Forum Selection in International Contract Litigation: The Role of Judicial Discretion

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# FORUM SELECTION IN INTERNATIONAL CONTRACT LITIGATION:
THE ROLE OF JUDICIAL DISCRETION

HANNAH L. BUXBAUM*

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I. INTRODUCTION

In recent years, discussions regarding avoidance of choice-of-law conflicts, or, more broadly, the mitigation and resolution of such conflicts, have often touched on the phenomenon of judicial globalization. A major element of the developing global judicial culture is increased cooperation among courts involved in international civil and commercial litigation. This new cooperation re-imagines the judicial role as a component of an integrated system, building on the recognition that each court plays a part in a community of transnational adjudication. Elements of the transjudicial approach include direct communication between courts in different jurisdictions and judicial deference granted to other courts, not merely as a matter of comity among nations, but also as a matter of respect for other judges.

One achievement of this expanded view of the judicial community is the creation of a framework within which judges can develop new tools for resolving conflicts of substantive law. Commentators frequently cite transnational bankruptcy proceedings as an example of progress in this regard. In multinational corporate insolvencies involving bankruptcy proceedings in multiple jurisdictions, some judges have worked directly with their counterparts in other countries. Rather than using traditional choice-of-law methodology to select the law

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4. See Judicial Globalization, supra note 1, at 194.

5. See id. at 213; Westbrook, supra note 3, at 570-77.
governing a particular issue, these courts have developed joint protocols harmonizing the conflicting rules. Advocates hope the proposed institutionalization of these channels for cross-border judicial communication will provide an alternative to traditional methods of resolving conflicts issues in international insolvencies.

Another achievement of the global view of judicial activity is that it encourages judges to think in new ways about the role of jurisdictional tools in managing conflicts. Judges sensitive to the needs of the transnational judicial system, and to the fact that the work of that system is shared among courts in different countries, are more likely to care about identifying the best place for a case to be heard. Such judges are therefore more likely to use the available mechanisms, such as dismissal on the basis of forum non conveniens, a stay on the basis of lis alibi pendens, or an antisuit injunction, to direct a case to that forum. Indeed, commentators identify an increased interest in achieving the ideal jurisdictional placement of cases as an important aspect of judicial globalization.

Although jurisdictional tools are not themselves choice-of-law instruments, proper forum selection plays an important role in avoiding choice-of-law conflicts. As Professor Blom observes elsewhere in this issue, “[j]urisdictional disputes often arise from expectations or hopes as to choice of law and the jurisdictional outcome may determine whether

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8. Slaughter, supra note 2, at 208-10.

9. Id.

10. See Westbrook, supra note 3, at 568 (identifying the growing interest of courts in "determin[ing] the optimal forum for each case").
to apply one country's law or another's.\textsuperscript{11} This link between jurisdictional allocation and the mitigation of choice-of-law conflicts is explicit in \textit{forum non conveniens} doctrine. As the earliest U.S. cases in this area acknowledged, one factor courts should consider in \textit{forum non conveniens} analysis is whether dismissal would avoid both unnecessary choice-of-law problems and the application of unfamiliar foreign law.\textsuperscript{12} A judicial approach to cross-border litigation that is attuned to the international system, and that encourages judges actively to seek the optimal placement of cases, could therefore become a powerful force in mitigating choice-of-law conflicts.\textsuperscript{13}

The notion of more active judicial management of forum selection, however, draws attention to one issue that has always been problematic under U.S. law: the availability of \textit{forum non conveniens} in contract cases involving negotiated forum selection clauses. Although \textit{forum non conveniens} doctrine is generally analyzed and applied in the context of tort litigation,\textsuperscript{14} it is available in contract cases as well. However, parties to a contract often will have negotiated in advance a forum for the resolution of potential disputes. The authority of the judge to monitor forum selection for undue inconvenience – and, where appropriate, to dismiss a case on that basis – may therefore be in tension with party autonomy to select a forum. Although at least in terms of outcome the clear trend in such litigation is to enforce the parties’ agreement, cases reflect substantial confusion in addressing the intersection between \textit{forum non conveniens} doctrine and the law on enforcement of forum selection clauses. This article explores that intersection, examining the different balances courts have struck between judicial discretion and party autonomy in the forum selection process.

It is an opportune time to address this issue – not only because recent literature on judicial globalization has drawn attention to the judicial role in managing forum selection, but also because the Hague Conference is currently developing a convention on choice of court agreements.\textsuperscript{15} This convention, which represents a portion of the larger

\begin{itemize}
\item \textsuperscript{12} Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).
\item \textsuperscript{13} Commentators in fact frequently use the list of public-interest factors in \textit{forum non conveniens} analysis as a starting point for broader discussions of judicial globalization and its benefits. See Anne-Marie Slaughter, \textit{Court to Court}, 92 Am. J. Int'l L. 708 (1998).
\item \textsuperscript{14} See discussion infra Part II.A.1.
Hague project on jurisdiction and judgments, will regulate the enforcement of forum selection clauses in commercial contracts involving parties from member states. Its negotiation has highlighted the substantial differences between U.S. law and the law of many other countries on judicial discretion in forum selection. As discussed in more detail below, most U.S. courts hold that forum non conveniens analysis is relevant even in cases involving valid forum selection clauses. Other legal systems, by contrast, reject judicial discretion to dismiss a case based on convenience – many entirely, and virtually all in cases in which the parties have negotiated an exclusive forum agreement. The current draft of the convention would essentially eliminate a court’s ability to dismiss a case based on convenience if it has been chosen in an exclusive forum selection clause. An examination of current practice in U.S. courts on judicial discretion in contract litigation will assist consideration of this proposal.

Part II of this article analyzes U.S. law on forum selection, addressing both the role of contracting parties in selecting a forum and the role of judges in correcting inappropriate selections. Part III then uses a few illustrative cases to examine more closely the ways in which expansive judicial discretion undermines contract goals. Finally, Part IV turns to the draft convention on choice of court agreements, situating the U.S. approach to forum selection within the international context.

