1991

Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases

Leandra Lederman
Indiana University Maurer School of Law, llederma@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub
Part of the Contracts Commons, and the Litigation Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/704

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
NOTES

VIVA ZAPATA!¹ TOWARD A RATIONAL SYSTEM OF FORUM-SELECTION CLAUSE ENFORCEMENT IN DIVERSITY CASES

LEANDRA LEDERMAN

INTRODUCTION

Parties who memorialize agreed-upon rights and obligations in contracts generally do so to impose enforceability on their agreements.² A written contract assists somewhat in clarifying the parties’ expectations. However, different forums may reach divergent interpretations of a written contract. In a multi-state or international agreement, in which personal jurisdiction and proper venue exists in many places,³ it may be impossible to predict where a plaintiff will file suit.⁴ To reduce this uncertainty,⁵ control litigation costs,⁶ and minimize potential tactical ad-

³ Modern jurisdictional statutes generally give a court personal jurisdiction over nondomiciliaries where the defendant or the transaction has any significant connection with the state. The New York long-arm statute is typical. See N.Y. Civ. Prac. L. & R. 302(a) (McKinney 1990) (jurisdiction properly premised on transaction of business within state, commission of tortious act within state, commission of tortious act outside state causing injury within state if certain other requirements are met, or ownership of real property in state).
⁴ A federal court sitting in diversity applies the jurisdictional statutes of the state in which it is located. See Fed. R. Civ. P. 4(e). Where the requirements of the applicable statute are met, the court then only needs to determine that the defendant has sufficient minimum contacts with the state to comport with “traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The Judicial Improvements Act of 1990, which, among other things, conflated venue with personal jurisdiction, has broadened the venue options in federal courts. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 311, 104 Stat. 5089 (1990); note 31 infra.
⁵ See Gruson, supra note 2, at 133 (“Absent . . . [advance] selection of a forum, one party could sue the other in any forum that would assert jurisdiction over the other party and over the subject matter of the litigation.”); see also Comment, supra note 2, at 1092 (“Litigation over a contract dispute provides an area of potential uncertainty because under federal venue statutes, which prescribe where parties may initiate an action in federal courts, the forum for contract litigation could be in any of several different courts.”).
⁶ See Gordonsville Indus. v. American Artos Corp., 549 F. Supp. 200, 205 (W.D. Va. 1982) (“By including [the forum-selection clause] in the contract, the two parties eliminated the uncertainties and great inconveniences that both parties could confront by being forced to adjudicate the contract in a forum [un]familiar to both parties.”); Comment, supra note 2, at
vantages to plaintiffs,\textsuperscript{7} sophisticated parties\textsuperscript{8} may bargain over the situs of future litigation when negotiating the contract.\textsuperscript{9} A contractual clause that establishes which forum will hear disputes arising from the contract commonly is known as a forum-selection clause.\textsuperscript{10}

\textsuperscript{7} See Gruson, supra note 2, at 133; Comment, supra note 2, at 1092-93; see also The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972) ("The elimination of ... uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.").

\textsuperscript{8} Parties also may include a choice-of-law clause in the contract, specifying the body of law that will govern contract disputes. See note 10 infra; see also Juenger, Supreme Court Validation of Forum-Selection Clauses, 19 Wayne L. Rev. 49, 50 (1972) ("Viewed realistically, choice of law and choice of forum are but two more terms on which agreement must be reached.").

\textsuperscript{9} A typical forum-selection clause might read: "[B]oth parties agree that only the New York Courts shall have jurisdiction over this contract and any controversies arising out of this contract." Elkin v. Austral Am. Trading Corp., 10 Misc. 2d 879, 879, 170 N.Y.S.2d 131, 132 (Sup. Ct. 1957). Such a clause also may be called a "choice-of-forum provision" or "forum clause." See Gruson, supra note 2, at 136 n.4. This Note uses "forum-selection clause" and "choice-of-forum provision" (or clause) interchangeably.

\textsuperscript{10} See Comment, supra note 2, at 133; Comment, supra note 2, at 1092-93; see also The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972) ("The elimination of ... uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.").
Modern courts and commentators recognize that forum-selection clauses advance many important public policies. The enforcement of reasonable forum-selection clauses protects the expectations of contracting parties, preserves the equities of the agreement, respects freedom of contract, encourages trade, and conserves judicial resources by limiting pretrial struggles over where to litigate. However, as the amount of litigation over forum-selection clauses illustrates, the stand-

of New York law, the California court still can retain jurisdiction over the lawsuit. Id. Of course, the parties may specify the same jurisdiction for choice-of-law and choice-of-forum purposes. See id.

11 This Note does not argue that all forum-selection clauses should be enforced reflexly, without regard for the reasonableness of doing so. The best solution would be a return to the standards articulated in The Bremen. See text accompanying note 22 infra; note 78 and accompanying text infra. However, this Note concludes that the Erie line of cases compels the application of state law to forum-selection clauses, even though this approach may result in the use of a different standard. See text accompanying note 23 infra. For a proposed solution to this dilemma, see note 78 infra.

12 See, e.g., Gruson, supra note 2, at 156 ("If the parties to an agreement stipulate that the courts of a specified foreign country shall have exclusive jurisdiction over all disputes, they intend to exclude the jurisdiction of all other foreign courts and of all United States federal and state courts that otherwise have... jurisdiction... "); Comment, supra note 6, at 1382 n.13 (advance agreement on forum helps parties anticipate how costly litigation will be). Of course, if the opposing party consents to the change in forum, the parties' agreement is not undermined at all and the parties should be entitled to proceed in the newly selected forum. See, e.g., Krenger v. Pennsylvania R.R., 174 F.2d 556, 560-61 (2d Cir.) (Hand, J., concurring) (noting that contractual forum-selection clauses agreed to after cause of action had accrued had been enforced), cert. denied, 338 U.S. 866 (1949); Herrington v. Thompson, 61 F. Supp. 903, 904-05 (D. Mo. 1945) (absent misrepresentation, fraud, or mistake, venue may be subject of contractual agreement where cause of action has accrued). But cf. Akerly v. New York C. R., 168 F.2d 812, 813-15 (6th Cir. 1948) (provision entered into after cause of action arose was within rule that contract limiting access to court was against public policy).

13 See, e.g., Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1075 (11th Cir. 1987) (en banc) (Tjoflat, J., concurring) ("The law of contracts presumes that Ricoh has already compensated Stewart, through lowered costs or some other method, for any inconvenience that Stewart or its witnesses might suffer by trying the case in New York."); rev'd on other grounds, 487 U.S. 22 (1988); TUC Elecs. v. Eagle Telephonics, 698 F. Supp. 35, 39 (D. Conn. 1988) ("[W]here parties have freely agreed upon a particular forum for their disputes, it is presumed that each party has been compensated by the bargain for any inconvenience it might suffer by resort to that forum."); D'Antuono v. Computax Sys., 570 F. Supp. 708, 713 (D.R.I. 1983) ("The better-reasoned view is that the plaintiff, by consenting to inclusion of the forum designation in the agreements, has in effect subordinated his convenience to the bargain."); Comment, supra note 2, at 1093 n.16 ("If a court does not enforce the forum selection clause, the equities of the agreement may be shifted.").

14 See The Bremen, 407 U.S. at 11; Gruson, supra note 2, at 151.


16 See Stewart, 487 U.S. at 33 (Kennedy, J., concurring) ("[f]orum-selection clauses] relieve courts of time consuming pretrial motions").

17 See Comment, supra note 2, at 1091 n.9 (1988 Westlaw search for cases on forum-selection clauses since 1980 produced 211 federal cases and 50 state cases).

The Supreme Court has decided three forum-selection clause cases in the past three years.
Forum-selection clauses are by no means clear. Ironically, whether a forum-selection clause is honored may depend on where the plaintiff brings suit, a state of affairs that may encourage parties to race to the courthouse and may discourage amicable dispute resolution.

This Note argues that all valid forum-selection clauses should be enforced under a standard similar to that established by the Supreme Court in The Bremen v. Zapata Off-Shore Co. The Note recognizes,

---

See Carnival Cruise Lines v. Shute, 111 S. Ct. 1522, 1524-25 (1991) (forum-selection clause on passenger ticket enforceable in admiralty under The Bremen although passengers did not receive tickets until after paying fare); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 497 (1989) (denial of 12(b)(3) motion to dismiss based on forum-selection clause not entitled to interlocutory review); Stewart, 487 U.S. at 32 (determination of whether to grant § 1404(a) transfer must be based primarily on § 1404(a) factors, not state policies or other federal law).

18 See notes 215-33 and accompanying text infra.

19 See Note, supra note 8, at 186 (noting this problem which may result from courts' divergent treatment of forum-selection clauses).

The importance of proper treatment of forum-selection clauses at the trial court level increased when the Supreme Court held that there is no right of interlocutory review of a denial of a 12(b)(3) motion to enforce a forum-selection clause. See Lauro Lines, 490 U.S. at 496. Review of these motions after final judgment has always been limited as a practical matter. See notes 90-101 and accompanying text infra.

20 If a party realizes that the contractual relationship is disintegrating and that she can gain the upper hand by being the one to file suit, she may be quicker to commence litigation than she otherwise would be.

21 A "valid" forum-selection clause is one that has not been tainted by fraud, undue influence, or overweening bargaining power. See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972) (finding "compelling reasons" to enforce only forum-selection clauses not affected by these defects in bargaining process). Clauses defective in one of these ways, or otherwise unreasonable, should not be enforced. Thus, as used in this Note, an "enforceable" clause is per se a "valid" one.

Some recent cases have manifested understandable reluctance to enforce forum-selection clauses contained in obvious contracts of adhesion, such as when written on a passenger ticket. See, e.g., Shute v. Carnival Cruise Lines, 897 F.2d 377, 388-89 & n.11 (9th Cir. 1990) (forum-selection clause in passenger ticket unenforceable, particularly where purchasers did not have notice of provision as they received ticket after purchasing cruise), rev'd, 111 S. Ct. 1522 (1991); Chasser v. Achille Lauro Lines, 844 F.2d 50, 52 (2d Cir. 1988) (denying interlocutory review of district court's refusal to enforce forum-selection clause appearing "in tiny type" on passenger ticket), aff'd sub nom. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989). But see Hodes v. S.N.C. Achille Lauro ed Altì-Gestione, 858 F.2d 905, 910 (3d Cir. 1988) (forum-selection clause in passenger ticket, although in small print, was readable and thus enforceable), cert. dismissed, 490 U.S. 1001 (1989).

The Supreme Court may have reversed the tide when, in a recent admiralty case, it enforced a forum-selection clause on a passenger ticket that was mailed to the plaintiff after she paid the fare. The Court held that The Bremen does not require that all forum-selection clauses that are not the product of bargaining be held unenforceable. See Carnival Cruise Lines v. Shute, 111 S. Ct. 1522, 1527 (1991).

It should be up to the party seeking to avoid enforcement to plead and prove fraud or overreaching by the other party. See The Bremen, 407 U.S. at 10-11, 15 (rule of prima facie validity applies to forum-selection clauses; party seeking to litigate in non-contractual forum bears "heavy burden" of showing invalidity or unreasonableness of clause); see also Gruson, supra note 2, at 149 (explaining "heavy burden" standard).

however, that under the analysis required by *Erie Railroad v. Tompkins*, state law applies to these clauses, which may require the application of a standard other than that applied in *The Bremen*. Accordingly, the Note offers suggestions for obtaining enforcement of forum-selection clauses within the present system.

Section A of Part I examines courts' historical antipathy to forum-selection clauses, as well as the Supreme Court's about-face in *The Bremen v. Zapata Off-Shore Co.* The Bremen's continuing influence on federal forum-selection clause cases, it is argued, stems from its formulation of a sensible test for forum-selection clause enforcement, a test far more receptive to forum-selection clauses than any applied previously. The post-*Bremen* revolution, which created a procedural tangle in the absence of a codified "Zapata motion"—a motion designed specifically for forum-selection clause enforcement—is discussed in Section B of Part I.

Part II of this Note focuses on the conflict-of-laws issues raised by forum-selection clauses. Section A of this Part considers whether *Erie Railroad v. Tompkins* counsels against the application of federal law to forum-selection clauses; it then discusses *Stewart Organization, Inc. v. Ricoh Corp.*, which addressed this question in the context of a motion to transfer venue under 28 U.S.C. § 1404(a). The Note argues that *Stewart* was decided wrongly and that its tenuous *Erie* analysis is explicable as a response to lower courts' willy-nilly overenforcement of forum-selection clauses. Since *Stewart* may be limited to the context of a motion under section 1404(a), the Note argues that state law should apply to other forum-selection clause motions. Section B of Part II discusses which state law should be applied to a forum-selection clause and explores the effect of a choice-of-law clause on that analysis.

---

23 304 U.S. 64 (1938).
25 *The Bremen* continues to be cited, in admiralty as well as non-admiralty cases, even after the pivotal Supreme Court decision that retreated from its teachings. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 23 (1988) (agreeing with court of appeals that *The Bremen* is "instructive" in determining whether to enforce forum-selection clause but stating that determinative inquiry is whether § 1404(a) counsels enforcement); notes 186-87, 233 and accompanying text infra. In a recent admiralty case, the Supreme Court applied *The Bremen* to uphold a forum-selection clause printed on a passenger ticket. See *Carnival Cruise Lines*, 111 S. Ct. at 1525.
26 This Note employs the term "Zapata motion" to refer to a uniform motion to enforce a forum-selection clause. The motion, contained in a Federal Rule of Civil Procedure, would be based on a federal statute incorporating a standard similar to that in *The Bremen*, and would ensure the application of a uniform body of law to forum-selection clauses. For a discussion of the mechanics and constitutionality of this procedure, see note 78 and accompanying text infra.
27 304 U.S. 64 (1938).
Part III analyzes the approach most likely to be effective within the present system and suggests courses of action for practitioners who wish to see their forum-selection clauses enforced. The Note concludes that careful drafting of forum-selection and choice-of-law clauses will enhance the likelihood of forum-selection clause enforcement.

I

THE EVOLUTION OF FORUM-SELECTION CLAUSE ENFORCEMENT

A. The Historical Development of Forum-Selection Clauses Within Federal Civil Procedure

Forum-selection clauses traditionally were viewed with disfavor by the judiciary. Judicial suspicion may have arisen in part because a private contractual agreement to litigate in a certain forum, made in advance of any dispute between the parties, cannot be limited to only one of the four established procedural limitations imposed on courts: subject matter jurisdiction, personal jurisdiction, venue and forum non con

29 Subject matter jurisdiction is “at the top of the hierarchy” in “the limitations on the courts’ ability to resolve a lawsuit.” Stein, supra note 7, at 786-87. It addresses the court’s “power” or “competency” in given “types” of lawsuits. Parties cannot create subject matter jurisdiction by agreement and thus cannot waive a subject matter jurisdiction objection. See Hoffman v. Blaski, 363 U.S. 335, 342-43 (1960).

30 Personal jurisdiction limits the territorial reach of the court; it protects defendants by narrowing the number of courts with subject matter jurisdiction in which a defendant is subject to suit. See note 3 supra. Personal jurisdiction requirements call for a significant connection between a defendant and the forum. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). A party can waive a personal jurisdiction objection. See Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979) (“neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties”).

31 Venue is the appropriate geographical location for trial within a single jurisdiction. See 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3801, at 3 (2d ed. 1986) (“‘Venue’ refers to locality, the place where a lawsuit should be heard.”); Covey & Morris, supra note 10, at 841 n.22 (“Jurisdiction is the power and authority of a court to hear and determine a judicial proceeding. Venue is the geographical area in which a court with jurisdiction may hear and determine a case.”) (citing Black’s Law Dictionary 766, 1396 (5th ed. 1979)); see also Hoffman, 363 U.S. at 351 (Frankfurter, J., dissenting in companion case Sullivan v. Behimer) (“[S]tatutory venue rules governing the place of trial do not affect the power of a federal court to entertain an action, or of the plaintiff to bring it, but only afford the defendant a privilege to object to the place chosen . . . .”).

