CONTRACTS—FORUM SELECTION—ABSENT BAD FAITH, FRAUD, OR OVERREACHING, A REASONABLE FORUM SELECTION CLAUSE IN A COMMERCIAL CRUISE FORM CONTRACT IS ENFORCEABLE—*Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991).

The "forum-selection clause" is a contractual term that specifies a particular court of justice or tribunal for litigation.[1] When contracting parties create a forum-selection clause, they frequently choose one that is exclusive, mandating that they litigate any dispute arising under their agreement solely in a pre-selected forum.[2] A commercial contract containing an exclusive forum clause—ideally, over which the parties have bargained[3]—affords enhanced certainty and stability in the contractual relationship because the provision indicates where individuals may litigate their potential claims.[4] The forum-selection clause, therefore, promotes trade and encourages interstate and international com-

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[1] Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296 (1988). Courts sometimes substitute the terms "choice-of-forum provision," "jurisdiction clause," or "forum clause." Howard W. Schreiber, Note, *Appealability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument Against "Canceling Out" The Bremen*, 57 FORDHAM L. REV. 463, 463 n.3 (1988).

[2] Schreiber, *supra* note 1, at 468-69. *See, e.g.*, Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 763 (9th Cir. 1989) ("[t]he district judge concluded that this language represented the parties' intent to pursue any litigation that arose only in Virginia"). Alternatively, parties may execute a non-exclusive clause, sometimes termed a "permissive" or "consent-to-jurisdiction" clause, merely allowing litigation in a particular chosen forum. Schreiber, *supra* note 1, at 469. Whether a clause is exclusive is a matter of contract interpretation; if an agreement is not exclusive, it confers jurisdiction on a particular forum, but does not preclude jurisdiction elsewhere. Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 134 (1982). The parties may also limit the clause to bind only the contracting party whose multiple venue options otherwise might require the opposing party to litigate in a distant forum. *Id.* at 134-36. In civil law terminology, these clauses are called "prorogation" clauses (permitting action in a given forum) and "derogation" clauses (prohibiting action in a particular forum). *Id.* at 136 n.7. *See generally*, Arthur Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements"*, 15 RUTGERS L. REV. 414, 415-30 (1961) (discussing the history of prorogation and, particularly, derogation clauses in an international context).

[3] *See* Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law*, 72 MINN. L. REV. 1090, 1093 (1988). The designated forum and law can control the outcome of potential litigation, impacting the parties' substantive rights. *Id.* Therefore, forum clauses are typically the product of bargaining upon entering into the contract. *Id.*

[4] Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 2-3 (1976-77). Most contracts that include a forum clause also include a choice of law provision indicating that the forum state's law will control potential disputes. *Id.* at 3; Erickson, *supra* note 3, at 1092-93.

mercial transactions by eliminating the fear of being subject to suit in an unanticipated forum.[5]

For those who view consensual adjudicatory procedure as practical and judicially expedient, the doctrine apparently draws on good common sense.[6] Because of its manifest simplicity, contractual forum selection is an appealing alternative to the potentially complex procedures inherent in our litigation system.[7] Thus, most courts embrace the concept[8] and will enforce a forum-selection clause unless the provision is clearly unreasonable.[9] The practice of contracting parties choosing in advance where they will sue each other, however, is not as free of complications as it initially appears.[10] The forum-selection clause some-

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5 Gilbert, *supra* note 4, at 3. This predictability is somewhat diminished, however, because forum-selection clauses are not universally recognized. Erickson, *supra* note 3, at 1093. Alabama, Georgia, Missouri, and Texas do not enforce forum-selection clauses. Eric Fahlman, Note, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?*, 64 WASH. L. REV. 439, 457 n.142 (1988).

6 Mullenix, *supra* note 1, at 293-96. Forum-selection clauses are a standard feature in large corporations' contracts because they control litigation costs by restricting litigation to a local forum. Stephen R. Buckingham, Comment, *Stewart Organization v. Ricoh Corp.: Judicial Discretion in Forum Selection*, 41 RUTGERS L. REV. 1379, 1382 (1989). Preselection of a forum for the resolution of disputes confers at least one advantage on the enforcing court: giving effect to forum-selection clauses helps the court to clear its docket. Mullenix, *supra* note 1, at 296. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)("[t]he argument that such clauses are improper . . . appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded"). Presumably, the case will be heard in the forum indicated in the parties' contract; as a consequence, the overall total of litigation is not reduced, but merely relocated. Mullenix, *supra* note 1, at 296.

7 Mullenix, *supra* note 1, at 293-94. A forum-selection clause is, in a sense, a waiver of the plaintiff's right to bring the case in an otherwise proper forum. *Id.* at 296 n.11. Interpretation of procedural rights under a forum clause, therefore, is based on contract law. *Id.* at 296. *See infra* note 9 and accompanying text. If categorically enforced, a forum-selection clause in the parties' contract simplifies a court's task when faced with a motion for a change of venue. *See* Hoffman v. Burroughs Corp., 571 F. Supp. 545, 551 (N.D. Tex. 1982) (venue in other than the chosen forum is presumptively wrong).

8 *See* Mullenix, *supra* note 1, at 293 (noting that party autonomy thrives with universal court approval of the doctrine of consensual adjudicatory procedure).

9 Gruson, *supra* note 2, at 140-42; Schreiber, *supra* note 1, at 467. The inception of the reasonableness test in forum clause adjudication is credited to Judge Learned Hand's concurring opinion in Krenger v. Pennsylvania R.R., 174 F.2d 556 (2d Cir. 1949). Gilbert, *supra* note 4, at 13-14. Judge Hand, in dictum, stated: "In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; . . . they are invalid only when unreasonable. . . ." *Krenger*, 174 F.2d at 561.

10 Mullenix, *supra* note 1, at 296. Given that a forum-selection clause is a contractual provision governed by principles of substantive contract law, it may cloud

times rides roughshod over intricate legal issues, breaching well-established jurisdictional precepts and sacrificing critical litigation rights.[11]

In a recent case, *Carnival Cruise Lines, Inc. v. Shute*,[12] the United States Supreme Court refused to limit enforcement of forum-selection clauses solely to negotiated agreements between parties of equal bargaining strength.[13] Instead, the Court endorsed a broad utilization of forum-selection clauses, depite an indisputable lack of bargaining parity, and concluded that a non-negotiated forum provision included in a routine consumer cruise ticket should be enforced.[14]

Russell and Eulala Shute, a Washington State couple, purchased tickets through an Arlington, Washington travel agency for a seven-day cruise aboard a Carnival Cruise Lines (Carnival or Carnival Cruise) ship.[15] The travel agency dispatched the Shutes' payment to Carnival's headquarters in Miami, Florida.[16] Carnival Cruise in turn forwarded the tickets—

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issues of civil procedure due to characterization problems. *Id.* at 297, 322-23. Specifically, confusion may arise as to whether a forum provision is a subject of jurisdiction or venue, or whether a forum clause supersedes the forum non conveniens doctrine. *Id.* Questions of federalism—upon which the lower courts are not in accord—are also invoked, such as whether federal common law that construes consensual adjudicatory procedure overrides conflicting state law. *Id.* at 299, 301, 332, 336.

11 *Id.* at 296-97. Consensual adjudicatory procedure, by replacing jurisdictional rules with contract precepts, allows parties to waive substantial and fundamental rights. *Id.* at 302. One of the most basic rights of a plaintiff is the right to choose a forum. *Id.* at 303. The plaintiff's choice in forum selection, which is bound up with notions of fair play and substantial justice, is traditionally accorded great deference. *Id.* Enforcing a forum-selection clause inherently merges concepts of personal jurisdiction (the power of a court over the parties in a case) and venue (deciding the most convenient forum from among courts of jurisdiction) because the right of the plaintiff to waive choice of forum is meaningless unless the plaintiff also waives the right to object to personal jurisdiction. *Id.* at 324.

12 111 S. Ct. 1522 (1991).

13 *Id.* at 1527. In examining the forum clause for reasonableness, the Court recognized the lack of bargaining parity between the contracting parties, but elected to concentrate on the realities of running a large-scale commercial cruise line operation and, consequently, the Court accorded little weight to the disparity in bargaining power. *Id.*

14 *Id.* at 1528.

15 Shute v. Carnival Cruise Lines, 1988 A.M.C. 591, 592 (W.D. Wash. 1987), *rev'd*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (9th Cir. 1989)(mem.), *modified*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). Carnival Cruise is the world's largest commercial cruise line operation. Paul Weiss, *Gibson Dunn Work on Cruise Line Deal*, 74 N.Y. L.J. 5 (1991).

16 Shute v. Carnival Cruise Lines, 897 F.2d 377, 379 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). Carnival Cruise is a Panamanian corporation and its principal place of business is in Miami, Florida. *Id.*

on the back of which appeared a passage contract containing a forum-selection clause[17]—to the couple in Washington.[18] The pair then travelled to Los Angeles where they boarded the ship, Tropicale, destined for Puerto Vallarta, Mexico.[19] While in international waters off the Mexican coast, the Shutes attended a supervised tour of the ship's galley, whereupon Mrs. Shute stumbled over a deck mat and was injured.[20]

The Shutes filed a negligence suit against Carnival Cruise in the United States District Court for the Western District of Washington.[21] Carnival Cruise moved for summary judgment on the grounds that the district court did not have personal jurisdiction over the cruise line and, additionally, that the forum-selection clause in the passage contract prevented the Shutes from bringing their suit in any court outside the State of Florida.[22] The district court, deliberating only the personal jurisdiction question,[23] granted Carnival's motion for summary judgment.[24] The court applied a minimum contacts analysis[25] and held that Carnival's

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17 *Id.* The cruise passage ticket and accompanying contract was reproduced in its entirety and appended to Justice Stevens' dissent from the United States Supreme Court's opinion in Carnival Cruise Lines v. Shute, 111 S. Ct. 1522, 1534-38 (1991) (Stevens, J., dissenting). The forum-selection clause provided:

> in all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

Id. at 1536 (Stevens, J., dissenting).

18 *Shute*, 897 F.2d at 379.

19 *Carnival Cruise*, 111 S. Ct. at 1524.

20 *Id.*

21 Shute v. Carnival Cruise, 1988 A.M.C. 591, 592 (W.D. Wash. 1987), *rev'd*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (9th Cir. 1989) (mem.), *modified*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct 1522 (1991).

22 *Shute*, 897 F.2d at 379. The forum clause in the Shutes' contract was exclusive: "[A]ll disputes . . . arising under . . . this Contract shall be litigated, *if at all*, in and before a Court located in the State of Florida. . . ." *Id.* (emphasis added). *See supra* note 2 (discussing the significance of exclusive versus non-exclusive clauses).

23 *Carnival*, 1988 A.M.C. at 593-95. Personal jurisdiction, or "in personam" jurisdiction, is the power of a court over a person. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 724 (1877) (distinguishing between a state's power over a person and its power over a person's property located within the state). *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.2-.28 (1985) (discussing the historical development of jurisdictional principles).

24 *Carnival*, 1988 A.M.C. at 595.

25 *Id.* at 593-95. Constitutional considerations of procedural due process under the Fourteenth Amendment mandate that defendants have sufficient minimum contacts with the forum state such that the court's exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

contacts with the State of Washington were not sufficient to sustain the court's exercise of personal jurisdiction over Carnival Cruise.[26]

The United States Court of Appeals for the Ninth Circuit reversed.[27] First, the court of appeals held that Carnival Cruise had engaged in sufficient forum-related activities to subject the cruise line to the personal jurisdiction of the district court.[28] If Carnival had not solicited business in Washington, the court determined, the Shutes would not have gone on the cruise and Mrs. Shute would not have been injured.[29] The court then shifted its

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26 *Carnival*, 1988 A.M.C. at 594-95. In Hanson v. Denckla, 357 U.S. 235 (1958), the United States Supreme Court recognized that to find minimum contacts sufficient to establish personal jurisdiction over a defendant, the defendant must engage in some affirmative conduct that amounts to a purposeful availment of the benefits of the forum. *Id.* at 253. The Supreme Court has determined that the act of a purchaser bringing the defendant's product into the forum does not constitute purposeful availment of the forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 297-98 (1980). The Court refined its position somewhat in Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987). Justice O'Connor contended that purposeful availment may be inferred by such conduct as intending to market a product in the forum, establishing channels for communication with customers in the forum, advertising, or maintaining a sales agent in the forum state. *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion).