II. FORUM SELECTION IN INTERNATIONAL CONTRACT LITIGATION

A. Judicial Discretion and Party Autonomy

Although not every transnational contract includes a forum selection clause, most do, and the question of forum selection therefore requires courts to balance interests of convenience against the bargained-for expectations of the parties.

1. The Judicial Role in Jurisdictional Allocation: Forum Non Conveniens

The common-law doctrine of forum non conveniens provides that a
court may in its discretion dismiss litigation brought in the United States in favor of litigation in a more convenient foreign forum.\(^{19}\) Dismissal is appropriate only if an adequate alternative forum exists.\(^{20}\) Once that has been established, a U.S. court considering dismissal must evaluate various public-interest and private-interest factors.\(^{21}\) The private interests relate primarily to the convenience of the parties and other participants in the litigation, including such factors as access to relevant evidence, cost of obtaining attendance of witnesses, and other factors "that make trial of a case easy, expeditious and inexpensive."\(^{22}\) The public interests, on the other hand, relate more to the convenience of the court and the judicial system in general. They include administrative difficulties for busy courts, the burden of jury duty, the interest "in having localized controversies decided at home," and the difficulty for the court in applying foreign law.\(^{23}\) Only if the balance of all factors weighs strongly in favor of the defendant should the court order dismissal.\(^{24}\)

The combination of private-interest and public-interest factors reveals the two quite different goals served by U.S. *forum non conveniens* analysis. One goal is to prevent the plaintiff from oppressing the defendant "by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."\(^{25}\) The other is to shield the court itself, and other third parties, from unreasonable burdens imposed by the plaintiff's choice of forum.\(^{26}\) The latter goal, which most other legal systems do not share, has caused the U.S. doctrine to evolve into a method used largely to locate the most appropriate jurisdiction for litigation.\(^{27}\)

The majority of cases applying this doctrine, and the vast majority of the commentary regarding it, focus on its application in tort cases.

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21. *Id.* at 241.
23. *Id.* at 509.
24. *Id.* at 508-09.
25. *Id.* at 508.
26. *Id.* at 508-09. In Gilbert's companion case, the Supreme Court articulated these as alternative goals. *See* Koster v. Am. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (stating that dismissal is available "upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems").
This is because the advantages that plaintiffs generally seek when they shop for a U.S. forum, such as a chance at punitive damages, are relevant in tort cases. \(^{28}\) Thus, when we think of *forum non conveniens*, we think of the Bhopal disaster, \(^{29}\) or of product liability suits brought by foreign plaintiffs against U.S. manufacturers. In such cases, to the extent there is a role for private parties to play in selecting the forum, it is simply the role of the plaintiff in choosing the court in which to initiate litigation. This is a relatively weak role. If a plaintiff chooses a clearly inappropriate forum in the hope of securing procedural or substantive advantage, there is little reason to accord that choice much weight if it causes substantial inconvenience to the other party and the court. \(^{30}\) In practice, while the starting point of *forum non conveniens* analysis is that the court should not disturb the plaintiff's choice of forum (although the court may accord less deference to a foreign plaintiff), \(^{31}\) judicial correction of private forum selection has become an important tool in combating forum shopping.

The doctrine is also available, however, in the international contract context. Even when the parties to a contract have included a privately negotiated forum selection clause, the court is free to consider the question of convenience. \(^{32}\) Here, the private role in forum selection is stronger: when a bargained-for selection is part of the contract, predictability and certainty in international contracting become relevant goals. As the U.S. Supreme Court noted thirty years ago, “a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is... an almost indispensable precondition to achievement of the orderliness and predictability

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28. See *Piper*, 454 U.S. at 264 n.18 (citing strict liability in tort cases and jury trials as two reasons that foreign plaintiffs find U.S. courts attractive). See also Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. Int'l L. 314, 321 (1997) (“[T]he real differences driving forum shopping are usually not rules of substantive law, but the availability or unavailability of juries, contingent fees, fee shifting, third-party discovery, class actions, punitive damages, and similar differences...”).


32. See discussion infra Part II.A.2.a (regarding this approach to the effect of a valid forum selection clause). A party who has in essence waived its right to argue personal inconvenience by agreeing to a particular forum in advance may not itself be permitted to move for dismissal on the basis of *forum non conveniens*. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The court may raise convenience issues *sua sponte*, however, and could also consider a convenience objection raised by a non-party. See id.
essential to any international business transaction." Any judicial correction of forum selection therefore comes at the cost not only of the plaintiff’s choice of jurisdiction, but also of the parties’ expectations regarding their bargain.

2. The Private Role in Jurisdictional Allocation: Forum Selection Clauses

Historically, the private role in forum selection was no more important in international contract cases than in other types of litigation. Courts held negotiated forum agreements unenforceable on the ground that their objective was to oust courts of their jurisdiction. Courts were therefore free to disregard private agreements regarding forum when considering dismissal based on convenience. With the 1972 decision in *Bremen v. Zapata Off-Shore Co,* however, the Supreme Court brought the private role to the fore. The Court rejected the ouster analysis, addressing court selection instead in more contract-based terms. It noted that:

The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting... [I]t would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

On that basis, it held that private selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” The Court also approved the selection of a neutral forum – one otherwise unconnected with the parties or the performance of the contract.

With respect to the balance between private choice and judicial discretion in forum selection, the Court’s decision had two major effects.

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36. Id. at 13-14.
37. Id. at 10. See also id. at 11 (noting that this approach “accords with ancient concepts of freedom of contract”).
First, it introduced a form of convenience analysis different from that used in traditional *forum non conveniens* cases, seemingly reducing the judicial role to a consideration of public-interest factors alone. Second, by approving the parties' choice of a neutral forum, it moved away from the notion of a "natural" or "appropriate" forum for contract litigation.

