THE FORUM SELECTION CLAUSE:
A TALE OF TWO CONCEPTS

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INTRODUCTION

The forum selection clause, a contractual designation as to where any litigation that may occur in regard to the contract should take place,1 appears to be a rather simple concept. Though simple, the forum selection clause presents an opportunity to serve both private and judicial interests of economy and efficiency.2 In the face of expansive notions of personal jurisdiction and venue, the clause can serve private commercial interests by allowing a party to limit its expenses of defending a lawsuit in a distant forum. By determining in advance where litigation should take place, parties can anticipate the costs of litigation in a contractually designated forum and consider those costs in determining their substantive rights and obligations under a contract. Additionally, the forum selection clause would seem to reduce litigation expenses and conserve judicial resources by obviating the need for pre-trial motions relative to the propriety of the action proceeding in the forum of filing.3

The attainment of these worthy goals by such a simple device prompted the Supreme Court in 1972 to reverse a longstanding American judicial antipathy4

*I. This definition of the forum selection clause is generalized. As will be discussed, the forum selection clause has been considered at various times to include notions of venue, subject matter jurisdiction, personal jurisdiction, and choice of law concerns in determining where and how litigation relative to a contract will take place. A precise definition of the concept is the subject of this article.


3. The goals of reducing litigation costs and conserving judicial resources have been largely illusory, as enforcement of the forum selection clause has become the object of much litigation. Therefore, that which was intended to reduce litigation costs has actually served to contribute to them.

4. Historically, state and federal courts shared the view that the forum selection clause violated public policy in that enforcement would allow parties to “oust” a court of its jurisdiction. See Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874), containing the famous quotation:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. A man may not barter away . . . his freedom, or his substantial rights . . . . [A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.
toward enforcement of the forum selection clause.\textsuperscript{5} Since 1972, forum selection clauses have enjoyed widespread acceptance in federal courts. Unfortunately, the apparent simplicity of the forum selection clause has proven seductive. In the rush to embrace it as a tool of commercial and judicial expediency, courts and commentators have concentrated on the development and application of a standard for enforcement without first defining exactly what the concept is to which the standard applies.\textsuperscript{6} They have merged the concepts of jurisdiction,\textsuperscript{7}

\textsuperscript{5} See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (forum selection clauses prima facie valid and enforceable if "reasonable").


\textsuperscript{7} Forum selection clause controversies are generally raised in a defensive posture. In this context, an action has been filed in a forum other than that specified by the clause. The defendant then seeks enforcement of the clause so as to dismiss the action or transfer the action to the contractual forum. As such, the discussion centers upon whether a court properly having jurisdiction over the parties should decline to exercise that jurisdiction because of the contractual provision. Forum selection clauses in this context have been referred to as derogation clauses. See \textit{infra} notes 32-34 and accompanying text for a discussion of the two different types of forum selection clauses. Most often, defendants prefer a contractual forum with which they have a close connection or, obviously, one in which the defendants would not raise an objection to jurisdiction.

To the contrary, forum selection clauses have been referred to as prorogation clauses when they are raised by a plaintiff in an offensive posture. The question whether forum selection clauses may confer personal jurisdiction and venue on an otherwise improper forum has seldom been discussed. See \textit{infra} notes 36-37 and accompanying text noting Court's failure to address this issue. Nevertheless, forum selection clauses have been assumed to confer personal jurisdiction and have been relied upon to do so. See \textit{infra} note 170. This article posits that the lack of discussion is a principal reason why the parameters of the forum selection clause remain ill-defined.
venue,\textsuperscript{8} and choice of law\textsuperscript{9} into the forum selection clause.\textsuperscript{10} Additionally, the concepts of the forum selection clause and the arbitration clause have been equated by courts and commentators further adding to the conceptual confusion.\textsuperscript{11}

The result of this lack of attention to a conceptual definition of the forum selection clause is apparent in three Supreme Court opinions that were decided within a period of twenty years, \textit{The Bremen v. Zapata Off-Shore Co.},\textsuperscript{12} \textit{Stewart v. Ricoh Corp.},\textsuperscript{13} and \textit{Carnival Cruise Lines v. Shute},\textsuperscript{14} that take two very different approaches to enforcement. The first approach, as articulated in \textit{The Bremen} and refined in \textit{Shute}, views the question of enforcement primarily as a question of contract formation. In \textit{The Bremen}, a forum selection clause was held to be prima facie valid and enforceable unless the opposing party could establish that the clause was “unreasonable.”\textsuperscript{15} The second, very different ap-

\textsuperscript{8} As with personal jurisdiction, when the forum selection clause is considered a matter of venue, it is most often the focus of litigation in a defensive posture where the defendant seeks to have the action dismissed or transferred from a forum other than that specified in the contract to the contractual forum. The reverse situation, or offensive posture, using the clause to confer venue where it would otherwise not be proper, has not received much discussion. The cases that have relied upon a clause to confer personal jurisdiction have also considered venue to have been conferred by the clause. \textit{See infra} note 170 and accompanying text.

\textsuperscript{9} The forum selection clause reorders choice of law issues where an action is filed in other than the contractual forum. Two situations can occur. First, the court in which the action is filed must determine whether to apply the law of the forum of filing or the law of the contractual forum. Second, if the action is transferred to the contractual forum, the transferee court must then determine whether to apply the law of the contractual forum, or that of the transferor forum as would be the case in the absence of the forum selection clause. \textit{See} J\textsc{ack} H. F\textsc{riedenthal} \textsc{et} \textsc{al.}, \textsc{civ}il \textsc{p}rocedure § 4.5, at 215-16 (when defendant moves for transfer transferee court must apply law that would have been applied by transferor court).