27 Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). The court of appeals withdrew an earlier reversal reported in Shute v. Carnival Cruise Lines, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (9th Cir. 1989) (mem.), *modified*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991), and certified the case to the Washington Supreme Court to resolve the issue of whether the state's long-arm statute conferred personal jurisdiction over the cruise line. Shute v. Carnival Cruise Lines, 872 F.2d 930 (9th Cir. 1989) (mem.), *modified*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). The Washington Supreme Court responded in the affirmative. Shute v. Carnival Cruise Lines, 783 P.2d 78, 82 (Wash. 1989) (en banc). Thereafter, the court of appeals modified and refiled its opinion. *Shute*, 897 F.2d at 380 n.1. The Washington long-arm statute provided, in pertinent part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if, an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
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> (a) The transaction of any business within this state . . . .

WASH. REV. CODE ANN. § 4.28.185 (West 1988).

28 *Shute*, 897 F.2d at 386. The court of appeals asserted that Carnival Cruise involved itself in the sort of conduct denoted by Justice O'Connor as constituting sufficient minimum contacts to confer personal jurisdiction. *Id.* at 382 (citing *Asahi*, 480 U.S. at 112).

29 *Shute*, 897 F.2d at 386. The court of appeals used the "but for" test to discern whether the defendant's minimum contacts were sufficient to uphold the exercise of personal jurisdiction. *Id.* at 385-86. The familiar "but for" test is traditionally associated with its application in tort law, specifically in the threshold determination of the prima facie element of causation. *See* W. PAGE KEETON ET AL., PROSSER

attention to the matter of the forum-selection clause.[30] Acknowledging that forum-selection clauses are presumed valid, the court of appeals nevertheless proclaimed the clause at issue unenforceable on the ground that it was not bargained for freely and therefore did not express the parties' true intent.[31]

The United States Supreme Court granted Carnival's petition for certiorari[32] to determine whether the court of appeals correctly declared, despite the forum-selection clause, that the Shutes' action should be adjudicated in federal district court in the State of Washington.[33] The Supreme Court eschewed consideration of the personal jurisdiction question[34] and reversed the court of appeals by finding the forum-selection clause valid and enforceable.[35] The Court held that a forum-selection clause in a passenger-ticket contract should be enforced when no evidence of fraud or overreaching in acquiring agreement to the clause existed and when the contract was unaffected by bad faith in selection of the forum.[36] The majority left open the possibility that a forum clause may be defeated if the selected forum was prohibitively inconvenient to one of the parties, but only if the complaining party bears the "heavy burden" of demonstrating

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AND KEETON ON THE LAW OF TORTS § 41, at 265-66 (5th ed. 1984). Under the court's application of the test in the context of personal jurisdiction, if the defendant's contacts are seen by the court as substantial, continuous, and part of an uninterrupted chain of events that ended in the plaintiff's injury, the court is entitled to reason that "but for" those contacts, the cause of action would not have arisen. *Shute*, 897 F.2d at 386. *But see*, Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911) (the defendant's conduct is the cause of the plaintiff's injury if the injury would not have occurred "but for" the conduct of the defendant, although that alone is insufficient to establish conclusively that the defendant's conduct was the legal cause of the injury).

30 *Shute*, 897 F.2d at 387.

31 *Id.* at 388-89. The court of appeals cited the plaintiff's great burden of litigating the case in Florida as an independent justification for refusing to enforce Carnival's forum-selection clause. *Id.* at 389. The court suggested that the inconvenience of the Florida forum to the parties and witnesses confirmed the reasonableness of subjecting Carnival Cruise to the personal jurisdiction of the Washington district court. According to the court of appeals, the Shutes were physically and financially unable to maintain suit in Florida. *Id.* Enforcing the forum clause, the court of appeals opined, would essentially deprive the Shutes of their day in court. *Id.* The United States Supreme Court, however, rejected this contention as unsupported by the record because the trial court made no finding concerning the Shutes' financial or physical ability to undertake the lawsuit in Florida. Carnival Cruise Lines v. Shute, 111 S. Ct. 1522, 1528 (1991).

32 Carnival Cruise Lines v. Shute, 111 S. Ct. 39 (1990) (mem.).

33 *Carnival Cruise*, 111 S. Ct. at 1525.

34 *Id.*

35 *Id.* at 1528.

36 *Id.*

serious inconvenience.[37]

American jurisprudence has traditionally disdained the forum-selection clause.[38] Courts were wary of contract terms purporting to limit jurisdiction to a particular forum because they believed such provisions to symbolize veiled attempts to oust a court of competent jurisdiction.[39] Thus, in the early case of *Insurance Co. v. Morse*,[40] in which the United States Supreme Court considered the validity of a statutory clause designating Wisconsin state courts as the exclusive fora in certain insurance matters,[41] the Court invoked the historical judicial apprehension against forum clauses.[42] The *Morse* Court, in asserting that the

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37 *Id.*

38 Erickson, *supra* note 3, at 1094.

39 Schreiber, *supra* note 1, at 465. In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the majority contended that the view that forum clauses impermissibly usurp courts of jurisdiction was outmoded and wholly without merit. *Id.* at 12.

40 87 U.S. 445 (1874).

41 *Id.* at 450. The *Morse* controversy began its ascent to the Supreme Court of the United States when a resident of Wisconsin sued the Home Insurance Company of New York in a Wisconsin state court. *Id.* at 446. When the company sought to remove the case into federal court under section 12 of the Judiciary Act of 1789, Morse drew on an 1870 Wisconsin statute that prevented nonresident insurance companies doing business in the state from removing suits to the federal courts. *Id.* at 446-47. Section 12 of the Judiciary Act of 1789 provides, in relevant part:

> [I]f a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state . . . and the defendant shall . . . file a petition for the removal of the cause for trial into the next circuit court . . . and offer good and sufficient surety for his entering in such court . . . it shall then be the duty of the state court to accept the surety, and proceed no further in the cause. . . .

Judiciary Act of 1789, Ch. 20, § 12, 1 Stat. 73, 79-80. The Supreme Court of Wisconsin affirmed the state court judgment in favor of Morse. Morse v. Home Ins. Co., 30 Wis. 496, 507 (1872). The United States Supreme Court reversed. *Morse*, 87 U.S. at 458. The Court later distinguished *Morse* as a case in which the issue primarily concerned the unconstitutionality of a state statute restricting the right to remove a case to federal court. *The Bremen*, 407 U.S. at 9 n.10.

42 *Morse*, 87 U.S. at 451-53. The Court explained:

> Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . *[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.*

Id. at 451 (emphasis added). *See* Hobbs v. Manhattan Ins. Co., 56 Me. 417, 421 (1869) (parties are not permitted to grant jurisdiction by private agreement where jurisdiction is not provided by Congress); Bartlett v. Union Mut. Fire Ins. Co., 46 Me. 500, 504 (1859) (a provision requiring suits to be brought in county of the insurance company does not bind the insured; breach of contract remedy is administered by law, and controlled by the law of the forum in which the plaintiff seeks vindication); Nute v. Hamilton Mut. Ins. Co., 72 Mass. 174, 183 (1856) (parties may not refashion legal rules concerning jurisdiction and venue by private agreement).

Wisconsin statute was invalid, intoned the now-discredited generalization that parties may not displace courts of jurisdiction by private contract.[43] In the aftermath of *Morse*, this orthodox common law view opposing contractual choice of forum endured in American courts for nearly a century.[44]

For example, the Federal District Court for the Eastern District of Pennsylvania followed the *Morse* approach in *The Ciano*.[45] The court examined whether a clause in the shipper's bill of lading,[46] naming the courts of Gijon, Spain as the exclusive site for resolution of disputes was simply an arbitration clause or an attempt to remove potential litigation from an otherwise proper venue.[47] The court opted for the latter position and held that the

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[43] *Morse*, 87 U.S. at 451.

[44] *See* Gruson, *supra* note 2, at 139-42 (explaining that the courts, relying on reasonableness factors, began in the 1950s to discard the common law philosophy that opposed forum clauses). Some writers suggest that judges, who were once paid by the case, may have considered forum clauses a threat to their livelihood. *See, e.g.*, Gilbert, *supra* note 4, at 9 (judicial disfavor of forum-selection clauses "may have begun when judges were paid for the number of cases they heard"); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983-84 (2d Cir. 1942) (suggesting that when judges' income came mostly from fees, they were inclined to preserve those fees).

[45] 58 F. Supp. 65, 66-67 (E.D. Pa. 1944).

[46] A bill of lading is defined as:

> An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

BLACK'S LAW DICTIONARY 168 (6th ed. 1990) (citation omitted).

[47] *Ciano*, 58 F. Supp at 66. The clause in the bill of lading read:

> The shippers and receivers, waiving their right to be tried in their home town expressly submit themselves to the jurisdiction of the Judges and Tribunals the shipowners are located, for all litigations that may arise from the present contract and its incidentals, regardless of any provision to the contrary in the Code of Commerce or Law of Procedure in matters of jurisdiction. This clause shall be understood to be always in force even though the ship's agents and the parties interested in the cargo may have tried to settle in principle, by whatever means, any differences that may arise.

Id. Ciano actually concerned six lawsuits brought by the owners of cargo aboard the vessel. *Id.* The cases were consolidated and the shipper, relying on the forum provision in its bill of lading, moved for dismissal on the ground that the district court did not have jurisdiction. *Id.* The court pointed out that the authorities were in conflict over whether consent to jurisdiction clauses represented acquiescence to arbitration (considered valid) or attempts to oust courts of jurisdiction (considered invalid). *Id.* The *Ciano* court was persuaded, by the then most recently reported case interpreting a forum clause, to construe the provisions as an ouster. *Id.* at 66-67 (citing *The Edam*, 27 F. Supp. 8 (S.D.N.Y. 1938)). In *Edam*, the court held that forum provisions limiting actions to foreign tribunals are not arbitration clauses

clause was designed to indicate a preference for one court over another.[48] The court declared that this was an unacceptable effort to oust a proper court of jurisdiction.[49] Traditional doctrine gradually began to erode, however, as a new trend favoring consensual forum selection developed in the lower federal courts.[50] By the middle of the twentieth century, the judiciary tended to shy away from the notion that forum provisions ousted a court of jurisdiction and, instead, began to treat the forum-selection clause as a device by which a court may surrender jurisdiction upon finding that enforcement of the particular provision was reasonable.[51]

An example of the then newly-developing approach appeared in the landmark circuit court decision of *Wm. H. Muller & Company v. Swedish American Line Limited*.[52] In *Muller*, the United States Court of Appeals for the Second Circuit gave effect to a

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within the meaning of the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1988), but rather are attempts to oust the jurisdiction of the courts of the United States. *Edam*, 27 F. Supp. at 8.

48 *Ciano*, 58 F. Supp. at 67.

49 *Id.*

50 *See, e.g.*, Cerro DePasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 991 (2d Cir. 1951) (forum clause naming Norwegian courts as exclusive situs for resolution of disputes held valid); Murillo Ltd v. The Bio, 127 F. Supp. 13, 16 (S.D.N.Y. 1955) (clause providing exclusive jurisdiction in Swedish courts given full consideration), *aff'd*, 227 F.2d 519 (2d Cir. 1955); Cerro De Pasco Copper Corp. v. The Alabama, 109 F.Supp. 856, 858 (S.D.N.Y. 1952) (clause placing jurisdiction exclusively in courts of France specifically enforced).

