brought in any judicial district where the defendant resides or is subject to personal jurisdiction, or in which a substantial part of the events giving rise to the claim occurred. *Id.*

188. A complication in this hypothetical occurs when the contract also contains a governing law clause, and the designated state law would enforce the forum selection clause. This is another variation

the original filing forum—the contractually designated forum—must dismiss or transfer under section 1406(a).[189] This hypothetical is, however, far more theoretical than others discussed in this article. The likelihood of a federal court lacking venue and of the forum selection clause designating one of the few jurisdictions voiding such clauses is indeed small.

The following section 1406(a) scenario is more likely. The parties enter into a forum selection clause designating New York as the exclusive forum for contract adjudication. A dispute arises, and plaintiff files in Alabama state court to avoid the clause. Defendant removes to federal court and seeks a section 1406(a) dismissal or transfer. The basis for this motion is that venue is laid in the "wrong district" because the exclusive clause designates New York as the only forum for appropriate venue and jurisdiction. The defendant has sufficient contacts with Alabama to give the federal district court sitting in Alabama both personal jurisdiction and section 1391(c) venue. Despite these contacts, is venue laid in the "wrong district" because of the exclusive forum selection clause?

The easy answer is to conclude, based on *Stewart*, that the Alabama court has federal statutory venue and personal jurisdiction and does not lose it due to the forum selection clause. In *Stewart*, the defendant also raised a section 1406(a) motion on precisely the grounds outlined above.[190] The *Stewart* Court observed that "[t]he parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama. See 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business)."[191] The quotation above is probably dicta because the parties did not raise the issue. The opinion is unclear as to whether the Court was simply noting that the issue was not raised or was indicating, by its reference to section 1391(c), that federal venue was proper. By discussing section 1404(a),[192] however, the Court must have intended to indicate that the forum selection clause did not make venue improper in Alabama.

This venue issue cannot, however, be dismissed so easily. Section 1406(a) contains language different than section 1404(a). Section 1406(a) does not say that it applies where the court lacks venue or personal jurisdiction, but takes a more circuitous statutory route. Section 1406(a) applies

---

of the general question of what law applies when there is a choice of law clause. *See supra* notes 124, 132.

189. With respect to the question of whether the forum selection clause provides a basis for venue (as opposed to personal jurisdiction) for purposes of § 1406(a), a federal court may have authority to resolve this issue by formulating federal common law. *See supra* notes 28, 159.

190. *Stewart*, 487 U.S. at 24.

191. *Id.* at 28 n.8.

192. *Id.* at 28-32.

where a case is filed "laying venue in the wrong division or district."[193] Certainly a forum selection clause specifying New York as the exclusive forum fits neatly into this language even though the Alabama court has statutory venue and personal jurisdiction. Although the Alabama court has venue, the case is simply in the "wrong district" because of the exclusive forum selection clause.[194]

The *Erie* doctrine further complicates the analysis. If the federal court applies Alabama law, the forum selection clause is invalid. If the federal court applies federal law upholding the clause, section 1406(a) applies. The consequences of these alternatives are dramatic. Assume the plaintiff files the case in any federal court sitting in a state which upholds the forum selection clause but not in the contractually designated exclusive forum. If section 1406(a) applies, the court must dismiss or transfer to the contractually specified forum; the court cannot *retain* the case. This runs counter to the court's discretion to retain or transfer in section 1404(a), which the Court found overriding in *Stewart*.[195]

If this interpretation of section 1406(a) were followed, then whenever a section 1404(a) motion is appropriate to enforce a forum selection clause, a section 1406(a) motion would likewise be proper. Because the section 1406(a) motion gives the court no discretion to retain the case, it must dismiss or transfer. Consequently, for most such cases, the section 1404(a) motion becomes irrelevant.[196] The flexibility to transfer or retain under section 1404(a) likewise becomes irrelevant.

Because this interpretation of section 1406(a) would essentially eliminate use of section 1404(a), it is unlikely the Supreme Court would so interpret section 1406(a). Instead, the Court is likely to construe section 1406(a) to apply only where the initial court lacks either statutory venue or personal jurisdiction. The Court would likely not apply section 1406(a) where the initial court does have both but is not the contractually mandated forum. In other words, the dicta in *Stewart* is the likely resolution of this issue by the Supreme Court, rather than a mere indication by the Court that the parties failed to raise the issue.[197]

---

193. 28 U.S.C. § 1406(a) (1988).

194. *See supra* note 181. A few pre-*Stewart* district courts have construed § 1406(a) in this manner. *See* Grossman v. Citrus Assoc., 706 F. Supp. 221, 232-33 (S.D.N.Y. 1989); D'Antuono v. CCH Computax Sys., 570 F. Supp. 708, 710 (D.R.I. 1983); Hoffman v. Borroughs, Corp., 571 F. Supp. 545, 550 (N.D. Tex. 1982). For recent cases holding the contrary, see *infra* note 197.

195. *Stewart*, 487 U.S. at 29-31.

196. The use of § 1406(a) instead of § 1404(a) to effect transfer has significant choice of law consequences. After a § 1406(a) transfer, the transferee court must apply the choice of law rules of the state where the transferee court is located. *See Ellis*, 646 F.2d at 1110; *Martin*, 623 F.2d at 472. After a § 1404(a) transfer from a district which has both personal jurisdiction and venue, the transferee court must apply the choice of law rules of the transferor court. *See supra* note 178.