\textsuperscript{10} \textit{See}, \textit{e.g.}, Solimine, \textit{Forum-Selection Clauses}, \textit{supra} note 2, at 51 (“[f]orum selection clauses are also referred to as choice-of-forum clauses, forum clauses, jurisdiction agreements, etc.” and for purposes of article, terms could be used “interchangeably”); \textit{id.} at 64-69 (preferable to view forum selection clause as device that confers personal jurisdiction upon designated forum); Alexander Proudfoot Co. World Headquarters L.P. & Apco, Inc. v. Thayer, 877 F.2d 912, 918 (11th Cir. 1989) (referring to forum selection clauses as “conferral of personal jurisdiction clauses”).

\textsuperscript{11} \textit{See}, \textit{e.g.}, Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (referring to an arbitration clause as a “specialized kind of forum selection clause”); Borchers, \textit{supra} note 6, at 61, 67 (forum selection clauses and arbitration clauses function similarly); Mullenix, \textsc{c}onsensual \textsc{a}djudicatory \textsc{p}rocedure, \textit{supra} note 6, at 315-19 (trilogy of Supreme Court cases affirm notion that arbitration clauses may dictate forum for dispute).

The concepts are similar in that by an arbitration clause, parties agree to submit to arbitration, usually in a specified forum. \textit{See}, \textit{e.g.}, Gilmer v. Johnson Lane Corp., 111 S. Ct. 1647, 1652 (1991) (arbitration clause binds parties to resolve their disputes in arbitral forum rather than judicial forum); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 229-30 (1987) (same); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (same). There is also an important difference. An arbitration agreement removes an action from the judicial system and does not attempt to reorder principles of procedure. \textit{See infra} note 389 and accompanying text for further discussion of arbitration agreements.

\textsuperscript{12} 407 U.S. 1 (1972).

\textsuperscript{13} 487 U.S. 22 (1988).

\textsuperscript{14} 111 S. Ct. 1522 (1991).

\textsuperscript{15} \textit{The Bremen}, 407 U.S. at 10. The essence of the “reasonableness standard” was that a
proach, adopted in Stewart, views enforcement not as a question of contract formation, but instead as a question of whether the action should be transferred from a noncontractual forum to the contractual forum depending upon the factors outlined in the transfer of venue statute, 28 U.S.C. § 1404(a): convenience of parties and witnesses and "the interest of justice." 16

That the struggle to construct a standard for enforcement has proven extremely difficult is best reflected by the fact that the decisions in Stewart, adopting the "venue/fairness" approach, and Shute, refining The Bremen's "formation/reasonableness" approach, were issued within a three-year period. 17 In Shute, as in The Bremen, the forum selection clause was enforced under the contract formation/reasonableness standard if there were no defect in formation. 18 On the other hand, the Stewart approach permitted an exercise of judicial discretion based upon factors of fairness that could lead to a refusal of enforcement in a situation where the forum selection clause would be enforced under the formation/reasonableness standard. 19

The two approaches to enforcement of forum selection clauses exist because clause would be enforced unless the clause was unreasonable or unjust, or the product of fraud or overreaching. Id. at 15. The main justification for enforcement was an attempt to facilitate commerce. Id. at 9, 13-15. The reasonableness standard also involved an inquiry as to whether the forum designated by the contract was so inconvenient as to prevent a party from pursuing its action. Id. at 18. Nevertheless, the reasonableness standard placed a "heavy burden" upon the party seeking to avoid enforcement of the clause, and the level of inconvenience required to prevent enforcement was rarely achieved in later cases. See, e.g., id. at 1, 15-19. The result was that clauses were almost never denied enforcement when challenged. See infra note 190 and accompanying text.

The Court "refined" the reasonableness standard in Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991). A forum selection clause contained on the back of a passenger cruise ship ticket was held to be enforceable in a situation that would have seemed to have been excluded from enforcement under the "reasonableness" standard of The Bremen due to the adhesive nature of the contract. Commentators have decried the Shute decision as opening the door for the routine inclusion of forum selection clauses in consumer contracts. Mullenix, Carnival Cruise Lines, supra note 6, at 359-60. Additionally, as courts had almost never relied upon the serious inconvenience arm of the reasonableness test, the "refinement" of Shute may serve to render ineffectual any challenge to enforcement based upon formation. See Mullenix, Carnival Cruise Lines, supra note 6, at 359-60.

16. Stewart, 487 U.S. at 30. Additionally, the Stewart court apparently shifted the burden from the party seeking to avoid enforcement, as in The Bremen and Shute, to the party seeking to enforce the forum selection clause through a transfer motion. See supra notes 247-49, 295-96 and accompanying text.

17. Though the approaches directly conflict with each other, the Court attempted unsuccessFully to distinguish the decisions on the ground that Stewart was a diversity action, while The Bremen and Shute were actions in admiralty. See supra notes 260-63, 355-57 and accompanying text.


19. Stewart, 487 U.S. at 30-31. The Stewart Court stated:
Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The district court must also weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of "the interest of justice." It is conceivable in a particular case for example, that because of these factors a district court acting under § 1404(a) would refuse to transfer a case not withstanding the counterweight of a forum selection clause . . . .