51 Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404, 415 (1990). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) (reflecting the view that a forum provision will be enforced unless it is unfair or unreasonable).

52 224 F.2d 806 (2d Cir. 1955), *cert. denied*, 350 U.S. 903 (1955), *rev'd on other grounds sub nom.* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) (en banc). *Indussa* found a conflict between forum clauses limiting jurisdiction to foreign courts in an in rem action and the prohibition in the United States Carriage of Goods by Sea Act (COGSA) against exculpatory clauses. *Indussa*, 377 F.2d at 202. COGSA provided in relevant part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

United States Carriage of Goods by Sea Act (COGSA) § 3(8), 46 U.S.C. § 1303(8) (1988). *Muller* nevertheless remains persuasive authority in cases that are not in admiralty. Gruson, *supra* note 2, at 141 n.26. For cases preceding *Muller*, *see supra* note 47 (citing cases in which forum-selection clauses were upheld). *See also* Krenger v. Pennsylvania R. Co., 174 F.2d 556, 561 (2d Cir. 1949) (Hand, C.J., concurring) (forum clauses are invalid only if unreasonable).

forum clause contained in a bill of lading that specified the Swedish courts as the exclusive situs of dispute resolution.[53] *Muller* directed forum clause adjudication away from rote application of authoritarian doctrine and focused on the reasonableness of the forum clause.[54] Recognizing the century-old hostility toward consensual adjudicatory procedure, the *Muller* court contended that there was no absolute ban on such provisions and insisted that, in general, a forum clause should be given full effect.[55] Accordingly, the Second Circuit held that a court may properly decline jurisdiction if it finds that a forum-selection clause was not unreasonable under the circumstances of the case.[56]

The United States Court of Appeals for the Fifth Circuit adopted the modern view in *Anastasiadis v. S.S. Little John*.[57] The question before the court was whether the trial court abused its discretion in declining jurisdiction over a breach of contract dispute.[58] An action was filed in the United States District Court for the Southern District of Texas by a Greek seaman, despite a forum-selection clause in the seaman's employment contract providing that disputes would be governed by Greek law in the

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[53] *Muller*, 224 F.2d at 808. *See supra* note 46 defining "bill of lading." *Muller* involved a shipping contract to deliver cocoa beans by cargo ship from Gothenburg, Sweden to Philadelphia, Pennsylvania. *Id.* at 806-07. Swedish American Line's ship, Oklahoma, was lost at sea and Wm. H. Muller & Co. sued in district court for the value of the cargo. *Id.* at 807. The District Court for the Southern District of New York, enforcing a forum-selection clause in the bill of lading against a challenge that the clause ran contrary to section 1303(8) of COGSA, declined jurisdiction and dismissed the case. *Id.* The United States Court of Appeals for the Second Circuit affirmed, finding the forum clause reasonable and finding no evidence that the parties could not receive fair and just relief in the Swedish courts. *Id.* at 808.

[54] Schreiber, *supra* note 1, at 467.

[55] *Muller*, 224 F.2d at 807-08 (citing *Krenger*, 174 F.2d at 561). "[T]he adherence of the parties to [their] agreement, which for aught that appears was freely given, should be given effect." *Id.* at 808.

[56] *Id.* at 808. The United States Supreme Court later lauded this proposition as the logical counterpart to that enunciated in National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). The United States Supreme Court confirmed, in *Szukhent*, that contracting parties may effectively submit to personal jurisdiction by agreement. *Szukhent*, 375 U.S. at 315-16. The Court enforced a contractual provision providing that the spouse of a Michigan defendant would suffice as a surrogate for service of process in New York. *Id.* at 318.

[57] 346 F.2d 281 (5th Cir. 1965), *reh'g denied*, 347 F.2d 823 (5th Cir. 1965).

[58] *Id.* at 281-82. The Greek sailor in *Anastasiadis* found the living conditions unsatisfactory aboard the ship upon which he was contracted to serve. *Id.* at 282. He expressed his feelings to the ship's master and filed a contract action while the vessel was docked in Texas, alleging, inter alia, total breach of his contract of employment. *Id.*

courts of Greece.[59] The court of appeals evaluated the fairness of the dismissal by recognizing that the seaman was himself Greek, that the vessel was only transitorily in the United States, and that the ship owner made a formal agreement to litigate the seaman's claim in Greece.[60] Approving the district court's dismissal, the appellate court held that the parties' contract provision was controlling absent any indication that Greece was an inconvenient forum for the plaintiff or would not provide an adequate remedy.[61]

Notwithstanding the growing current of support for the forum-selection clause, some federal courts preferred to adhere to the old dogma—that a forum clause ousted courts of competent jurisdiction—and a split among the circuits remained unresolved until 1972,[62] when the United States Supreme Court delivered its opinion in *The Bremen v. Zapata Off-Shore Co.*[63] In *The Bremen*, the Court again considered the enforceability of a clause naming a foreign jurisdiction as the exclusive site for the resolution of disputes.[64] The Court held that a forum-selection clause

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59 *Id.* The forum clause provided, in relevant part, "[F]or any dispute between the seaman and the ship, the Greek law will apply, competent courts to solve any dispute will be the Greek courts at Piraeus." *Id.*

60 *Id.* at 284. The *Anastasiadis* court quoted the United States Supreme Court: "[E]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply." *Id.* at 284 (quoting Lauritzen v. Larsen, 345 U.S. 571, 588-89 (1953).

61 *Id.* at 284. Although *Lauritzen* concerned the question of whether a foreign sailor had the right to invoke the Jones Act in a personal injury suit, the *Anastasiadis* court believed the same test was appropriate in considering whether to accept jurisdiction over an essentially foreign dispute. *Id.* at 283 (citing *Lauritzen*, 345 U.S. 571 (1953)). The Jones Act, 46 U.S.C. § 688 (1988), applied railway employee statutes to personal injury actions filed by seaman. *Id.*

62 *Compare, e.g.*, Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958) (bolstering the lingering common law antipathy toward the forum clause by holding that a court cannot be ousted of its jurisdiction by private contract), *cert. dismissed*, 359 U.S. 999 (1959) *and* United States *ex rel.* Ray Gains, Inc. v. Essential Constr. Co., 261 F. Supp. 715, 720 (D. Md. 1966) (enforcement of the clause would severely hinder the plaintiff's right to proceed with its claim) *and* Muoio v. Italian Line, 228 F. Supp. 290, 293 (E.D. Pa. 1964) (limiting jurisdiction to judicial authority of Genoa, Italy was an illegitimate effort to oust the district court of jurisdiction) *with* Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir. 1966) (forum clause is enforceable, and not an ouster) *and* Takemura & Co. v. The S.S. Tsuneshima Maru, 197 F. Supp. 909, 912 (S.D.N.Y. 1961) (a forum clause is enforceable unless unreasonable).

63 407 U.S. 1 (1972).

64 *Id.* at 2-3. The *Bremen* controversy was an admiralty case concerning an international towage contract that contained a forum-selection clause designating the London High Court of Justice for the resolution of disputes. Zapata Off-Shore Co. v. M/S Bremen (*In re* Unterweser Reederei, GmbH), 296 F. Supp. 733, 734 (M.D. Fla. 1969), *aff'd*, 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g*, 446 F.2d 907 (5th Cir.

should be enforced under federal law absent a strong showing that enforcing the clause was unreasonable, unfair, or unjust.[65] In the course of its decision, the *Bremen* Court incontrovertibly established that forum clauses did not oust courts of jurisdiction.[66]

The *Bremen* Court grounded its opinion on policy considerations.[67] The majority assessed the forum-selection clause in view

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1971) (en banc), *vacated and remanded sub nom.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Unterweser (a German corporation) contracted to tow an offshore drilling rig belonging to Zapata (a Houston based corporation) from the Gulf of Mexico to the Adriatic Sea. *The Bremen*, 407 U.S. at 2. The rig was damaged in a storm in the Gulf of Mexico, long before reaching its destination in Italy. *Id.* at 3. Zapata then directed Unterweser to haul the rig to Tampa. *Id.* Zapata thereafter filed suit to recover for damages to its rig in the United States District Court for the Middle District of Florida. *Unterweser*, 296 F. Supp. at 734. Unterweser moved to dismiss for lack of jurisdiction and, alternatively, for a stay pending a hearing in the London High Court of Justice, pointing out that the parties' towing contract designated the London court as the exclusive court of jurisdiction over the contract. *Id.* The district court denied Unterweser's motions. *Id.* at 736. The court held the forum-selection clause unenforceable and in a subsequent proceeding — again denying Unterweser's request for a stay — issued an injunction preventing Unterweser from prosecuting a breach of contract claim filed against Zapata in London. The United States Court of Appeals for the Fifth Circuit affirmed. Zapata Off-Shore Co. v. M/S Bremen (*In Re* Unterweser Reederei, GmbH), 428 F.2d 888, 890 (5th Cir. 1970), *aff'd on reh'g*, 446 F.2d 907 (5th Cir. 1971) (en banc), *vacated and remanded sub nom.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). The decision of the panel was subsequently adopted in a rehearing en banc. Zapata Off-Shore Co. v. M/S Bremen (*In Re* Unterweser Reederei, GmbH), 446 F.2d 907, 908 (5th Cir. 1971) (en banc), *vacated and remanded sub nom.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

65 *The Bremen*, 407 U.S. at 15. The Court commented on the "more hospitable attitude toward forum-selection clauses" taken in many of the lower federal courts, that forum clauses are presumed valid unless unreasonable, and opined that this view ought to be adopted by the federal courts in admiralty. *Id.* at 10. Federal courts, however have neither limited this holding to cases in admiralty nor to cases involving a foreign forum. Gruson, *supra* note 2, at 149. Courts have applied the *Bremen* principles to all forum-selection clauses, even in domestic cases in which the parties have selected a domestic forum and even where the parties are citizens of different states. *Id. See, e.g.*, Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279 (9th Cir. 1984) (stating that there is no reason the principles announced in *The Bremen* should not apply in the domestic context). Given that *The Bremen* was decided under admiralty and federal question jurisdiction, it is arguably not authoritative in diversity disputes because a federal common law rule must yield when state substantive law to the contrary is on point. Mullenix, *supra* note 1, at 314, 332-33. *See generally* Hanna v. Plumer, 380 U.S. 460, 465 (1965) (holding that federal courts, sitting in diversity cases, are to apply state substantive and federal procedural law).

66 *The Bremen*, 407 U.S. at 12, 13. The majority stated: "The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction." *Id.* at 12.

67 Mullenix, *supra* note 1, at 312. The *Bremen* Court's policy concerns wielded considerable influence on future decisions. Schreiber, *supra* note 1, at 468. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-20 (1973), *reh'g denied*, 419 U.S. 885

of growing American involvement in international commerce and

(1974), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985), the United States Supreme Court, relying heavily on the *Bremen* standards, recognized the validity of arbitration clauses contained in international sales agreements. In both *Scherk* and *Mitsubishi*, the Supreme Court focused on the particularly compelling need for predictability and concern for comity in international transactions. *Scherk*, 417 U.S. at 516; *Mitsubishi*, 473 U.S. at 629. *See generally* Dougherty, *supra* note 51, at 409-38 (containing a comprehensive list of cases construing forum clauses).

The *Scherk* Court considered whether an arbitration clause in an international business acquisition contract barred a purchaser of assets from pursuing a remedy in a judicial court under the Securities Act of 1933. *Scherk*, 417 U.S. at 509-10. Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." Securities Act of 1933, 15 U.S.C. § 77n (1988). The Court contended that an arbitration clause in which parties agree to arbitrate before a specific tribunal is really a type of forum-selection clause that identifies the procedure as well as the forum for resolution. *Scherk*, 417 U.S. at 519.