Until 1990, where federal subject matter jurisdiction was founded only on diversity of citizenship, venue was proper “in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.” 28 U.S.C. § 1391(a) (1988). The Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (1990), has expanded venue in the federal courts. Among other things, the Act amended § 1391(a) to read:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any
Forum-selection clauses pose a characterization problem since such clauses may waive a party's personal jurisdiction objection, waive access to certain courts with subject matter jurisdiction, specify a particular venue within a court system, or offer a reason relevant to forum non conveniens analysis to favor the contractual forum over other possible forums.

The terminology used to describe forum-selection clauses is important because it may affect the analysis of enforceability. Historically, almost all American courts treated forum-selection clauses as unenforceable attempts to "oust [their] jurisdiction." However, this categoriza-

den in the same state (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.

See Stein, supra note 7, at 786. Forum non conveniens is a judicial doctrine that allows a court to dismiss a case where there is a more convenient forum elsewhere, although the original forum may hear the dispute properly. See note 121 and accompanying text infra.


See J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 3.5, at 104 (1985). In fact, non-exclusive forum-selection clauses often are referred to as "consent to jurisdiction" clauses. See note 10 supra.

See Gruson, supra note 2, at 156 ("If the parties to an agreement stipulate that the courts of a specified foreign country shall have exclusive jurisdiction over all disputes, they intend to exclude the jurisdiction of all other foreign courts and of all United States federal and state courts that otherwise have personal and subject matter jurisdiction over the parties and claims in dispute.").

See id. at 157 ("If suit is brought on the basis of diversity jurisdiction in a federal district court other than the contractual federal district court, and the federal court is asked to dismiss or transfer the case to the federal district court which the parties intended to have exclusive jurisdiction, the federal court is faced with an issue of 'venue' rather than jurisdiction.").

See Royal Bed & Spring Co. v. Famosul Indus., 906 F.2d 45, 48 (1st Cir. 1990) (relying on forum-selection clause as evidence of alternative forum for action in affirming district court's dismissal on forum non conveniens grounds); cf. Gruson, supra note 2, at 142 n.28 ("[S]ome decisions make a distinction between passing on the reasonableness of a forum-selection clause and the exercise of discretion under the doctrine of forum non conveniens; however, the factors to be considered in deciding both motions are the same.").

See Gruson, supra note 2, at 157-58 (noting that terming forum-selection clauses "jurisdictional" may affect analysis of their enforceability and that labeling them questions of "venue" may bias Erie question); cf. Stein, supra note 7, at 786-87 ("A particular doctrine's position in the hierarchy will determine when and whether a party can raise the limitation as an objection to the proceeding, the degree of appellate scrutiny over the trial court's ruling, the res judicata effect of the judgment, and, in certain cases, even the degree of constitutional scrutiny over the decision." (footnotes omitted)).

See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts."). One commentator referred to the "few cases in the United States . . . enforcing" forum-selection clauses as "standing alone, separate and apart." Comment, Agreements in Advance Conferring Exclusive Jurisdiction on
tion is fallacious: forum-selection clauses cannot limit the subject matter jurisdiction of courts,41 since private parties have no power to abrogate statutorily conferred jurisdiction.42

The Supreme Court finally recognized this fallacy, at least in the context of international commerce, in its 1972 decision in The Bremen v. Zapata Off-Shore Co.43 In The Bremen, the plaintiff, Zapata, contracted with the defendant, owner of The Bremen, to transport its oil rig from Louisiana to Italy.44 When the rig was damaged in a storm, Zapata commenced an admiralty suit in Florida, in violation of a contractual clause requiring all disputes to be litigated in London.45 The defendant moved to dismiss based on the forum-selection clause, but the Florida court held that the clause, as an attempt to "oust" its jurisdiction, was against public policy and thus unenforceable.46 The court of appeals affirmed.47

Foreign Courts, 10 La. L. Rev. 293, 297 (1950).

40 Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (dictum) ("agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void"), superseded by statute as stated in Graham v. State Farm Mut. Ins. Co., 565 A.2d 908, 910-11 (Del. Super. Ct. 1989); see also Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 19, 111 N.E. 678, 681 (1916) ("The same rule [of ouster] prevails generally in all States where the question has arisen."); Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 86, 66 N.E. 627, 628 (1903) ("[N]othing is better settled than that agreements of this character are void."); Juenger, supra note 9, at 51 ("United States courts have . . . frequently refused to dismiss actions brought in violation of [forum-selection] clauses on the ground that a private contract cannot take away jurisdiction from a court.").

"The origins of the ouster doctrine are shrouded in history." Id. One hypothesis is that early judges, who were paid by the case, were reluctant to relinquish cases for pecuniary reasons. See id.; Reese, The Contractual Forum: Situation in the United States, 13 Am. J. Comp. L. 187, 189 (1964). Another explanation is that the rejection of forum-selection clauses grew out of judges' rejection of arbitration clauses. See A. Ehrenzweig, A Treatise on the Conflict of Laws § 41, at 148 (1962). A third explanation attributes the spreading of the ouster doctrine to the power of language: "Perhaps the true explanation is the hypnotic power of the phrase 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark." Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (footnote omitted); Juenger, supra note 9, at 52 (noting that courts were "[i]mpressed with the epithet 'ouster'").

41 Although litigants may waive objections to lack of personal jurisdiction or lack of venue, they cannot consent to subject matter jurisdiction where there is none, nor may they abrogate subject matter jurisdiction where it exists by statute. See note 29 supra. The phrase "oust the jurisdiction of the court" is thus a misnomer. Perhaps the best way to understand forum-selection clauses is as a request that the court exercise its discretion to decline to hear the case where there is a more appropriate forum elsewhere, a request resembling the invocation of forum non conveniens. See Gruson, supra note 2, at 140; Annotation, Validity of Contractual Provision Limiting Place or Court in which Action May be Brought, 31 A.L.R. 4th 404, 409 (1990).

42 See note 29 supra.
44 Id. at 2.
45 Id. at 3-4.
46 Id. at 4, 6.
47 Id. at 7.
fendant appealed to the Supreme Court. Calling the ouster doctrine a "vestigial legal fiction," the Court enforced the contract's exclusive forum-selection clause providing for trial in London, even in the absence of any relationship between the transaction and England, to respect "the legitimate expectations of the parties, manifested in their freely negotiated agreement." The Court then concluded that forum-selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. . . . A freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect." The Court noted that "the elimination of . . . uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." 

*The Bremen* was decided in admiralty jurisdiction and thus is not binding in other areas of federal common law. It also is possible to

---

48 Id. at 12.
49 Id.
50 Id. at 10-13 (footnotes omitted).
51 Id. at 13-14; see also Covey & Morris, supra note 10, at 838-39 (discussing *The Bremen* Court's analysis of the enforceability of forum-selection clauses). In another international case, the Court added that dispute-resolution clauses are "almost indispensable" for orderly and predictable international business transactions. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).
52 See *The Bremen*, 407 U.S. at 3.
53 See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988) (although *The Bremen* may be "instructive," it does not bind federal court sitting in diversity); 19 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4514, at 256-59 (2d ed. 1982) (uniform body of substantive maritime law applicable to matters within admiralty and maritime jurisdiction).

Federal courts have original jurisdiction over admiralty claims under the Constitution. See U.S. Const. art. III, § 2, cl. 1. The Supreme Court has interpreted this constitutional grant of power as authorizing the creation of federal common law in the admiralty area. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). Since the federal courts do not have authority to fashion general federal common law, see note 157 and accompanying text infra, *The Bremen*, a decision based on admiralty, cannot be binding in federal cases in which jurisdiction is based on diversity of citizenship. Nonetheless, this Note argues that the *Bremen* principles, applied correctly, represent the best test for enforcement of forum-selection clauses generally. Accordingly, Congress should enact a federal statute incorporating the *Bremen* standard of enforcement of forum-selection clauses. See note 78 infra. But see text accompanying notes 236-44 infra (under present law, *Erie* analysis dictates application of state law).

Because the *Bremen* Court used both restrictive and more general language, see note 56 infra, commentators have differed on whether the *Bremen*’s reasoning was intended to apply outside the admiralty area. Compare Gruson, supra note 2, at 149 n.58 ("By stating that the decision in *Bremen* should be read in conjunction with National Equipment Rental, Ltd. v. Szukent, 375 U.S. 311 (1964), the Supreme Court implied that the teaching of *Bremen* should not be limited to admiralty law.") with Nadelman, Choice-of-Court Clauses in the United States: The Road to Zapata, 21 Am. J. Comp. L. 124, 135 (1973) (*The Bremen* Court intended reasonableness test to be limited to admiralty cases).
read the decision as limited to cases involving international agreements. However, courts have not hesitated to extend the principles articulated in The Bremen to the domestic, nonadmiralty context. Application of the Bremen principles to domestic cases is sensible insofar as these cases implicate the ends The Bremen sought to serve—respecting freedom of contract by upholding freely bargained-for agreements, limiting pretrial struggles over where to litigate, and honoring the expectations of the parties.

For this reason, the application of The Bremen to domestic forum-selection clause disputes aired in federal courts sitting in diversity was, for a time, uncontroversial. Indeed, The Bremen sparked an overreaction, resulting in excessive enforcement of forum-selection clauses.

---

54 See The Bremen, 407 U.S. at 12-13 ("There are compelling reasons why a freely negotiated private international agreement . . . should be given full effect." (emphasis added)). A Supreme Court decision following The Bremen that gave dispute-resolution clauses similarly favorable treatment was also an international, though not an admiralty, case. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

55 Since courts generally do not distinguish between international and interstate agreements in their analyses of forum-selection clauses, see Grusan, supra note 2, at 137 n.11, many courts have applied The Bremen to purely domestic, nonadmiralty disputes. See, e.g., Pelleport Investors v. Budco Quality Theatres, 741 F.2d 273, 279 (9th Cir. 1984) ("W[e see no reason why the principles announced in Bremen are not equally applicable to the domestic context. Courts addressing the issue uniformly apply Bremen to cases involving domestic forum selection questions.").

56 See, e.g., Bense v. Interstate Battery Sys. of Am., 683 F.2d 718, 721 (2d Cir. 1982) (argument that The Bremen only applies to cases brought under federal admiralty jurisdiction "lacks merit"); In re Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979) ("While The Bremen dealt with admiralty matters, its teaching is appropriate in the instant case.").

57 See notes 13-14 and accompanying text supra.

58 See note 16 and accompanying text supra.

59 See note 12 and accompanying text supra.

60 The Court itself helped spur the overreaction, finding that a clause would remain enforceable despite proof of fraud in the contracting process unless that fraud related directly to the inclusion of the forum-selection clause itself in the agreement. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974). Perhaps a more reasonable rule would find a forum-selection clause vitiated by evidence of fraud in the contracting process so substantial as to support the assumption that, but for the fraud, a party would never have entered into the contract containing the forum-selection clause in the first place. See Hoffman v. Minuteman Press Int'l, 747 F. Supp. 552, 559 (W.D. Mo. 1990) (applying this rule to deny § 1404(a) motion to transfer to contractual forum).
Compensating for the historical aversion to forum-selection clauses, lower federal courts began to enforce them almost reflexly, ignoring the Bremen Court's instruction not to enforce clauses resulting from fraud, undue influence, overweening bargaining power, or that are otherwise unreasonable. It is difficult to find a case in which a court applied the Bremen test prior to its modification in Stewart Organization, Inc. v. Ricoh Corp. and refused to enforce a forum-selection clause. By shifting dramatically in the 1970s and 1980s from routinely disregarding forum-selection clauses to enforcing them willy-nilly without a rulebook "Zapata" motion, the federal courts set the stage for a procedural tangle and, ultimately, a confusing retreat from the Bremen standard.

B. Pick a Motion, Any Motion

When a party to a contract with a forum-selection clause is haled into court in a forum other than the one specified, her attorney must decide whether and how to attempt enforcement of the forum-selection clause. The enforcement of a forum-selection clause is not an absolute right. Occasionally a contractual dispute arises that was not foreseeable by the parties at the time of their agreement and that might be better heard in a forum other than the contractual one. One party may nevertheless attempt to enforce the clause, perhaps only because she feels that her opponent would suffer the greater disadvantage of retaining the contractual forum. Similarly, although an agreed-upon forum might have been the most convenient at the time of contracting, changed circumstances might render another forum more logical and appropriate. For example, a permissive forum-selection clause favoring Iran was not enforced where, after the Islamic revolution, the Iranian legal system had undergone unanticipated radical changes. See McDonnell Douglas Corp. v. Islamic Republic of Iran, 591 F. Supp. 293, 302-08 (E.D. Mo. 1984), aff'd, 758 F.2d 341 (8th Cir.), cert. denied, 474 U.S. 948 (1985).

See Note, Forum Selection Clauses: Substantive or Procedural for Erie Purposes, 89 Colum. L. Rev. 1068, 1083 (1989). Perhaps the sole instances where such clauses were not enforced despite application of The Bremen are cases in which the forum-selection clause appeared in small print on a passenger ticket. See Carnival Cruise Lines v. Shute, 897 F.2d 377, (9th Cir. 1990), rev'd, 111 S. Ct. 1522 (1991); Chasser, 844 F.2d at 51-52.

61 See notes 39-40 and accompanying text supra.
62 For an example of a forum-selection clause that a court properly refused to enforce, see Chasser v. Achille Lauro Lines, 844 F.2d 50, 51 (2d Cir. 1988), dismissing appeal from Klinghoffer v. Achille Lauro, 1988 A.M.C. 636 (S.D.N.Y. 1987), aff'd sub nom. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989). In Chasser, the Court of Appeals for the Second Circuit denied interlocutory review of the district court's refusal to enforce a forum-selection clause appearing "in tiny type" on a passenger ticket. But see Carnival Cruise Lines v. Shute, 111 S. Ct. 1522 (1991) (applying The Bremen, in admiralty case, to uphold forum-selection clause on passenger ticket); Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 853 F.2d 905, 915-16 (3d Cir. 1988). In Hodes, another case arising out of the Achille Lauro hijacking, the Court of Appeals for the Third Circuit examined presumably the same forum-selection clause appearing on a passenger ticket and found that the clause, although in small print, was enforceable under the Bremen standard. See id.
63 See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972). Even where there is no evidence of fraud or the like in the bargaining process, "the enforcement of [a forum-selection] clause is not an absolute right." Covey & Morris, supra note 10, at 842. Occasionally a contractual dispute arises that was not foreseeable by the parties at the time of their agreement and that might be better heard in a forum other than the contractual one. One party may nevertheless attempt to enforce the clause, perhaps only because she feels that her opponent would suffer the greater disadvantage of retaining the contractual forum. Similarly, although an agreed-upon forum might have been the most convenient at the time of contracting, changed circumstances might render another forum more logical and appropriate. For example, a permissive forum-selection clause favoring Iran was not enforced where, after the Islamic revolution, the Iranian legal system had undergone unanticipated radical changes. See McDonnell Douglas Corp. v. Islamic Republic of Iran, 591 F. Supp. 293, 302-08 (E.D. Mo. 1984), aff'd, 758 F.2d 341 (8th Cir.), cert. denied, 474 U.S. 948 (1985).
64 487 U.S. 22 (1988); see text accompanying note 215 infra.
65 See Note, Forum Selection Clauses: Substantive or Procedural for Erie Purposes, 89 Colum. L. Rev. 1068, 1083 (1989). Perhaps the sole instances where such clauses were not enforced despite application of The Bremen are cases in which the forum-selection clause appeared in small print on a passenger ticket. See Carnival Cruise Lines v. Shute, 897 F.2d 377, (9th Cir. 1990), rev'd, 111 S. Ct. 1522 (1991); Chasser, 844 F.2d at 51-52.
66 See note 26 supra; note 78 and accompanying text infra.
FORUM-SELECTION CLAUSES

If the defendant wishes to see the clause enforced, she must make a motion in the noncontractual forum for dismissal or transfer based on the clause. Neither the Federal Rules of Civil Procedure nor the common law presently provide for a "Zapata" motion, a motion expressly designed for forum-selection clause enforcement. Therefore, defense attorneys have had to invoke an assortment of rules and concepts that were not designed with forum-selection clauses in mind. For example, they have moved to transfer cases under 28 U.S.C. § 1404(a), to dismiss or transfer cases under 28 U.S.C. § 1406(a), to dismiss cases under the common-law doctrine of forum non conveniens, and to dismiss cases

---

67 See note 26 and accompanying text supra.

68 One commentator put it aptly: "Attorneys seeking enforcement of a forum provision typically invoke an array of procedural remedies and defenses in the hope that one is appropriate to the court's view of the case. This makes for interesting lawyering and bad law." Mullenix, supra note 33, at 327.