Id.
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each addresses a very different underlying conceptual view of the clause. What the Court has not recognized or discussed is that these two very different approaches toward enforcement have existed since the beginning of the shift away from judicial repudiation of the clause. In accepting the forum selection clause as being prima facie valid, The Bremen Court neglected to define which of the two conceptual views it was adopting. As a result, the Court has formulated contrasting standards of enforcement, each of which is based upon a different underlying conceptual view of the forum selection clause.

The essential difference between these two conceptual views is the extent to which parties may contractually reorder procedural principles. In Stewart, the Court's conceptual view was very narrow. The Stewart approach involves a contractual expression of a preference for where venue should lie from among the possibilities for venue as designated by statute. Enforcement is not routine but is subject to an exercise of judicial discretion based on principles rooted in the "interest of justice." In this view, procedural principles are not privately reordered. By contrast, the other view, reflected in The Bremen and Shute, is expansive. Parties may confer venue and personal jurisdiction where they see fit. Enforcement does not depend on the interests of justice, but merely concerns questions of contract formation. If the contract evidences no defect in formation, the forum selection clause is enforced.

Privatization of procedure usually involves removing a controversy from the system of dispute resolution through litigation in favor of resolution by means such as arbitration. Nevertheless, the forum selection clause involves a very different kind of privatization. Instead of removing a case from the litigation system, it seeks to reorder certain aspects within that system. Depending on how the forum selection clause is conceptualized, such reordering could im-

20. The approach of The Bremen and Shute contemplates a contractual device by which parties may confer personal jurisdiction and venue on a court where neither would otherwise be proper. In short, it allows for parties to privately reorder the procedural framework, and that reordering is free from judicial scrutiny for fundamental fairness. Under the Stewart approach, parties may not reorder procedural principles but may only seek to select a venue choice from within the existing procedural framework. That choice is subject to judicial scrutiny for fairness in the consideration of enforcement.

21. As will be discussed herein, see infra notes 38-41, 81-101 and accompanying text, prior to The Bremen the minority view that forum selection clauses were not void as contrary to public policy actually encompassed two distinct approaches as to when a forum selection clause should be enforced. One view was essentially the prima facie validity approach articulated in The Bremen. The other approach was to enforce a forum selection clause in situations where deferring to the contractual forum would be in accordance with the principles of the doctrine of forum non conveniens. That is, considerations of party and forum convenience overrode the plaintiff's choice of forum in favor of the contractual forum designated by the forum selection clause.


23. See supra note 16 and accompanying text for a discussion of Stewart.


26. See infra notes 177-91 and accompanying text for a discussion of this view.
plicate one or more of several procedural issues: selecting venue,\textsuperscript{27} determining where personal jurisdiction would lie,\textsuperscript{28} or selecting the applicable law for the litigation.\textsuperscript{29} The scope of the conceptualization is critical because procedural principles do not exist in isolation of each other but instead are interrelated. When parties are allowed to reorder certain aspects within the procedural framework, the application of related principles may become problematic.

Commentators who have analyzed the opinions and surveyed the judicial enforcement of the forum selection clause have noted such problems and have developed categories of issues that are considered unresolved, or perhaps unresolvable.\textsuperscript{30} Most recently, proposals for legislative action have been made to resolve those questions.\textsuperscript{31} Therefore, it is useful to revisit the conceptual history of the forum selection clause. This reveals a tale of two coexisting, conflicting conceptual views. The Court has yet to appreciate that the fundamental difference between these views lies in the extent to which procedural principles may be privately reordered under each. Although the Court at times has contemplated each view in its formulation of a standard of enforcement, neither the Court nor commentators has analyzed the two conceptual views for the purpose of determining which reflects the appropriate scope of the forum selection clause. This article offers that analysis and demonstrates that by defining the forum selection clause's appropriate scope many of the issues presented by the Court's considerations of the clause are resolved.

After a brief explanation in Part I of the two contexts in which a forum selection clause can arise, this article, in Parts II - VI, examines in successive order the Court's consideration of a standard for enforcement, from the shift from repudiation to acceptance in the lower courts prior to \textit{The Bremen}, to the