Scherk concerned an agreement by Alberto-Culver (an American corporation) to purchase toiletry manufacturing companies as well as certain trademarks in cosmetic goods from Scherk (a French entrepreneur). *Id.* at 508. A contract was signed, containing an arbitration clause, which provided in relevant part:

> The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France. . . . The law of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.

Albert-Culver Co. v. Scherk, 484 F.2d 611, 613 (7th Cir. 1973), *rev'd*, 417 U.S. 506 (1973), *reh'g denied*, 419 U.S. 885 (1974). Nearly a year after the closing, Alberto-Culver discovered encumbrances threatening to interfere with its exclusive use of the trademarks. *Id.* at 614. Alberto-Culver filed suit in federal district court in Illinois which refused to enforce the arbitration clause. *Id.* at 612. Subsequently, the United States Court of Appeals for the Seventh Circuit affirmed. *Id.* The United States Supreme Court reversed the court of appeals' decision. *Scherk*, 417 U.S. at 520-21. The Court focused on the uncertainties wrought by complicated international agreements and found that specifying in advance a forum for dispute was "almost indispensable" under these conditions. *Id.* at 516, 517. The majority predicated its decision on section 4 of the United States Arbitration Act and, finding that the agreement was in accord with the Act, held the arbitration clause valid and enforceable. *Id.* at 510-13. Section 4 of the United States Arbitration Act provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28 [The Judiciary Act, 28 U.S.C.§§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order

warned that adopting the absolute doctrine of the traditional common law would do little to expand American participation in world markets.[68] Contractual forum selection, the majority recognized, facilitated participation in international trade by infusing contracts with certainty and furnishing a neutral forum for dispute resolution.[69] The Court emphasized that the parties, through their forum-selection clause, freely selected the courts of England to resolve conflicts arising under the contract.[70] Noting

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> directing the parties to proceed to arbitration in accordance with the terms of the agreement. . .

United States Arbitration Act, 9 U.S.C. § 4 (1988).

The *Mitsubishi* Court confronted the question of whether antitrust claims were arbitrable under a valid arbitration clause. *Mitsubishi*, 473 U.S. at 616. In answering in the affirmative, the Court based its decision on the strong presumption, established in *The Bremen* and *Scherk*, in favor of enforcing forum-selection clauses under federal law. *Id.* at 631, 640. *Mitsubishi* involved a disagreement arising out of a sales contract between the Japanese corporation, Mitsubishi, and Soler, a Puerto Rican automobile dealer. *Id.* at 616. Mitsubishi filed suit in federal district court and sought to enforce an arbitration clause in its agreement with Soler, requiring the parties to resolve all disputes arising under the contract by arbitration in Japan. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 723 F.2d 155, 157 (1st Cir. 1983), *aff'd in part and rev'd in part*, 473 U.S. 614 (1985). Paragraph VI of the Mitsubishi Sales Agreement, "Arbitration of Certain Matters," provides:

> All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

Mitsubishi, 473 U.S. at 617. Soler counterclaimed, asserting antitrust claims against Mitsubishi. *Mitsubishi*, 723 F.2d at 157. The district court, relying on *Scherk*, 417 U.S. 506 (1974), directed the parties to arbitrate most of the claims and counterclaims filed in the case in accordance with their agreement. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538, slip op. at B-8 (D.P.R. Nov. 22, 1982), *aff'd in part and rev'd in part*, 723 F.2d 155 (1st Cir. 1983), *aff'd in part and rev'd in part*, 473 U.S. 614 (1985). The United States Court of Appeals for the First Circuit affirmed in part, but excluded the antitrust claims from arbitration, pursuant to the United States Arbitration Act, which evidenced a public policy favoring the domestic adjudication of monopolization claims. *Mitsubishi*, 723 F.2d at 167-69. Despite acknowledging this strong policy, the United States Supreme Court reversed on the issue and upheld the foreign arbitrability of the antitrust claims at issue. *Mitsubishi*, 473 U.S. at 628-29. The Court dismissed, as unpersuasive in an international setting, factors identified by lower federal courts apparently mandating judicial resolution of claims. *Id.* at 632-39. The Court preferred to ground its reasoning on the dominant trend in federal courts advocating the enforcement of forum-selection clauses. *Id.* at 631, 639.

68 *The Bremen*, 407 U.S. at 9. The *Bremen* Court stated: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Id.*

69 *Id.* at 17.

70 *Id.*

that the parties' choice of forum resulted from arm's-length negotiations, the Supreme Court announced that, absent some countervailing and compelling reason, forum selection clauses should be enforced by the courts and honored by the parties.[71] The Court thus instilled a new animus into venerable freedom of contract principles.[72] Following *The Bremen*, federal courts quickly endorsed a contracting party's right to select, in advance, the judicial body that would hear their disputes.[73]

The watershed *Bremen* decision solidly entrenched reasonableness as the preferred bench mark in contractual forum selection.[74] Though the prima facie validity of the forum-selection clause had been acknowledged consistently in the nearly two decades following *The Bremen*, the judiciary did not hesitate to invalidate unreasonable clauses.[75] Courts refused to enforce forum provisions in cases where the chosen forum was substantially more inconvenient than the court where the case was brought.[76]

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71 *Id.* at 12.

72 *Id.* at 11. The Court iterated that allowing parties to agree in advance to yield to the jurisdiction of a particular court "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world." *Id.*

73 Schreiber, *supra* note 1, at 467. *See, e.g.*, Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481-82 (1989) (a provision to arbitrate claims was enforceable and in accordance with the Securities Act of 1933); Southland Corp. v. Keating, 465 U.S. 1, 17 (1984) (arbitration clause in franchise agreement enforced); Heller Fin., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1290 (7th Cir. 1989) (forum-selection clause in equipment lease agreement was valid); Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656, 660 (2d Cir. 1988) (forum-selection clause in construction contract should be enforced absent a strong showing to the contrary); Tisdale v. Shell Oil Co., 723 F. Supp 653, 655-56 (M.D. Ala. 1988) (forum-selection clause in employment contract was enforceable); Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361, 365, 367 (S.D.N.Y. 1975) (forum-selection clause was not rendered invalid because plaintiff negligently fails to acquire a translation of a foreign language contract).

74 Gilbert, *supra* note 4, at 24.

75 *See* Dougherty, *supra* note 51, at 433-38 (enumeration of cases in which forum-selection clauses were adjudged unreasonable under the specific circumstances and, consequently, unenforceable).

76 *See, e.g.*, Randolph Eng'g Co. v. Fredenhagen Kommandit-Gesellschaft, 476 F. Supp. 1355, 1359-60 (W.D. Pa. 1979) (enforcing forum clause was unreasonable because litigating case in contractual forum would place substantial inconvenience on plaintiff). The United States Supreme Court referred to the inconvenience aspect of its *Bremen* decision in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 486 (1985). The *Burger King* Court found that the assertion of personal jurisdiction by a federal district court in Florida over Michigan businessmen did not offend due process. *Id.* at 487. The businessmen had sufficient minimum contacts with the State of Florida, pursuant to their contract and interactions with Burger King, for the Court to sustain personal jurisdiction over them in Florida. *Id.*

The Court, citing *The Bremen*, however, warned that jurisdictional procedures

Similarly, other courts invalidated forum selection clauses when the plaintiff was unable to acquire an effective remedy in the selected forum,[77] or when the forum-selection clause was garnered by fraud or misrepresentation, misuse of superior economic position, or unconscionable means.[78] The United States Supreme Court echoed these concerns in *Stewart Organization, Inc. v. Ricoh Corp.*,[79] where the Court declared that the presence of a forum-selection clause, while significant, was not the only factor in determining whether to grant a motion to transfer venue.[80] The

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may not be used to make litigation so arduous as to place a party at a drastic disadvantage, and may not divest a party of his day in court. *Id.* at 478, 486 (citing *The Bremen*, 407 U.S. at 18).

77 *See, e.g.*, McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 346 (8th Cir. 1985) (forum clause in international contract unenforceable because grave danger that selected forum would deprive plaintiff of day in court), *cert. denied*, 474 U.S. 948 (1985).

78 *See, e.g.*, Couch v. First Guar., Ltd., 578 F. Supp. 331, 333-34 (N.D. Tex. 1984) (forum clause unenforceable because it was a boilerplate provision designed for convenience of drafting party, plaintiff was defrauded, and plaintiff had no notice of clause); Horning v. Sycom, 556 F. Supp. 819, 821 (E.D. Ky. 1983) (forum clause in computer sales contract bordered on unconscionable and, additionally, was unenforceable due to great inconvenience of transfer and disparity of bargaining power); First Pacific Corp. v. Sociedade de Empreendimentos e Construcoes, Ltda., 566 So.2d 3, 4 (Fla. Dist. Ct. App. 1990) (forum-selection clause was invalid because the clause was induced by fraud).

79 487 U.S. 22 (1988). The issue in *Stewart* was whether a court sitting in diversity should apply federal or state law when considering a motion to transfer pursuant to 28 U.S.C. § 1404(a) in conjunction with a forum-selection clause. *Id.* at 26-28. The United States Supreme Court found that the existing federal procedural statute, 28 U.S.C. § 1404(a), was broad enough to command the question presented. *Id.* at 28. This section provided: "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." 28 U.S.C. § 1404(a) (1988). Section 1404(a) provided the Court with a basis on which to ground its decision, but at least one commentator has argued that it is of little value in advancing the analytical progression of consensual adjudicatory procedure. Mullenix, *supra* note 1, at 321.

80 *Stewart*, 487 U.S. at 29. *Stewart* involved a contract between an Alabama corporation (Stewart) and a manufacturer with its principal place of business in New Jersey (Ricoh). *Id.* at 24. Seeking to enforce a forum clause in a dealership agreement requiring all disputes to be litigated in Manhattan, Ricoh moved to transfer to New York or dismiss a suit filed against it by Stewart in an Alabama federal district court. Stewart Org., Inc. v. Ricoh Corp., 779 F.2d 643, 645 (11th Cir. 1986), *aff'd on reh'g*, 810 F.2d 1066 (11th Cir. 1987), *aff'd*, 487 U.S. 22 (1988). The district court's denial of the motion on the ground that forum-selection clauses are void under Alabama law was subsequently reversed by the United States Court of Appeals for the Eleventh Circuit. *Id.* at 651. The circuit court remanded with instructions to transfer the case to New York, a result that was adopted in a hearing by the full court. *Stewart*, 810 F.2d at 1071.

The United States Supreme Court granted certiorari to correct and refine the court of appeals' analysis. Stewart Org., Inc. v. Ricoh Corp., 484 U.S. 894 (1987)

majority maintained that courts must consider additional elements, including the convenience of the transferee forum, the fairness of transferring in view of the forum-selection clause and the relative bargaining strength of the parties.[81]

Against this foundation of judicial precedent emerged the United States Supreme Court's decision in *Carnival Cruise Lines,*

(mem.); *Stewart*, 487 U.S. at 25, 28. The Supreme Court noted that the court of appeals, en banc, referred to federal statutes — including the venue statute — and to judicial decisions in determining that a strong federal interest supporting forum clauses mandated that the clause at issue be enforced. *Id.* at 25. The court of appeals then applied an analysis based on the *Bremen* standards. *Id.* at 28. While agreeing with the court of appeals that *The Bremen* may have been "instructive," the Supreme Court emphasized that the court of appeals erred in deciding whether full effect is given to a forum-selection clause by applying exclusively the principles of *The Bremen*. *Id.* at 28-29. The task before the court of appeals, the Supreme Court instructed, was to determine whether the district court abused its discretion in denying Ricoh's section 1404(a) motion. *Id.* at 29. *See supra* note 79 (quoting 28 U.S.C. section 1404(a) (1988)). Perhaps the clearest proposition to emerge from *Stewart* is that a forum selection clause is a procedural issue of venue, and therefore federal procedural law applies to the exclusion of state substantive contract law, at least where the case is under diversity jurisdiction and the issue arises on a section 1404(a) motion to transfer venue. *See* Mullenix, *supra* note 1, at 334. Thus, the Court simplified its task by declining to address specifically the contractual validity of the forum-selection clause and based its decision instead upon the discretionary question of venue. *Id.* at 334-36.