197. *Stewart*, 487 U.S. at 28 n.8. The lower federal courts interpret *Stewart*'s footnote eight refer-

Is this a proper ruling? The key is the intent of Congress behind the words "laying venue in the wrong district." The Supreme Court has already liberally construed these words to apply to any obstacle in the filing court which "may impede an expeditious and orderly adjudication of cases and controversies on their merits."[198] A reasonable interpretation of wrong district would include a district which is wrong because of an exclusive forum selection clause which designates a different district. This use of section 1406(a) would provide an expeditious mechanism for federal court enforcement of forum selection clauses.

However, in light of the *Stewart*'s Court's interpretation of section 1404(a), such use of section 1406(a) makes little practical sense from a policy perspective. If section 1406(a) required federal district *A* to automatically transfer a case to the contractually mandated federal district *B*, or dismiss the case, any efficiency seems illusory. District court *B* could still entertain a motion by the plaintiff or defendant to retransfer the case back to district *A* pursuant to section 1404(a). Despite the existence of the exclusive forum selection clause designating district *B*, the plaintiff is not precluded from seeking a section 1404(a) venue transfer back to district *A* according to *Stewart*.[199] The public interest factors incorporated into sec-

---

ence to § 1406(a) in this manner. *See* Crescent Int'l v. Avatar Communities, 857 F.2d 943, 944 n.1 (3d Cir. 1988); National Micrographics Sys. v. Canon U.S.A., Inc., 825 F. Supp. 671, 679-80 (D.N.J. 1993); Creditors Collection Bureau, Inc. v. Access Data, Inc., 820 F. Supp. 311, 312 (W.D. Ky. 1993); Southern Distrib. Co. v. E. & J. Gallo Winery, 718 F. Supp. 1264, 1267 (W.D.N.C. 1989); Page Constr. Co. v. Perini Constr., 712 F. Supp. 9, 11 (D.R.I. 1989); TUC Elecs. v. Eagle Telephonics, 698 F. Supp. 35, 38 (D. Conn. 1988).

198. *Goldlawr*, 369 U.S. at 466-67. Section 1406(a), when originally enacted in 1948, provided only a statutory sanction for transfer instead of dismissal when venue was improperly laid. Judiciary and Judicial Procedure, ch. 646, 62 Stat. 937 (1948). However, § 1406(a) was amended in 1949 to its current form, to authorize dismissal as well as transfer. Judiciary and Judicial Procedure, ch. 139, § 81, 63 Stat. 101 (1949) (codified as amended at 28 U.S.C. § 1406 (1988)). Apparently, the purpose of this amendment was to prevent abuse by plaintiffs who deliberately brought suit in a district court which lacked venue but where the plaintiff could properly serve the defendant. When the question of venue was raised, the court was required to transfer. However, in the meantime, service had been perfected on the defendant in the wrong venue, and would carry over into the new, and proper, venue. Rather than promote justice, this use of the 1948 act was viewed as causing abuse. S. REP. NO. 303, 81st Cong., 1st Sess. 6 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1253.

The *Goldlawr* Court on the basis of this legislative history, declined to give § 1406(a) a restrictive interpretation. The Court stated:

> The problem which gave rise to the enactment of . . . [§ 1406(a)] . . . was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn.

Goldlawr, 369 U.S. at 466. Some lower courts have even extended *Goldlawr*'s ruling to permit the use of a § 1406(a) transfer when both proper venue and personal jurisdiction are present, but the statute of limitations applicable in the filing court may be used to bar adjudication on the merits. *See* Porter v. Groat, 840 F.2d 255 (4th Cir. 1988).

199. *See supra* notes 75-89 and accompanying text.

tion 1404(a) may still point toward district court *A* as the appropriate forum to hear the case.[200]

Such "transfer of venue ping-pong" seems inefficient and unwise.[201] A better result would be to interpret section 1406(a) as not requiring automatic transfer or dismissal based on the forum selection clause in such situations, but as permitting only a discretionary motion to transfer pursuant to section 1404(a). For this practical post-*Stewart* policy reason, as well as the others discussed above, a court should not interpret section 1406(a)'s "wrong district" language to encompass an otherwise proper district which happens to not be the contractually mandated court.

F. *Forum Selection Clauses and Removal Jurisdiction*

A final question deals with forum selection clauses and removal jurisdiction. Pursuant to 28 U.S.C. § 1441(a), a defendant may remove a case initiated in state court to the federal district court sitting in the place where such action is pending.[202] Procedurally, when a defendant files a petition for removal in the federal court, the action is automatically removed from state court.[203] If the plaintiff wishes to challenge the propriety of the removal, she must then file a motion to remand back to the state court pursuant to section 1447.[204]

Some forum agreements designate a specific state court as the exclusive forum to adjudicate contract disputes. Will the federal courts enforce these provisions or does the removal statute embody a nonwaivable right to be heard in federal court? This question is potentially more difficult than personal jurisdiction and venue issues because removal jurisdiction

---

200. *See supra* notes 88-98 and accompanying text.

201. *See* Moses v. Business Card Express, 929 F.2d 1131, 1137 (6th Cir.), *cert. denied*, 112 S. Ct. 81 (1991) (noting the possibility of forcing a case into perpetual litigation by playing "jurisdictional ping-pong"); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 482-87 (1990) (stating multiple venue transfer considerations are counterproductive, unfair to the parties, and an unnecessary expense).

202. 28 U.S.C. § 1441(a) (1988). The United States District Court must, of course, have original subject matter jurisdiction of the civil action. *Id.* In an action not founded on federal question jurisdiction, such action is removable only if none of the defendants is a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b) (1988).

203. The defendant must file a notice of removal in the district court, accompanied by a statement of the grounds for removal and copies of any pleadings, within thirty days after receiving the complaint or summons. 28 U.S.C. § 1446(a)-(b) (1988). Promptly after filing such petition for removal and a bond, the defendant must give notice to all adverse parties and file a copy with the state court, "which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d) (1988 & Supp. IV 1992).