\textsuperscript{27} See \textit{supra} note 8 and accompanying text for a discussion of venue.
\textsuperscript{28} See \textit{supra} note 7 and accompanying text for a discussion of personal jurisdiction.
\textsuperscript{29} See \textit{supra} note 9 and accompanying text for a discussion of choice of law.
\textsuperscript{30} See, e.g., Borchers, \textit{supra} note 6, at 78-93 (discussing five categories of "conundrums" concerning forum selection clauses: "Choice of Law;" "Interpretive Issues;" "Transfer Issues;" "Subject Matter Jurisdiction Issues;" and "The Reasonableness Test"); Gruson, \textit{supra} note 6, at 137-38 (discussing forum selection clause issues in international and interstate contracts); Mullenix, \textit{Consensual Adjudicatory Procedure, supra} note 6, at 296-302 (containing comprehensive examination of perplexing issues attending forum selection clauses after decisions in \textit{The Bremen} and \textit{Stewart}).
\textsuperscript{31} See, e.g., Borchers, \textit{supra} note 6, at 93-111 (proposing comprehensive federal statute that would limit enforcement of forum selection clauses to contracts having value of $50,000 or more and proposing standards for enforcement similar to that of \textit{The Bremen}); Phoebe Korinfeld, \textit{The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation, 6 ALASKA L. REV. 175, 175-76 (1989)} (calling for legislation to provide certainty and predictability to enforcement of forum selection clauses in order to promote trade); Leandra Lederman, Note, \textit{Viva Zapatal: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases, 66 N.Y.U. L. REV. 422, 432-37 (1991)} (arguing that Congress should codify standards for enforcement of \textit{The Bremen} and insert into Federal Rule of Civil Procedure 12(b), a "Zapata motion" by which party would seek enforcement of forum selection clause); \textit{see also} Mullenix, \textit{Consensual Adjudicatory Procedure, supra} note 6, at 369-72 (though not calling for legislative action, urging courts to adopt stricter approach to waiver of civil litigation rights that encompasses due process considerations); cf. Mullenix, \textit{Carnival Cruise Lines, supra} note 6, at 359-60 (apparently inspired by decision in \textit{Shute}, titled section in her article discussing the case, "Why Forum-Selection Clauses Are a Bad Idea," though not addressing need for legislative reform).
Supreme Court's three pronouncements on the topic in *The Bremen*, *Stewart*, and *Shute*. It discusses the division reflected in these three opinions between the two very different views as to what the forum selection clause is, and how and when it should be enforced. The analysis reveals that, although the view of the forum selection clause adopted by the Supreme Court in *The Bremen* and *Shute* provides an opportunity for expansive private reordering of existing rules, statutes, and principles of procedure, the Court did not appreciate or analyze the full extent to which procedural principles would be reordered by the conceptual view of the forum selection clause that it adopted.

In Part VII, this article discusses that the most sound and preferred conceptual view and standard for enforcement of the forum selection clause is the narrow conceptual view reflected in the approach of *Stewart*. The *Stewart* view, in short, is that the forum selection clause should be treated as just one factor in determining where venue should lie. As will be discussed, this is the conceptual view of the minority circuits that first enforced forum selection clauses prior to *The Bremen*. Though a narrow view, it is consistent with the conceptual view of other consensual procedural mechanisms in that it does not allow for parties privately to reorder the procedural framework. Additionally, it ensures that the question of procedural fairness is included in the enforcement analysis.

Part VII also briefly discusses the calls for legislative reform. It argues that the preferred mechanism for reform is to recognize the standard for enforcement of *Stewart* and its underlying conceptualization of the forum selection clause as a matter of venue considered within the existing procedural framework. If legislative reform is necessary, adhering to the principle that less is more, this article proposes legislative reform in terms of a minor revision to 28 U.S.C. § 1391, the federal venue statute and to 28 U.S.C. § 1404(a), the transfer of venue statute.

I. TWO CONTEXTS: AN OFFENSIVE AND A DEFENSIVE POSTURE

Forum selection clauses have been described as being either derogation or prorogation clauses. The derogation clause arises in a defensive posture. It occurs when a plaintiff files an action in a forum other than that designated by the forum selection clause. The defendant seeks to have the action either dismissed in the forum of filing or transferred to the contractual forum. In this context, the clause is not relied on to confer personal jurisdiction or venue on the contractual forum. Instead, it is relied on to deny plaintiff the ability to main-
tain the action in the noncontractual forum. This is the only context in which
the Supreme Court and the vast majority of lower courts have considered the
forum selection clause. A prorogation clause arises in an offensive posture
when a plaintiff files an action in a forum contractually designated by a forum
selection clause. In this context, the plaintiff may seek to rely on the clause to
determine venue and to confer personal jurisdiction over the defendant.

Because the Court has not considered the prorogation, or offensive con-
text, it has developed a standard for enforcement that only contemplates
whether a clause should be enforced for the purpose of having the case heard
elsewhere. American tradition has not distinguished the prorogation and der-
ogation clauses for purposes of developing a standard of enforcement. Yet, it is
in the prorogation context that the forum selection clause most obviously could
reorder procedural principles by conferring personal jurisdiction and venue on a
court when there is no basis for personal jurisdiction or venue other than the
contractual agreement. Having not had the opportunity to consider the en-
forcement of a prorogation clause, the Court has not fully or properly defined the
concept for which it has developed a standard for enforcement. In a derogation
context, the rather hands-off approach of the "reasonableness" standard from
The Bremen and Shute may seem the appropriate approach. A court only has to
consider whether it should not hear the case. In the prorogation context, where
a court may have to decide whether to hear a case that has no independent basis
for jurisdiction or venue other than the contractual agreement, the more intru-
sive inquiry of the Stewart approach that contemplates factors of fairness and
convenience seems more appropriate. Until the forum selection clause is prop-
erly conceptualized, a standard for enforcement that is free of the troublesome

34. See Gruson, supra note 6, at 136-37 (litigation usually involves the defendant seeking to
have the proceeding brought in the contractual forum). It was the defendants in The Bremen, Stewart,
and Shute, who argued for the enforcement of a forum selection clause for the purpose of having
the case not heard in the forum in which the cases were filed. In each, the defendant sought to have
the case heard in the forum designated in a forum selection clause.

National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) is often cited, however, as
being a case that considered a forum selection clause in a prorogation context. See, e.g., Borchers,
supra note 6, at 62 (discussing Szukhent as "non-exclusive forum selection agreement"); Solimine,
supra note 2, at 55 (describing Szukhent as "first case" in which Supreme Court "bestowed approval
upon forum-selection clauses"). As discussed herein at infra notes 150-61 and accompanying text,
however, Szukhent merely involved the validity of an appointment of an agent for service of process
within the context of Fed. R. Civ. P. 4(d)(3) and should be distinguished from the forum selection
clause cases.