**a. The New Convenience Analysis**

In holding that forum selection clauses were presumptively enforceable, the Court in *Bremen* indicated that private choice would ordinarily displace consideration of at least the private-interest factors reflected in normal *forum non conveniens* analysis. The Court focused on the foreseeability of that kind of inconvenience in reaching this conclusion. Responding to the defendant's argument that litigating in London, the chosen forum, would cause it substantial inconvenience, the Court stated:

Where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.39

The case thus suggests that a defendant who agreed to a particular forum in advance of litigation could not, in the event of litigation there, raise its own inconvenience as a reason for dismissal.40 This then alters traditional *forum non conveniens* analysis by eliminating from consideration those factors relating to private convenience.41

In establishing the criteria for enforcement of forum selection clauses, however, the Court did set forth a different form of convenience analysis. While holding forum selection clauses to be prima facie valid, the Court noted that enforcement could be denied if a clause was found to be "unreasonable and unjust."42 One reason a chosen forum might be

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38. Id. at 17-18.
39. Id. at 16.
40. Id. at 18 (discussing the foreseeability of such forms of inconvenience). See Gruson, *supra* note 34, at 180.
41. See discussion *infra* Part II.A.2.b. (noting that the Court in *Bremen* did not specifically address the continued availability of dismissal on the basis of inconvenience to the court).
42. *Bremen*, 407 U.S. at 15. Other grounds for refusing enforcement include defects in formation such as "fraud, undue influence, or overweening bargaining power." Id. at 12.
found unreasonable is if it were "seriously inconvenient," in which case, the Court suggested, its selection by the parties could be ignored in favor of litigation initiated by the plaintiff in a U.S. forum. 43 Although this formulation does permit considerations of litigant convenience, subsequent cases have read this exception quite narrowly. Certainly in commercial contracts, but in many consumer contracts as well, courts have upheld bargains as to forum despite the resulting inconvenience to one of the parties in ensuing litigation. 44 Overall, cases finding grave inconvenience are quite rare. 45

b. Departure From "Natural Forum" Analysis

Another effect of Bremen was to render the broader convenience analysis—including public-interest factors as well as private-interest ones—less relevant in cases involving a negotiated forum selection. As discussed above, the goal of forum non conveniens analysis in the United States is largely to identify the most suitable forum for a particular case. 46 In Bremen, however, the Court enforced the selection of a neutral forum, thereby indicating that a lack of contacts between the chosen forum and the parties and their transaction, and any inconvenience resulting from litigation in a forum lacking such contacts, would not render the choice of forum unenforceable. 47 Rather, the question was simply whether the parties had a reason for selecting the neutral forum. 48 In the case itself,

43. Id. at 18 (establishing a high standard for this argument and placing the burden of proof on the defendant). The defendant must show that litigating in the chosen forum "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." Id. This approach is quite different from that used in pre-Bremen cases that enforced forum selection clauses, in which "reasonableness" was viewed as synonymous with regular convenience. Gruson, supra note 34, at 141-45.

44. The Supreme Court applied the Bremen rule to a case involving a domestic forum selection clause within a non-negotiated passenger contract in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). Although the Court did not address whether its holding would extend to foreign forum selections, subsequent cases have viewed the decision as precedential in the international context. See id. at 604 n.6 (Stevens, J., dissenting).

45. See, e.g., Sudduth v. Occidental Peruana, Inc., 70 F.Supp.2d 691, 695 (E.D. Tex. 1999) (holding that U.S. employees who entered into an international employment contract containing a forum-selection clause in favor of Peru "would, in all probability, be unable to afford to travel back to Peru for purposes of litigation"). The district court concluded that enforcing the clause would deprive the plaintiffs of their day in court. Id. at 696.

46. See Brand, supra note 27 and accompanying text.


48. See, e.g., Cal-State Business Products & Services, Inc. v. Ricoh, 16 Cal. Rptr. 2d 417, 427 (Cal. Ct. App. 1993) (explaining that the choice of the New York courts was reasonable due to those courts' expertise in commercial litigation. "Thus, there is nothing irrational about the forum selected by the contract which would defeat its enforcement." (emphasis in original).
London's status as a center for maritime law made the choice reasonable; subsequent cases have likewise approved the choice of neutral fora with relevant expertise in the particular subject matter. The *Bremen* decision does create one narrow exception to this principle: it notes that if two U.S. parties choose "to resolve their essentially local disputes in a remote alien forum," a court might find their selection unreasonable. Thus, if parties choose a forum unconnected with their transaction in order to complicate the initiation of a lawsuit, or in order to avoid otherwise applicable local law, a court would not enforce the forum selection clause. In general, however, U.S. courts do not view a connection between the chosen forum and the parties or their transaction as necessary.

**B. Balancing Private Choice and Judicial Discretion**

Post-*Bremen*, then, the private role in forum selection in international contracts has become relatively strong. This is not to say, however, that judicial discretion regarding forum selection plays no role at all. As the Seventh Circuit put it in a recent case, "there really is something special about forum selection clauses after all. They could interfere with the orderly allocation of judicial business and injure other third-party interests (that is, interests of persons other than the parties to the contract containing the clause) as well." This articulation captures the dual purpose of U.S. *forum non conveniens* doctrine. Its intent is to prevent vexation and oppression of the defendant, but also to permit the court to correct selections that unreasonably burden the judicial system. It also raises directly the question implied by the *Bremen* decision: how to reconcile the strong role for private forum selection with the court's authority to consider those aspects of convenience analysis that address factors other than the convenience of the parties themselves.

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49. *Bremen*, 407 U.S. at 12 (approving the parties' decision to seek a neutral forum "with expertise in the subject matter" and noting that the English courts "meet the standards of neutrality and long experience in admiralty litigation").

50. *Id.* at 17.

51. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 414 (3d ed. 1996).

52. N.W. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 376 (7th Cir. 1990) (concluding, with respect to a domestic forum selection, that a forum selection clause should be enforced unless such third-party interests would be infringed); see also Noto v. Cia Secula di Armanento, 310 F.Supp. 639, 649 (S.D.N.Y. 1970) (noting that jurisdictional analysis must consider protecting "not only the immediate defendant from harassing and vexatious litigation, but also other litigants and the community at large from unwarranted imposition upon the local courts' jurisdiction").

53. See discussion *supra* Part II.A.1.
In *Bremen*, the Supreme Court did not address any possible public interest factors that might have played into the analysis, although the Court decided the case on *forum non conveniens* grounds. The decision therefore provides little guidance on how to consider a public interest-oriented convenience issue in the face of a forum selection clause. Subsequent cases reflect a variety of approaches to this question and, more fundamentally, to the basic question whether *forum non conveniens* is available at all in cases involving a valid forum selection clause. In these subsequent cases, the question is how courts use the “competing rubrics of improper venue/forum non conveniens and contract law” to analyze the enforceability of forum selection clauses. These decisions reflect the different ways in which courts have struck the balance between private and public interests.

It is worth noting that there is substantial confusion surrounding the procedural aspects of enforcing a forum selection clause. Litigants are often unsure of how to move for enforcement, and courts order relief on a number of different bases, from improper venue to lack of subject-matter jurisdiction. In addition, while some courts apply the law of the U.S. forum to decide the enforceability of a forum selection clause, others apply the foreign law of the chosen forum. Finally, in federal diversity cases, courts differ on whether state law or the federal common law rule articulated in *Bremen* should be applied in most cases involving international commerce. Much of this confusion reflects the blend of substantive and procedural issues that selection clauses present: while proper venue is a matter of procedure, the enforceability of a negotiated forum selection is also a matter of substantive contract law. Against this backdrop, it is not surprising that cases reflect a variety of different


55. Professor Park notes that “[t]here is as yet no ‘*Zapata* motion’ to compel respect for a jurisdiction clause [under the Federal Rules of Civil Procedure].” WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 33 (1995). See also Marra v. Papandreou, 216 F.3d 1119, 1123 (D.C. Cir. 2000) (“[W]hile the forum-selection clause defense is a creature that has evaded precise classification, most courts and commentators have characterized it as a venue objection analogous to a *forum non conveniens* motion or motion for transfer of venue . . . .”).


57. See Gruson, *supra* note 34, at 186.

approaches regarding the further question of what effect a forum selection clause has on *forum non conveniens* analysis.\(^{59}\)

1. **Forum Selection Precludes Forum Non Conveniens Analysis**

A few courts seem to suggest that the *Bremen* rule displaces *forum non conveniens* analysis entirely, and that the inclusion of a valid forum selection clause in a contract essentially deprives them of the authority to consider dismissal based on inconvenience.\(^{60}\) In one case representative of this position, the court stated that "parties to a contract have the right to agree on a forum for settling disputes, and, at least in litigation between sophisticated business entities, a valid forum selection clause will trump the usual considerations governing forum non conveniens."\(^{61}\) For courts adopting this position, the inconvenience analysis under *Bremen* – under which elements of inconvenience need not be considered unless they rise to the very high level that would cause the selection to be unreasonable – is exclusive.

2. **Forum Selection Precludes Only Consideration of Private Convenience Factors**

Many courts have held that traditional *forum non conveniens*...
analysis is available in cases involving negotiated forum selections, but should proceed minus the factors that address the convenience of the parties themselves. On this view, because a party agreeing to the clause has thereby indicated that litigation in the chosen forum would not be prohibitively costly or burdensome, it should not be able to reintroduce such concerns through a *forum non conveniens* motion. The court, however, could either raise *forum non conveniens* sua sponte in response to public interests such as judicial efficiency, or, presumably, consider a convenience issue relevant to someone other than one of the parties to the contract. This approach apparently assumes that *Bremen* did not intend to foreclose consideration of at least the public interest factors protected by *forum non conveniens* analysis.

3. **Forum Selection is Merely One Element in Forum Non Conveniens Analysis**

Some courts have held that a valid forum selection clause should be viewed simply as one factor in a full *forum non conveniens* analysis. On this view, the court may consider even the convenience of the party resisting the clause as a basis for dismissal. Courts adhering to this view vary in the weight they assign a forum selection clause. In one case, the court described a forum selection clause as "simply one of the

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63. This analysis flows from *Bremen* itself. *See discussion supra* Part I.A.2.a. It would still be possible for a plaintiff to argue that the clause in fact did not reflect party expectations, and therefore should not preclude consideration of private convenience factors. *See, e.g.*, *In re Assicurazioni Generale S.P.A. Holocaust Insurance Litigation*, 228 F. Supp.2d 348, 373 (S.D.N.Y. 2002) (traditional *forum non conveniens* analysis appropriate partly because the clause did not reflect party expectations, as "[t]he extent of plaintiffs' present-day inconvenience was not foreseeable to the parties at the time of contracting. Those inconveniences were caused by the Holocaust").


65. *See, e.g.*, Meridian Seafood Products, Inc. v. Fianzas Monterrey S.A., 149 F. Supp. 2d 1234 (S.D. Cal. 2001) (finding an enforceable forum selection clause, but then proceeding through a full analysis of both private and public factors); *Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822 (2d Cir. 1990) (taking a similar view in the context of arbitration, applying regular *forum non conveniens* analysis in the face of an arbitration clause).
factors that should be considered and balanced by the courts in the exercise of sound discretion. In another, the court fully considered all private- and public-interest factors, but noted that a forum selection clause "heavily favors dismissal." Interestingly, in considering this issue in the domestic context – when the defendant sought transfer to another U.S. court rather than dismissal in favor of a foreign forum – the Supreme Court held that a valid selection clause was only one factor to consider in a broader convenience analysis.