204. 28 U.S.C. § 1447 (1988). Plaintiff must make a motion to remand the case on the basis of a defect in removal procedure within thirty days after the defendant's filing of the notice of removal. 28 U.S.C. § 1447(c) (1988). However, the court shall remand at any time before final judgment if it appears that the district court lacks subject matter jurisdiction. *Id.*

implicates subject matter jurisdiction.[205]

Generally, the federal courts will enforce forum selection clauses which specify adjudication in state, rather than federal, court.[206] These federal courts view the right to removal as a waivable statutory right; a right the defendant can waive in advance by contract.[207] This view seems generally correct. The right to remove is waivable in the sense that if the defendant does not petition for removal, the case will remain in state court. Neither the plaintiff nor the court on its own motion can remove. Although federal subject matter jurisdiction embodies an Article III and a federal statutory limitation on federal courts often referred to as "nonwaivable,"[208] this characterization is not inconsistent with the view that the right to remove is waivable. Parties to an action cannot confer subject matter jurisdiction on a federal court by consent when such jurisdiction is otherwise lacking, and, in that sense, cannot waive the Article III and federal statutory requirements by failing to challenge jurisdiction.[209] But certainly they can do the converse. The parties can waive their Article III and federal statutory right to be heard in federal court by agreeing not to exercise federal jurisdiction although it is available.[210]

Despite such an agreement, if a defendant actually files a petition for removal, the case must be removed to federal court.[211] The question then becomes: Does the federal court have the authority to remand the case back to the state court to effectuate the forum agreement? The answer to this question is more complicated than simply acknowledging that removal

---

205. The federal removal statutes, §§ 1441-1452, not only provide the procedure for removal and remand, but also provide a basis for federal subject matter jurisdiction. *See* Terral v. Burke Constr. Co., 257 U.S. 529, 531-33 (1922).

206. *See* Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir. 1992); Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1214 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991); Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990); Morgan v. National Distillers & Chem. Corp., 900 F.2d 890, 894 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990). For a discussion of the arguments against enforcing such clauses, see Mullenix, *supra* note 7, at 339-46.

207. *See supra* note 206 and accompanying text.

208. *See Insurance Corp.*, 456 U.S. at 702.

209. California v. LaRue, 409 U.S. 109, 112 n.3 (1972).

> Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an "actual controversy" within the meaning of . . . Art. III.

Id.; *accord Insurance Corp.*, 456 U.S. at 702.

210. In a similar context, the Supreme Court indicated that the Article III right to have a case heard before a federal court, as opposed to an Article I tribunal, is, in part, a personal right waivable by the parties. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-49 (1986); *see also* Peretz v. United States, 111 S. Ct. 2661, 2669-71 (1991) ("We have previously held that litigants may waive their personal right to have an Article III judge preside over a civil trial.").

211. *See supra* note 203 and accompanying text.

is a waivable statutory right. The authority to remand is statutory.[212] The Supreme Court has indicated that a federal district court has no power to remand unless specifically authorized to do so by the remand statute.[213] The statutory authority to remand is limited to instances where "it appears that the district court lacks subject matter jurisdiction" or where there is a "defect in the removal procedure."[214] The issue then becomes one of statutory construction. Does the federal district court lack subject matter jurisdiction because a forum selection clause designates state court? Does removal in contravention of such a clause constitute a defect in the removal procedure?[215]

A case is generally removable to federal court under section 1441(a) if the federal courts would have had "original jurisdiction" to hear it initially. A diversity case that the plaintiff could have filed in federal court, for example, can be removed pursuant to section 1441(a).[216] Once removed, the federal court has statutory authority to remand under the second sentence of section 1447(c) if the federal court actually lacks subject matter jurisdiction.[217] Does the existence of a forum selection clause exclusively designating state court deprive the federal court of subject matter jurisdiction?[218] No, not according to the Supreme Court in *Bremen*. The federal

---

212. The grounds and procedure for remand to the state court where the action was filed is set forth in 28 U.S.C. §§ 1441(c), 1447 (1988 & Supp. IV 1992). If the defendant requests the federal court to enforce a forum selection clause that mandates a state court other than the court in which the plaintiff filed, the appropriate procedure is a motion to dismiss. *See American Performance*, 749 F. Supp. at 1096 (dismissing the federal action because of a failure to state a claim); Hammond N. Assocs. v. ABG Fin. Servs., 708 F. Supp. 334, 336 (S.D. Fla. 1989) (forum non conveniens dismissal); *TUC Elecs.*, 698 F. Supp. at 39-40 (providing for forum non conveniens dismissal to enforce a forum selection clause mandating state court in another state).

213. *See* Thermtron Prods. v. Hermansdorfer, 423 U.S. 336 (1976). In *Thermtron*, the Supreme Court held improper a district court's remand of a properly removed case to state court on the ground that the federal docket was overcrowded, noting that "[l]ower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute." *Id.* at 345 n.9. *Thermtron* was later distinguished by the Supreme Court as being a case where the district court lacked authority to dismiss a properly removed case because the district court had diversity jurisdiction, which is not discretionary. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 356 (1988).

214. 28 U.S.C. § 1447(c) (Supp. IV 1992). Section 1441(c) also authorizes discretionary remand of separate and independent state law claims joined with federal question actions when issues of state law predominate. The precise meaning of this provision is unclear, but the statute appears inapplicable to forum selection clause remands without showing that the clause is unreasonable, unfair, or unjust. *See Bremen*, 407 U.S. at 1.

215. 28 U.S.C. § 1447(c) (Supp. IV 1992).