69 28 U.S.C. § 1404(a) (1988) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

70 28 U.S.C. § 1406(a) (1988) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Motions under § 1404(a) and § 1406(a) may be made separately, together, or in combination with other motions. See, e.g., In re Fireman's Fund Ins. Cos., 588 F.2d 93, 94 (5th Cir. 1979) (mandamus action seeking recall of district court's § 1404(a) transfer order); Moretti & Perlow Law Offices v. Aleet Assocs., 668 F. Supp. 103, 104 (D.R.I. 1987) (defendant made motion to dismiss under five Federal Rules of Civil Procedure, or in the alternative to transfer case under § 1406(a), which was granted); D'Antuono v. CCH Computax Sys., 570 F. Supp. 708, 709 (D.R.I. 1983) (transfer motion failed to specify transfer statute invoked; court treated as based on both §§ 1404(a) and 1406(a)); Leasing Serv. Corp. v. Broetje, 545 F. Supp. 362, 364 (S.D.N.Y. 1982) (general motion to dismiss under Rule 12(b), or, in the alternative, to transfer under § 1404(a)); Cutter v. Scott & Fetzer Co., 510 F. Supp. 905, 906 (E.D. Wis. 1981) (combination motion to transfer or dismiss under both statutes); Wellmore Coal Corp. v. Gates Learjet Corp., 475 F. Supp. 1140, 1141 (W.D. Va. 1979) (motion to dismiss under Rule 12(b), or in the alternative, to transfer under § 1406(a)); Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 146 (N.D. Tex. 1979) (motion to dismiss under Rule 12(b), or in alternative to transfer; court did not specify under which statute transfer is sought); Full-Sight Lens Corp. v. Soft Lenses, 466 F. Supp. 71 (S.D.N.Y. 1978) (section 1404(a) or 1406(a) transfer sought); National Equip. Rental v. Sanders, 271 F. Supp. 756, 760 (E.D.N.Y. 1967) (same).

71 Forum non conveniens permits a court to decline jurisdiction where there is a more appropriate forum elsewhere. See Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1218 (11th Cir.), cert. denied, 417 U.S. 948 (1985). Forum non conveniens has been used to dismiss cases from federal courts where there was a more convenient forum in a foreign country. It also has been used occasionally where the more convenient forum was a state court. For a case granting a forum non conveniens motion based on a forum-selection clause, see Royal Bed & Spring Co. v. Famossul Indus., 906 F.2d 45, 52-53 (1st Cir. 1990) (affirming dismissal on forum non conveniens grounds so that action could be brought in forum specified in forum-selection clause).

Generally the forum non conveniens motion is made in conjunction with another motion, with the latter motion specifically intended to obtain forum-selection clause enforcement, see note 124 and accompanying text infra, but a forum non conveniens motion also may be made
under various Federal Rules of Civil Procedure, including Rule 12(b)(1) (lack of subject matter jurisdiction);\(^72\) Rule 12(b)(2) (lack of personal jurisdiction);\(^73\) Rule 12(b)(3) (improper venue);\(^74\) Rule 12(b)(6) (failure to state a claim);\(^75\) and Rule 56 (summary judgment).\(^76\)

The motions presently used for forum-selection clause enforcement may be placed into four categories: (1) statutory transfer motions under sections 1404(a) and 1406(a); (2) forum non conveniens dismissal motions; (3) motions to dismiss for lack of venue under Rule 12(b)(3); and

expressly to enforce the forum-selection clause, see *Royal Bed*, 906 F.2d at 52-53; note 124 and accompanying text infra.

\(^72\) See *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985) (12(b)(1) motion based on forum-selection clause alone); *LFC Lessors v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 7 (1st Cir. 1984) (motions made under Rules 12(b)(1) and 12(b)(3), but court held that 12(b)(6) would be proper motion); *International Ass'n of Bridge Workers Local Union 348 v. Koeki Constr. Co.*, 474 F. Supp. 370, 371 (W.D. Pa. 1979) (motion for remand premised on Rule 12(b)(1)).

\(^73\) See *Richardson Greenshields Sec. v. Metz*, 566 F. Supp. 131, 132 (S.D.N.Y. 1983) (motion to dismiss under Rule 12(b)(2), or in the alternative, to transfer under 28 U.S.C. § 1404(a)).


\(^75\) See, e.g., *Instrumentation Assoc. v. Madsen Elec.*, 859 F.2d 4, 6 n.4 (3d Cir. 1988) (motion to dismiss premised only on 12(b)(6)); *LFC Lessors*, 739 F.2d at 7 (finding proper motion was not 12(b)(1) or 12(b)(3), but 12(b)(6)); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 343 (3d Cir. 1966) (treating 12(b)(6) motion as Rule 56 summary judgment motion because supporting affidavits filed by both parties); *American Performance Corp. v. Sanford*, 749 F. Supp. 1094, 1094 n.1 (M.D. Ala. 1990) (finding that forum-selection clause did not deprive court of jurisdiction or venue but rather warranted dismissal under Rule 12(b)(6)); *Page Constr. Co. v. Perini Constr.*, 712 F. Supp. 9, 11 (D.R.I. 1989) (motions to dismiss under 12(b)(6) and § 1406(a) analyzed under § 1404(a); court did not reach issue of whether violation of forum-selection clause sufficient for 12(b)(6) dismissal).

\(^76\) See *General Eng'g Corp. v. Martin Marietta Alumina*, 783 F.2d 352 (3d Cir. 1986); *Moretti & Perlow Law Offices v. Aleet Assocs.*, 668 F. Supp. 103, 104 (D.R.I. 1987) (defendant filed motions to dismiss under numerous provisions, including Rules 12(b)(2), 12(b)(3), 12(b)(6), 17, and 56). In still other cases, defendants have moved to remand cases removed to federal court in contravention of a provision requiring a state forum. See, e.g., *Hunt Wesson Foods v. Supreme Oil Co.*, 817 F.2d 75, 76 (9th Cir. 1987); *Transure v. Marsh & McLennan*, 766 F.2d 1297, 1299 n.9 (9th Cir. 1985); *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 275 (9th Cir. 1984); *Intermountain Sys. v. Edsall Constr. Co.*, 575 F. Supp. 1195, 1197 (D. Colo. 1983); *City of New York v. Pullman Inc.*, 477 F. Supp. 438, 440-41 (S.D.N.Y. 1979); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1071 (W.D. Mo. 1979). The latter cases are in a different procedural posture than the cases relevant to this Note, as they involve attempts to enforce a forum-selection clause that excludes federal forums, limiting the parties to a particular state forum. Since this Note addresses forum-selection clause enforcement within the federal system, it does not examine these state forum-selection clauses further. For a discussion of the issues raised by forum-selection clauses in this procedural posture, see *Mullenix*, supra note 33, at 339-46.
(4) dismissal motions premised on other Federal Rules of Civil Procedure. The remainder of this Part discusses forum-selection clause enforcement under each of these motions and points out the problems associated with their use. This discussion will show that the use of make-shift motions for the enforcement of forum-selection clauses is fraught with problems, particularly where the policies behind forum-selection clauses are not coextensive with those of the mechanisms used to seek enforcement.77 A rulebook "Zapata" motion, based on a uniform body of federal law on forum-selection clauses, would eliminate many of these difficulties.78

1. 28 U.S.C. § 1404(a)

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."79 Transfer under section 1404(a) is predicated on proper jurisdiction and venue in the transferor court80 and the availability of another federal court81 in which the suit could have been brought originally.82 This restriction reinforces the statutes that limit available forums by preventing parties from using the transfer mechanism to obtain access to a federal court from which they otherwise would have been barred.83

77 See text accompanying notes 79-145 infra.
78 Ideally, Congress would pass a statute requiring forum-selection clause enforcement in the federal courts. The statute would codify a standard similar to that expressed in The Bremen. Such a statute might read: "Contractual agreements between private parties to litigate in one forum to the exclusion of all others will be honored in the federal courts to the extent that they do not result from fraud, undue influence, overweening bargaining power, or are otherwise unreasonable." A motion to enforce the statute could be included in Rule 12(b) of the Federal Rules of Civil Procedure and would simply be a motion to dismiss to honor an exclusive forum-selection clause. The combination of a Federal Rule of Civil Procedure and a federal statutory standard would allow development of a body of law tailored to forum-selection clause enforcement.
80 Where venue or personal jurisdiction is defective, the proper transfer mechanism is 28 U.S.C. § 1406(a). See notes 104-05 and accompanying text infra.
81 See 28 U.S.C. § 1404(a). Where the alternative forum is not another federal court, the common-law doctrine of forum non conveniens may be invoked. See note 32 and accompanying text supra.
82 It sometimes is stated that § 1404(a) is the statutory codification of forum non conveniens. In fact, the transfer mechanism had been proposed several years before Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), approved the use of forum non conveniens in the federal courts. See id. at 512; Stein, supra note 7, at 807; see also Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (section 1404(a) is not a codification of forum non conveniens and thus does not require as strong a showing of inconvenience).
84 However, this reasoning does not apply in certain instances. Since an objection to venue is waivable, and a valid forum-selection clause can serve as an agreement to waive a venue objection, see note 10 supra, it is possible that the parties would have had access, as an original
The section 1404(a) transfer mechanism, often employed outside the forum-selection clause context, is also a popular way to seek forum-selection clause enforcement. In addition, use of section 1404(a) in the forum-selection clause context recently garnered attention when the Supreme Court held in Stewart Organization, Inc. v. Ricoh Corp. that section 1404(a) analysis controls a decision whether to transfer a case to the contractual forum.

Despite this endorsement by the Supreme Court, the use of a section 1404(a) transfer to enforce a forum-selection clause may carry two significant disadvantages for defendants. First, in a section 1404(a) analysis, a forum-selection clause is but one of a myriad of factors a court may consider in determining whether “the convenience of parties and witnesses” and “the interest of justice” favor transfer. While the clause usually matter, to a court from which they are barred under the statute. The explanation for this apparent anomaly is that courts have interpreted the “might have been brought” language of § 1404(a) to mean a forum for which the statutory venue requirements actually are met, not waived. See Heller Fin. v. Shop-A-Lot, Inc., 680 F. Supp. 292, 295 (N.D. Ill. 1988) (section 1404(a) transfer motion denied since “Heller could not have brought this action in Louisiana because not all of the defendants reside there.”).

84 See C. Wright, Law of Federal Courts § 44, at 164 (2d ed. 1983) ("[N]o issue of civil procedure gives rise to so many reported decisions, year after year, as does this seemingly simple statute."). Parties may make a § 1404(a) transfer motion either to attempt enforcement of a forum-selection clause, see, e.g., Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1071 (11th Cir. 1987) (directing district court to grant motion to transfer case to New York to honor forum-selection clause), aff'd, 487 U.S. 22 (1988); Full-Sight Contact Lens Corp. v. Soft Lenses, 466 F. Supp. 71, 72-74 (S.D.N.Y. 1978) (defendant moved to dismiss under 12(b)(3) and § 1406, or, in the alternative, to transfer under § 1404), or to try to move the case out of the contractual forum, see, e.g., Plum Tree, Inc. v. Stockment, 488 F.2d 754, 757 (3d Cir. 1973) (dictum) (“we note that the existence of a valid forum-selection clause whose enforcement is not unreasonable does not necessarily prevent the selected forum from ordering a transfer of the case under § 1404(a)” (footnotes omitted)); Savin v. C.S.X. Corp., 657 F. Supp. 1210, 1214-15 (S.D.N.Y. 1987) (case transferred to Pennsylvania despite New York forum-selection clause); Credit Alliance Corp. v. Crook, 567 F. Supp. 1462, 1464 (S.D.N.Y. 1983) (transferred from contractual forum to California); Coface v. Optique Du Monde, 521 F. Supp. 500, 505-06 (S.D.N.Y. 1980) (transferred from contractual forum to Illinois). This Note concerns itself solely with motions seeking enforcement of forum-selection clauses.


86 See id. at 23; text accompanying notes 185-91 infra.


is considered in the evaluation of the parties' convenience since it is presumed that their agreement took convenience into account,\textsuperscript{89} it is unclear whether the forum-selection clause is relevant to any of the other section 1404(a) elements.\textsuperscript{90} Thus, in weighing the factors considered relevant under section 1404(a), a court may refuse to enforce a contractual provision, not because it is defective in substance, but merely because other factors "outweigh" its enforcement.\textsuperscript{91} This possibility in effect enables a court to override an otherwise valid contractual provision as a "proce-

\textsuperscript{89} See\textsuperscript{Stewart, 487 U.S. at 29 ("the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue");\textsuperscript{Plum Tree, Inc. v. Stockment, 488 F.2d 754, 758 (3d Cir. 1973) (convenience factor is within power of private parties to indicate in forum-selection clause);\textsuperscript{New Medico Assocs., 750 F. Supp. at 1145-46 (on motion to transfer out of contractual forum, forum-selection clause operates as waiver of moving party's objection on grounds of inconvenience);\textsuperscript{TUC Elec. v. Eagle Telephonics, 698 F. Supp. 35, 39 (D. Conn. 1988) (contract designation conclusive on convenience question);\textsuperscript{Savin v. C.S.X. Corp., 657 F. Supp. 1210, 1214 (S.D.N.Y. 1987) (same).\textsuperscript{90} The Supreme Court's most recent words on this question are somewhat opaque: In its resolution of the § 1404 motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum in light of the parties' expressed preference for that venue, and the fairness of transfer in light of the forum selection clause and the parties' relative bargaining power.\textsuperscript{Stewart, 487 U.S. at 29. The general rule seems to be that the forum-selection clause may affect only the "convenience of the parties" factor. See, e.g.,\textsuperscript{Heller Fin. v. Midwhey Powder Co., 883 F.2d 1286, 1293 (7th Cir. 1989) (only "convenience of the parties" factor is within parties' power to waive);\textsuperscript{Red Bull Assoc. v. Best W. Int'l, 862 F.2d 963, 967 (2d Cir. 1988) ("interest of justice" factor not within control of parties);\textsuperscript{Full-Sight Contact Lens Corp. v. Soft Lenses, 466 F. Supp. 71, 74 (S.D.N.Y. 1978) (only evaluation of convenience of parties is affected by forum-selection clause).\textsuperscript{One of the first courts to address this issue seemed ambivalent. It first appeared to endorse the general rule above, stating: Congress set down in § 1404(a) the factors it thought should be decisive on a motion for transfer. Only one of these—the convenience of the parties—is properly within the power of the parties themselves to affect by a forum-selection clause. The other factors—the convenience of witnesses and the interest of justice—are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement of the parties.\textsuperscript{Plum Tree, Inc., 488 F.2d at 757-58. However, in a later footnote the court retreated from certainty, stating: A valid forum-selection agreement may be treated as a waiver by the moving party of its right to assert its own convenience as a factor in favoring transfer from the agreed upon forum or as one element to be considered in weighing the interest of justice. Whether the forum-selection agreement should be treated in either or both of these ways will often depend on its specific terms. Id. at 758 n.7. This approach generally has not been followed.\textsuperscript{91} See\textsuperscript{Stewart, 487 U.S. at 23 ("The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration... nor no consideration... but rather the consideration for which Congress provided in § 1404(a).")); cf. Arkansas-Best Freight Sys. v. Youngblood, 359 F. Supp. 1125, 1129 (W.D. Ark. 1973) ("The plaintiff's choice of the forum should rarely be disturbed.")
In fact, under Stewart, district courts have almost unfettered discretion in deciding section 1404(a) motions based on forum-selection clauses. Defendants accordingly have no way of predicting the weight to be accorded these clauses.