35. See Gruson, supra note 6, at 136 (discussing that "court will look at the forum-selection
clause as a submission to its jurisdiction [by the defendant]").

36. See Solimine, supra note 2, at 65 (acknowledging that "the clauses in The Bremen, Stewart
and Shute did not explicitly waive the minimum contacts barrier [thereby conferring personal juris-
diction]," but arguing that forum selection clause "would not be effective" unless that was in fact
considered to have been done).

37. See Mullenix, Consensual Adjudicatory Procedure, supra note 6, at 329-32 (civil law sys-
tems recognize difference between prorogative and derogative clauses, but American courts have
not). As discussed herein, American courts might have benefitted if they had at least considered the
prorogation aspects of forum selection clauses when determining a standard of enforcement in the
derogation context.
issues that have attended the Court's three attempts in *The Bremen*, *Stewart*, and *Shute*, will remain elusive.

II. BEFORE *THE BREMEN*: BACK TO THE BEGINNING(S)

Many commentators have discussed the shift in judicial regard toward enforcement of forum selection clauses that occurred prior to the decision in *The Bremen*.\(^{38}\) The discussion has centered on how the original antipathy toward forum selection clauses as an impermissible "ouster" of the jurisdiction of a court by private parties gradually lessened in some circuits in favor of a standard of enforcement that inquired as to whether the clause was "reasonable" and would thus be enforced. Nevertheless, these commentators have failed to recognize that two competing formulations of "reasonableness" developed, based on differing views of the ability of contracting parties privately to reorder the principles of procedure to be applied in any litigation relative to their contract. Those two formulations of "reasonableness," discussed herein as the "serious impairment formulation"\(^{39}\) and the "forum non conveniens formulation,"\(^{40}\) resurfaced in and are at the heart of the difference between the contract formation approach of *The Bremen* and *Shute*, and the fairness approach of *Stewart*.\(^{41}\)

By failing to recognize that two conceptual views existed, the Court has not weighed the relative merits of each in its struggle to determine a standard for enforcement of the forum selection clause. Not only has the Court not analyzed the two contrasting formulations, the Court has wavered between the two in its approach to enforcement in *The Bremen* and *Shute* versus that of *Stewart*. Therefore, an examination of the two views is useful in sorting out the differences between the conceptual views embodied in the Supreme Court's considerations of the forum selection clause.

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39. See infra notes 81-85, 96-97 and accompanying text for a discussion of the "serious impairment formulation."

40. See infra notes 81-96 and accompanying text for a discussion of the "forum non conveniens formulation."

41. See infra notes 267-70 and accompanying text for a further discussion.
A. The Ousting of the Ouster Doctrine

Writing for the majority in *The Bremen* in 1972, Chief Justice Burger effectively summarized the American view toward forum selection clauses of the previous 100 years: "[f]orum-selection clauses have historically not been favored by American courts." Courts and commentators most often expressed that disfavor by reciting a passage from the 1875 opinion in *Insurance Co. v. Morse*:

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

The "ouster doctrine" thus was born and thereafter was relied upon to deny effect to forum selection clauses as contrary to public policy.

Movement away from the ouster doctrine is often said to have been foreshadowed twenty-three years prior to the decision in *The Bremen* in the dicta of a concurring opinion by Learned Hand in *Krenger v. Pennsylvania R. Co.*

In truth, I do not believe that today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement [of Contracts, § 558 (1932)], they are invalid only when unreasonable; and *Mittenthal v. Mascagni* is a notable instance in which a contract in futuro was held "reasonable." What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless persists.

In 1960, G. Merle Bergman prophetically warned that this statement could be interpreted to mean much more than was actually intended by Judge Hand. Hand's intention is drawn into question by his language in an opinion nineteen years prior to *Krenger* where he stated that it is "well settled" that a clause in a bill of lading "intended to confine any litigation over the contracts to a French..."

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42. English courts apparently had retracted their antipathy to forum selection clauses nearly one hundred years earlier and have enforced them thereafter. *Zapata Off-Shore*, 428 F.2d at 900 n.11 (Wisdom, J., dissenting).


44. 87 U.S. (20 Wall.) 445 (1874).

45. Id. at 451.

46. The term "ouster doctrine," or a derivation thereof, has been used almost universally by commentators. See, e.g., Borchers, supra note 6, at 60 (referring to "the ouster doctrine"); Gilbert, supra note 6, at 8-9 (discussing "ouster"); Fernandez, supra note 38, at 276 (referring to the "common law ouster rationale"); Solimine, supra note 2, at 54 (referring to "[t]he 'ouster' concept").

47. For a list of cases refusing to enforce forum selection clauses based upon the "ouster doctrine," see Dougherty, supra note 38, at 409-11; Grunso, supra note 6, at 138-39 n.14-17.


49. Id. at 561. In *Mittenthal v. Mascagni*, 66 N.E. 425 (Mass. 1903), a forum selection clause specifying the courts of Florence, Italy, was held to be enforceable as reasonable under the circumstances. It was not until nearly 50 years later that enforcement began to be seen in more than an isolated incident.