In the wake of *Stewart*, because the Court dealt with the forum clause in the narrow context of a section 1404(a) change of venue motion, it remains somewhat uncertain whether a federal court will enforce a forum-selection clause in a different procedural context in a state where the clause is invalid. Fahlman, *supra* note 5, at 456-57. Additionally, the Court stated that the decision will promote forum-shopping because parties seeking to avoid adherence to a forum-selection clause, in states that do not enforce the clause, are encouraged to bring their case in state court. *Id.* at 458. *See infra* notes 89-94 (discussing the forum-selection clause in view of the *Erie* doctrine).

[81] *Stewart*, 487 U.S. at 29. The circuit courts are not in accord on the question of whether state law is trumped by federal common law policy favoring the forum-selection clause. Erickson, *supra* note 3, at 1091. *Compare* Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990) (it is doubtful, after *Stewart*, that forum-selection clauses are governed by state law) *and* Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 512-13 (9th Cir. 1988) (state law does not apply to forum-selection clauses) *with* General Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 357 (3d Cir. 1986) (where there is no federal interest, federal common law derived from *The Bremen* displaces state law; therefore state contract law should apply). In Coastal Steel Corp. v. Tilghman Wheelabrator Ltd. 709 F.2d 190 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983), Judge Gibbons observed that although the application of federal law was suggested by Supreme Court decisions, the issue remained unsettled in the Third Circuit at the time. *Id.* at 201-02. The Eighth Circuit is internally split. *Compare* Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 852 (8th Cir. 1986) (applying state law) *with* Sun World Lines, Ltd. v. March Shipping Corp., 801 F.2d 1066, 1068 (8th Cir. 1986) (applying federal law).

Inc. v. Shute.[82] The issue was whether a forum-selection clause printed on a form passage contract could be repudiated because it was unduly burdensome to the purchaser.[83] Writing for the majority, Justice Blackmun began the Court's assessment by disposing of some prefatory matters.[84] Justice Blackmun indicated that the Court would refrain from inquiry into the constitutional contention that Carnival Cruise did not fall under the personal jurisdiction of the district court.[85] The majority explained that its disposition concerning the forum-selection clause resolved the question of where the Shutes' claim against Carnival Cruise should properly be determined.[86] Justice Blackmun then prefaced the majority's legal analysis by delineating the scope of the Court's inquiry.[87]

First, because the case fell within the Court's admiralty jurisdiction,[88] Justice Blackmun determined that federal law governed the forum-selection clause.[89] Second, noting that the Shutes ef-

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82 111 S. Ct. 1522 (1991).

83 *Id.* at 1526.

84 *See id.* at 1525.

85 *Id.*

86 *Id.* Passing on constitutional questions not essential to deciding the case, the majority reminded, was contrary to established Court policy. *Id.* Justice Blackmun quoted: "It is not the habit of the Court to decide questions of a constitutional nature 'unless absolutely necessary to a decision of the case.' " *Id.* (quoting Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

87 *Carnival Cruise*, 111 S. Ct. at 1525.

88 *Id.* "Admiralty," by reference to "maritime," is defined as: "Pertaining to navigable waters, *i.e.*, to the sea, ocean, great lakes, navigable rivers, or the navigation or commerce thereof." BLACK'S LAW DICTIONARY 968 (6th ed. 1990). *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (stating that federal common law must control cases falling under admiralty jurisdiction because following state law would be inappropriate). *See generally* FRIEDENTHAL ET AL., *supra* note 23 § 4.7, at 224-25 (discussing historical aspects of federal law with regard to admiralty).

89 *Carnival Cruise*, 111 S. Ct. at 1525. A federal district court sitting in diversity must consider whether the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), a dominant element of federal jurisprudence, requires the court to apply state substantive law. FRIEDENTHAL ET AL., *supra* note 23, § 4.2 at 194; Erickson, *supra* note 3, at 1101. *Erie* stands for the now well-accepted principle that state statutory and decisional law governs substantive issues where state law is not contradicted by federal rules. *Erie*, 304 U.S. at 78. The substantive versus procedural ambiguity of forum-selection clauses poses an *Erie* dilemma, an issue the Court sidestepped here by adherence to the principle that federal common and statutory law govern admiralty and maritime cases. *Carnival Cruise*, 111 S. Ct. at 1525. *See* Mullenix, *supra* note 1, at 332-34 (explaining that the *Bremen* Court never reached the *Erie* question, leaving the courts split on whether forum selection is substantive or procedural under an *Erie* analysis).

The key ingredients of the *Erie* doctrine, in addition to *Erie* itself, are the cases

fectively conceded they were not without notice of the provision, Justice Blackmun indicated that the Court need not contend with the notice issue.[90]

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of Guarantee Trust Co. v. York, 326 U.S. 99 (1945), Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), and Hanna v. Plumer, 380 U.S. 460 (1965). *York* introduced one of the *Erie* doctrine's fundamental concerns—the need for vertical uniformity. FRIEDENTHAL ET AL., *supra* note 24, § 4.3. The *York* Court explained that *Erie* assured prospective litigants that if a federal court heard their state law cause of action, the case should have the same outcome as if it were brought in state court. *York*, 326 U.S. at 109. If the federal rule, the Court posed, would substantially affect the case in such a way that the outcome would be different under federal law than if state law were applied, then the federal rule must give way to the state law. *Id.* Where, however, the question concerns simply the "manner and means" employed to secure recovery, that is, procedure rather than substance, the federal court always applies its own rule. *Id. Byrd* later reshaped the *Erie* doctrine by declaring that state rules should not displace federal law merely by finding that federal law would affect the outcome of a particular case. FRIEDENTHAL ET AL., *supra* note 23, § 4.3. *Byrd* informed that state law must be balanced against strong federal policies. *Byrd*, 356 U.S. at 538. Finally, the *Hanna* Court clarified that the *York* "outcome-determinative" test "cannot be read without reference to the twin aims of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468. *Hanna* further explained that while federal law will necessarily apply only when there is a direct conflict between a federal rule and a state law, if the federal rule indeed conflicts with the state law, is both constitutional and broad enough to control the issue, and complies with the Rules Enabling Act, then it must apply to the complete exclusion of the state law. *Id.* at 470-72.

[90] *Carnival Cruise*, 111 S. Ct. at 1525. The case quotes the Shutes' brief: "The respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated." *Id.* (quoting respondents' Brief at 26). Further support for declining to address the notice issue, reasoned Justice Blackmun, was in the fact that as the court of appeals assumed, the Shutes were aware of the clause when that court evaluated its enforceability. *Id.* As the Supreme Court noted, however, the court of appeals termed the assessment that the Shutes had adequate notice "doubtful." Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 n.11 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991).

The United States Supreme Court missed an earlier opportunity to determine whether a forum clause in fine print on a cruise ticket was unenforceable for lack of notice in Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989). The Court considered whether the denial of a motion to dismiss pursuant to a forum clause was appealable under 28 U.S.C. § 1291. *Lauro Lines*, 490 U.S. at 496. Section 1291 provided, in pertinent part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1291 (1988). Holding that the motion was not immediately appealable because § 1291 allowed appeals only from final decisions, the Supreme Court explained that the order was interlocutory and did not fall within a small class of claims allowed immediate appeal under the collateral order doctrine. *Lauro Lines*, 490 U.S. at 498-501.

The collateral order doctrine came out of the United States Supreme Court case, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), in which the Supreme Court allowed an appeal from the denial of a motion to compel compliance with a state statute that required the posting of security costs in a derivative action. *Id.* at

The Supreme Court pointed out that the court of appeals correctly began its analysis with an exposition of *The Bremen*, but the Court nonetheless warned that a routine utilization of the *Bremen* principles to Carnival's form passage contract was inap-

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543-47. The *Cohen* Court found that the order was final with regard to that question, hence the appeal was in compliance with the final judgment rule. *Id.* at 546-47. *See generally*, Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 512 (1990) (explaining the purposes served and problems avoided by the final judgment rule).

The respondents in *Lauro Lines* were passengers or representatives of the estates of passengers aboard a cruise ship hijacked by terrorists. *Lauro Lines*, 490 U.S. at 496. A printed contract on their passenger tickets contained a forum-selection clause limiting all suits under the contract to adjudication in Naples, Italy. Klinghoffer v. Achille Lauro, 1988 A.M.C. 636, 638 (S.D.N.Y. 1987), *appeal dismissed sub nom.* Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988), *aff'd sub nom.* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989). In denying Lauro Lines' motion to dismiss pursuant to a forum-selection clause, the United States District Court for the Southern District of New York refused to give effect to the clause, holding that the ticket did not give sufficient notice to the passengers that they were giving up the right to sue in the United States. *Id.* On appeal, the United States Court of Appeals for the Second Circuit held that the district court's denial of the motion was not immediately appealable. Chasser v. Achille Lauro Lines, 844 F.2d 50, 56 (2nd Cir. 1988), *aff'd sub nom.* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989). Because the United States Supreme Court affirmed the court of appeals' holding, the Court never reached the substantive equitable question of whether insufficient notice would have rendered the clause unenforceable. *See Lauro Lines*, 490 U.S. at 497.

Lauro Lines is particularly noteworthy for the revelation that forum-selection clauses may be frustrated by the final judgment rule. *Cf.* Schreiber, *supra* note 1, at 470-71. If a party is forced to litigate in a place other than that indicated in its forum provision, the benefit of the clause is essentially nullified even if an appellate court ultimately enforces adherence to the clause. *Lauro Lines*, 490 U.S. at 502-03 (Scalia, J., concurring).

> While it is true, therefore, that the 'right not to be sued [in other than the selected forum]' is not fully vindicated — indeed, to be utterly frank, is positively destroyed — by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals.

Id.

Before *Lauro Lines*, the circuit courts differed on this aspect of forum selection. *Compare, e.g.*, Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 891 (7th Cir. 1984) (motion to dismiss pursuant to a forum clause not immediately appealable under 28 U.S.C. § 1291), *cert. denied*, 469 U.S. 890 (1984) *with* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 197 (3d Cir. 1983) (jurisdiction to hear the appeal falls within exceptions to finality requirement), *cert. denied*, 464 U.S. 938 (1983). *See also* Rohrer, Hibler & Replogle, Inc. v. Perkins, 469 U.S. 890 (1984) (White, J., dissenting from denial of cert.) (arguing that because there was no significant distinction in the factual posture of *Rohrer* and *Coastal Steel*, the Court should have granted certiorari to resolve the conflict). In Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989), the Third Circuit again maintained that a motion denying dismissal is a collateral order subject to immediate appeal. *Id.* at 908.

propriate because of the basic dissimilarities between the cases.[91] The majority stressed that the contract scrutinized in *The Bremen* was between two business corporations and, while the Court in *The Bremen* enumerated factors that rendered the clause at issue enforceable, it did not specifically define circumstances under which enforcing a forum clause would be unreasonable.[92] The majority stated that the reasonableness factors discussed in *The Bremen* might be applicable in discerning whether a similar clause should be enforced, but emphasized that Carnival's passage ticket contract was drawn under circumstances factually different from those under which The Bremen's international towage contract arose.[93] Justice Blackmun observed that the court of appeals, cognizant of *The Bremen's* reasonableness factors, inappropriately concluded that because the Shutes were not business people and did not negotiate the forum clause, the provision was unenforceable.[94] The Court dismissed the contention that the provision contravened the reasonableness criteria set forth by the the *The Bremen* Court merely because the disputed

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91 *Carnival Cruise*, 111 S. Ct. at 1526. The Court regarded as an ostensible paradox the fact that both the cruise line and the Shutes relied on *The Bremen* in support of their respective arguments. *Id.* Justice Blackmun asserted that the reason for this circumstance is the parties' failure to account for crucial differences in the facts. *Id.*

92 *Id.* The Court explained that the factors enumerated in *The Bremen* satisfied the Court's inquiry into the reasonableness of the clause there at issue. *Id.* These factors, the Court indicated, would apply to reasonableness scrutiny in an analogous situation. *Id.*

93 *Id.* A Florida district court, in a factual situation on point with *Carnival Cruise*, found that the Supreme Court's language in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), controlled the question of whether to enforce the forum-selection clause at issue. *See* Bremen v. Cunard Line, 771 F. Supp. 1175 (S.D. Fla. 1991). *Stewart*, the court recognized, established that a motion to give effect to a forum clause is determined by reference to the transfer statute, 28 U.S.C. § 1404(a). *Id.* at 1176. Further, the district court noted, *Stewart* requires that the relative bargaining strength of the parties is to be considered as a factor in a § 1404(a) analysis. *Id.* at 1177, 1178. The Florida district court declared: "this court determines that the Supreme Court's previous guidance in *Stewart* provides adequate authority to prevent the transfer of the instant case." *Id.* at 1178 n.1.