A second question arising from the use of section 1404(a) for the enforcement of forum-selection clauses is what substantive law to apply once the transfer occurs. Under Van Dusen v. Barrack, a section 1404(a) transfer carries with it the law that would have been applied by the transferor forum. The rationale for the Van Dusen rule is that the defendant should not be able to use a change of venue to obtain a different law. This makes sense in the classic transfer case, where it is simply judicial convenience that calls for litigation of the matter in a district other than the one in which the case was brought. The rule, however, poses problems where the section 1404(a) transfer is used to effect forum-selection clause enforcement, because, in the forum-selection clause context, a defendant successful in obtaining a 1404(a) transfer to enforce a forum-selection clause nevertheless loses the benefit of the choice-of-law of the contractual forum, since the transferee court will apply the law that the original, noncontractual forum would have applied.

Whatever the district court judge's decision on such a 1404(a) transfer motion, it likely will escape appellate review entirely, both as a matter

---

92 In Stewart, the district court's decision not to enforce the forum-selection clause, on remand from the Supreme Court, is indicative of the problem. See Stewart Org., Inc. v. Ricoh Corp., 696 F. Supp. 583, 590 (N.D. Ala. 1988) ("In this case, the other private factors [in the § 1404(a) inquiry] simply outweigh any weight to be given the private factor consisting of the forum-selection clause, no matter how relatively important this factor might be."). The transfer order ultimately was granted, however, as mandamus was issued by the Court of Appeals for the Eleventh Circuit. See In re Ricoh Corp., 870 F.2d 570, 574 (11th Cir.), motion for stay of mandamus denied, 713 F. Supp. 1419, 1419 (N.D. Ala. 1989).

93 See notes 217-25 and accompanying text infra.


95 Id. at 636 ("parties not entitled to "change of law as a bonus for a change of venue" (quoting Wells v. Simonds Abrasive Co., 345 U.S. 514, 522 (1952) (Jackson, J., dissenting))).

96 Id. However, a recent Supreme Court case calls this rationale into doubt: the same rule was held to apply to a plaintiff-initiated transfer, which means that a plaintiff can bring suit in an improper venue solely to obtain that forum's law and then can transfer the case to the desired forum. See Ferens v. John Deere Co., 110 S. Ct. 1274, 1280-81 (1990).

97 Including a choice-of-law clause in the contract may prevent this problem if the transferee court, applying the law that the transferor court would have applied, enforces the choice-of-law clause. Since most states enforce reasonable choice-of-law clauses, see note 255 infra, this precaution should protect most defendants. Of course, the problem is not avoided if the transferee court, the contractual forum, would have enforced the choice-of-law clause had the case been brought there as an original matter but refuses to enforce the choice-of-law clause after determining that the transferor forum would not.

98 See Hoffman v. Burroughs Corp., 571 F. Supp. 545, 550-51 (N.D. Tex. 1982) (judge considered whether to transfer case under § 1404(a) or § 1406(a) since transfer mechanism would determine applicable law, including what choice-of-law rules would apply after transfer).
of interlocutory appeal and after final judgment. A section 1404(a) transfer is an interlocutory order because it does not address the merits of the underlying dispute, and as such it generally is not reviewable immediately. More important to defendants, if transfer is denied, review of that order is rare and, even if granted, is not worth much after an

99 See C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3855 (1978); see also Sunshine Beauty Supplies v. United States Dist. Court, 872 F.2d 310, 311 (9th Cir. 1989) (stating that transfer order not final appealable order but granting mandamus to review); Louisiana Ice Cream Distrib. v. Carvel Corp., 821 F.2d 1031, 1033 (5th Cir. 1987) (denying interlocutory appellate review of 12(b)(3) motion based on forum-selection clause because not "collateral order" of trial court and because analogous denial of § 1404(a) transfer not immediately reviewable); Southern Dist. Co. v. E. & J. Gallo Winery, 718 F. Supp. 1264, 1268 (W.D.N.C. 1989) (stating that order granting or denying 1404(a) transfer motion is interlocutory and ordinarily nonappealable).

100 If the § 1404(a) motion is based upon the forum-selection clause, interlocutory review of a denial of a 12(b)(3) motion to dismiss based on a forum-selection clause may be unavailable. See Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 496 (1989). In most cases the grant or denial of a § 1404(a) transfer motion is not reviewable prior to final judgment, as it is an interlocutory order. See note 99 and accompanying text supra. In the overwhelming majority of § 1404(a) transfer cases, § 1292(b)(2) certification for interlocutory appeal would not be available because the requisite controlling question of law would be absent. See, e.g., Southern Distrib. Co., 718 F. Supp. at 1268 n.2 (declining to certify for interlocutory appeal based on lack of "controlling question of law as to which there is substantial ground for difference of opinion" (quoting 28 U.S.C. § 1292(b)(2))); note 182 infra. But see Red Bull Assocs. v. Best W. Int'l, 862 F.2d 963, 965 n.4 (1988) ("Some commentators have questioned whether § 1404(a) transfer motions are properly appealable under § 1292(b). . . . Where, however, it is urged that the court considered improper factors in making its decision to transfer, review via § 1292(b) is appropriate." (citations omitted)).

If transfer is granted, review may be unavailable even after final judgment, as many circuits follow the rule that a circuit court cannot review a decision of a district court in another circuit, a rule derived from 28 U.S.C. § 2105 (1988): "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." See, e.g., Hatch v. Reliance Ins. Co., 758 F.2d 409, 413 (9th Cir.) (reconsideration by transferee court of removal and transfer inappropriate unless appellants were denied full and fair opportunity to litigate), cert. denied, 474 U.S. 1021 (1985); Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 985-86 (11th Cir. 1982) (refusing to review merits of transfer order because court "lack[s] jurisdiction to review the decision of a district court embraced by another circuit"); Technitrol v. McManus, 405 F.2d 84, 87 (8th Cir. 1968) (expressing "grave doubt" whether court had right to review transfer order issued by district court of another circuit), cert. denied, 394 U.S. 997 (1969); Purex Corp. v. St. Louis Nat'l Stockyards Co., 374 F.2d 998, 1000 (7th Cir.) (appropriate appellate court to review order on appeal from district court of another circuit), cert. denied, 394 U.S. 997 (1969); Preston Corp. v. Reese, 335 F.2d 827, 828 (4th Cir. 1964) (per curiam) (dictum) (same); cf. In re Corrugated Container Anti-Trust Litig., 620 F.2d 1086, 1090-91 (5th Cir.) (order to appear for a deposition reviewable only in circuit embracing court that issued subpoena), cert. denied, 449 U.S. 1102 (1980). But see Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866, 868-70 (2d Cir. 1950) (court of appeals of circuit embracing transferee court may review transferor court's order on appeal from final judgment).

If defendant's transfer motion is granted, the plaintiff may request permission of the district court to certify a question of law regarding the grant of such a motion or, after transfer, can move for retransfer in the transferee court and appeal a denial of retransfer to the transferee appellate court. See Nascone v. Spudnuts, 735 F.2d 763, 765-67 (3d Cir. 1984). These
entire trial has taken place in the wrong forum. 101

In sum, the section 1404(a) transfer, although frequently used as a means of enforcing forum-selection clauses, contains traps for the unwary. Under current law, in cases where federal jurisdiction is based on diversity of citizenship, the forum-selection clause is only one of many factors the court considers in deciding whether to transfer. 102 Thus, a perfectly valid clause may not be enforced if the district judge finds that other convenience factors disfavoring transfer outweigh the clause. If the case is transferred, the defendant may find that the law applied is not the law that she expected, namely that which would have been applied had suit been brought in the contractual forum as an original matter. 103 Finally, whatever the judge's decision, it likely will be shielded from appellate review.

2. 28 U.S.C. § 1406(a)

28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 104 It is a curative provision that enables litigants to avoid dismissal for a defect in venue that would not have arisen in at least one other federal court. 105 Although the statute authorizes dismissal or transfer, it often is used for transfer, as an alternative to section 1404(a) when venue is laid improperly in the original forum.

Transfer of a case from one federal forum to another to honor a maneuvers have little chance of success. However, at least in the Ninth Circuit, a party may be able to obtain review of a grant of a transfer motion by mandamus. See Sunshine Beauty Supplies, 872 F.2d at 311. But see Petition of Int'l Precious Metals Corp., 917 F.2d 792, 792 (4th Cir. 1990) (petition for mandamus to order district court to transfer case to enforce forum-selection clause denied because appeal after final judgment is adequate means of relief).

101 See Lauro Lines, 490 U.S. at 499 ("If it is eventually decided that the District Court erred in allowing trial in this case to take place in New York, petitioner will have been put to unnecessary trouble and expense, and the value of its contractual right to an Italian forum will have been diminished."); Sunshine Beauty Supplies, 872 F.2d at 311 ("Although Sunshine could appeal after final judgment . . . , the prejudice that results from an erroneous transfer order is of a type not correctable on appeal.").

102 See Stewart, 487 U.S. at 29; text accompanying note 191 infra; note 88 and accompanying text supra.

103 See notes 97-98 and accompanying text supra.


105 Section 1406(a) can be used to cure a venue defect even where the transferor court lacks personal jurisdiction over the defendant. See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962) ("The language of 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed has personal jurisdiction over the defendants or not.").
forum-selection clause sometimes is effected under this section.\textsuperscript{106} However, the fit is awkward. In the typical forum-selection clause case, the parties are in a forum that satisfies the requirements of the federal venue statutes but is not the contractual forum. Venue thus is not technically "wrong."\textsuperscript{107} Accordingly, section 1406(a) is not properly available to most defendants seeking to enforce forum-selection clauses. Such clauses cannot "oust" the venue created by statute anymore than they can oust the jurisdiction of the courts.\textsuperscript{108}

Nevertheless, courts have enforced forum-selection clauses under section 1406(a) even where venue is proper, revealing the mistaken belief that section 1406(a) can serve simply as an alternative to section 1404(a) where suit is brought in contravention of a valid forum-selection clause.\textsuperscript{109} Faced with a defendant's transfer motion based on a forum-selection clause, some courts have viewed section 1406(a) as a legitimate transfer mechanism for this purpose.\textsuperscript{110} Still others have avoided the question by acting simultaneously under both sections 1404(a) and 1406(a), or acting without explicit reference to either.\textsuperscript{111} The Supreme Court noted the incorrect use of section 1406(a) in \textit{Stewart Organization},

\textsuperscript{106} See notes 109-10 infra.
\textsuperscript{107} See \textit{Stewart}, 487 U.S. at 28 n.8 ("The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama. See 28 U.S.C. § 1391(c) (1988) (venue proper in judicial district in which corporation is doing business.").
\textsuperscript{108} See notes 40-42 and accompanying text supra (discussing "ouster" doctrine).
\textsuperscript{109} See \textit{D'Antuono v. CCH Computax Sys.}, 570 F. Supp. 708, 710 (D.R.I. 1983) ("The federal courts have hop-scotched between these sections in weighing the effect of forum selection covenants."); \textit{Hoffman v. Burroughs Corp.}, 571 F. Supp. 545, 550 (N.D. Tex. 1982) (noting that courts have differed on this issue, some applying one statute, some the other, some both, and one acting without reference to either one); see also \textit{Full-Sight Contact Lens Corp. v. Soft Lenses}, 466 F. Supp. 71, 72-74 (S.D.N.Y. 1978) (comparing application of § 1406 to forum-selection clauses with application of § 1404(a)).
\textsuperscript{110} See, e.g., \textit{Moretti & Perlow Law Offices v. Aleet Assoc's.}, 668 F. Supp. 103, 104-07 (D.R.I. 1987) (defendant made transfer motion under five Federal Rules of Civil Procedure and § 1406(a) but only pursued its § 1406(a) motion, which court granted after articulating federal common law theory based in part on existence of § 1406(a)); \textit{D'Antuono}, 570 F. Supp. at 710 (treating motion to transfer as resting on both §§ 1404(a) and 1406(a) and applying the latter since court found venue "improper" due to forum-selection clause); \textit{Hoffman}, 571 F. Supp. at 550-51 (conscious preference by court for section 1406(a) based on choice-of-law issue); \textit{Full-Sight Contact Lens Corp.}, 466 F. Supp. at 74 (finding § 1406(a) applicable because venue "improper," but noting that same result would follow under § 1404(a)).
\textsuperscript{111} See, e.g., \textit{Kline v. Kawai Am. Corp.}, 498 F. Supp. 868, 873 n.5 (D. Minn. 1980) (acting under both statutes); \textit{Taylor v. Titan Midwest Constr. Corp.}, 474 F. Supp. 145, 148-49 (N.D. Tex. 1979) (acting without reference to either statute); \textit{Cruse v. Castleton}, 449 F. Supp. 564, 571 n.6 (S.D.N.Y. 1978) (acting under both statutes); see also \textit{D'Antuono}, 570 F. Supp. at 711 n.4 ("Thus, although the initial judicial approach to a motion grounded upon a forum selection clause should, in this court's view, be by way of 1406(a), an instant replay, under 1404(a) standards, may well take place if it is eventually found that the clause relied on cannot be enforced.").
Inc. v. Ricoh Corp. Some lower courts have interpreted Stewart to preclude the use of section 1406(a) where venue is proper under the applicable statute, but at least one federal district court applied that section to a forum-selection clause after Stewart where venue was not held improper.

It has been argued that section 1406(a) should be available for transfers to enforce forum-selection clauses to avoid the choice-of-law problem accompanying the use of section 1404(a). The rationale for the use of section 1406(a) in such cases is that a case not brought in the contractual forum is in effect brought in the "wrong" venue. However, this is a misinterpretation of section 1406(a). The statute is a curative provision that applies only where "a case [is filed] laying venue in the wrong division or district," that is, where it fails to meet the requirements of the statutory venue provisions. Certainly for the defendant

---


113 See, e.g., Crescent Int'l v. Avatar Communities, Inc., 857 F.2d 943, 944 n.1 (3d Cir. 1988) (motion to dismiss under Rule 12; court notes statement in Stewart that § 1406 does not apply when venue is proper under § 1391); Southern Distrib. Co. v. E. & J. Gallo Winery, 718 F. Supp. 1264, 1267 (W.D.N.C. 1989) (noting that Stewart made clear that presence of forum-selection clause does not in and of itself make venue improper; treating § 1406(a) motion as having been raised under § 1404(a)); Page Constr. Co. v. Perini Constr. Co., 712 F. Supp. 9, 11 (D.R.I. 1989) (reading Stewart as finding that § 1406(a) transfer is inappropriate where venue is proper, and treating motion under Rule 12(b)(6) and § 1406(a) as a § 1404(a) transfer motion); TUC Elec. v. Eagle Telephonics, 698 F. Supp. 35, 38 n.3 (D. Conn. 1988) (noting Stewart Court's application of § 1404(a) and statement that District Court properly denied § 1406(a) motion as venue was not improper under § 1391(c)).

114 See L.A. Pipeline Constr. Co. v. Texas E. Prods. Pipeline Co., 699 F. Supp. 185, 186-87 (S.D. Ind. 1988) (noting that Stewart held that federal law applied to § 1404(a) transfer motion, and holding that federal law similarly applies to § 1406(a) motion to enforce forum-selection clause; court does not address question of whether venue is proper).


116 See Hoffman, 571 F. Supp. at 551 ("It is true that venue in the plaintiff's chosen court, while contrary to the contractual agreement, may satisfy the legal requirements for venue of 28 U.S.C. 1391. However, the nature of a motion to enforce a forum selection clause is that venue is wrong in the first instance . . ."); D'Antuono v. CCH Computax Sys., 570 F. Supp. 708, 710 (D.R.I. 1983) (section 1406(a) applies to transfers based on forum-selection clauses since venue in such cases is "wrong," not merely inconvenient).


118 See 28 U.S.C. §§ 1391-1403; see also Comment, supra note 6, at 1395-96 n.102 ("A plain-meaning construction of section 1406(a) in pari materia with the general venue statute, 28 U.S.C. § 1391, leads to the conclusion that 'improper venue' refers only to venues where the place of business or residence of the litigants is improper."). This interpretation of section 1406(a) is consistent with that of the Supreme Court in Stewart. See note 112 and accompanying text supra.
moving for forum-selection clause enforcement, a section 1406(a) transfer is preferable to a section 1404(a) transfer because the applicable law will be that of the contractual, transferee forum, rather than the law of the improper forum selected by the plaintiff. Section 1404(a) is the logical alternative but it affords plaintiffs the potential for manipulation of choice of law. The proper judicial response is not to allow either party to use the inappropriate transfer mechanism, but rather for courts to apply section 1404(a) without retaining the transferor court’s choice of law after transfer.