216. 28 U.S.C. § 1441(a) (1988). For example, a diversity case that could have originally been brought in federal court may be removed pursuant to § 1441(a), subject, of course, to the limitation set forth in § 1441(b). *See supra* note 203.

217. The second sentence of § 1447(c) reads: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (Supp. IV 1992).

218. *Bremen*, 407 U.S. at 12.

court is not ousted of jurisdiction; the court simply declines to exercise it.[219]

Does removal despite the clause constitute a defect in the removal procedure? Although courts are split on this issue, several circuits have interpreted section 1447(c) literally by denying motions to remand because of forum selection clauses.[220] However, the legislative history behind this 1988 amendment to section 1447(c) suggests that Congress intended the "defective procedure" language to apply to all motions for remand except those based on lack of subject matter jurisdiction.[221] If this latter interpretation is proper, section 1447(c) authorizes a remand to effectuate a forum selection clause if the motion to remand is filed within the thirty-day time limitation.[222] But if the plain meaning of section 1447(c)'s language governs, the statute does not appear to authorize a remand on such a basis.

The conclusion that the federal court has no authority to remand, but only authority to dismiss or abstain, is not likely.[223] The Supreme Court

---

219. *Id.*

220. The court in Foster v. Chesapeake Ins. Co., 933 F.2d 1207 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991), construed this portion of § 1447(c) to mean what it says, and to authorize remand only on the basis of a defect in the removal procedure. *Id.* at 1213. Consequently, the *Foster* court did not construe § 1447(c) to authorize a remand to effectuate a forum selection clause. *Id.*; *see also* Melahn v. Pennock Ins., 965 F.2d 1497, 1503 (8th Cir. 1992) (following *Foster* with respect to remand based on abstention).

The Fifth Circuit adopts a contrary interpretation of § 1447(c) by steadfastly construing any defect in removal procedure to include any nonjurisdictional objections that existed at the time of the removal. Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783, 787 (5th Cir. 1993) (citing *In re* Shell Oil Co., 932 F.2d 1518, 1522 (5th Cir.), *cert. denied*, 112 S. Ct. 914 (1991)). If the defect is not raised by a motion to remand within 30 days of removal as required by § 1447(c), the objection is waived. *Id.* Examples of this construction of defective procedure include cases where a petition for removal was filed after the 30 day time limit of § 1446(b). *See, e.g.*, Belser v. St. Paul Fire & Marine Ins. Co., 965 F.2d 5, 8 (5th Cir. 1992) (removing a state worker's compensation action in contravention of § 1445(c)); Tennessee Gas Pipeline Co. v. Continental Casualty Co., 814 F. Supp. 1302 (M.D. La. 1993) (removing an action in contravention of a forum selection clause). The main consequence of the Fifth Circuit's interpretation, as opposed to that of *Foster*, is that the forum selection clause must be asserted within 30 days after remand or it will be considered waived. *See infra* notes 224-31 and accompanying text.

221. H.R. REP. NO. 889, 100th Cong., 2d Sess. 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033. For a discussion of this legislative history, see *Foster*, 933 F.2d at 1212.

222. 28 U.S.C. § 1447 (Supp. IV 1992). Section 1447 provides in relevant part: "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)." *Id.*

223. This distinction between remand and dismissal may be significant when the statute of limitations comes into play. If the federal court dismisses, the plaintiff may be precluded from refiling in the state court if the limitation period has expired. Consequently, the plaintiff will be unable to pursue her claim in any forum. This is not likely to be a problem if sufficient time is left in the limitation period. A petition to remove must be made by the defendant within 30 days of service. 28 U.S.C. § 1446(b) (1988). Presumably, a plaintiff will act quickly after removal to enforce the forum selection clause. Nevertheless, by the time the court rules on the plaintiff's motion the applicable statute of limitations

recently took a more generous view of federal court authority to remand in *Carnegie-Mellon University v. Cohill*.[224] In *Carnegie-Mellon*, the Court indicated that a federal court could remand to state court even when not expressly authorized to do so by section 1447.[225]

The plaintiff in *Carnegie-Mellon* filed a complaint in state court alleging a federal claim and a related state claim.[226] The defendant properly removed both claims to federal court based on section 1441(a) and pendant jurisdiction.[227] Subsequently, the plaintiffs dismissed their federal claim, and moved to remand the pendant state claim to state court.[228] The district court, exercising its discretion to decline to exercise jurisdiction over the pendant state claim, granted the motion to remand.[229] The Supreme Court approved this remand, as opposed to a dismissal, although not specifically authorized by the removal statutes.[230] The Court reasoned that the district court had the power to decline to exercise jurisdiction over the pendant state claim and that congressional silence should not be construed to limit the federal court's authority to remand under such circumstances.[231]

The situation in *Carnegie-Mellon* is analogous to the typical forum selection clause case designating a state court forum. The federal court has original jurisdiction and could exercise it, but declines to do so because of the clause. Using *Carnegie-Mellon* as authority, the federal court should have authority to remand. Thus, as a general proposition, federal courts should enforce forum selection clauses by remand after removal. This general proposition is subject to caveats and limited exceptions.

One caveat involves the content of the forum selection clause. Although the right to remove is a waivable right, many courts require that the clause carefully express the intent to waive this right.[232] The forum selection clause must demonstrate the parties' intent to litigate exclusively in state court. For example, a clause which merely consents to jurisdiction and venue in a state court will not necessarily preclude removal to federal

---

may well have expired, making remand a necessity if the forum selection clause is to be enforced.

224. 484 U.S. 343 (1988).

225. *Id.* at 348.

226. *Id.* at 345.

227. *Id.*

228. *Id.* at 346.

229. *Id.*

230. *Id.* at 357.