94 *Carnival Cruise*, 111 S. Ct. at 1526-27. *But see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (enforcing such a provision does not violate due process as long as it is "freely negotiated" and not "unreasonable and unjust"). Ordinarily, business people are presumed to understand the nature of their agreements. Leasing Serv. Corp. v. Graham, 646 F. Supp. 1410, 1415 (S.D.N.Y. 1986). The average passenger aboard a cruise ship, however, is not aware of the extent to which sensitive rights are affected by a cruise ticket contract. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (usually, parties neither understand, nor, in most cases, even read the terms of contracts of adhesion).

forum clause was not bargained for, but appeared instead on the back of a ticket received after purchase.[95]

After criticizing the court of appeals for failing to distinguish relevant facts and, thereby, misapplying *The Bremen* principles, Justice Blackmun articulated the discriminate factors.[96] The Justice determined that the unique towing contract in *The Bremen* was uncommon because the parties involved were from different nations and were concerned with transporting a very expensive apparatus across a great expanse of ocean.[97] Given these extraordinary circumstances, the majority posited that it was reasonable for the *Bremen* Court to assume that the parties conscientiously negotiated the selection of an adjudicatory forum.[98]

The Court attested that Carnival's passage contract, on the other hand, was completely conventional and virtually identical to any passage contract.[99] The Court concluded that it was unreasonable to deduce that the Shutes would or could have negotiated the forum-selection clause with Carnival Cruise.[100] A forum provision in this context, maintained the Court, would not be the subject of negotiation.[101] The Court conveyed that common sense commanded both that admission to a cruise ship be manifested in a form contract and that the purchaser of a cruise ticket did not enjoy equal bargaining power with a cruise line.[102]

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95 *Carnival Cruise*, 111 S. Ct. at 1527. Common sense, the Court reasoned, indicates that this type of ticket is not the subject of bargaining and that passengers do not enjoy equal bargaining power with the cruise line. *Id.*

96 *Id.* The Court also refuted the court of appeals' alternate justification for its ruling against enforcement of the forum-selection clause, that the Shutes would essentially be deprived of their day in court if the clause were enforced. *Id.* Justice Blackmun summarily dismissed the court of appeals' "conclusory reference to the record" in its determination that the Shutes were physically and financially prevented from conducting their lawsuit in Florida. *Id.* at 1528. There was no such finding in the district court, the Justice chided. *Id.*

97 *Id.* at 1527 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972)).

98 *Id.* The Court posited that it would have been entirely reasonable for the Court to expect that the parties in *The Bremen* had carefully negotiated the forum clause in their agreement, even absent the evidence that they had done so. *Id.*

99 *Id.* As an example of such a clause, the court cited Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 910 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989). *Carnival Cruise*, 111 S. Ct. at 1527. In *Hodes*, the Court found a forum clause contained in a form passage cruise contract enforceable. *Hodes*, 858 F.2d at 907, 916. To hold the clause unenforceable, the Court explained, would be a return to the "parochialism" denounced in *The Bremen*. *Id.* at 915.

100 *Carnival Cruise*, 111 S. Ct. at 1527.

101 *Id.*

102 *Id.*

The appellate court skewed the *Bremen* holding, Justice Blackmun concluded, by neglecting salient dissimilarities in the commercial contexts in which these two contracts arose.[103]

Justice Blackmun then furnished reasons to support enforcement of such a provision.[104] The Justice began by identifying the cruise line's purpose for limiting the places in which it can be subject to suit.[105] First, because its passengers were of diverse citizenry, the Justice explained, Carnival could be subjected to litigation in any number of fora.[106] Second, noted Justice Blackmun, forum clauses also could benefit a carrier because specifying the forum in advance saved time, money, and judicial resources by pre-determining the proper forum.[107] Moreover, the Court postulated that the cruise line saved money by restricting its liability to a specified forum.[108] The cruise line's savings, asserted the Court, were passed on to consumers in the form of lower fares.[109]

The majority noted that the appellate court relied on the *Bremen* discourse in identifying inconvenience factors that might be sufficient to set aside a forum clause.[110] The majority further asserted that the court of appeals failed to observe the proper context in which these elements were intended to apply.[111] The hypothetical that the Court posited in *The Bremen*, recounted Justice Blackmun, described a situation in which two Americans agreed to settle their "essentially local disputes" in a distant forum.[112] In such a case, the Justice advised, the gross onerousness to one or more parties might play a more significant role in determining inconvenience, provided the complaining party could

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103 *Id.* In view of these disparate business settings, the majority stated that determining whether Carnival's forum-selection clause was reasonable required refining the analysis of *The Bremen* to address the specific nature of form passage contracts. *Id.* (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)). Thus, as an initial proposition, the majority rejected the court of appeals' determination that a forum provision in a routine passage contract is not enforceable just because it is not negotiated. *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* On the other hand, the forum clause itself has created a significant amount of litigation. Erickson, *supra* note 3, at 1091. A WESTLAW search revealed that forum-selection clauses were considered in nearly nine hundred federal and state cases between 1980 and 1991.

108 *Carnival Cruise*, 111 S. Ct. at 1527.

109 *Id.*

110 *Id.* at 1528.

111 *Id.*

112 *Id.*

satisfy a "heavy burden of proof."[113] The majority explained that the dispute at issue was not "essentially local," and the Florida choice of forum was not particularly distant, given that the tort occurred off the Mexican coast.[114] In view of these contextual distinctions and because the Shutes had notice of the forum provision, the majority concluded that the Shutes did not meet the required burden.[115]

Stating that forum clauses in form passage contracts were a legitimate subject for judicial scrutiny on fairness grounds, the Court acknowledged that a forum clause motivated by bad faith, such as one designed to discourage passengers from proceeding with valid claims, might be unenforceable as fundamentally unfair.[116] The Court emphasized, however, that there was no suggestion of bad faith in the present case.[117] The Justice explained that the State of Florida was petitioner's principal place of business and Florida ports were the site of the departure and return of many of petitioner's cruises.[118] These facts, the Court asserted, belied any notion that the cruise line was motivated by bad faith in drafting the forum clause.[119]

The Court charged that because there was no element present that would invalidate the forum-selection clause, the court of appeals erred when it declined to give effect to the provision.[120] Justice Blackmun backed this determination by stating, without elaboration, that no evidence existed to suggest that agreement to the clause was garnered by "fraud or overreaching."[121] Returning to the notice issue, Justice Blackmun reiterated that the Shutes had effectively admitted they had notice of the clause.[122] Having notice, the majority reasoned, presumably meant that the Shutes could simply walk away from the contract with

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113 *Id.* at 1526 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972).

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id. But cf.* Hoffman v. Minuteman Press Int'l, Inc., 747 F. Supp. 552, 559 (W.D. Mo. 1990) ("Forum selection clauses that are drafted broadly so as to encompass even tort litigation that may arise between the contracting parties are themselves prima facie evidence of fraud and overwhelming bargaining power.").

118 *Carnival Cruise*, 111 S. Ct. at 1528.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id. See supra* note 90 and accompanying text (discussing notice); *see also infra* notes 133-35 (same).

impunity.[123]

Justice Blackmun found no merit in the Shutes' argument that the forum clause in Carnival's passage ticket contract violated 46 U.S.C. § 183c, which limited the use of exculpatory clauses by passenger carriers.[124] Regarding the statutory clause that prohibited a vessel owner from limiting or taking away a passenger's right to a court of competent jurisdiction, the majority stressed that the Florida courts were courts of competent jurisdiction.[125] Therefore, the Court asserted, the forum-selection clause did not offend section 183c.[126] The Court maintained that rather than take away the passengers' right to a court of competent jurisdiction, the forum clause merely appointed the Florida courts, which plainly fit that description.[127]

Justice Blackmun dismissed the Shutes' assertion that, although the clause did not directly encroach on their right to recover for the injury, it transgressed Congress's intended goal by operating to place an extreme hardship on the Shutes' ability to have their case heard in a judicial court.[128] The Justice, noting that the Shutes did not cite any authoritative support for their position, took issue with their interpretation of Congress' intent.[129] Contrary to the Shutes' view, Justice Blackmun reviewed the legislative history of section 183c and concluded that Congress intended the legislation to prevent ship owners from incorporating arbitration clauses into contracts that removed the jurisdiction of *all* judicial courts or limited the ship owner's liability for negligence.[130] The majority concluded that because the Shutes' forum clause neither blocked judicial resolution of claims nor purported to limit Carnival's negligence liability, it did not violate section 183c.[131]

Justice Stevens, joined by Justice Marshall, authored an in-

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123 *Id.* at 1528. In the dissent, Justice Stevens noted that the Shutes had, by the time they read the clause, already paid for the non refundable tickets. *Id.* at 1529 (Stevens, J., dissenting).

124 *Id.* (Stevens, J., dissenting). *See* 46 U.S.C. § 183c (West 1988). *See also infra* note 139 for text of statute.

125 *Carnival Cruise*, 111 S. Ct. at 1528 (Stevens, J., dissenting).

126 *Id.*

127 *Id.* Justice Stevens would find the challenged forum clause in violation of 46 U.S.C. § 183c, if not literally, then at least in spirit. *See id.* at 1532 (Stevens, J., dissenting).

128 *Id.* at 1528-29 (Stevens, J., dissenting).

129 *Id.* at 1529 (Stevens, J., dissenting).

130 *Id.*

131 *Id.*

sightful dissent.[132] Although the focus centered on two contentions—that the forum clause violated section 183c and, alternatively, that the clause was basically unfair—Justice Stevens began his discussion by refuting the majority's finding that the Shutes had full and fair notice of the provision.[133] The Justice opined that the eighth paragraph of a twenty-five paragraph fine print contract on the back of a ticket was not likely to be seen by the average person.[134]

Moreover, the Justice conveyed that most passengers, including the Shutes, purchased their tickets before having had a chance to read the contract printed on them.[135] Justice Stevens argued that by the time the passenger had the ticket in hand, the contract, including a provision that prohibited refunding unused tickets, presumably was already in force.[136] The Justice indicated that this left ticket purchasers with a Hobson's choice—either accept all the contract provisions or cancel a planned vacation without a refund.[137] Placing such a burden on passengers, Justice Stevens asserted, reduced the cruise line's costs but did not render the forum clause reasonable.[138]

The dissent disclosed its central thesis by asserting that the

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[132] *Id.* at 1529 (Stevens, J., dissenting).

[133] *Id.* (Stevens, J., dissenting). Justice Stevens posited that the dissent would disagree with the Court's analysis even if the Shutes had full and fair notice of the forum provision. *Id.* (Stevens, J., dissenting).