3. Forum Non Conveniens

Forum non conveniens is a common-law doctrine that allows a judge to dismiss a case when there is a more convenient forum elsewhere, even though jurisdiction and venue are laid properly in the original forum. The doctrine is similar in theory to the section 1404(a) transfer, but while that section operates only within the federal system, forum non conveniens may be used by federal courts to respect a more convenient forum in a foreign country, or even in a state or territorial court. It is thus an ideal motion for enforcement of a clause specifying a forum other than another federal court. A motion to enforce a forum-selection provision may be made directly under forum non conveniens, or it may be brought under a federal statutory provision and joined with a

119 See text accompanying notes 97-98 supra.
120 See Van Dusen v. Barrack, 376 U.S. 612, 636 (1964) (holding that § 1404(a) transfer carries with it the law that transferor forum would have applied). The Van Dusen Court reasoned that where a defendant obtains a transfer from one appropriate venue to another, she should not get a choice-of-law bonus. See notes 95-96 and accompanying text supra. However, where plaintiff chose her venue in violation of a forum-selection clause, she should not benefit by retaining the choice of law of that forum. Unfortunately, the Supreme Court is unlikely to cut back on Van Dusen, as it recently applied the rule to a plaintiff-initiated transfer, thus allowing a plaintiff to shop for choice of law and then obtain her forum of choice. See Ferens v. John Deere Co., 110 S. Ct. 1274, 1280-81 (1990); note 96 supra.
121 See, e.g., Royal Bed & Spring Co. v. Famossul Indus., 906 F.2d 45, 51 (1st Cir. 1990) (noting that, since forum-selection clause refers to forum outside United States, § 1404(a) does not apply, but forum non conveniens may); Glicken v. Bradford, 204 F. Supp. 300, 304 (S.D.N.Y. 1962) (forum non conveniens is applicable only where action should have been brought in a foreign country or in a state court).
122 In this scenario, forum-selection clause enforcement should not be affected by the Supreme Court’s decision in Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988). See Note, Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability in Diversity Cases? A Question Left Open by Stewart Organization, Inc. v. Ricoh Corp., 22 Cornell Int’l L.J. 308, 310 (1989). The Stewart case, decided in the § 1404(a) context, is necessarily limited to cases where the contractual forum is another federal court, since § 1404(a) is operative only within the federal system. See 28 U.S.C. § 1404(a) (1988); note 81 and accompanying text supra.
123 See Royal Bed & Spring Co., 906 F.2d at 53 (affirming dismissal on forum non conveniens grounds so that action could be brought in forum specified in forum-selection clause, which court found enforceable).
forum non conveniens motion, either as an alternative reason for dismis-
sal,124 or in the hope that the clause will be considered in deciding the
forum non conveniens motion if dismissal based solely on the forum-
selection clause is not granted.

In *Gulf Oil v. Gilbert*,125 the Supreme Court enumerated the factors
to be considered in deciding a forum non conveniens motion to dismis-
126 The presence or absence of a forum-selection clause was not
mentioned in the long list of factors. In fact, the *Gilbert* Court stated
that, "[u]nless the balance is strongly in favor of the defendant, the plain-
tiff's choice of forum should rarely be disturbed."127 This presumption
in favor of the plaintiff's chosen forum could render forum-selection
clause enforcement via forum non conveniens difficult. The appropri-
ateness of *Gilbert*'s influence on forum-selection clause motions is questiona-
ble, however, since forum-selection clauses stood in disfavor at the time
of the *Gilbert* decision.128

The Supreme Court has not decided whether state principles of fo-
rum non conveniens are binding on a federal court sitting in diversity,129
but current thought seems to be that they are not,130 an assumption similar
to many courts' conclusions that state law was inapplicable to forum-

sponded by invoking the forum clause of the towage contract, and moved to dismiss for lack of
jurisdiction or on *forum non conveniens* grounds, or in the alternative to stay the action pend-
ing submission of the dispute to the 'London Court of Justice.' "); *Coastal Steel Corp. v. Tilgh-
man Wheelabrator*, 709 F.2d 190, 193 (3d Cir.) (motions to dismiss based on forum-selection
clause and on forum non conveniens grounds made in bankruptcy court), cert. denied, 464
Pa. 1987) (granting motion to dismiss based on forum-selection clause, thus not reaching defen-
dant's forum non conveniens motion); *Diatronics v. Elbit Computers*, 649 F. Supp. 122,
125, 127 (S.D.N.Y. 1986) (determining that venue was proper under 28 U.S.C. § 1391(d) but
dismissing on basis of forum-selection clause and forum non conveniens).

126 These factors included: access to sources of proof; ability to force attendance of unwill-
ing witnesses; cost of obtaining willing witnesses; possibility to view premises (where appropri-
ate); practical trial considerations of speed and expense; enforceability of an obtained
judgment; advantages and obstacles to a fair trial; plaintiff's choice of forum; public interests,
such as congestion of courts or burden on a jury to hear a case that has no relation to the
community; local interest in having localized controversies decided at home; and having the
state whose law governs apply its own law in its own forum. Id. at 508-09.
1987) (stating, in context of § 1404(a) transfer motion, that presumption in favor of plaintiff's
choice of forum shifts if defendant can show existence of valid prior agreement to litigate in
another federal forum).

128 See text accompanying notes 39-40 supra.
130 See *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir.), cert. denied, 474 U.S.
948 (1985); C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828 (1986).
But see Note, supra note 122, at 327 (*Erie* requires federal courts to apply state law to forum
non conveniens motions).
selection clauses after the *Bremen* decision.\textsuperscript{131} If state forum non conveniens principles are not binding on a diversity court, presumably the principles of *Gilbert* and *Piper Aircraft v. Reyno*,\textsuperscript{132} including the presumption in favor of a plaintiff's choice of forum, will apply to motions in federal court for forum-selection clause enforcement based on forum non conveniens. Additionally, *Stewart* may give courts some guidance in treating forum non conveniens motions because of the parallel nature of forum non conveniens and the section 1404(a) transfer mechanism.\textsuperscript{133}

4. *Federal Rule of Civil Procedure 12(b)(3)*

Federal Rule of Civil Procedure 12(b)(3) provides for a motion to dismiss for improper venue. It is triggered by the same defect that underlies a section 1406(a) motion: noncompliance with the statutory venue provisions in 28 U.S.C. §§ 1391-1403. Just as section 1406(a) is not an appropriate mechanism for honoring a forum-selection clause where venue in the original forum is properly laid, Rule 12(b)(3) is similarly inappropriate since motions under both provisions rest on the erroneous assumption that a forum-selection clause in itself creates "improper" venue in noncontractual forums.\textsuperscript{134}

Attorneys considering a 12(b)(3) motion should note that the *Erie* issue regarding possible conflicts between the Federal Rules of Civil Procedure and state law on forum-selection clauses is unresolved. The *Stewart* Court did not address Rule 12(b)(3).\textsuperscript{135} In addition, one commentator has argued persuasively that state law should apply to a motion to enforce a forum-selection clause based on Rule 12(b)(3).\textsuperscript{136} Thus, at least where the relevant state law reflects a public policy against forum-selection clauses,\textsuperscript{137} Rule 12(b)(3) does carry some risk of nonenforcement.

5. *Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(6), and 56*

In a few cases, parties seeking forum-selection enforcement have resorted to Federal Rules of Civil Procedure that are entirely inappropriate

\textsuperscript{131} See notes 55-56 and accompanying text supra.


\textsuperscript{133} See text accompanying note 121 supra; cf. *Instrumentation Assoc. v. Madsen Elecs.*, 859 F.2d 4, 6 n.4 (3d Cir. 1988) (agreeing with parties that *Stewart* does not govern case where no federal transfer statute is applicable; noting that parties "do not raise the common law doctrine of 'forum non conveniens' to which § 1404(a) is related.").

\textsuperscript{134} See text accompanying notes 106-08, 116-18 supra.

\textsuperscript{135} See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 22-23 (1988); text accompanying notes 176-94 infra.

\textsuperscript{136} See Note, supra note 65, at 1079.

\textsuperscript{137} See note 173 infra.
for this purpose, reflecting the general confusion that permeates forum-selection clause enforcement. For example, Rule 12(b)(1), which provides for a motion to dismiss for lack of subject matter jurisdiction, has been employed in several cases. As is clear from the Supreme Court's rejection of the ouster doctrine, however, there is no merit to the notion that a forum-selection clause destroys the subject matter jurisdiction of a forum otherwise empowered to host the litigation.

Rule 12(b)(2) entitles a party to object to a lack of jurisdiction over her person. But forum-selection clauses cannot operate to defeat personal jurisdiction in a noncontractual forum. Although the plaintiff may have violated the forum-selection clause, the determination of whether the noncontractual court has personal jurisdiction over the defendant is independent of the forum-selection clause. Thus, Rule 12(b)(2) is a similarly inappropriate mechanism for forum-selection clause enforcement.

Rule 12(b)(6) allows a party to move for dismissal for the plaintiff's "failure to state a claim for which relief can be granted." This rule is an inappropriate mechanism for forum-selection clause enforcement; violation of the forum-selection clause does not mean that the plaintiff has not stated a cause of action. Finally, a Rule 56 motion for summary judgment is premised on the grounds that there is no issue of material fact and that decision for one party may be had as a matter of law. The motion should not be used to enforce a forum-selection clause because, again, a forum-selection clause is unrelated to the merits of the underlying dispute.


140 See The Bremen, 407 U.S. at 12.
141 See notes 41-42 and accompanying text supra; text accompanying notes 46-49 supra.
143 A forum-selection clause can constitute a waiver of a potential objection to personal jurisdiction where it is lacking in the contractual forum. See note 10 supra.
In sum, the lack of a "Zapata" motion that contains the reasonable, clearly articulated standards for forum-selection clause enforcement articulated in *The Bremen v. Zapata Off-Shore Co.* created two problems. First, lower courts' overly broad application of *The Bremen* resulted in overenforcement of forum-selection clauses. Second, the lack of a uniform motion created the confusing use of a multiplicity of motions, all ill-designed for the purpose of forum-selection clause enforcement. This lack of a "Zapata" motion assured that any forum-selection clause case decided by the Supreme Court would arise on a motion not intended for forum-selection clause enforcement. Both these factors led to the Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, a case arising on a section 1404(a) motion, where, in addressing a conflict-of-laws issue raised by forum-selection clauses, the Court seized the opportunity to retreat from *The Bremen*.

II

CONFLICT-OF-LAWS ISSUES RAISED BY FORUM-SELECTION CLUSES

In addition to the problems brought on by the confused array of motions at the attorney's disposal, forum-selection clause enforcement is complicated by the question of whether federal or state enforcement standards should apply. *The Bremen*, which spoke so strongly in favor of enforcement, was a federal admiralty case. However, federal courts hearing a case in which subject matter jurisdiction is based on diversity of citizenship do not look automatically to federal law. Instead, these diversity courts first must consider whether *Erie Railroad Co. v. Tompkins* and its progeny require the application of state law. The *Erie* determination is logically a threshold inquiry for a court, as the court first must determine what is the appropriate body of law before it can apply a standard of enforcement.

Part A of this section discusses this important *Erie* question and addresses the Supreme Court's discussion of the issue in *Stewart Organization, Inc. v. Ricoh Corp.* and the *Erie* issues left unresolved by the *Stewart* Court. This Part argues that *Stewart* wrongly decided that fed-

---

145 See note 78 and accompanying text supra.
148 See text accompanying note 52 supra.
149 304 U.S. 64 (1938).
150 See In re Diaz Contracting, 817 F.2d 1047, 1050 (3d Cir. 1987) ("A preliminary concern in determining the enforceability of a forum selection clause is what law, state or federal, governs that determination.").
eral law should apply to forum-selection clauses and that, where *Stewart* does not apply, *Erie* case law dictates that state law apply to forum-selection clauses. Part B examines the ensuing question of which state's law to apply to a clause.

**A. Vertical Choice of Law:** 152 State or Federal?

In *Erie Railroad Co. v. Tompkins*, 153 the Supreme Court held that state, not federal, common law applies in federal court in diversity cases. 154 The concern behind the *Erie* decision was that while a state court always would apply state law, a federal court sitting in diversity in the same state could reject that law on the same facts, and instead apply whatever "federal law" it fashioned. This, it was feared, would create disuniformity in the outcomes of similar cases between state and federal courts in the same state. 155 Thus, *Erie* purported to abolish general federal common law, and directed that state common law be applied in federal diversity courts. 156 *Erie* did not, however, disturb the applicability of federal law to matters of procedure, 157 since these are considered mere "housekeeping" details. Subsequent decisions have attempted to define a test to distinguish between substantive and procedural rules. 158

Under the *Erie* line of cases, it is important to determine what kind of state and federal rules are in conflict. Where a Federal Rule of Civil Procedure conflicts with a state rule, the analysis of *Hanna v. Plumer* 159 applies. Under *Hanna*-in which the Supreme Court held that a federal court could apply its own service-of-process rules 160-the first question is whether the federal rule is so broad as to cause a "direct collision" with the state rule. 161 If it is, the federal rule applies as long as it does not exceed the constitutional power granted to the federal judiciary by the

---

152 In this Note, "vertical" choice of law refers to a choice between state and federal law. "Horizontal" choice of law indicates a choice among state laws.
153 304 U.S. 64 (1938).
154 See id. at 78.
155 See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (twin aims of *Erie* are "discouragement of forum-shopping and avoidance of inequitable administration of the laws").
156 See *Erie*, 304 U.S. at 78 ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . ."). But see *Wheel- din v. Wheeler*, 373 U.S. 647, 663 (1963) (Brennan, J., dissenting) ("Mr. Justice Brandeis' dictum: 'there is no federal general common law,' . . . cannot, of course, be taken at its full breadth."); *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (federal power for dealing with essentially federal matters remains unimpaired).
157 See *Erie*, 304 U.S. at 92 (Reed, J., concurring in part) ("[N]o one doubts federal power over procedure.").
158 See *Comment*, supra note 2, at 1099 ("After *Erie*, federal courts had difficulty distinguishing between substantive issues and procedural issues." (footnote omitted)).
160 See id. at 463-64.
161 See id. at 471-72.
Rules Enabling Act. Where the federal rule does not conflict squarely with the state rule, the court simply must ask whether applying the federal rule would violate either of the twin aims of Erie, namely the discouragement of forum shopping and avoidance of inequitable administration of the laws. In Walker v. Armco Steel Corp., the Court held that a failure to meet either prong of this test would warrant the application of state law.

When the federal rule that arguably conflicts with state law is not a Federal Rule of Civil Procedure, the two-pronged Hanna analysis does not apply. Instead, Hanna requires that a modified version of the Erie analysis developed in Byrd v. Blue Ridge Rural Electric Cooperative govern. Accordingly, the court must ask whether the state rule is tightly or loosely bound up with state-created rights and obligations and whether the application of federal law would be outcome-determinative in that it would violate the twin aims of Erie. The court then must balance state concerns and Erie's twin aims with any affirmative countervailing considerations militating in favor of use of the federal rule. Application of either of these two Hanna tests should result in the use of state law except where either the federal rule is a mere housekeeping detail or the federal interest is so strong as to overcome a conflicting state interest.