231. *Id.* at 355-57. The court distinguished *Thermtron* as a case where the district court lacked authority to decline diversity jurisdiction, and therefore no authority to remand absent a statutory directive. *Id.* at 356. The *Carnegie-Mellon* Court also noted that remand, as opposed to dismissal, of a pendant state claim better accommodates the values of economy, convenience, fairness, and comity which underlie the pendant jurisdiction doctrine. *Id.* at 357.

232. *See* Mullenix, *supra* note 7, at 298 n.18 (citing numerous examples).

court.[233] Likewise, a clause which specifies an exclusive geographic location may not prevent removal.[234] Only where the clause evidences an intent to have the case heard in state court, and only state court, will removal be precluded.[235] In other words, the clause must exclusively mandate state court as the appropriate forum.[236]

Many courts have converted this simple drafting prerequisite into a more formalized standard which requires that the clause "clearly and unequivocally" reveal an intent to waive the right to remove.[237] To the extent this standard means that something more stringent than the ordinary methods of contract construction and interpretation should apply to antiremoval clauses, the heightened standard seems inappropriate, unless Congress intended to place the statutory right of removal on a more favored status than other similar statutory and constitutional rights. There is no indication that Congress, in making the federal courts available through the removal statutes, expressed a general policy preferring federal forums to state forums for resolving private disputes.[238]

---

233. *See, e.g.*, Regis Assocs. v. Rank Hotels (Management), 894 F.2d 193, 194 (6th Cir. 1990) (remanding despite a contract clause stating "the parties hereby submit to the jurisdiction of the Michigan Courts"); Proyectin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 397 (2d Cir. 1985).

234. Courts have held removal to federal court permissible despite existence of such a clause. *See* Links Design, Inc. v. Lahr, 731 F. Supp. 1535, 1536 (M.D. Fla. 1990) (contract stating that "the proper venue for . . . [any legal] action shall be Polk County, Florida"); John's Insulation, Inc. v. Siska Constr. Co., 671 F. Supp. 289, 291 (S.D.N.Y. 1987) (contract clause providing that "any action hereunder shall be commenced in the Supreme Court of the State of New York"). *Contra* Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1343 (10th Cir. 1992) (interpreting a contract clause providing that "*venue shall be proper under this agreement in Johnson County, Kansas*" to preclude removal).

235. *See supra* notes 233-34. For additional case citations, see generally CASAD, *supra* note 91, § 3.01[5][a], at 3-85 n.272; Mullenix, *supra* note 7, at 339-45 nn.253 & 283.

236. The forum selection clause designating state court must be mandatory and exclusive, and not permissive or nonexclusive. *See* Heiser, *State Courts, supra* note 1, at 361; Mullenix, *supra* note 7, at 298 n.18 (citing numerous case examples).

237. *See Regis Assocs.*, 894 F.2d at 195; Capital Bank & Trust Co. v. Associated Int'l Ins. Co., 576 F. Supp. 1522, 1524 (M.D. La. 1984).

238. *See Foster*, 933 F.2d at 1216. Likewise, the majority in Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656 (2d Cir. 1988) applied ordinary principles of contract interpretation to the following contract clause: "No action or proceeding shall be commenced by [Koch] against [NYCCDC] except in the Supreme Court of the State of New York, County of New York." *Id.* at 658. The court concluded that the parties intended to preclude removal. *Id.* at 659. The dissent argued to allow removal because the clause did not clearly and expressly manifest an intent to waive the right to remove. *Id.* at 660-61.

The Court in *Foster* distinguished many of the remand cases applying the "clear and unequivocal" contract interpretation standard as ones removed pursuant to § 1441(d). *Foster*, 933 F.2d at 1217-18 n.15 (discussing *In re* Delta Am. Re Ins. Co., 900 F.2d 890 (6th Cir. 1990)). Section 1441(d) is "a part of the Foreign Sovereign Immunities Act (FSIA) which extends removal to actions brought against foreign states and which permits the foreign state to demand a non-jury trial once in federal court." *Id.* These cases recognized that the purpose of the FSIA in general, and § 1441(d) in particular, is the development of a uniform body of sovereign immunity doctrine in the federal courts. *Id.* Be-

A second caveat concerns the *Erie* doctrine. Not only must a forum selection clause be carefully worded to waive the defendant's right to remove, but a clause so drafted must also be enforceable.[239] The same *Erie* concern returns, *i.e.*, whether federal or state law governs the determination of the clause's enforceability. The issue may be of little concern where the potentially applicable state law is similar to the federal standards announced in *Bremen* and *Carnival Cruise*. However, as previously noted, not every state has adopted the *Bremen* standards.[240] Moreover, many states that have adopted the *Bremen* standards are unlikely to apply them to consumer contracts in the manner these standards were applied by the Supreme Court in *Carnival Cruise*.[241]

The federal removal statutes do not appear "sufficiently broad to control the issue" of forum selection clause enforceability.[242] The removal statutes set forth the extent of the jurisdictional right to removal and remand and the procedure before and after removal.[243] Unlike section 1404(a), nothing in the language of these statutes indicates any concern "[f]or the convenience of parties and witnesses"[244] or "the interests of justice"[245] which the courts might broadly construe to govern forum selection clauses. Moreover, the purpose of these statutes is to provide defendant with the option of a federal forum in certain civil actions where defendants may have historically experienced bias in state court.[246] This purpose has nothing to do with the concerns for convenience, fairness, and

---

cause the FSIA represents a drastic departure from the previously long-standing rule granting foreign sovereigns absolute immunity, this doctrine includes the unqualified right to remove to federal court and avoid a state court jury trial. *Id.* In enacting the FSIA, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 497 (1983). In light of the congressional preference for federal court expressed in § 1441(d), requiring a clear and unequivocal contractual waiver of the right to remove seems appropriate for FSIA cases, but not generally for other civil actions. *See* Welborn v. Classic Syndicate, Inc., 807 F. Supp. 388, 390-91 (W.D.N.C. 1992) (following *Foster* the court held that forum selection clause removal waivers in general civil actions need not be clear and unequivocal); Michael E. Solimine, *Forum-Selection Clauses and the Privitization of Procedure*, 25 CORNELL INT'L L.J. 51, 89-90 (1992).