[134] *Id.* (Stevens, J., dissenting). "[O]nly the most meticulous passenger" would notice such a clause, Justice Stevens offered. *Id.* (Stevens, J., dissenting). The dissent buttressed this determination by appending the passage contract, in its original type size, to the dissent's opinion. *Id.* at 1534-38. (Stevens, J., dissenting).

[135] *Id.* at 1529 (Stevens, J., dissenting). In Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989), the court interposed an agency theory to resolve the question of notice. *Id.* at 912. The cruise passengers in *Hodes* obtained their tickets, as did the Shutes, through a travel agent. *Id.* at 911-12. The Third Circuit indicated that the point of inquiry is "whether someone has 'acted in the capacity of an agent in acquiring the ticket for the plaintiff.' " *Id.* at 912 (quoting DeCarlo v. Italian Line, 416 F. Supp. 1136, 1137 n.2 (S.D.N.Y. 1976)). Through their agent, the passengers were charged with notice of the clause. *Id.*

[136] *Carnival Cruise*, 111 S. Ct. at 1529 (Stevens, J., dissenting). Paragraph 16(a) of Carnival's passenger ticket contract provided: "The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger." *Id.* at 1534-37 (Stevens, J., dissenting).

[137] *Id.* at 1529 (Stevens, J., dissenting). The average passenger, noted the dissent, is not legally savvy enough to be sure whether the no-refund provision is enforceable. *Id.* (Stevens, J., dissenting). Justice Stevens assumed, therefore, that the passenger would prefer risking enforcement of the forum clause to forgoing settled vacation plans. *Id.* (Stevens, J., dissenting).

[138] *Id.* (Stevens, J., dissenting). In Steven v. Fidelity & Casualty Co., 377 P.2d 284 (Cal. 1962), the Supreme Court of California refused to give effect to a limita-

clause violated 46 U.S.C. section 183c.[139] Because terms that limit a ship owner's liability or weaken a passenger's rights were often the result of disparate bargaining power and did not serve the public interest in inhibiting negligent conduct, instructed Justice Stevens, exculpatory clauses were long recognized as unjust and unenforceable under federal admiralty law.[140] Justice Stevens indicated that exculpatory clauses took a variety of forms, including the forum-selection provision, and shared the common purpose of "[putting] a thumb on the carrier's side of the scale of justice."[141] Justice Stevens underscored the majority's contention that the forum clause in controversy was reasonable because reducing the carrier's liability provided a benefit in the form of reduced fares.[142] This rationale, Justice Stevens warned, would render all exculpatory clauses enforceable, a result contrary to

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tion on liability provision in an insurance policy because the insured had to purchase the policy before he could gain notice of its provisions. *Id.* at 298.

[139] *Carnival Cruise*, 111 S. Ct. at 1529 (Stevens, J., dissenting). 46 U.S.C. § 183c provides:

> It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. § 183c (West 1988). The court of appeals had found the forum-selection clause in this case unenforceable as against public policy. Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 n.12 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). The court therefore declined to give its opinion what effect section 183c has on forum-selection clauses in general. *Id.*

[140] *Carnival Cruise*, 111 S. Ct. at 1529-30 (Stevens, J., dissenting). Justice Stevens quoted from *The Kensington*:

> It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary.

Id. at 1530 (Stevens, J., dissenting) (quoting The Kensington, 183 U.S. 263, 268 (1902)).

[141] *Carnival Cruise*, 111 S. Ct. at 1530 (Stevens, J., dissenting).

[142] *Id.* at 1530 n.4 (Stevens, J., dissenting).

time-honored jurisprudence.[143]

The controlling factor in deciding whether the forum-selection clause in Carnival's contract was valid, Justice Stevens insisted, was 46 U.S.C. section 183c.[144] Justice Stevens acknowledged that the statute was specifically directed at limitations on carriers' liability, but stated that the House Report on the bill revealed section 183c was added as a response to all ticketing practices that reduced a passenger's ability to seek redress for injuries in a qualified court of jurisdiction.[145] Because of the general remedial purpose of section 183c and its legislative history condemning such practices, the dissent reasoned that the language of the statute should be read liberally.[146] Even though there was no explicit reference to forum-selection clauses, Justice Stevens imparted, the language of the statute was sufficiently expansive to cover them.[147] Illuminating the judicial climate at the time the statute was enacted, the Justice explained that forum clauses were not specifically indicated in the statute because they were rejected by the common law, and thus rarely used.[148]

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143 *Id.* (Stevens, J., dissenting).

144 *Id.* at 1532 (Stevens, J., dissenting).

145 *Id.* (Stevens, J., dissenting). The dissent referred to the following excerpt from the House Report: "The amendment . . . is intended to, and in the opinion of the committee will, put a stop to all such practices and practices of a like character." H.R. REP. No. 2517, 74th Cong., 2d Sess. 6-7 (1936). These words, Justice Stevens conveyed, were given effect in section 183c, which reads in relevant part: "It shall be unlawful . . . to insert in any rule, regulation,contract, or agreement any provision or limitation. . . (2) purporting . . . to lessen, weaken, or avoid the right of any claimant. . . ." *Carnival Cruise*, 111 S. Ct. at 1532 (Stevens, J., dissenting).

146 *Carnival Cruise*, 111 S. Ct. at 1532 (Stevens, J., dissenting). Justice Stevens maintained that the forum clause in Carnival's passage contract, requiring Mr. and Mrs. Shute to litigate in Florida, indeed compromised the Shutes' ability to obtain legal redress for the accident that happened while on a cruise that "originated and terminated in Los Angeles, California." *Id.* (Stevens, J., dissenting). Instead of focusing on Mr. and Mrs. Shute's physical and financial abilities, however, the Justice offered that witnesses could be more readily and less expensively gathered in a west coast forum. *Id.* (Stevens, J., dissenting).

147 *Id.* (Stevens, J., dissenting). If the dissent is correct in its belief that the language of 46 U.S.C. section 183(c) is broad enough to encompass the forum-selection clause at issue, then, under choice of law doctrine, it must be applied "to the total exclusion" of the forum clause. *See* Burlington R.R. v Woods, 480 U.S. 1, 4-5 (1987).

148 *Carnival Cruise*, 111 S. Ct. at 1532. (Stevens, J., dissenting). Justice Stevens indicated that exculpatory clauses were typically held unenforceable in admiralty courts because such clauses usually arose out of an imbalance in bargaining power. *Id.* at 1530 (Stevens, J., dissenting). The compelling state interest in discouraging negligence is undermined, the Justice suggested, when exculpatory clauses are enforced in favor of the more powerful entity — the carrier. *Id.* (Stevens, J., dissenting).

Though Florida was not a foreign jurisdiction, Justice Stevens posited that requiring individuals to travel from Washington to Florida to prosecute their case was analogous to forcing a corporation to travel to a foreign country.[149] Given this postulate, Justice Stevens concluded that the language in section 183c—forbidding a carrier to weaken, lessen or avoid a passenger's right to a court of competent jurisdiction—should control the manifestly unreasonable provision in the Shutes' passenger ticket contract.[150]

The dissent denoted that two strands of contract law intersected when evaluating the fairness of a forum-selection clause in a passage contract.[151] The fundamental contract principle that courts should enforce contracts according to their terms, posited Justice Stevens, was tempered by reference to these two principles.[152] First, the Justice explicated, a form contract prepared by a party of superior bargaining power and submitted on a take-it-or-leave-it basis is generally a contract of adhesion which is traditionally subjected to heightened scrutiny.[153] Justice Stevens observed that, because the weaker party had not expressed voluntary and knowing consent to all contract's terms, some commentators have suggested that such a contract may not be enforceable at all.[154] The dissent pointed out, however, that due to the great prevalence of form contracts in the commercial arena, the common law took a more tolerant view toward contracts of adhesion, preferring instead to scrutinize their terms

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149 *Id.* at 1533. (Stevens, J., dissenting).

150 *Id.* (Stevens, J., dissenting). Recognizing that Carnival Cruise is a Panamanian corporation, the dissent stated that the majority did not indicate whether it would enforce Carnival's forum-selection clause if Panama had been the named forum. *Id.* at 1533 n.6 (Stevens, J., dissenting). The dissent pointed out that where circuit courts have applied the United States Carriage of Goods by Sea Act (COGSA) § 3(8), 46 U.S.C. § 1303(8) (1988), the requirement that suits must be settled in a foreign jurisdiction has been held to lessen or weaken the plaintiff's right to recovery in violation of COGSA. *Carnival Cruise*, 111 S. Ct. at 1532-33 (Stevens, J., dissenting).

151 *Id.* at 1530 (Stevens, J., dissenting).

152 *Id.* (Stevens, J., dissenting).

153 *Id.* at 1530-31 (Stevens, J., dissenting).

154 *Id.* at 1531 (Stevens, J., dissenting). *See, e.g.*, Rakoff, *supra* note 99, at 1180-83 (suggesting that terms in contracts of adhesion are frequently inserted to displace "clear rules of law that would otherwise govern the transaction in question"); W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 13 (1974) (principles of a free society assure that a person is not obligated to fulfill duties without a manifestation of voluntary assent).

under a reasonableness standard.[155]

The second contract precept implied by the forum-selection clause, Justice Stevens continued, was the historical view that the clause ran counter to public policy and was therefore invalid.[156] The Justice cautioned that while many courts discarded this maxim, the prevailing rule remained that a forum clause was enforceable if it was not the subject of free bargaining, denied a remedy to one party, or created excess costs for one party.[157] Justice Stevens asserted that before the Court's decision in *The Bremen* there was no question that a forum-selection clause in a routine form passage contract was unenforceable.[158] Even in the wake of *The Bremen*, Justice Stevens opined, such a clause continued to be unenforceable.[159]

Until *Carnival Cruise*, each time the United States Supreme Court specifically upheld the validity of a forum clause, the contracting parties were business entities whose negotiated agree-

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155 *Carnival Cruise*, 111 S. Ct. at 1531 (Stevens, J., dissenting). Justice Stevens reproduced Judge J. Skelly Wright's description of the state of the law:

> Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id. (Stevens, J., dissenting) (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965) (footnotes omitted)).

156 *Carnival Cruise*, 111 S. Ct. at 1531 (Stevens, J., dissenting) (quoting Dougherty, *supra* note 56, at 409). The dissent admitted that "adherence to this general rule" has declined since *The Bremen*. *Id.* (Stevens, J., dissenting). Yet, under the circumstances of *Carnival Cruise*, the dissent would not enforce the forum-selection clause at issue. *Id.* (Stevens, J., dissenting).

157 *Id.* (Stevens, J., dissenting).

158 *Id.* (Stevens, J., dissenting). Entering an agreement that contains a forum-selection clause should not strip a party of his due process rights and, similarly, construction of such an agreement should not be read as paramount to state long-arm statutes. Mullenix, *supra* note 1, at 304.

159 *Carnival Cruise*, 111 S. Ct. at 1531 (Stevens, J., dissenting). Justice Stevens argued that the present controversy was not really controlled by *The Bremen*. *Id.* (Stevens, J., dissenting). Fine-print contracts appearing on the back of tickets, the dissent indicated, were in no way discussed or alluded to in that case. *Id.* (Stevens, J., dissenting). Instead, remarked Justice Stevens, *The Bremen* distinguished those cases that endorsed the traditional common law approach (regarding all forum clauses as void because they oust courts of jurisdiction) on the ground that the common law doctrine did not reach the agreements in which the parties enjoyed bargaining parity. *Id.* (Stevens, J., dissenting).

ments included provisions benefitting both parties.[160] For example, the corporations involved in the *Bremen* controversy equally enjoyed the benefit of selecting in advance the forum for adjudication of potential disputes. Carnival's passage contract, on the other hand, disproportionately benefitted the cruise line. The trade-off in decreasing Carnival's cost of maintaining suit was the diminishing of the Shutes' litigation rights. Outside of signing the contract, there was no evidence that the Shutes truly understood and consented to this consequence.