50. Bergman, supra note 38, at 440.
It is Bergman's thesis that Judge Hand was not advocating the wholesale enforcement of forum selection clauses, but instead that he meant only to acknowledge their validity in a limited context—where their enforcement was consistent with the factors considered under the doctrine of forum non conveniens. Judge Hand's citation to *Mittenthal v. Mascagni* bolsters Bergman's thesis. In *Mittenthal*, the Supreme Court of Massachusetts upheld the trial court's exercise of discretion to decline jurisdiction in favor of an Italian court, as provided in an employment contract. The *Mittenthal* court's denial of jurisdiction was based upon consideration of the forum non conveniens factors of party residence and domicile, place of partial performance of the contract, and upon the fact that the language of the contract in dispute and law to be applied were Italian.

While some courts clung to the notion that contractual forum selections were void as contrary to public policy, the "general hostility" toward forum selection clauses began to erode as courts relied on Judge Hand's soon-to-be-famous statement from *Krenger v. Pennsylvania R. Co.* Courts upheld the enforcement of forum selection clauses, most notably in the Second and Third

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51. Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d. 941, 942 (2d Cir. 1930).
52. Note, *Enforcement and Effect of the Jurisdiction Clause in Admiralty*, 34 ST. JOHN'S L. REV. 72, 73 (1959) (trend is to look more favorably upon forum selection clauses). *But see* Nadelmann, *supra* note 38, at 127 ("The more favorable climate for forum selection clauses did not develop overnight.").
53. *See Mullenis, Consensual Adjudicatory Procedure, supra* note 6, at 308, n. 55 ("Bergman persuasively argues that Judge Learned Hand's statement in his *Krenger* concurrence was based upon a misapprehension of the Restatement of Contracts § 555 (1932).").
54. *See Bergman, supra* note 38, at 441. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the Supreme Court held that federal courts may exercise discretion to decline to entertain a case brought before a court with proper jurisdiction and venue on the grounds of forum non conveniens. The discretion is properly exercised when an adequate alternate forum is available, and considerations of party, evidentiary, and court convenience override the traditional considerations of plaintiff autonomy in the selection of forum. *See id.* at 506-08.
55. 66 N.E. 425 (1903).
56. *Id.* at 426-27.
58. 174 F.2d 556 (2d Cir. 1949). *See supra* note 49 and accompanying text for Judge Hand's statement in *Krenger*.
59. *See, e.g., Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 990-91 (2d Cir. 1951) (forum selection clause valid under laws of Peru and Norway where agreement was made and properly enforced under circumstances); Wm. A. Mueller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d. Cir.) (enforcement of forum selection clause providing for exclusive jurisdiction in Swedish courts proper when agreement freely made and not unreasonable), cert. denied, 350 U.S.
Circuits,\textsuperscript{60} where the courts found it not to be “unreasonable” to do so based on the circumstances of a particular case:

[W]e accept the conclusion of Judge L. Hand stated in his concurring opinion in the \textit{Krenger} case . . . . From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness. We agree with the appellant to this extent: the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented . . . \textsuperscript{61}

Two important but separate concepts were developed by these courts when considering the enforcement of a forum selection clause. First, such a clause does not “oust” a court of its jurisdiction—that is, the jurisdiction of the court is not altered by the existence of a forum selection clause. Second, a clause will be enforced when “reasonable,” notwithstanding the continuing jurisdiction of the court.

In enforcing forum selection clauses, courts brushed aside the “ouster” doctrine, the source of judicial repudiation of forum selection clauses since 1874,\textsuperscript{62} as being inapposite. Courts recognized that the enforcement of a forum selection clause did not effect an “ouster” of jurisdiction; rather, a court’s jurisdiction still exists, even though the court gives effect to an agreement of the parties. In such a case, the court merely declines to exercise its constitutional and statutory jurisdiction.\textsuperscript{63}

It may seem odd that a doctrine that was adhered to for so long could so easily be brushed aside, but the Court had already cleared the intellectual path for doing so by acknowledging in several other contexts that jurisdiction was not

\textsuperscript{903 (1955). In \textit{Mueller}, an action in admiralty, the Second Circuit held that the trial court did not abuse its discretion in finding it not unreasonable to give effect to a clause in a bill of lading providing for exclusive jurisdiction in the courts of Sweden.}

\textsuperscript{60. See, e.g., \textit{Central Contracting Co. v. Maryland Casualty Co.}, 367 F.2d 341, 344-45 (3d Cir. 1966). In a diversity action brought by a sub-contractor against a general contractor, the Third Circuit found it reasonable for the Pennsylvania district court to enforce a forum selection clause specifying New York as the location of any action brought in relation to the contract in question. \textit{Id.} at 345. The court considered reasonableness to be defined by whether enforcement of the clause would seriously impair the plaintiff’s ability to pursue its cause of action. \textit{Id.}}

\textsuperscript{61. \textit{Mueller}, 224 F.2d. at 808.}

\textsuperscript{62. See \textit{supra} notes 46-47 and accompanying text for a list of citations referring to the “ouster” doctrine.}

\textsuperscript{63. See \textit{Gilbert, supra} note 6, at 5 n.16, 9-10 (parties’ agreement cannot deprive court of competent jurisdiction; courts may withhold jurisdiction to enforce parties’ agreement); \textit{Gruson, supra} note 6, at 140 (parties’ contractual agreement cannot abrogate court’s jurisdiction which is based on statute; jurisdiction withheld merely by law giving effect to contractual agreement). \textit{But see Borchers, supra} note 6, at 61 (“like forum selection agreements, arbitration agreements oust the jurisdiction of the regular tribunals,” apparently arguing that forum selection clause is “ouster” of jurisdiction); \textit{Mullenix, Consensual Adjudicatory Procedure, supra} note 6, at 331 (referring to reasoning employed by courts to overcome “ouster doctrine” as “some fancy, linguistic mumbo-jumbo that does violence to a common understanding of the English language”).}
actually being ousted when a court declined to exercise jurisdiction. In 1821, Justice Marshall announced the view that it would be “treason” for the Court to decline to exercise jurisdiction. Thereafter, but prior to the rejection of the ouster doctrine, courts concluded that a declination of jurisdiction was not an ouster of jurisdiction in the areas of abstention doctrines, suits between persons of foreign citizenship, and forum non conveniens, thereby renouncing Justice Marshall’s earlier view.