The Erie issue is of more than passing concern in the forum-selection clause context because forum-selection clauses are neither clearly substantive nor clearly procedural. Although The Bremen established a "federal" standard that is favorable to enforcement, many forum-selection clause cases in federal court are diversity cases. Some states view forum-selection clauses as contrary to public policy, thus raising a

---

162 See id.; Comment, supra note 2, at 1100 n.51.
164 See Hanna, 380 U.S. at 467.
165 446 U.S. 740 (1980).
166 See id. at 752.
168 See id. at 535-36.
171 Forum-selection clauses are "procedural" in the sense that they lay venue, but the clauses are also "substantive" in that they are an integral part of the parties' contractual agreement. See Farmland Indus. v. Frazier-Parrott Commodities, 806 F.2d 848, 852 (8th Cir. 1986); Gruson, supra note 2, at 154; Comment, supra note 2, at 1091 n.12; Note, supra note 15, at 452. The Supreme Court has not resolved this issue, although in Stewart, where the forum-selection clause issue arose on a motion to transfer venue under 28 U.S.C. § 1404(a), it held that § 1404(a), a procedural statute, controls the issue. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988); text accompanying notes 191-94 infra.
172 Three states, Alabama, Georgia, and Missouri, still have a public policy against forum-
conflict between state and federal law in diversity cases. Until recently, few lower courts explicitly had considered this issue; many simply applied *The Bremen* without discussion.\(^{173}\) Those that had discussed the issue were in conflict.\(^{174}\)

**I. Stewart Organization, Inc. v. Ricoh Corp.**

In 1988, *Stewart Organization, Inc. v. Ricoh Corp.*\(^{175}\) provided the Supreme Court with an opportunity to decide whether state or federal law should govern forum-selection clauses. The parties to the *Stewart* case were the Stewart Organization, an Alabama copy machine dealer, and the Ricoh Corporation, a New York manufacturer with its principal place of business in New Jersey.\(^{176}\) The two parties had entered into a contract that contained a clause specifying that all disputes were to be aired in courts situated in the borough of Manhattan.\(^{177}\) In contravention of that provision, the Stewart Organization brought suit against

---


Although the law of only a few jurisdictions contains a strict public policy against forum-selection clauses, a serious *Erie* concern is raised since, if federal law does not govern the issue of forum-selection clause enforcement, the plaintiff may choose a forum in which the law of one of these jurisdictions is likely to be applied to defeat the forum-selection clause.

\(^{173}\) See Citro Fla. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985) (per curiam) (interpretation of forum-selection clause based upon *The Bremen* without discussion of state law); see also Mullenix, supra note 33, at 313 ("It is rare that a federal court even questions *The Bremen's* applicability to domestic cases based in federal question or diversity jurisdiction." (footnote omitted)).

\(^{174}\) Compare Bense v. Interstate Battery Sys. of Am., 683 F.2d 718, 721-22 (2d Cir. 1982) (explicitly declining to apply Texas law, which disfavored forum-selection clauses) and Moretti & Perlow Law Offices v. Aleet Assocs., 668 F. Supp. 103, 105 (D.R.I. 1987) ("Forum selection clauses, then, are merely privately bargained procedural rules adjunct to the operation of § 1406(a). As such, they are subject to a governing federal common law rule filling in the ‘interstices’ of that statute." ) with Farmland Indus. v. Frazier-Parrott Commodities, 806 F.2d 848, 852 (8th Cir. 1986) ("Because of the close relationship between substance and procedure in this case we believe that consideration should have been given to the public policy of Missouri."); General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 357 (3d Cir. 1986) ("The interpretation of forum selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law.") and Snider v. Lone Star Art Trading Co., 672 F. Supp. 977, 981 (E.D. Mich. 1987) ("Since no federal statute which evinces a preference for the enforcement of a forum selection clause is apparent in this record, state law must govern with regard to this contract clause.").

\(^{175}\) 487 U.S. 22 (1988).

\(^{176}\) Id. at 24.

\(^{177}\) Id. at 24 n.1.
Ricoh in the Northern District of Alabama for alleged breach of the dealership agreement. Ricoh made a motion under 28 U.S.C. § 1404(a) to transfer the case to the Southern District of New York, a venue within the contract's forum-selection clause, or to dismiss under 28 U.S.C. § 1406(a). The district judge held that Alabama law, which disfavors forum-selection clauses, controlled the question of enforceability of the forum-selection clause, and denied the motion. The district court certified its ruling to the Eleventh Circuit for interlocutory review under 28 U.S.C. § 1292(b). On appeal, the Court of Appeals for the Eleventh Circuit reversed, finding that federal law governed forum-selection clauses. The court applied the Bremen principles to enforce the clause.

The Supreme Court affirmed the court of appeals's decision to enforce the clause but rejected the Eleventh Circuit's reasoning. Instead, the Court characterized the case as presenting a conflict between section 1404(a) and Alabama law rather than as one addressing the more general issue of a conflict between federal and state law concerning forum-selection clause enforcement. According to the Court, the ques-

---

178 Id. Section 1404(a) allows a party to obtain a transfer of venue within the federal court system where the judge finds that it would be more convenient for the parties and witnesses and in the interest of justice. See 28 U.S.C. § 1404(a) (1988); note 69 supra.

179 See Stewart, 487 U.S. at 24. Section 1406(a) allows a party to obtain a dismissal or transfer of venue when a plaintiff has filed suit in a district in which venue is improper. 28 U.S.C. § 1406(a) (1988); see text accompanying notes 104-05 supra. The Stewart Court noted that the use of § 1406(a) is inappropriate where venue is proper under the applicable statute. See Stewart, 487 U.S. at 28 n. 8.


> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order ....

Id.

182 See Stewart, 779 F.2d at 647.

183 A single dissenting judge would have held that Erie required the application of state law to the clause. See id. at 651-53 (Godbold, J., dissenting). On rehearing, he was joined by four of his colleagues. See Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1076 (11th Cir. 1987) (en banc) (Godbold, J., dissenting).

184 See Stewart, 487 U.S. at 25.

185 See id. at 28-29 ("Although we agree with the Court of Appeals that the Bremen case may prove 'instructive' in resolving the parties' dispute ... we disagree with the court's articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in The Bremen.'").

186 See id.
tion of whether to apply section 1404(a) to the forum-selection clause "involves a considerably less intricate analysis than that which involves the 'relatively unguided Erie choice.'"187 Although section 1404(a) is devoid of any reference to forum-selection clauses,188 the Court concluded that ordinary section 1404(a) analysis should determine whether to enforce the forum-selection clause.189 Accordingly, the Court found that a forum-selection clause is a "significant factor" in a court's balancing of a "number of case-specific factors" on a motion to transfer venue under section 1404(a).190 Noting that where a federal statute controls a question, the only remaining inquiry is whether the statute is constitutional,191 the Court stated, "[i]f Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter."192 It then proceeded to a discussion of the application of section 1404(a).193

The Court thus made a hard case easier by framing its decision as one of venue, not of forum-selection clauses per se. Once the Court characterized the case as one in which the state policy conflicted with a federal venue statute, the Court's holding is not surprising.194 Under Erie, venue is procedural, and thus federal law applies. As a federal statutory venue transfer device, section 1404(a) is an arguably "procedural," housekeeping provision, which, under the Hanna v. Plumer195 interpretation of Erie, means that it overrides parallel, conflicting state rules. However, by stretching section 1404(a) to govern the forum-selection clause, the majority imported substantive elements of the contracting process into the section 1404(a) analysis, in effect lessening the procedural nature of the statute.196 The Court ignored the substantive, con-

187 Id.
188 See 28 U.S.C. § 1404(a); see also Comment, supra note 6, at 1415 ("Because section 1404(a) does not address forum selection clauses, the Court's construction of it in Ricoh was not compelled by the plain meaning of that statute.").
189 See Stewart, 487 U.S. at 29.
190 See id.
191 See id. at 27.
192 Id.
193 See id. at 28-31.
194 See Mullenix, supra note 33, at 334 ("Framing the issue as a venue-transfer problem clearly answered the Erie dilemma, because it followed ineluctably that venue would be deemed procedural for Erie purposes.").
196 Justice Scalia stated:

In holding that the validity between the parties of a forum-selection clause falls within the scope of § 1404(a), the Court inevitably imports . . . a new retrospective element into the court's deliberations, requiring examination of what the facts were concerning, among other things, the bargaining power of the parties and the presence or absence of overreaching at the time the contract was made. . . . It is difficult to believe that state contract law was meant to be pre-empted by this provision that we have said "should be regarded as a
tractual aspects of forum-selection clauses when it treated the clause as a factor in the section 1404(a) analysis, rather than seeing section 1404(a) for what it was in Stewart: a mechanism for forum-selection clause enforcement.

Thus, the Stewart Court’s Erie analysis was fundamentally misguided. The Court cast the Erie question as whether section 1404(a) “is sufficiently broad to control the issue before the Court.”197 However, as the dissent correctly stated, “in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.”198 The Court admitted that previous cases had examined whether there was a “direct collision” between the state and federal rules, but it claimed that this language actually stated the test of whether the federal law is broad enough to cover the issue.199

The Stewart majority read section 1404(a) broadly, stretching it beyond its ordinary scope to cover the enforceability of the forum-selection clause, instead of determining whether there was in fact a direct collision between the two rules that would require the supremacy of federal law.200 Somehow the Court found that section 1404(a) is broad enough to occupy the field in which the state law operates.201 Yet a few paragraphs later, the Court conceded, “[i]t is true that § 1404(a) and Alabama’s putative policy regarding forum-selection clauses are not perfectly coextensive.”202 How these two conclusions can be reconciled is unclear. Even less apparent is how section 1404(a) analysis controls the treatment of forum-selection clauses when the statute never addresses them.203 In manufacturing a conflict where there need not have been one, the Court gave short shrift to a fundamental policy of Erie, namely achieving substantial uniformity of outcome between federal and state

---

197 Id. at 26 (quoting VanDusen v. Barrack, 376 U.S. 612, 636-37 (1964)) (Scalia, J., dissenting) (emphasis altered).
198 Id. at 37-38 (Scalia, J., dissenting).
199 See id. at 26 n.4.
200 See id. at 35 (Scalia, J., dissenting) (majority gave § 1404(a) “novel scope”).
201 See id. at 29.
202 Id. at 30.
203 See 28 U.S.C. § 1404(a). Justice Scalia, dissenting in Stewart, argued that “[s]ection 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law.” Stewart, 487 U.S. at 37 (Scalia, J., dissenting); see also Note, supra note 15, at 447-51 (language of § 1404(a), its legislative history, and circumstances surrounding its enactment all indicate that Congress never intended it to govern forum-selection clauses).
In deciding whether Alabama's policy against forum-selection clauses should be applied to prevent transfer of the case to the District Court for the Southern District of New York, or whether a federal law that rendered the clause enforceable should govern the transfer motion, the Court could have framed the issue as whether the federal policy of enforcing forum-selection clauses, as reflected in *The Bremen*, could apply in the face of a conflicting state policy. Under *Hanna*, this question would mandate a pure *Erie* analysis along the *Byrd/Guaranty Trust* line of inquiry and would result in a principle applicable to all forum-selection clause cases.

Justice Scalia filed a well-reasoned dissent in *Stewart*. He conducted an *Erie* analysis similar to that employed by the majority, rejecting the concurrence's view that judge-made law is appropriate in this context. However, Justice Scalia first found that the federal statute does not govern the question, and then he conducted a traditional *Erie* analysis to determine whether judge-made law would violate the twin aims of *Erie*. He found that it would, stating, "[w]ith respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of the clause will be encouraged to sue in state

---

204 See *Stewart*, 487 U.S. at 37 (Scalia, J., dissenting).

205 Other members of the *Stewart* Court took this approach. Justice Scalia, in his dissent, examined whether federal judge-made law could govern the issue, since, in his opinion, § 1404(a) did not. See id. at 38. He found that *Erie* mandated application of state law. See id. at 39.

Justice Kennedy, joined by Justice O'Connor, filed a brief concurrence in which he cited only *The Bremen* and none of the *Erie* line of cases. See id. at 33 (Kennedy, J., concurring). His position seems to be that the reasoning of *The Bremen* should be applied even outside the admiralty area because of the interest of the federal judicial system in "the correct resolution of these questions." Id. at 33. This quasi-*Erie* analysis is subject to criticism on the ground that it does not follow the governing decisions. However, it may reinfuse some life into *The Bremen* to the extent that lower courts heed the concurrence and not the majority opinion. See, e.g., *Jones v. Weibrecht*, 901 F.2d 17, 18-19 (2d Cir. 1990) (decision whether to remand case to state court to honor forum-selection clause not governed by *Stewart* whose holding was limited to § 1404(a) context; "federal rule" of *The Bremen* continues to apply to forum-selection clauses after *Stewart*).


207 The *Stewart* Court based its conclusion on the *Hanna/Walker/Burlington Northern* line of cases, all of which concern the conflict of a Federal Rule of Civil Procedure, not a federal statute, with a state rule. Although the analysis employed in these cases arguably could apply to the issue in *Stewart*, since a federal statute is as much a reflection of the exercise of Congress's constitutional power as is a Federal Rule, the *Stewart* Court did not give adequate attention to the fact that it was applying the analysis developed under the Federal Rules cases. The Court simply cited these cases as governing the question of whether to apply a federal statute that conflicts with a state rule, observing in a footnote that the *Hanna* Rules Enabling Act test does not apply to a federal statute. See *Stewart*, 487 U.S. at 22, 26-27 & n.5.

208 See id. at 33.

209 See id. at 38-40.
court, and non-resident defendants will be encouraged to shop for more favorable law by removing to federal court."210 Thus, he determined that Erie warranted application of state law, a view that is supported by some commentators.211

Given the Stewart Court’s manifest lack of adherence to Erie principles, the best explanation for the Court’s decision is that it was a result-oriented response to overenforcement of forum-selection clauses under the Bremen standard.212 The Court may have seen the Stewart case as an opportunity to cut back on The Bremen’s reach without overruling it. If that was its hope, the Court was remarkably successful in its endeavor, as lower courts continue to cite and apply The Bremen while simultaneously applying the Stewart 1404(a) balancing test.213

Not surprisingly, given the state of forum-selection clause analysis, the Stewart decision has created confusion in the lower courts. For forum-selection clause motions brought under section 1404(a), lower courts now have a new test to apply: they must perform the balancing test provided for by the federal procedural statute, weighing the forum-selection clause as one factor in deciding whether fairness and the convenience of the parties favor transfer.214 Thus, according to the Court, “[i]t is conceivable in a particular case, . . . that because of these factors a District Court acting under section 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, whereas the coordinate state rule might dictate the opposite result.”215

Although prior to Stewart forum-selection clause enforcement was in a state of some confusion,216 at least there was a measure of predictability: if The Bremen were applied, the clause would be enforced, and if a state “ouster” policy were applied, it would not be. After Stewart, even this modest level of clarity is lost,217 since enforcement under Stewart’s

210 Id. at 40.
211 See, e.g., Note, supra note 122, at 329; Note, supra note 15, at 456; Note, supra note 65, at 1079.
212 See Comment, supra note 6, at 1416 (“Of course, the Court’s ability to determine outcome is easily manipulated and no doubt influences its interpretation of a statute or Rule. Such influence is illustrated in Ricoh by comparing the majority decision with the dissent.”); text accompanying notes 184-93, 200-04, 208-11 supra.
213 See note 232 and accompanying text infra.
214 See Stewart, 487 U.S. at 29.
215 Id. (footnote omitted).
216 See text accompanying notes 61-66 supra.
217 See Stewart, 487 U.S. at 28-29 (acknowledging The Bremen but adopting discretionary balancing inquiry). There have been various proposals to solve some of the problems caused by Stewart, including applying state law to forum-selection clause issues not arising in the § 1404(a) context, see Note, supra note 65, at 1079; overruling Stewart and applying state law to all such clauses, see Note, supra note 15, at 456-58; and creating a “procedural” federal common law favoring forum-selection clauses; see Comment, supra note 2, at 1122.
"highly discretionary standard" is variable and perhaps arbitrary. The subsequent history of the Stewart case illustrates this instability: on remand, the Stewart trial court, applying federal law, performed the required balancing test and still found the clause unenforceable. After so ruling, the district judge refused to certify his order for appeal. However, in In re Ricoh Corp., the Eleventh Circuit granted Ricoh's petition for a writ of mandamus to compel transfer. The In re Ricoh Corp. decision may have further muddied the waters. The Eleventh Circuit determined that forum-selection clauses alter the burden of persuasion on motions to transfer, stating: "[W]e see no reason why a court should accord deference to the forum in which the plaintiff filed its action. Such deference to the filing forum would only encourage parties to violate their contractual obligations, the integrity of which are vital to our system." Other courts have taken affront at this language, finding that it renders a forum-selection clause dispositive of the transfer issue rather than a mere factor in the decision, as the Supreme Court said it should be.