The majority purported to evaluate the reasonableness of the forum clause by refining the *Bremen* analysis "to account for the realities of form passage contracts."[161] In tailoring its evaluation, the majority missed a significant distinction between Unterweser's (the international towing concern in *The Bremen*) objective of reducing the uncertainties of litigation and Carnival's objective of limiting the forums in which it may be sued.[162] There is no doubt that, considering the nature of its business, Carnival Cruise might be subject to suit in a number of different fora.[163] Carnival's interest in abating potential inconvenience, however, in no way approaches Unterweser's interest in limiting

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160 *See* Spradlin v. Lear Siegler Management Serv. Co., 926 F.2d 865, 867 (9th Cir. 1991)("*Bremen* and most of the published opinions following it involve commercial contracts between two fairly sophisticated parties."); *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (forum clause enforced against copy machine dealer by reference to § 1404(a)); Scherk v. Alberto-Culver Co., 417 U.S. 506, (1974) (clause requiring arbitration in France enforced against corporate purchaser of business entities). In Lauro Lines S.R.L. v. Chasser, 470 U.S. 475 (1989), a case concerning a cruise ticket contract in which the parties were of manifestly unequal bargaining strength, the Court examined the application of the final judgment rule when forum-selection clauses are at issue, not the enforceability of the particular clause in dispute. *Id.* at 496.

161 *Carnival Cruise*, 111 S. Ct. at 1527. Justice Blackmun justified the majority's modification of the *Bremen* test by asserting that Carnival's passage contract was unremarkable. *Id.* The ticket was virtually the same as any other sold to passengers on cruise lines. *Id.* The majority's opinion falls short, however, of pointedly identifying how enforcing a forum clause against unwitting passengers is fair.

162 The majority referred to the cruise line's desire to limit the fora in which it could be sued as a "special interest." *Id.*

163 Carnival, in addition to utilizing the ports of numerous states and nations, services customers from many domiciles and "reaches out" to those customers in the form of advertising. *See* Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). Under established doctrine, however, it is precisely this "reaching out" that makes the imposition of personal jurisdiction fair. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985); Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 383 (6th Cir. 1968) (defendant "purposely availed" itself of the benefits of the forum because he sold and leased machines in the forum state).

the vast uncertainties involved in international towage.[164] Unterweser sought to ameliorate the unquestionable hardship of potentially being forced to litigate, in the event of a mishap, anywhere in its course of travel.[165] Carnival feared being sued in the domicile of an injured passenger. In Unterweser's case, the subject of the potential suit was likely to be only incidentally related to the forum.[166] Not so with Carnival Cruise. As the court of appeals determined, Carnival's substantial connection with the State of Washington could be easily established by reference to the minimum contacts test of *International Shoe* and its progeny.[167]

The majority asserted that the clause in question was enforceable, though not the product of bargaining, because it was unreasonable to assume that a cruise line would negotiate with a passenger over a provision in a passage contract.[168] Not only, however, was the clause not negotiated but the Shutes did not see the contract until it arrived in the mail. Having already paid for the non-refundable tickets, they had no choice but to accede to the forum provision or lose their money.[169] The Court's rationale for finding this condition fair is unconvincing. Because the Court found that the clause provided some advantages, mainly to the cruise line, it concluded that placing the Shutes in this no-win situation was permissible.[170]

The Court cited several factors—the cruise line's interest in limiting the fora in which it is subject to suit and courts' concern in conserving time and resources—that purportedly rendered the clause permissible.[171] Yet, these concerns merely present the fundamental reasons any enterprise would choose to include a forum provision in its contracts. An additional element of the majority's reasoning in finding the clause permissible, that passengers may enjoy lower fares as a consequence of agreeing to

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164 *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972).

165 *Id.*

166 *Id.* Damage to the equipment in tow could have occurred anywhere along the vessel's route, potentially submitting Unterweser to suit in any of the "countless possible ports of refuge." *Id.*

167 Shute v. Carnival Cruise Lines, 897 F.2d 377, 380, 381-83 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991).

168 Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522, 1527 (1991).

169 *Id.* at 1529 (Stevens, J., dissenting). *See* Williams v. Walker-Thomas Furniture Co., 250 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.").

170 *See Carnival Cruise*, 111 S. Ct. at 1527.

171 *Id.*

the forum-selection clause,[172] may be simply mistaken. More accurately, as Justice Stevens squarely asserted in his dissent, the savings to the cruise line in reduced litigation costs was accomplished by placing an unfair burden on the passenger.[173]

The majority undertook an assessment of whether the forum-selection clause in this case was reasonable.[174] Justice Blackmun began by stating that a reasonable forum clause "may well be *permissible* for several reasons" and proceeded to list the reasons the Court found the forum clause permissible in this context.[175] In the process, the Court recast the *Bremen* analysis and no longer limit enforcement to cases involving parties of the same sophistication or bargaining power. The Court favored the forum-selection clause despite the obviously disparate bargaining power.[176] The result must speak for itself because the Court did not directly reveal what made this forum clause reasonable. Beyond its holding, the majority left nothing other than the vague notion that almost any forum-selection clause is somehow reasonable and permissible.[177]

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172 *Id.* Conceding that the clause may reduce Carnival's litigation costs does not lead inexorably to the conclusion that this adhesive contract benefits the consumer.

173 *Id.* at 1529. (Stevens, J., dissenting). The dissent argued that thrusting an inconvenient judicial forum on passengers cannot be sufficient to render the clause reasonable. *Id.* (Stevens, J., dissenting). Further, the majority offered no support for its conclusion that the savings is passed on to the purchasers of tickets. The majority seemed to offer the proposition as a matter to be taken on faith. In reality, price decreases in the marketplace are generally determined by the effect on total revenue when price is cut. Even in response to lowered costs, a large profit-making corporation would not lower its prices unless the result would be an increase in total revenue. It is therefore inaccurate for the Court to assume that Carnival's passengers enjoy lower cruise ticket prices because Carnival has reduced its litigation costs. *See generally*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 461-556 (1985) (discussing the analysis of decreasing cost and total revenue).

174 *Carnival Cruise*, 111 S. Ct. at 1527. This evaluation, the majority asserted, required the Court to "refine" the test, as set forth in *The Bremen*, to fit the form passage context. *Id. See also supra* note 166 and accompanying text.

175 *Carnival Cruise*, 111 S. Ct. at 1527 (emphasis added).

176 *See* Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 376 (7th Cir. 1990) ("If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary.").

177 Lower courts will have difficulty applying the decision because the Court's reasoning implies that any boilerplate provision may stand as long as, by virtue of its inclusion in the contract, some benefit to the *drafting party* can be shown. Even apart from its imprecise rhetoric, the *Carnival Cruise* decision is unfortunate because it obfuscates the common law criteria for establishing when terms in contracts of adhesion are unenforceable. Professor Farnsworth has expounded:

> A second judicial technique in dealing with standard forms is to refuse to hold a party to a term on the ground that, although the writing may plainly have been an offer, the term was not one that an uninitiated reader ought reasonably to have understood to be a part of that offer.

This is not to argue that forum-selection clauses should never be used. On the contrary, contracting parties wisely endeavor to attain the highest degree of predictability in their commercial arrangements.[178] The forum-selection clause is but one contractual provision to which parties resort in achieving that goal. Courts concerned with fairness, freedom of contract and maintaining a contract's equitable balance should respect freely negotiated forum provisions.[179] Nevertheless, by elevating the sanctity of freedom of contract above traditional notions of substantial justice and fair play,[180] the *Carnival Cruise* majority engaged in a form of Lochnerism,[181] requiring the Shutes to comply with a decidedly inequitable agreement that predominantly benefitted the cruise line. While the majority pointedly recognized that the contract was certainly not freely negotiated, the Court failed to perceive the inherent inequity in requiring the Shutes to conform to a contract, the provisions of which they were not aware until after they remitted the non-refundable

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> This result is especially easy to reach if the term is on the reverse side of the form and the reference, if any, to terms on the reverse side is itself in fine print or otherwise inadequate.

E. FARNSWORTH, CONTRACTS 314 (1990). The reference, in Carnival's contract, was large enough to be observed; there were, however, many fine-print provisions imbedded in the contract, rendering recognition of each individual provision difficult for all but the most careful reader. *Carnival Cruise*, 111 S. Ct. at 1529 (Stevens, J., dissenting).

178 Erickson, *supra* note 3, at 1092.

179 Most of the analytical difficulties wrought by forum clauses would, in effect, be moot if all states were to give full effect to reasonable, fair, and freely negotiated forum-selection clauses. *See supra* note 5 (listing states that do not recognize the validity of forum selection clauses); *See also supra* note 86 (detailing cases in which federal courts considered whether federal common law policy supporting contractual forum selection is strong enough to supplant state substantive law to the contrary).

180 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 463 (1940).

181 In Lochner v. New York, 198 U.S. 45 (1905), the Court struck down health legislation that limited bakery employees' hours to a maximum of ten hours per day. *Id.* at 46 n.1, 64-65. The *Lochner* majority was intent on safeguarding liberty of contract, despite legislative recognition of adverse health affects suffered by the bakers. *Id.* at 51, 57. The disparity in bargaining power between the bakers and their employers was disregarded by the Court, even though the contention that bakers were at liberty to accept or reject the terms of their employment was, in reality, a fiction. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 578 (2d ed. 1988). It is similarly a fiction to suppose that Mr. and Mrs. Shute were not the victims of Carnival's overweening bargaining power, but merely willing participants in a mutually beneficial agreement. Yet, the majority saw fit to enforce the boilerplate forum provision in Carnival's cruise ticket, ignoring the fact that accession to the clause in no way represented a deliberate and knowing exercise of the Shutes' will.

fee.[182]

Recognizing Carnival's vast advantage in bargaining power and the Shutes's "Hobson's choice" of having to pay for their ticket before reading the contract, should have led the Court to invalidate the forum clause in the interest of justice.[183] Moreover, because of the compelling evidence that the State of Washington had personal jurisdiction over Carnival Cruise, it is difficult to support the Court's determination to allow the cruise line's interests in convenience and lowered costs to interfere with the Shutes' lawful and valid interest in pursuing their legal claim.[184] While there surely are circumstances under which a commercial cruise line has a legitimate interest in limiting the fora in which it may be sued,[185] the benefits and burdens of such a limitation should be equitably distributed between the contracting parties. Where a cruise line clearly profits from the forum-selection clause and the benefit to the passenger is discovered only by a great stretch in reasoning, the focus should properly be on the passenger's burden. In this case, a conscientious application of *Stewart* and the *Bremen* would have rendered Carnival's forum-selection clause patently unreasonable, unenforceable and unconscionable.

Richard A. Gantner

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182 It seems likely that future challenges to forum-selection clauses in form contracts will center on the issue of notice. *See* Carnival Cruise, Inc. v. Superior Court of Calif., Nos. B050142, B050255, 1991 WL 190309, at *5 (Cal. Ct. App. Sept. 27, 1991) (the California Court of Appeal supported Carnival's venue contentions; however, pointing out that the Supreme Court, in Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991), did not address the issue of notice, the court remanded on that issue with an order to invalidate the clause as against any passenger deemed to lack adequate notice of the provision).

183 Regrettably, the Court chose instead to reconstruct the *Bremen* analysis to find Carnival's forum-selection clause enforceable. Carnival Cruise Lines v. Shute, 111 S. Ct. 1522, 1527 (1991).

184 *See* Hoffman v. Minuteman Press Int'l, Inc., 747 F. Supp. 552, 559 (W.D. Mo. 1990) ("No one should be able to erect, through forum selection clauses, a shield of immunity to all litigation in undesirable forums.").

185 It may be unreasonable to subject the cruise line to suit in any of the foreign ports to which it travels. *See supra* notes 154-55 and accompanying text. It would be even more unreasonable to require passengers to traverse such distances to litigate. A reasonable, mutually beneficial restriction, therefore, might be to limit lawsuits to the courts of the United States.