The early courts enforcing forum selection clauses made it clear by the procedural mechanisms they used that their jurisdiction had not been “ousted,” but, instead, that the courts were merely declining to exercise the jurisdiction that the court possessed irrespective of any agreement of private parties. In the majority of cases, enforcement was effectuated by way of a party’s “motion to decline jurisdiction.”

64. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).

65. See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29 (1959) (federal judicial discretion to decline jurisdiction when unfamiliar with controlling law is derived from policy of federalism); Burford v. Sun Oil Co., 319 U.S. 315, 332-33 (1943) (abstention doctrine is applicable to federal courts in furtherance of state and federal harmony without need for congressional restriction of judicial powers) (citing Railroad Comm’n v. Pullman Co., 312 U.S. 496, 500-01 (1941)).

66. See Canada Malting Co. v. Patterson S.S. Ltd., 285 U.S. 413, 422-23 (1932) (jurisdiction properly declined where all parties were Canadian citizens and litigation would be more appropriately conducted in foreign court); The Belgenland, 114 U.S. 355, 364-65 (1885) (courts to use discretion in accepting jurisdiction over controversies when all parties are foreigners).

67. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947) (under doctrine of forum non conveniens, court may decline statutorily conferred jurisdiction, but doctrine should be applied only in rare cases).

68. See supra note 64 and accompanying text for Justice Marshall’s earlier view. Though arbitration agreements also operate to cause a court to decline to exercise jurisdiction, they are not included in the foregoing list because of a critical distinction. Judicial declination of jurisdiction in light of an arbitration agreement is a result of the Federal Arbitration Act, 9 U.S.C. §§ 1-208 (1988). Because Congress has the authority under Article III of the United States Constitution to determine the extent of the federal courts’ jurisdiction, Congress may also determine when the federal courts should decline to exercise that jurisdiction. Such situations must be distinguished from situations in which the courts themselves decline jurisdiction, particularly when they do so to enforce an agreement of private individuals.

employed to effectuate enforcement, the court's analysis in each case indicates that the issue always under consideration was whether to decline to exercise jurisdiction, and that the court did not consider that an ouster of its jurisdiction could occur by operation of a contractual provision.\textsuperscript{70}

The fact that the enforcement of a forum selection clause does not alter, change, or eliminate the power of a court as conferred by statute or constitution may seem to be a simple point. Nevertheless, the failure of courts and litigants to recognize this fact when they consider the appropriate procedural mechanism to use to enforce a forum selection clause has been a major contributor to the conceptual enigma that the clause has become. An unresolved issue often noted by commentators concerns the ramifications of the choice of procedural mechanism to obtain enforcement of a forum selection clause.\textsuperscript{71} Once it is recognized that the existence of the clause does not alter or diminish a court's jurisdiction, the appropriate mechanisms for enforcement are narrowed. Motions to dismiss challenging lack of jurisdiction, subject matter\textsuperscript{72} or personal,\textsuperscript{73} improper venue,\textsuperscript{74} or failure to state a claim\textsuperscript{75} are inappropriate. The existence of a forum selection clause by itself does not alter the power of the court in any of these areas.\textsuperscript{76}

While the ouster doctrine was the major hurdle to be overcome in the shift toward judicial acceptance of contractual forum selection, the doctrine was only applicable to forum selection clauses in the derogation context—where the contractual forum is other than that in which the action has been filed, and the

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70. See, e.g., Central Contracting Co. v. Maryland Casualty Co., 367 F.2d. 341, 343, 346 (3d Cir. 1966) (proper for district court to decline jurisdiction and to grant defendant's motion for enforcement of forum selection clause by means of Rule 12(b)(6) motion for failure to state claim); Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F. Supp. 848, 849, 851-52 (D. Haw. 1968) (seeking enforcement of forum selection clause by means of motion to dismiss for improper venue under Federal Rules of Civil Procedure 12(b)(3)); Geiger v. Keilani, 270 F. Supp. 761, 762-64 (E.D. Mich. 1967) (discussing nature of motion brought by defendant seeking enforcement of forum selection clause for purpose of determining whether defendant is barred by consolidation principles of Rule 12(g) from bringing motion because of previous Rule 12 motion and concluding there is no bar because motion most closely analogous to motion for transfer of venue pursuant to 28 U.S.C. § 1404(a)).