C. Conclusion

Surveys of decisions addressing contracts that contain forum selection clauses suggest that litigation is steered toward the chosen forum in the great majority of cases. Nevertheless, the ability of judges to consider factors external to the contractual relationship, and to direct a case to a different forum on the basis of those factors, necessarily injects uncertainty into the contracting process. Particularly in the international context, this is costly. Previous efforts to codify the application of forum non conveniens in contract cases have done little to eliminate such uncertainty. The Model Choice of Forum Act drafted by the National Conference of Commissioners on Uniform State Laws, for instance,

67. Mobil Sales & Supply Corp. v. Republic of Lithuania, No. 97 CIV 4045, 1998 WL 196194, at *11 (S.D.N.Y. 1998). The court concluded that the contract in question included a valid and enforceable forum selection clause, but then continued with a forum non conveniens analysis:

Even if not fully effective to require dismissal in and of itself, the clause plainly demonstrates that the parties intended to litigate any disputes between them... in a Lithuanian forum... Thus, in order to give effect to that intent, the Court should dismiss this action in favor of the chosen forum.

Id. at *11.
69. That is, the court finds the forum selection valid and does not then choose to dismiss in favor of another, more convenient forum.
70. See PARK, supra note 55, at 31 ("Decision-making based on open-ended and ill-determined factors such as convenience and justice may be appropriate for disputes implicating politically sensitive community values... In the global commercial community, however, the relative malleability of convenience and fairness notions defeats the certainty sought by business managers.")
provided that a U.S. court was required to enforce a foreign forum selection clause only if the chosen forum was not "substantially less convenient" than the forum in which litigation was in fact initiated.\footnote{71} The Conflict of Jurisdiction Model Act proposed by the American Bar Association's international section did not specifically address negotiated forum selections, and therefore provided that a selection clause could be ignored if its enforcement would result in "substantial inconvenience" to the parties.\footnote{72}

However, scholars addressing the issue have been less accommodating of convenience analysis. Their proposals would on the whole reduce the question of enforceability to the issue of contractual validity alone. Thus, if the parties bargained for a forum selection clause that was not the product of fraud or overreaching, their agreement should generally be enforced.\footnote{73} One state has addressed this uncertainty through legislation: under New York law, a state court must enforce a forum selection clause if the parties agreed to submit to the jurisdiction of New York courts and chose New York law to govern their contract,\footnote{74} and may not dismiss such an action on the basis of \textit{forum non conveniens}.\footnote{75}

Contracting parties can of course mitigate this uncertainty by choosing arbitration rather than litigation as the method for eventual

\footnote{71. UNIF. MODEL CHOICE OF FORUM ACT §4(3) (1968) (withdrawn 1975), reprinted in HANDBOOK OF THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219-22 (1968).}

\footnote{72. See CONFLICT OF JURISDICTION MODEL ACT (1989), discussed in Louise Ellen Teitz, Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings, 26 INT'L. LAW. 21 app. 1 at 56-7 (1992). Teitz describes the treatment of negotiated forum clauses as "problematic." Id. at 53.}

\footnote{73. See, e.g., Patrick J. Borchers, Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform, 67 WASH. L. REV. 55 app. at 107-11 (1992); PARK, supra note 55, app. C at 191-92 (Model International Court Selection Act, which is limited to transactions involving either a U.S. party or a claim under U.S. law).}

\footnote{74. N.Y. GEN. OBLIG. § 5-1402 (McKinney 2001) (applying to contracts for transactions of one million dollars or more). Federal courts may view this rule as applicable in diversity actions as well. See, e.g., Cambridge Nutrition A.G. v. Fotheringham, 840 F. Supp. 299 (S.D.N.Y. 1994).}

\footnote{75. N.Y.C.P.L.R. Rule 327(b) (McKinney 2003). In the contract context, then, other policies trump the usual arguments about judicial convenience. Compare Credit Francais v. Sociedad Financiera, 490 N.Y.S. 670, 676 (N.Y. Sup. Ct. 1985) ("New York, as the center of international trade and finance, has expressly recognized . . . that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationship.") with Doe v. Hyland Therapeutics, 807 F. Supp. 1117, 1128 (S.D.N.Y. 1992) ("That this Court sits in 'one of the busiest districts in the country' is undeniable, making this one of the 'congested centers' of litigation referred to in \textit{Gilbert} . . . . The need to guard our docket from disputes with little connection to this forum is clear . . . '") (internal citations omitted).}
dispute resolution. The United Nations convention on arbitral awards, which requires courts in member states to enforce valid arbitration clauses in contracts, provides greater predictability than does the law on forum selection.\(^7\) In a sense, then, the availability of the arbitration alternative mitigates the effect of uncertainty in the judicial process – parties for whom certainty in this matter is critical have a way of securing it. For a variety of reasons, however, parties may believe arbitration is inappropriate or insufficient,\(^7\) and its availability is therefore not a reason to ignore the certainty question in the judicial arena.

III. THE APPROPRIATE FORUM IN INTERNATIONAL CONTRACT CASES

U.S. *forum non conveniens* doctrine focuses largely on determining which potential forum is most appropriate for the resolution of a particular dispute. The more a court focuses on appropriateness, however, the more likely that it will undermine important goals of private forum selection. The following section examines several cases in which courts consider whether the chosen forum is appropriate for the resolution of the dispute. They illustrate particularly clearly the effect of an emphasis on *forum non conveniens* analysis in contract litigation.

A. Cases

In the first two cases below, the plaintiffs brought contract actions in U.S. courts despite having agreed to litigate exclusively in a foreign forum. The courts treated defendants' motions to dismiss not as a matter of enforcement of the contractual selection, but as a matter of *forum non conveniens*. Therefore, as the decisions reveal, the courts accorded far less weight to the contractual agreement than a *Bremen*-style enforceability analysis would require. In the third case, the plaintiff sued in the chosen U.S. court. The court nevertheless considered defendant's motion to dismiss on the basis of *forum non conveniens*, suggesting that it had discretion to decline jurisdiction if it found the parties' choice to


have been inappropriate.