Post-Stewart confusion is manifested in cases confronting several remaining open questions. First, it is not clear whether Stewart applies

---

218 Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990); see also Red Bull Assocs. v. Best W. Int'l, 862 F.2d 963, 967 (2d Cir. 1988) ("Post the Supreme Court's pronouncement in Stewart, it is clear that a district court has even broader discretion to decide transfer motions under § 1404(a) than was provided by Bremen.").


220 See Stewart, 696 F. Supp. at 591 ("Not only because of the presumption favoring a plaintiff's choice of forum and Ricoh's failure here to present evidence sufficient to rebut that presumption, but because both the private and public interests militate against a transfer to Manhattan, this court concludes that the Northern District of Alabama is an entirely appropriate forum for trying this action.").


222 See id. at 574. The Stewart Organization then moved for a stay of the writ of mandamus so that it could file a petition with the Supreme Court for a writ of certiorari. The District Court denied Stewart's motion to stay and issued the transfer order. See Stewart Org., Inc. v. Ricoh Corp., 713 F. Supp. 1419, 1419 (N.D. Ala. 1989).

223 In re Ricoh Corp., 870 F.2d at 573. This language does not seem entirely consistent with the standard established by the Supreme Court. It will be interesting to see whether lower courts outside the Eleventh Circuit, and thus not bound by In re Ricoh, will apply this interpretation of the Stewart decision.

outside the section 1404(a) context, although the better reading of the opinion would limit it to section 1404(a) motions. If this is so, the next logical question is whether state or federal law applies to the other motions used to enforce forum-selection clauses in federal diversity cases. Some post-Stewart courts have avoided deciding this thorny issue either by finding that all the laws that possibly could govern the motion to enforce a forum-selection clause favor enforcement or by...


226 See Stewart Org., Inc. v. Richo Corp., 487 U.S. 22, 29 (1988) ("A motion to transfer under §1404(a) thus calls on the District Court to weigh in the balance a number of case-specific factors." (emphasis added)); see also Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) (since Stewart Court only decided issue of whether state or federal law governed § 1404(a) transfer motion, its reasoning not applicable to motion to dismiss or to remand case to state court); Note, supra note 122, at 310 (1989) ("Stewart did not resolve whether, in diversity suits, federal or state law governs enforceability of forum selection clauses designating foreign courts." (emphasis in original)); Note, supra note 65, at 1069-70 (Supreme Court in fact avoided Erie issue raised by forum-selection clauses by deciding Stewart in such narrow procedural context).

227 The Stewart decision gives no guidance on the application of Erie principles to forum-selection clause enforcement outside the context of the § 1404(a) motion. See, e.g., Manetti-Farrow v. Gucci Am., 858 F.2d 509, 512 n.2 (9th Cir. 1988) ("Our case involves a motion to dismiss, rather than to transfer venue, and because there is no federal rule directly on point the Stewart [Erie] analysis is inapplicable."); American Performance v. Sanford, 749 F. Supp. 1094, 1095 (M.D. Ala. 1990) (analysis of motion to dismiss to enforce forum-selection clause, noting that Stewart case was factually distinguishable); Note, supra note 65, at 1075 (pointing out Stewart's lack of guidance for 12(b)(3) motion to dismiss based on forum-selection clause). The Stewart Court gave no indication of how it would treat any other motions, except for a motion to dismiss or transfer under 28 U.S.C. § 1406, which it stated was inapposite since venue was "proper" in the original forum. See Stewart, 487 U.S. at 28 n.8; Note, supra note 8, at 191 & n.94.

228 See, e.g., Instrumentation Assocs., 859 F.2d at 8-9 (forum-selection clause enforceable under Pennsylvania, Ontario, and federal judge-made law); Crescent, 857 F.2d at 944 (forum-selection clause enforceable under federal, Florida, or Pennsylvania law, "the jurisdictions . . . which could conceivably govern this question"). It is notable that both of these cases are Third Circuit cases; prior to Stewart, Third Circuit case law consistently held that enforcement of forum-selection clauses was a matter of state law. See, e.g., In re Diaz Contracting, 817 F.2d 1047, 1050 (3d Cir. 1987) (state law applies to determination of enforceability of forum-selection clause unless there is significant conflict with federal policy or interest); General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 357 (3d Cir. 1986) ("The interpretation of forum selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law."); Mutual Fire, Marine and Inland Ins. Co. v. Barry, 646 F. Supp. 831, 833 (E.D. Pa. 1986) (interpretation of forum-selection clauses is governed by state law).
The wake of the Supreme Court's ruling in [Stewart], and applying [Shute], [Kennedy], admiralty, its reasoning applies with much force to federal courts sitting in diversity. Finally, it is unclear to what extent [The Bremen] has survived [Stewart] in diversity cases, although lower courts continue to apply it on a variety of theories.

---

229 See Page Constr. Co., 712 F. Supp. at 11-12 (dismissal motion under § 1406(a) and Rule 12(b)(6) treated as § 1404(a) transfer motion and granted under [Stewart] standards); TUC Elec. v. Eagle Telephonics, 698 F. Supp. 35, 38 (D. Conn. 1988) (dismissal motion under § 1406(a) considered as if made under § 1404(a)).

230 See TUC Elec., 698 F. Supp. at 38 n.3 (“A recent Supreme Court case has settled [the] confusion [over what law applies to these clauses], holding that the effect of a forum-selection clause on federal venue is governed by § 1404(a).”).

231 See, e.g., Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990) (finding that parties' agreement that federal law should apply does not exceed appropriate limits); Jones v. Weinbrecht, 901 F.2d 17, 19 (2d Cir. 1990) (applying [The Bremen] to forum-selection clause); Seward v. Devine, 888 F.2d 957, 962 (2d Cir. 1989) (citing only [The Bremen] in affirming 12(b)(1) dismissal of contract claims based on forum-selection clause); Manetti-Farrow, 858 F.2d at 512 (after conducting Erie analysis, concluding that federal law, in form of [The Bremen], applies); American Performance, 749 F. Supp. at 1095-97 (stating that [Stewart] is factually distinguishable but that Erie analysis indicates that federal law applies); Venners v. Kimball Int'l, 749 F. Supp. 714, 715 (E.D. Va. 1990) (although state law governs contract issues, [Stewart] decision is housekeeping rule and does not affect substantive rights, therefore federal law applies).


The [Stewart] Court's instructions were confusing at best. It stated: "Although we agree with the Court of Appeals that the [Bremen] case may prove 'instructive' in resolving the parties' dispute, . . . we disagree with the court's articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in [The Bremen].' " [Stewart Org., Inc., v. Ricoch Corp., 487 U.S. 22, 28-29 (1988)]. The concurrence may have reinforced some life into [The Bremen]. Justice Kennedy stated, "Although our opinion in [The Bremen v. Zapata Off-Shore Co. . . . involved a Federal District Court sitting in admiralty, its reasoning applies with much force to federal courts sitting in diversity." Id. at 33 (Kennedy, J., concurring).

2. Post-Stewart Application of Erie to Forum-Selection Clauses

Since Stewart probably does not apply to forum-selection clauses outside the section 1404(a) context, courts must still confront the Erie question that arises when a defendant makes a motion to enforce a forum-selection clause under a provision other than section 1404(a). A straightforward Erie analysis compels the conclusion that state law should apply to forum-selection clause motions. Where a state policy against forum-selection clauses is implicated on a motion to enforce such a clause under a Federal Rule of Civil Procedure, Hanna v. Plumer precludes application of the federal rule unless it squarely conflicts with the state policy. It is difficult indeed to argue that any of the Federal Rules of Civil Procedure, none of which refer to forum-selection clauses, squarely conflicts with a state policy against such clauses. Once it is

---

233 See note 228 supra.

234 Although the Stewart decision may endorse the use of § 1404(a) for forum-selection enforcement to some extent, and although there are problems with the use of other motions to enforce forum-selection clauses, see notes 67-148 and accompanying text supra, in the absence of a rulebook "Zapata" motion or a directive by the Supreme Court to use § 1404(a) and nothing else, the other motions remain mere possibilities in the present system. Although some courts have converted other motions to § 1404(a) motions, they can only do so when the contractual forum is another federal court, as § 1404(a) operates only to effect transfers between federal courts. See 28 U.S.C. § 1404(a). One commentator states that parties may "subvert" Stewart by specifying foreign or state courts in their forum-selection clauses. See Comment, supra note 6, at 1380 n.10. It is certainly true that such a clause could avoid the effect of Stewart, but the use of the word "subvert" implies that Stewart was intended to apply to all forum-selection clause motions. However, there is no authority that suggests that the Stewart decision was an attempt to establish rules for all forum-selection clause enforcement regardless of the context in which such clauses arise and regardless of the forum specified in the clause.


Forum-selection clauses that are not followed implicate two courts: the contractual forum and the noncontractual forum in which the plaintiff has brought suit. Although forum-selection clauses often implicate the policies of two different states, this does not mean federal law should apply. There is no plausible reading of the Erie line of cases that allows the application of a federal common law standard solely because multiple state policies may be implicated. See text accompanying notes 241-42 infra. The Stewart Court refocused the issue by finding a federal statute, 28 U.S.C. § 1404(a), that it said controlled the question. See Stewart, 487 U.S. at 25-26. However, this is not the only procedural posture in which forum-selection clause issues arise. See notes 68-76 and accompanying text supra. Probably the best solution to the Erie dilemma would be a federal statute codifying the Bremen test for an enforceable forum-selection clause and mandating enforcement of such clauses in multi-state cases. Such a statute, unlike § 1404(a), would directly conflict with a contrary state rule. Congress could pass the statute under the authority of Article III of the Constitution. See U.S. Const. art. III; note 78 supra.


237 See id. at 470-71.

238 See Note, supra note 65, at 1075-76 (1989) (discussing Rule 12(b)(3), which only concerns time at which motion to dismiss for improper venue is made and nowhere addresses
determined that a federal rule is not squarely in conflict with the state policy, state law must apply to avoid the differences in outcome that *Erie* condemns.239

If a defendant simply makes a “motion to dismiss to honor the forum-selection clause,” one not premised on any statutory motion or Federal Rule of Civil Procedure, the only arguably applicable federal law is contained in *The Bremen*. However, the *Bremen* Court applied judge-made federal law, which should not apply to a forum-selection clause in the face of judge-made state law.240 The Court in *Erie* stated that “[t]here is no federal general common law,”241 and *Erie* principles mandate that state law be applied where federal law would result in a difference in outcome likely to affect the choice of forum.242 In the forum-selection clause context, application of *The Bremen* might result in dismissal of the case from the plaintiff’s chosen forum, whereas application of state law would not. This might encourage plaintiffs to forum shop between state and federal court and result in inequitable differences in outcome depending on where the suit was heard. Thus, state law must apply.

If state law applies to forum-selection clauses, another dilemma arises. Inequities in outcome can arise within the federal court system depending on whether the state law the court applies favors forum-selection clauses or not.243 Differing state laws thus create some lack of horizontal uniformity within the federal system.244 The alternative, however, is a lack of vertical uniformity, that is, a difference in outcome between federal and state court, which is exactly what *Erie* condemns.245

---

239 See text accompanying notes 167-70 supra.
240 But see Comment, supra note 2, at 1102-03, 1111-22 (arguing for new federal common law governing forum-selection clauses).
243 See note 172 supra.
244 Perhaps this is the reason some courts and commentators have favored fashioning a “federal common law.” Although it has its advantages, it is not supported by *Erie* doctrine. One alternative would be for Congress to validate forum-selection clauses legislatively, as it did for arbitration agreements. See 9 U.S.C. §§ 1-15 (1988). A “*Zapata*” motion—designed specifically for forum-selection clause enforcement—promulgated by the Supreme Court and included in the Federal Rules of Civil Procedure would serve as the mechanism to raise the procedural objection. See note 78 supra.
245 See *Erie*, 304 U.S. at 74-77; *Guaranty Trust*, 326 U.S. at 109; see also Comment, supra note 2, at 1115 (“The *Erie* court was primarily concerned with forum shopping between federal and state courts.”).
B. Horizontal Choice of Law: Which State's Law?

If state law applies to forum-selection clause enforcement, as this Note argues it should, the question for a federal district court sitting in diversity is which state's law to apply. A court could decide the forum-selection clause issue prior to considering which state's law is applicable, in which case it will apply forum law. This approach has the disadvantage that district courts of four jurisdictions would not enforce forum-selection clauses under any circumstances. Additionally, this approach, perhaps reflective of a feeling that "procedural" matters such as forum selection are decided prior to choice-of-law, ignores the substantive, contractual nature of a forum-selection clause.

An arguably superior procedure is for the noncontractual forum first to determine which law governs interpretation of the contract and then to apply that law to determine the enforceability of the forum-selection clause. Where the contract does not contain a choice-of-law clause, the court will look first to the choice-of-law rules of the state in which the court sits to determine what law governs the contract and

---

246 See text accompanying notes 239–45 supra.

247 Courts that have not applied federal law to forum-selection clauses have often applied the law of the state in which they are located, though the rationales for doing so have differed. See, e.g., Cutter v. Scott & Fetzer Co., 510 F. Supp. 905, 909 (E.D. Wis. 1981) (applying Wisconsin law to forum-selection clause where Wisconsin statute governs "a substantial portion of the plaintiff's action"); Kolendo v. Jerell, Inc., 489 F. Supp. 983, 987 (S.D. W. Va. 1980) (applying West Virginia law to Texas forum-selection clause, after determining that either West Virginia or Pennsylvania law governed agreement, since forum law governs "matters respecting the bringing of the suit"); Leasewell, Ltd. v. Jake Shelton Ford, 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976) (applying West Virginia law to question of enforceability of New York forum-selection clause since West Virginia conflicts rules "require that West Virginia law be applied to the contract" when execution and performance occur in West Virginia).

248 See note 172 supra.

249 There is an argument that the law governing the interpretation of the clause should not necessarily determine its enforceability. Judge Posner seemed to imply this in dictum in Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990), in which he stated:

Validity and interpretation are separate issues, and it can be argued that as the rest of the contract in which a forum selection clause is found will be interpreted under the principles of interpretation followed by the state whose law governs the contract, so should that clause be. But this is another issue we need not decide; neither side invokes any interpretative principles founded on a particular state's law.

Id.

However, although validity (or enforceability) and interpretation may be separate issues, the enforceability of the forum-selection clause may be determined in part by whether it is interpreted to be exclusive or nonexclusive. See note 10 supra. Perhaps more important, the enforceability of a forum-selection clause is a reflection of its interpretation. See Central Coal Co. v. Phibro Energy, 685 F. Supp. 595, 597 (W.D. Va. 1988) (applying contractually stipulated New York law to "interpretation and application of the forum selection clause").

thus the forum-selection clause. So, for example, a federal district court in New York would look to New York's choice-of-law rules to determine the body of law applicable to the contract. If it determines that California law governs the contract, it will construe the forum-selection clause under California law. This approach is not commonly seen where the contract does not contain a choice-of-law provision, but it nevertheless has support from some cases and commentators.

Where a contract contains a choice-of-law clause, the court should take the same approach, but with an additional step. The court again should look to the choice-of-law rules of the state in which it sits. But the task then is to apply those rules to determine the enforceability of the contract's choice-of-law (as opposed to choice-of-forum) provision. Since reasonable choice-of-law clauses generally are enforceable,

---

251 See note 256 infra. However, courts in the Third Circuit, which, at least prior to Stewart, applied state law to forum-selection clauses, see note 228 supra, discussed which state's law would apply. Confronted with a contract with no choice-of-law clause, at least one court considered which state's law to apply to the forum-selection clause. See Mutual Fire, Marine & Inland Ins. Co. v. Barry, 646 F. Supp. 831, 833 (E.D. Pa. 1986) (determining that either Colorado or Pennsylvania law would be applied, but not deciding which, as they had similar law on forum-selection clauses).