239. The forum selection clause must be enforceable as in the *Bremen* standards, and must be valid based on contract formation principles.

240. *See* Heiser, *State Courts, supra* note 1, at 371.

241. *Id.* at 374-76.

242. *See supra* notes 49-74 and accompanying text (discussing the *Erie* doctrine and *Stewart*).

243. 28 U.S.C. §§ 1441-1452 (1988 & Supp. IV 1992).

244. 28 U.S.C. § 1404(a) (1988).

245. *Id.*

246. *See* Mullenix, *supra* note 7, at 344-45. This policy is offset by the notion that removal of civil cases to federal court infringes state sovereignty consequently, the courts should construe the removal statute to resolve all doubts in favor of remanding the case to state court. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); Abels v. State Farm Fire & Casualty Co., 770 F.2d 26 (3d Cir. 1985).

certainty implicated in enforcement of forum selection clauses.

Consequently, the question again boils down to a choice between federal common law and state law based on a "twin aims" analysis.[247] If the federal *Bremen* doctrine applies, the forum selection clause will be enforced and the federal court will remand the action to state court.[248] Alternatively, if state law applies and voids forum agreements per se, the federal court will ignore the forum selection clause and the action will remain in federal court. Application of federal judge-made law in such cases does not appear to encourage forum shopping by the defendant or result in the inequitable administration of the laws.[249]

A different twin aims conclusion is likely where the forum selection clause designates an exclusive state court forum other than the state court in which the plaintiff filed the action. In such circumstances the federal *Bremen* doctrine, if applied after removal, would enforce the mandatory clause through a motion to dismiss for forum non conveniens.[250] But state law voiding the forum agreement per se, if applied, would invalidate the clause and permit the action to remain in the federal court after removal. The difference in treatment may be sufficient to encourage forum shopping by defendants and result in inequitable administration of the removal and forum selection clause laws.[251] The defendant's choice of federal court through removal would permit the defendant to enforce the forum selection clause if federal law applied, a result the defendant could not obtain in the state court applying state law. Therefore, state law should

247. *See supra* notes 29-32 and accompanying text. A number of courts have simply announced that federal law governs all forum selection clause removal issues without mention of the twin aims test, perhaps because the courts perceived no conflict between the federal and relevant state law with respect to forum selection clause enforcement standards. *See* Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990); Pelleport Investors v. Budco Quality Theatres, 741 F.2d 273, 279-80 (9th Cir. 1984). The parties may avoid the need for such rulings by including a governing law clause which specifies a state's law that endorses the *Bremen* doctrine. *See* Heiser, *State Courts, supra* note 1, at 371.

248. After remand, ironically, the forum selection clause will be considered void per se by the state court and unenforceable; and consequently no bar to any attempt by the defendant to have the action heard in another court.

249. Pursuant to § 1441(b), in a diversity action removal can only occur if none of the defendants are citizens of the forum state. *See supra* note 202. The § 1441(b) distinction between defendants who may and may not remove due to their citizenship sets up a classic *Erie* concern for unfair discrimination against citizens of the forum state in diversity cases. *See supra* note 31. However, no discrimination would occur when federal law enforces the forum selection clause because the noncitizen defendant is returned to state court. *E.g. American Performance*, 749 F. Supp. at 1097.

250. *See supra* note 213.

251. *See* Rindal v. Seckler Co., 786 F. Supp. 890 (D. Mont. 1992). In *Rindal*, the plaintiff commenced an action in an United States District Court located in Montana despite a forum selection clause specifying a district court in Colorado as the exclusive forum. *Id.* at 891. The defendant sought to dismiss the action, claiming that the forum selection clause should be enforced. *Id.* The district court, after conducting a twin aims analysis, concluded that Montana state law must apply, and denied the motion to dismiss because Montana state law considers forum selection clauses void. *Id.* at 894-95.

govern the enforcement of a forum selection clause after removal in cases where the clause specifies an exclusive state court forum other than the state court in which the plaintiff chose to commence the action.

II. CONCLUSION

Nearly all states endorse the *Bremen* doctrine or something like it.[252] Consequently, enforcement of a reasonable forum selection clause in most state courts is fairly certain.[253] Three state law influences may affect such enforcement.[254] One is whether the forum selection clause is valid based on state contract formation principles.[255] A second is whether the state court has personal jurisdiction based on the clause or otherwise. A third is whether the designated forum is so inconvenient that dismissal for forum non conveniens is appropriate.[256]

Resolution of these problems in state court is fairly straightforward. The courts need only remember that the parties can contractually waive only those rights that the parties personally hold. Such rights include the individual liberty interest, which constitutes a defendant's due process, personal jurisdiction right, and the convenience of the parties and most witnesses, which constitute the major components of forum non conveniens.[257]

In most cases, a state court will enforce a valid and reasonable forum selection clause. Each state is free, however, to shape the legal influences which will affect forum selection clause enforcement through legislation or court decisions, aiming to achieve whatever policy goals the state deems appropriate. A state which wishes to protect consumers, for example, may enact personal jurisdiction legislation which restricts forum selection clause enforcement as to consumer defendants or may adopt contract formation doctrine which avoids forum selection clauses in adhesive consumer form contracts. The Supreme Court's decisions in *Bremen*, *Stewart*, and *Carnival Cruise* do not preclude a state from taking such protective measures.[258]