1. **Mercier v. Sheraton International**\(^7\)

In this 1991 case, the First Circuit addressed claims by U.S. plaintiffs arising out of their failed agreement with an international hotel chain to operate a casino in Turkey.\(^7\) The Protocol between the parties, which apparently contained their understanding of the agreement between them, included a forum-selection clause and choice-of-law clause in favor of Turkey.\(^8\) When the plaintiffs sued in Massachusetts despite these clauses, the district court granted the hotel chain's motion to dismiss on the basis of *forum non conveniens*.\(^9\) In doing so, the court considered the forum selection clause as one among several factors indicating that the case had little to do with Massachusetts.\(^10\)

The First Circuit vacated the judgment, holding that the trial court had improperly balanced the *forum non conveniens* factors and remanding the case for reevaluation of those factors.\(^11\) In reviewing the district court’s conclusion, the Court of Appeals focused primarily on whether the dispute was “local to the United States.”\(^12\) Because the contract was executed in Turkey and dealt entirely with a business endeavor in that country, the resulting dispute was not of the “essentially local” character that might defeat its enforcement under the *Bremen* standard.\(^13\) The court followed its own recent decision that a forum selection clause was only one factor in *forum non conveniens* analysis,\(^14\) however, and therefore viewed the question of localization more broadly. It suggested that the U.S. citizenship of the parties triggered the public interest of the United States in providing a convenient forum for its citizens, and also justified imposing jury duty on U.S. citizens.\(^15\) Thus, by situating this inquiry within *forum non conveniens* analysis, the court engaged in a considerably less deferential review of the parties' selection than a reasonableness analysis under *Bremen* would have indicated. The court remanded for a rebalancing of the *forum non conveniens* factors, 

\(^{78}\) Mercier, 935 F.2d at 430.

\(^{79}\) Id. at 429-30.

\(^{80}\) Id. at 429 n.13, citing Royal Bed & Spring Co., Inc. v. Famossul Industria E Comercio de Moveis Ltda., 906 F.2d 45, 51 (1st Cir. 1990).
and therefore did not itself conclude where the litigation would most appropriately be heard. However, its analysis suggested that the transaction’s links with the United States might permit the local court to deny the motion to dismiss on *forum non conveniens* grounds, and thereby to retain the case despite the existence of a contractually valid forum agreement.

2. *Apotex Corp. v. Istituto Biologico Chemioterapico S.p.a.*

In *Apotex*, a federal district court considered litigation arising out of a supply agreement between a U.S. plaintiff and an Italian defendant that contained an exclusive forum selection clause in favor of Italy. Although the court noted the *Bremen* standard for enforcement of forum selection clauses, it considered all of the defendant’s arguments for dismissal within the context of its motion to dismiss on the basis of *forum non conveniens*. The court therefore engaged in traditional *forum non conveniens* analysis, considering the *Gilbert* factors relating to the convenience of the litigants as well as that of the tribunal. The court began this analysis by attempting to determine whether the dispute was connected primarily with Illinois or with some other jurisdiction:

Borrowing from the closely-related issue of choice of law, the court notes that Illinois courts adhere to the ‘most significant contacts’ test to determine which law applies in a contractual dispute. Although the record is not entirely clear on all these factors, it would be a stretch to conclude that Illinois had the most significant contacts regarding the Supply Agreement.

The court thus recognizes the strength of the *Bremen* presumption in favor of enforceability, but nevertheless focuses on the connections between the dispute and particular locations. Further, its analysis implies that if the most significant contacts of the parties and their transaction had in fact been in Illinois, those contacts would speak in favor of retaining jurisdiction there despite the parties’ valid selection of a foreign forum.

3. *Paradis Enterprises Ltd. v. Sapir*

This case involved a New York defendant who had incurred gambling debts in a Bahamas casino while on a trip organized by the

89. Id.
90. Id. at *5.
91. Id. at *8.
casino's New Jersey marketing affiliate.93 The casino sued in New Jersey court to collect amounts due under the related credit agreement.94 Although that agreement included a non-exclusive forum selection clause in favor of New Jersey, the defendant nevertheless moved to dismiss on the basis of forum non conveniens, arguing that the case had insufficient contacts with that state.95 The district court granted defendant's motion.96 While recognizing that the defendant had agreed to the selection of New Jersey courts, it simply concluded that New Jersey had no interest in the case.97 The appellate court reversed, holding that the trial court had erred in applying forum non conveniens alone rather than considering the law governing enforcement of forum selection clauses.98 The court began its own analysis with the Bremen principle, noting its adoption by state as well as federal courts in New Jersey.99 Although recognizing that "there seems to be no clear rule as to whether forum non conveniens analysis is required in a case where an express forum selection clause exists," the court suggested that valid forum selection clauses should be granted preclusive effect.100 However, it then went on to state that "forum non conveniens factors are too attenuated in this case to trump the parties' agreed choice of forum."101 Further, at the conclusion of its decision, the court noted the following:

We emphasize that our conclusions have been reached in the context of the record before us. The effect of a forum selection clause in a case in which there are not present [local] contacts to the degree that were here shown to exist, or where it can be shown that the litigation would be markedly burdensome to the resources of our judiciary, will remain to be determined in the future.102

Thus, despite its strong endorsement of the Bremen principle, the court seemed to suggest that the appropriateness of the forum in which

93. Id. at 518-19.
94. Id. at 519.
95. Id.
96. Id.
97. Id. at 520. This, then, was one of the relatively rare cases in which the chosen court declined to honor the parties' choice.
98. Id. at 523.
99. Id. at 521-22.
100. Id. (noting that it was "unnecessary to rely on forum non conveniens doctrine" if a contract contained a valid forum selection clause).
101. Id. at 523.
102. Id. at 529.
the party initiated the action— the weight of contacts between the transaction and that forum— was relevant even when the parties had agreed to litigate there.