252 See, e.g., Snively's Mill v. Officine Roncaglia, S.P.A., 678 F. Supp. 1126, 1129 (E.D. Pa. 1987) ("[T]he enforceability of a forum selection clause is governed by state law, specifically, that of the jurisdiction whose law controls the construction of the contract."); see also Gruson, supra note 2, at 186 ("Most federal courts that have considered this question and that have not applied federal law have applied the law governing the contract to determine the enforceability of forum-selection clauses." (footnotes omitted)). Apparently, this approach also is followed by Canadian courts. One commentator stated that in Canada, [i]t is well established that the interpretation of a contract is governed by its proper law. In this regard a jurisdiction clause should be treated no differently from any other clause in the contract. Consequently, the issue of whether a jurisdiction clause is exclusive in nature should be determined by the proper law of the contract and not by [local law]. Robertson, Jurisdiction Clauses and the Canadian Conflict of Laws, 20 Alberta L. Rev. 296, 312 (1982), quoted in Instrumentation Assocs. v. Madsen, 859 F.2d 4, 8 (1988) (footnotes omitted).

253 See, e.g., Leasewell, Ltd. v. Jake Shelton Ford, 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976) (stating in reference to combination choice-of-law/forum-selection clause, "[i]f the selection of which law to apply to this clause, it is obvious that the contract should be tested under whichever law is applicable had the questioned provision not been in the contract. . . . To do otherwise would be to permit the clause to 'pull itself up by its own bootstraps.'") (citations omitted)).

254 Choice-of-law provisions are recognized as enforceable by the Uniform Commercial Code and the Restatement (Second) of Conflict of Laws. See U.C.C. § 1-105(1) (1987); Restatement (Second) of Conflict of Laws §§ 80, 187 comment b (1971). Since there are several approaches to conflict-of-laws issues, a full discussion of which is beyond the scope of this Note, the analysis of such clauses may vary. See Gruson, supra note 10, at 209. The reasonable-relation test often is applied. See, e.g., Woods-Tucker Leasing Corp. v. Hutcherson-Ingram Dev. Co., 642 F.2d 744, 749-53 (5th Cir. 1981); Carefree Vacations v. Brunner, 615 F. Supp. 211, 215 (W.D. Tenn. 1985) ("In a multi-state transaction, the contracting parties' choice-of-law provision is valid absent contravention of public policy of the forum state or a showing that the selected forum does not bear a reasonable relationship to the transaction."
courts should, on this analysis, uphold the choice-of-law provision and then apply that law to determine the enforceability of the forum-selection clause.\footnote{55}

Several cases have taken the approach of applying the parties' choice of law to the forum-selection clause.\footnote{56} In one case, for example, the

\footnote{55} See Gruson, supra note 2, at 156. One exception to the enforcement of forum-selection clauses is if a court finds enforcement contrary to the public policy of the state in which it sits. See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). Although disputed by at least one commentator, see Gilbert, Choice of Forum in International and Interstate Contracts, 65 Ky. L.J. 1, 39-40 (1976-77), this limitation should not be a concern insofar as giving effect to a choice-of-law clause in turn effects a change of venue through a forum-selection provision. Nor should comity be used to justify a court's refusal to enforce the forum-selection clause on the basis of the public policy of the contractual forum.

\footnote{56} See, e.g., In re Diaz Contracting, Inc., 817 F.2d 1047, 1050 (3d Cir. 1987) (applying parties' contractual stipulation of New York law to forum-selection clause); General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 357 (3d Cir. 1986) (Virgin Islands court applying Maryland law selected in contract to forum-selection provision); Hoes of Am., Inc. v. Hoes, 493 F. Supp. 1205, 1207-08 (C.D. Ill. 1979) (enforcing forum-selection clause under German law provided for in choice-of-law provision); Wellmore Coal Corp. v. Gates Learjet Corp., 475 F. Supp. 1140, 1143-45 (W.D. Va. 1979) (law of Virginia forum would require Arizona law stipulated in choice-of-law clause to apply to forum-selection clause providing for Arizona forum); Taylor v. Titan Midwest Constr. Corp., 474 F. Supp. 145, 147 (N.D. Tex. 1979) (dictum) (Texas federal court noting that "[i]f under Texas conflicts law this was viewed as primarily a question of contract law, then arguably a Texas court would apply Missouri law to its resolution, in view of the contractual choice-of-law provision"); Goff v. AAMCO Automatic Transmissions, 313 F. Supp. 667, 669-70 (D. Md. 1970) (Maryland federal court applying Pennsylvania law selected in choice-of-law clause to forum-selection provision). This approach also is advocated by at least one commentator. See Gruson, supra note 2, at 185-92; Gruson, supra note 10, at 209-16; see also Comment, supra note 2, at 1097 n.34 ("Most states applying state law to the question of enforceability have applied the contractual choice of law, resulting in uniform outcomes regardless of which circuit is deciding the matter." (citing Gruson, supra note 2, at 185-86)). Another commentator disagrees with this view. See Mullenix, supra note 33, at 351 (raising question of whether choice-of-law analysis should precede analysis of forum-selection clause itself and noting that courts traditionally construe forum-selection clauses without any consideration of choice-of-law provision). However, where the determination of the proper forum depends on a contractual provision, the better approach seems to be to determine the law governing interpretation of the contract and interpret the clause under that law, assuming \textit{Stewart} is inapposite because the enforcement mechanism is other than § 1404(a). See notes 227-28 and accompanying text supra.

The selection of the governing law that also should apply to the forum-selection clause depends on whether the conflict-of-laws rules of the forum state consider the enforceability of a forum-selection clause a procedural issue (in which case it would apply forum law) or an issue of contract law (in which case it would apply the law governing the contract). See Gruson, supra note 2, at 186. Generally courts apply the law governing the contract. Id.

The Supreme Court in \textit{Stewart} did not mention this issue despite the presence of a choice-of-law clause; it did not have to reach this question since it held that the federal transfer statute controlled the forum-selection clause. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28-29 (1988). The Eleventh Circuit had raised the issue in an opinion that later was vacated. See Stewart Org., Inc. v. Ricoh Corp., 779 F.2d 643, 647 n.8 (11th Cir. 1985), vacated, 785 F.2d 896 (11th Cir. 1986), rev'd per curiam, 810 F.2d 1066 (11th Cir.) (en banc), aff'd on other
court stated:

the question of what law governs this contract (and hence the enforce-
ability of its forum selection clause) must be determined in the first
instance by Virgin Islands law. . . . In this case, the parties specified
that the contract was to be governed by the law of Maryland. There-
fore the enforceability of the forum selection clause in this case is gov-
erned by Maryland law. This approach is sensible: the court is being asked to interpret a clause of
the agreement, and if the parties' choice-of-law clause is enforceable
under forum law, it should govern the applicability of the forum-selec-
tion clause.

III

FORUM-SELECTION CLAUSE ENFORCEMENT:
THE STRATEGIC OPTIONS

As the above discussion illustrates, Stewart Organization, Inc. v.
Ricoh Corp. has created much uncertainty for forum-selection clause
enforcement, particularly under the statutory transfer mechanism, 28
U.S.C. § 1404(a). Although Stewart renders certainty of forum-selection
clause enforcement unlikely, there are options that nevertheless will aid
in achieving such enforcement.

At the drafting stage, an attorney who is aware of the potential diffi-
culties in enforcing forum-selection clauses in diversity cases also should
include a choice-of-law provision providing for interpretation of the con-
tract, and specifically the forum-selection clause, under the internal prin-
ciples of a state that routinely enforces forum-selection clauses. This
may be the best hope a party has for securing enforcement of the forum-
selection clause even if the other party commences suit in a state that
disfavors forum-selection clauses.

grounds, 487 U.S. 22 (1988). However, the Eleventh Circuit's reasoning was faulty. It re-
jected the applicability of Klaxon v. Stentor, 313 U.S. 487 (1941), stating "the issue in this
case, however, is not the legitimacy of a choice of law clause. Both states enforce such clauses.
Rather we are asked to enforce a choice of forum clause." Stewart, 779 F.2d at 647 n.8 (em-
phasis in original). The court's statement is correct as far as it goes, but it does not address the
proper issue. If state, not federal, law were to apply, the next determination would be which
state's law to apply even though the issue was the enforceability of a forum-selection clause,
not a choice-of-law provision. See text accompanying notes 247-48 supra. Since there was a
choice-of-law clause in the contract that forum law would validate, presumably New York law
would be applied, and the forum-selection clause would be enforced.

257 General Eng'g Corp., 783 F.2d at 358.
258 See text accompanying notes 175-232 supra.
260 See notes 172, 255 supra.
261 In addition, on a § 1404(a) motion, a choice-of-law clause may affect the transfer deci-
sion, since one factor in the transfer determination is the relative familiarity of the transfeere
The defendant who has been haled into a forum other than the one selected in the clause, and who wishes to see the forum-selection clause enforced, has several remedies at her disposal. Theoretically, she may bring an action for breach of contract. If there are meritorious issues that require resolution, probably the best course of action for the defendant seeking forum-selection clause enforcement is to commence a second suit in the contractual forum. However, she still must appear with the substantive law to be applied. See, e.g., Heller Fin. v. Midwhey Powder Co., 883 F.2d 1286, 1293 (7th Cir. 1989); Heller Fin. v. Shop-A-Lot, 680 F. Supp. 292, 296 (N.D. Ill. 1988) (“justice requires that, whenever possible, a diversity case should be decided by the court most familiar with the applicable state law”); Lafayette Coal Co. v. Gilman Paper Co., 640 F. Supp. 1, 2 (N.D. Ill. 1986) (transferring case to Georgia because Georgia law applied). A forum-selection clause that specifies the same state as the choice-of-law clause would increase the likelihood of a transfer to that forum.

Venue objections generally are not raised by the court since venue limitations are deemed to protect the convenience of the defendant, not to infringe upon the court’s power to adjudicate. See note 31 supra. Thus, Federal Rule of Civil Procedure 12(b)(1) provides that a defense of improper venue is waived if it is not timely made. A federal court can consider a transfer under § 1404(a) of its own initiative, see Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 (5th Cir. 1989), but this is relatively rare. But cf. Stanley Works v. Globemaster, 400 F. Supp. 1325, 1338 (D. Mass. 1975) (asking parties for assistance in determining advisability of transfer from Massachusetts to Texas).

See Gruson, supra note 2, at 136-37 (“Litigation questioning the enforceability of exclusive-forum-selection clauses usually arises before . . . excluded fora, which would, but for the clause, have jurisdiction.”). If the suit is brought in the contractual forum, the issue of the enforceability of the clause does not arise unless one party seeks to move the suit out of the contractual forum and into another forum. See note 84 supra. Where a defendant to an action brought in the correct forum attempts to obtain removal, transfer, or dismissal of the case, the situation is analytically distinct. In such cases, the plaintiff must assert the forum-selection clause as a barrier to such dismissal or transfer. The forum-selection clause thus is balanced against the policies favoring the defendant’s freedom to move the case out of the original forum. Most of the legal scholarship and case law addressing forum-selection clauses is limited to the scenario of suit in a noncontractual forum. This Note also limits itself to this context.

Few cases have considered this possibility. Id. But see Venners v. Kimball Int’l, 749 F. Supp. 714, 715 (E.D. Va. 1990) (defendants in wrongful termination action filed counterclaim for breach of employment contract based on commencement of suit in noncontractual forum).


Theoretically, the defendant may obtain an injunction against suit in the noncontractual forum, thereby securing enforcement of the forum-selection clause. However, comity concerns make courts understandably reluctant to grant such injunctions. See Alabama Power Co. v. Tennessee Valley Auth., 92 F.2d 412 (5th Cir. 1937) (abuse of discretion to enjoin party from proceeding with suit). Even if an injunction is granted, it cannot be directed at a court, only at the parties, see Cole v. Cunningham, 133 U.S. 107, 121 (1980); thus, the first court need not honor it and may even issue a counterinjunction prohibiting suit elsewhere, although this is extremely unlikely. Cf. Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1127 n.11 (D.D.C. 1983) (party obtained injunction against counterinjunction that would prevent British action).
in the action that is proceeding in the wrong forum to prevent default.\footnote{266}{See Fed. R. Civ. P. 55(a).}
It is in that forum that the important question of the best mechanism to enforce the forum-selection clause arises. It is particularly important to choose a motion or motions to enforce the clause that have a strong likelihood of being granted, for, if they fail, there is little chance of interlocutory\footnote{267}{See Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) (no interlocutory review of 12(b)(3) motion to enforce forum-selection clause); text accompanying notes 100-01 supra.} or postjudgment review.\footnote{268}{Review of a §§ 1404(a) or 1406(a) transfer motion may be unavailable after final judgment as a matter of law. See note 100 supra. More important to defendants seeking trial in the correct forum, review after final judgment is not worth very much. See Farmland Indus. v. Frazier-Parrott Commodities, 806 F.2d 848, 850-51 (8th Cir. 1986) (noting that order denying forum-selection clause enforcement effectively was unreviewable after final judgment because right to single trial in preselected forum already was lost); 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, 471 (1988) (“It is the loss of ... the right to avoid being forced to litigate in a court other than the one agreed to that makes [such] an order ... effectively unreviewable after final judgment.”); text accompanying note 101 supra.}

When appearing in the noncontractual forum, the defendant may make a motion to dismiss or transfer the action to the proper forum.\footnote{269}{See text accompanying notes 69-76 supra.} She also may make a “motion to dismiss based on the forum-selection clause” without citing a particular statute or rule.\footnote{270}{One commentator labels this “pleading around Stewart.” See Note, supra note 122, at 327 n.145. Even if that characterization is accurate, such a motion is perfectly proper, as the Stewart decision did not mandate the use of § 1404(a) but rather made its Erie decision in the § 1404(a) context because that was the posture in which the case arose. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 25 (1988).} For the attorney who wishes to choose particular motions, a motion to dismiss under Rule 12(b)(3) is still a good choice under present law, as it arguably does not implicate\footnote{271}{See notes 226-27 and accompanying text supra.} Stewart,\footnote{272}{See note 74 supra.} and its use has been upheld in several cases.\footnote{273}{See Stewart, 487 U.S. at 28.} It may be joined with a forum non conveniens motion and a motion to dismiss based on the forum-selection clause per se. Alternatively, if a court seems likely to apply a state law disfavoring forum-selection clauses, a section 1404(a) transfer motion may be desirable because it will be governed by federal law.\footnote{274}{See id. at 29-30; text accompanying notes 218-20 supra.} However, while a section 1404(a) transfer is often a litigator's first impulse, the choice to use that method should not be made without hesitation since enforcement of the clause is discretionary.\footnote{275}{See note 261 supra.} Two section 1404(a) factors that may aid enforcement of the forum-selection provision are a choice-of-law clause in the contract specifying the law of the chosen forum\footnote{276}{See notes 266-27 and accompanying text supra.} and a pending related action in the
contractual forum. However, the section 1404(a) motion may be accompanied by problems for the defendant seeking a trial in the contractual forum.

CONCLUSION

A forum-selection clause should memorialize an agreement between contracting parties regarding the situs of possible future litigation. In a perfect world, the principles enunciated in The Bremen v. Zapata Off-Shore Co. would be applied to enforce valid forum-selection clauses and to deny enforcement of those obtained improperly. In that perfect world, the Federal Rules of Civil Procedure would contain a rule specifically providing for a motion for the enforcement of forum-selection clauses, thereby eliminating the confusion over where to pigeonhole these clauses. In addition, a federal statute designed for forum-selection clause enforcement in the federal courts would codify the Bremen standard, thus resolving the Erie problem.

Unfortunately, however, under current law there is no such ideal "Zapata" motion, and defense attorneys must use other procedural devices to argue for forum-selection clause enforcement. In fact, the Supreme Court has cut back the reach of The Bremen in nonadmiralty cases. In an imperfect world without a "Zapata" motion and a federal forum-selection clause statute, decisions like Stewart that are limited to a specific factual context only complicate an already muddled situation. The present procedural thicket renders it more difficult for attorneys to obtain enforcement of forum-selection clauses, but some day the pendulum should swing back toward the principles of The Bremen v. Zapata Off-Shore Co.

276 See text accompanying note 265 supra. A pending proceeding in another forum is a factor in the transfer decision. See note 88 supra.
277 See text accompanying notes 87-103 supra.