The same three state law influences that affect forum selection clause enforcement in state courts also affect their enforcement in the federal courts. Due to *Erie* dictates, the federal courts are subject to the first two state law influences, those of general contract formation principles and

252. *See* Heiser, *State Courts*, *supra* note 1, at 366-76.
253. *See id.* at 378-400.
254. *See id.*
255. *See id.*
256. *See id.*
257. *See id.* at 377-401.
258. *See id.* at 366-72.

statutory personal jurisdiction.[259] However, the flexible federal transfer of venue statute, section 1404(a), displaces state forum non conveniens doctrine in the federal courts. Because section 1404(a) transfers are far more discretionary than state common law dismissals, the effect of the third influence is unpredictable in federal court. After *Stewart*, a federal court may order a transfer of venue away from a contractually designated forum although a state court would not have dismissed under the same circumstances. Consequently, forum selection clause enforcement in the federal courts is unavoidably less certain than in the state courts.

The current overall forum selection clause enforcement scheme in both state and federal courts appears to be a reasonable accommodation of several competing interests. These include certainty, uniformity, and economic and contract policy on the one hand; and convenience, public policy, and fairness on the other hand. The accommodation is both reasonable and appropriate. Because nearly all states follow the *Bremen* doctrine, freely negotiated commercial forum selection clauses will be enforced. But the states are free to provide a measure of protection to consumers, to the extent each state sees fit. If these protections are part of the state's contract formation validity doctrine or of its long-arm statute, the protections will have impact in both the federal and state courts. Likewise, the flexibility of section 1404(a) venue transfers in federal court seems appropriate despite the existence of forum selection clauses. Such flexibility permits the federal courts to be sensitive not only to the parties' agreement and to state protective policies, but also to the federal court's own institutional interests and the interests of third parties and the public. The current overall scheme, although reasonable and appropriate, does result in some uncertainty of forum selection clause enforcement.

If more uniformity and certainty of forum selection clause enforcement is desired, what steps can be taken to accomplish this goal? Many commentators advocate federal legislation as the best way to accomplish forum selection clause uniformity and certainty.[260] One proffered model is the Federal Arbitration Act (F.A.A.), which embodies a federal policy favoring enforcement of arbitration agreements and preempts contrary state law in all courts.[261] However, because nearly all states already endorse the *Bremen* doctrine and presume forum selection clauses valid and enforceable, F.A.A.-type legislation for judicial clauses would add little to certainty of enforcement. State personal jurisdiction and contract validity laws would still apply in all courts, as would the unpredictable section

259. *See* discussion *supra* parts I.B.4.b., I.C.

260. *See* Borchers, *supra* note 93, at 55; Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992).

261. 9 U.S.C. §§ 1-16 (1988 & Supp. IV).

1404(a) venue transfer statute in federal courts.

To further the goal of uniformity and certainty, federal legislation more comprehensive than the F.A.A. is necessary.[262] Such legislation must not only codify the *Bremen* standards, but must include federal standards for personal jurisdiction as it relates to forum selection clauses, as well as federal contract formation laws. Additionally, the legislation must somehow restrict section 1404(a) in its application to forum selection clauses.

Such comprehensive federal forum selection clause legislation is unlikely, and, at least in part, is undesirable. Although federalization of personal jurisdiction in federal court makes sense, federalization of the other two factors do not. Uniform federal contract formation doctrine which preempts state contract validity principles seems no more appropriate for judicial forum selection clauses than for arbitration agreements.[263] Section 1404(a), despite the inherent uncertainty it introduces, seems necessary to accommodate the interest of the federal court system itself, not to mention those of third parties affected by forum selection clauses.

If comprehensive federal legislation is not likely, what can the courts do themselves to achieve more uniformity and certainty? The federal courts have a variety of options. The Supreme Court could propose an amendment to the Federal Rules of Civil Procedure that would federalize the personal jurisdiction standards for federal courts, at least in federal question cases.[264] Such an amendment would eliminate the uncertainty that results from incorporating state long-arm statutes. Alternatively, the Supreme Court could construe section 1404(a) to control issues of personal jurisdiction and contract validity as to forum selection clauses, although this seems contrary to its language and legislative history.[265] The Court could accomplish the same result through formulation of federal common law rather than through rule changes or statutory construction. In light of the vague guidelines defining the authority of a federal court to formulate judge-made law, the Supreme Court could probably find some justification for its utilization in these areas.[266] However, such application of federal

262. *See, e.g.*, Borchers, *supra* note 93 (proposing comprehensive federal forum selection clause legislation).

263. *See supra* note 117 and accompanying text.

264. One such proposal already exists. The Supreme Court recently amended Rule 4 of the Federal Rules of Civil Procedure, which became effective December 1, 1993, to authorize the federal courts to assert nationwide personal jurisdiction over foreign defendants in federal question cases where such defendants are not otherwise subject to the personal jurisdiction of the courts of general jurisdiction of any state. FED. R. CIV. P. 4(k)(2).

265. *See* discussion *supra* part I.D.