B. The Effect of Focusing on Appropriateness

These cases, which focus on the ties between the chosen forum and the parties and their transaction, suggest that a lack of sufficient contacts may undercut the enforceability of a valid forum selection. This suggestion is interesting for two reasons. First, it undermines the holding in Bremen that the selection of a neutral forum is appropriate. The ability of contracting parties to choose a neutral forum rather than the home forum of one of the parties, or another forum more closely linked to the transaction, is critical in international contracts. A more flexible, discretionary approach that uses the criterion of appropriateness to test the enforceability of a negotiated and contractually valid selection therefore ignores important commercial needs. Second, it highlights a conundrum presented by forum non conveniens analysis. Dismissal based on public-interest factors is intended partly to avoid choice-of-law problems, yet a court considering dismissal must determine whether and where the dispute is truly localized. This task introduces many of the uncertainties of traditional multilateral choice-of-law methodology, in that it requires the court to examine the weight of the various contacts between the parties and their transaction and the particular countries involved.

It is true that a court might consider the question of appropriateness, measured by the factual contacts between the chosen forum and the parties or their transaction, even if it analyzes a motion to dismiss as a matter of contract enforcement alone. The Bremen decision notes that if two U.S. parties choose “to resolve their essentially local dispute in a remote alien forum,” a court may find their selection clause unreasonable

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103. See discussion supra Part II.
104. PARK, supra note 55, at 13-14.
105. See William Reynolds, The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts, 70 TEX. L. REV. 1663, 1680 (1992) (noting that courts generally use a “loose form of the ‘center of gravity’ or ‘most significant relationship’ test used in conflicts law” to determine the localization of a dispute). See also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981) (finding one reason not to weigh a possible change in substantive law too heavily is that then “the trial court would have to determine what law would apply if the case were tried in the chosen forum”).
106. That is, even if the court believes that a negotiated forum agreement precludes forum non conveniens analysis entirely. See discussion supra Part II.B.1.
due to resulting inconvenience.\footnote{See supra text accompanying note 49.} Therefore, in some cases, courts may consider where a dispute is based in order to determine whether this exception is available.\footnote{See, e.g., Pearcy Marine, Inc. v. Seacor Marine, Inc., 847 F.Supp. 57, 59-60 (S.D. Tex. 1993) (invalidating a clause negotiated by two U.S. parties selecting an English forum for resolution of any dispute, but noting the possibility of overreaching, if not fraud, in the procurement of that clause).} For this reason, precluding \textit{forum non conveniens} analysis in contract cases would not eliminate indeterminate choice-of-law style analysis entirely. It would, however, significantly limit its effect. If that analysis were restricted to the \textit{Bremen} approach to enforcement, the party resisting enforcement of a previously negotiated clause would have to establish inappropriateness rising to the level of grave inconvenience in order to defeat the clause. A showing that another forum was merely more appropriate would not suffice. In addition, \textit{Bremen} suggests that this exception is limited to contracts involving two U.S. parties, and therefore would not apply to the category of international contracts in which advance agreement as to forum is most critical.\footnote{See Park, supra note 62.}

\section*{IV. THE DRAFT HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS}

The United States is not currently party to any treaty on forum selection. The Hague Convention on the Choice of Court of 1965 was opened for signature but never ratified,\footnote{See Hague Convention on the Choice of Court, available at http://www.hcch.net/e/conventions/text15e.html (last visited May 19, 2004). For a discussion of this proposal, see Park, supra note 55, at 30 n.92.} and member states have delayed the Hague Conference's broad jurisdiction and judgments project, which addressed forum selection among other issues, due to fundamental differences in their domestic jurisdictional regimes.\footnote{For a sampling of the commentary on this project, see Symposium: Enforcing Judgments Abroad: The Global Challenge, 24 BROOK. J. INT'L L. (1998).} However, the articles of the latter project dealing with forum selection are now the subject of a narrower convention on choice of court agreements in commercial transactions.\footnote{See Choice of Court Convention, supra note 15; Hague Conference on Private International Law, Preliminary Draft Convention on Exclusive Choice of Court Agreements: Draft Report, March, 2004, at http://www.hcch.net/e/workprog/jdgm.html (last visited May 19, 2004) [hereinafter Draft Report].} It is therefore an opportune time to consider the U.S. approach to forum selection, particularly the
role of judicial discretion in that selection, within the international framework.

The notion of empowering judges to dismiss a case when the parties have properly established jurisdiction and venue is foreign to many legal systems. Civil-law countries generally have more restrictive jurisdictional rules than common-law systems, and rely on those rules to confine the plaintiff’s selection of a forum in which to initiate litigation. Thus, many countries do not recognize judicial discretion to dismiss a case over which the court has jurisdiction at all. Some may recognize particular exceptions to this rule, but these are generally exceptions serving substantive policy rather than judicial expediency. Other countries – primarily common-law countries – do recognize a general doctrine based on convenience, but one serving only to prevent oppression of the defendant, not to reduce the administrative burden on courts. Such doctrines consider only the convenience of litigants, not that of the courts, and therefore do not mirror U.S.-style forum non conveniens.

These differences are even more pronounced in the context of international contract litigation. Many systems recognize no role at all for judicial intervention when the parties have negotiated a forum in advance. The Brussels Convention, which when adopted in 1968

113. See Brand, supra note 27, at 468. But see Friedrich K. Juenger, Judicial Control of Improper Forum Selection: Some Random Remarks and a Comment on How Not to Do It, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 311 (Jack L. Goldsmith ed., 1997) (arguing that civil-law systems would also benefit from the use of judicial discretion to correct forum selection by plaintiffs, as they contain “such exorbitant jurisdictional bases as plaintiff’s nationality and the presence of assets”).