266. *See* discussion *supra* part I.A. One court, after reviewing the literature on federal common law, remarked that "[q]uestions concerning the appropriate scope of federal common law have produced a debate that does credit to the slogan 'let a hundred flowers bloom and a hundred schools of

common law to forum selection clauses in civil cases generally would do violence to established *Erie* precedents and principles.[267]

One thing the Supreme Court could easily do to assure certainty of forum selection clause enforcement in the federal courts is to construe section 1406(a) to apply whenever a plaintiff commences an action in a district court other than the contractually specified forum. Such an interpretation would mean that the only forum that is not the wrong district within the meaning of section 1406(a) would be the contractually mandated forum.[268] However, the Supreme Court appears to have foreclosed this possible interpretation of section 1406(a) in *Stewart*.[269] In light of the *Stewart* Court's strong endorsement of the need for flexibility and discretion under section 1404(a), such an interpretation of section 1406(a) is unlikely.[270]

What, then, can the contracting parties themselves do to assure certainty of forum selection clause enforcement? Given the current legal landscape, a party who desires certainty of litigation location above all else may take several protective measures. First, the contracting parties should designate a state court as the exclusive forum, as opposed to a federal court. Whatever inconveniences the forum selection clause later produces will be tested by state forum non conveniens doctrine instead of the more discretionary transfer of venue statute in federal court.[271] If the defendant removes the action to federal court pursuant to section 1441, the federal court is likely to enforce the clause through a remand back to the state court.[272]

Second, the parties should designate a court in a state whose laws are the most favorable to forum selection clause enforcement. This means a state which follows the *Bremen* doctrine, has some reasonable relationship to the contract, and has no specific public policy that would invalidate the forum selection clause based on the substantive nature of the contract. The chosen state should also have favorable laws on such matters as contractual personal jurisdiction waivers, adhesion contracts, and general contract formation principles. Third, to additionally assure that such favorable state law will apply, the parties should include a choice of law clause which designates that the desirable state's law will govern contract construction

---

thought contend.' " Morgan v. South Bend Community Sch. Corp., 797 F.2d 471, 475 (7th Cir. 1986).

267. *See* discussion *supra* parts I.A., I.D.

268. An action commenced in any district court in contravention of the forum selection clause would result in dismissal or transfer to the contractually designated forum. *See supra* part I.E.

269. *See* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1128-29 (1989); *supra* notes 184-87 and accompanying text.

270. *See supra* notes 194-201 and accompanying text.

271. *See supra* notes 213, 242-50 and accompanying text.

272. *See supra* part I.F.

and disputes. This combination of considerations should identify a state court which is most likely to enforce the forum selection clause; the contract should designate that state court as the exclusive forum.

How is certainty assured, however, where no such desirable forum exists which has a reasonable relationship to the contract? Or where the parties are more rational and allow both convenience and certainty to influence their contractual choice of forum?[273] What if no state court fulfills both of these prerequisites? The answer is to not designate any *judicial* forum in the contract. Instead, the parties should designate an arbitral forum to resolve all contract-related disputes and specify where such arbitration is to take place and what law will apply.

Generally an agreement to arbitrate contained in an interstate contract will be governed by the F.A.A.[274] The F.A.A.'s standards favoring enforcement of arbitration agreements therefore prevail in both federal and state courts.[275] A court enforcing an arbitration award will assume that the contract waived any objection to the designated arbitration location based on personal jurisdiction.[276] Because arbitration is purely a private consensual arrangement for dispute resolution, the agreed-upon location will be presumed convenient; the transfer provisions of section 1404(a) do not apply.[277] The only uncertainty in cases governed by the F.A.A. is whether the arbitration agreement is valid under general contract formation principles.[278] Even this bit of uncertainty may be eliminated by a governing law clause which applies favorable state contract law to contract construction and disputes.

---

273. More realistically, the inquiry is what may one party do to assure both convenience to that party and certainty of forum selection clause enforcement?

274. *See supra* note 117. The F.A.A. governs enforcement of arbitration agreements in any maritime transaction or contract involving interstate or foreign commerce, except contracts of employment. 9 U.S.C. §§ 1-2 (1988). The F.A.A. authorizes the federal courts to compel compliance with an agreement to arbitrate, 9 U.S.C. §§ 3-4 (1988); and to judicially enforce arbitration awards, 9 U.S.C. §§ 9-13 (1988 & Supp. IV 1992).

275. Section 2 of the F.A.A. "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

276. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977); Management Recruiters Int'l v. Nebel, 765 F. Supp. 419, 420 (N.D. Ohio 1991).

277. *See* Painewebber, Inc. v. Rutherford, 903 F.2d 106, 108-09 (2d Cir. 1990); Snyder v. Smith, 736 F.2d 409, 419 (7th Cir. 1984); Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 680-81 (5th Cir. 1976); Medika Int'l v. Scanlan Int'l, 830 F. Supp. 81, 86 (D.P.R. 1993) (ruling that an inquiry based on the *Bremen* standards, not on the forum non conveniens standards of § 1404(a), is relevant to the enforcement of an agreement to arbitrate in a particular place).

278. 9 U.S.C. § 2 (1988). Under the F.A.A., state law supplies these general contract law principles; but the F.A.A. preempts any state law specifically designed to invalidate arbitration agreements. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); *supra* note 117.

Consequently, the contractual designation of an arbitral forum, as opposed to a judicial forum, will usually achieve both certainty of clause enforcement and party convenience. In designating an arbitral forum, parties must be willing to forgo the greater procedural safeguards of a judicial resolution of a potential contract-related dispute.[279] If the parties are not willing to make this sacrifice and prefer a judicial forum, then some uncertainty of judicial forum selection clause enforcement is inevitable under current law. This uncertainty, however, is offset by legitimate concerns for fairness and convenience.

279. An agreement to arbitrate may require arbitration of not only contract claims, but also tort and statutory claims related to the contract. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987); Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 632-39 (1985). Arbitration is generally less formal than a judicial proceeding and provides fewer procedural safeguards. For example, the arbitration process typically involves limited discovery and relaxed rules of evidence. The arbitrator is under no real obligation to provide reasons for an award; and the consequent lack of a record necessarily limits judicial review. *See* Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1064-65 (1987); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 433-53 (1987-88).