114. See Choice of Court Agreements in International Litigation, supra note 77, at 7 (reviewing the laws of European countries); Juenger, supra note 113, at 313 (“On the whole, the prevailing opinion in most civil-law countries is opposed to according judges discretion to stay or dismiss cases that they feel can be litigated more conveniently elsewhere.”). See also KESSEDJIAN, supra note 2, at 275-76 (discussing the underlying differences in the conception of judicial authority in common-law and civil-law jurisdictions).

115. For a statement of the differences between U.S.-style forum non conveniens analysis and these types of provisions, see J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 27 (P.B. Carter ed., 1995).

116. Consider for example the statement of the Australian High Court: “It is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances.” Oceanic Sun Line Special Shipping Co. Inc. v. Fay, (1988) 165 C.L.R. 197, 252.

117. See Brand, supra note 27, at 495 (concluding that the United States “appear[s] to be alone” in including public interest factors in convenience analysis).

118. See FAWCETT, supra note 115, at 48-49. But see Choice of Court Agreements in International Litigation, supra note 77, at 13-14 (noting that English and Australian courts have on occasion ignored forum-selection clauses on the basis of convenience considerations).
harmonized European law on this point, provided that member states must enforce forum-selection clauses in favor of other member states, with no reference to convenience analysis. The Council Regulation replacing the Convention carries over this approach. Article 23 of the Regulation provides that a valid forum selection clause creates jurisdiction in the chosen court, and Article 27 that other courts must defer to the court first seized once its jurisdiction has been established. In this system, at least as between courts in Europe, there is no role for discretionary dismissal in contract cases. In most non-European countries as well, courts lack discretion to dismiss cases in the face of an enforceable forum selection clause.

In negotiating the larger Hague convention on jurisdiction and judgments, the United States had reached a certain compromise with other countries on the availability of forum non conveniens generally. Article 22 of the preliminary draft convention on jurisdiction provided that a court may dismiss a case if it is "clearly inappropriate" for it to exercise jurisdiction, and if the court of another state is "clearly more appropriate." However, that discretion did not extend to contract cases involving exclusive forum selection clauses. Article 22(1) prohibited a court with "exclusive jurisdiction" from dismissing a case, and Article 4 stated that an exclusive forum selection clause confers exclusive jurisdiction on the chosen court. Thus, despite the move toward compromise on judicial discretion generally, the draft jurisdiction and judgments convention would have foreclosed forum non conveniens analysis entirely in most international contract litigation.

The current draft of the smaller convention, governing choice of
court agreements in commercial contracts, similarly rejects the application of *forum non conveniens* in litigation involving negotiated forum selection clauses.\(^{128}\) Article 5(2) of the proposed text states that a court designated in an exclusive\(^{129}\) forum clause "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another [country]."\(^{130}\) This approach parallels that discussed in Part I.B.1 above, and would require U.S. courts to enforce contractually valid forum selection clauses with no additional reference to factors of convenience or the appropriateness of the chosen forum.\(^{131}\) It would therefore depart from current practice in many U.S. courts.

Article 18 of the draft convention sets forth one qualification to this approach: it grants member states the option of declaring in advance that their courts, even if selected in an exclusive forum agreement, may refuse jurisdiction over cases in which no connection exists between the parties or their transaction and that state.\(^{132}\) Thus, the United States could reserve for its courts the right to decline jurisdiction if chosen by non-U.S. parties as a neutral forum.\(^{133}\) Such a reservation would serve some goals of current U.S. *forum non conveniens* doctrine – and, as the report accompanying the draft convention notes, the provision was indeed designed to accommodate countries concerned that providing a neutral forum for the resolution of contractual disputes would "impos[e] an undue burden on their judicial systems."\(^{134}\) Even if the United States chooses to make this reservation upon eventual accession, however, the convention as currently drafted would provide significantly greater certainty than current U.S. law with respect to the enforceability of private forum selection. In all contracts involving parties or transaction

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128. See *Choice of Court Convention*, supra note 15.
129. The Convention states that a clause designating one specific court, or the courts of one country, shall be deemed exclusive unless the parties state otherwise. *Id.* at art. 3. This definition would therefore capture clauses such as that litigated in the *Paradis Enterprises* case. See discussion supra Part III.A.3.
130. *Choice of Court Convention*, supra note 15, at art. 5(2). Article 5(3) clarifies that "the internal allocation of jurisdiction among the courts of a Contracting State" would not be affected; thus, venue transfers between U.S. courts, as opposed to dismissals in favor of foreign courts, would be permitted. *Id.* at art. 5(3).
131. *Id.* at art. 5(3). Article 5(3) further recognizes national laws relating to subject-matter jurisdiction, and states that a chosen court would not be required to hear a case if such jurisdiction were lacking. *Id.*
132. *Id.* at art. 18.
133. The reservation would not require dismissal of such cases, but merely permit it.
134. Draft Report, *supra* note 112, at para. 155. Countries that make such a reservation would of course acknowledge that their own courts will not promote the value, recognized in *Bremen* and elsewhere, of permitting parties to a commercial contract to agree on a neutral forum.
elements connected to the United States, *forum non conveniens* analysis would be excluded and the parties could therefore rely on the enforceability of an agreement selecting U.S. courts.

V. CONCLUSION

Judges can play an important role in avoiding or resolving conflict by considering the optimal jurisdictional placement of cases with international elements and, when necessary, correcting inappropriate forum selections by plaintiffs. In the particular context of contract litigation, however, the availability of judicial discretion undermines the predictability critical to international commercial transactions. The draft Hague Convention on Choice of Court Agreements creates an opportunity for the United States to rationalize the forum selection process in international contract litigation before U.S. courts.