71. See infra notes 317-20 and accompanying text for a discussion of commentators' criticism of this unresolved issue.

72. FED. R. CIV. PRO. 12(b)(1).

73. FED. R. CIV. PRO. 12(b)(2).

74. FED. R. CIV. PRO. 12(b)(3).

75. FED. R. CIV. PRO. 12(b)(6).

76. See infra notes 113-75, 257-59, 271-89 and accompanying text for a discussion of parties' ability to reorder principles of procedure under forum selection clauses.
forum of filing must decide whether to decline to proceed with the action.\textsuperscript{77} None of the cases presented the question of enforcement of a forum selection clause in the prorogation context\textsuperscript{78} and, therefore, the implications of reordering longstanding principles of personal jurisdiction that would result from a prorogation clause were not considered.\textsuperscript{79}

While it is important that the historical anomaly of the ouster doctrine be discarded in the derogation context, enforcement in the prorogation context involves questions beyond that of the ouster doctrine. Enforcement in the former simply means that judicial acceptance of a contractual forum selection clause does not alter the jurisdictional reach of a court. Enforcement in the latter, though not implicating the discarded fiction of ouster, addresses a very different concept—to what degree may parties confer jurisdiction where it would not otherwise be present? The prorogation context involves a private reordering of procedural principles that was abhorred in the premise of the ouster doctrine.\textsuperscript{80} Although the ouster doctrine itself has been rejected, the doctrine’s premise, abhorrence of litigants’ ability privately to reorder procedural principles, has not been rejected.

\textbf{B. Two Views of Procedure—Two Views of Reasonableness}

Having first determined that enforcement of a forum selection clause in a derogation context leaves their underlying jurisdiction intact, courts then developed a second concept in their shift toward enforcement of forum selection clauses—that a clause would be enforced if “reasonable.”\textsuperscript{81} Two views of what constituted reasonableness developed. The apparent majority view, largely developed in cases from the Second Circuit, held that a determination of reasonableness involved the same considerations as did a motion to dismiss on the basis of the doctrine of forum non conveniens.\textsuperscript{82} The second view, largely developed

\textsuperscript{77} See supra notes 33-34 and accompanying text for a discussion of forum selection clauses in the derogation context.

\textsuperscript{78} The early cases discussing enforcement of a forum selection clause, see supra note 34, apparently all arose in the derogation context.

\textsuperscript{79} See infra notes 161-63 and accompanying text for a discussion of the court’s failure to note that a contract does not create a court’s jurisdiction.

\textsuperscript{80} See supra notes 42-47 and accompanying text for a discussion of the premise that the ouster doctrine was born to deny effect to forum selection clauses as contrary to public policy.

\textsuperscript{81} See supra notes 57-63 and accompanying text for a discussion of the courts’ enforcement of forum selection clauses when reasonable.

\textsuperscript{82} See Gruson, supra note 6, at 142-45 (“The factors applied by the courts to determine the reasonableness or unreasonableness of a forum-selection clause are similar to or identical with the factors used by courts in deciding the issue of forum non conveniens.”). Cf. Gilbert, supra note 6, at 11 (“[D]ifferent factors will be significant in the courts decision in choice of forum cases as opposed to the straight forum non conveniens situation.”).

For cases expressly indicating that the test for reasonableness was equivalent to the factors of the doctrine of forum non conveniens, see, e.g., Hernandez v. Koninklijke Nederlandsche Stoomboot Maatschappij N.V., 252 F. Supp. 652, 654 (S.D.N.Y. 1965) (“The relevant factors as to this issue are similar to those involved in deciding a question of forum non conveniens.”) (citations omitted); Takemura & Co. v. The S.S. Tsuneshima Maru, 197 F. Supp. 909, 912 (S.D.N.Y. 1961) (“Factors determinative of unreasonable are similar to those involved in deciding an issue of forum non
in the Third Circuit, considered reasonableness to exist unless a party demonstrated that enforcement of the clause would seriously impair or practically prevent the party from pursuing her cause of action.\textsuperscript{83} These two formulations of reasonableness, the "forum non conveniens formulation" and the "serious impairment formulation" reflected very different views of the relationship between

conveniens . . . ."); Nieto v. The S.S. Tinnenm, 170 F. Supp. 295, 296 (S.D.N.Y. 1958) ("A consideration of the reasonableness of such a provision, is so closely related to the issue of forum non conveniens that they may well be considered together.") (citations omitted); Sociedade Brasileira De Intercambio Comercial E Industrial, Ltda. v. S.S. Punta Del Este, 135 F. Supp. 394, 396 (D.N.J. 1955) ("What are to be applied in this case are the criteria included in the doctrine of forum non conveniens . . . ."); Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13, 15 (S.D.N.Y.) ("[T]he factors determinative of an inconvenient forum largely turn upon identical ones involved in the unreasonableness of a stipulation limiting the tribunal to which resort may be had, and accordingly both the ground of the unreasonable stipulation and that of the inconvenient forum should be appraised together.").), aff'd, 227 F.2d 519 (2d Cir. 1955); St. Paul Fire & Marine Ins. Co. v. The Republica de Venezuela, 105 F. Supp. 272, 272 (S.D.N.Y. 1952) ("The Court is requested to decline jurisdiction in this admiralty suit on the ground of forum non conveniens.").

For cases applying factors of the doctrine of forum non conveniens to determine reasonableness but not expressly stating that the doctrine of forum non conveniens is equivalent to the question of reasonableness in forum selection clause enforcement, see, e.g., Wm. H. Mueller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 807-08 (2d. Cir.) (factors considered by court include expense of appellant to litigate in Sweden, reasonableness of agreement, and whether agreement was freely made), cert. denied, 350 U.S. 903 (1955); Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 991 (2d Cir. 1951) (factors considered by district court were whether it was proper forum based on fact that parties had no real ties to United States and whether agreement was such that no court had jurisdiction); Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F. Supp. 848, 851-52 (D. Haw. 1968) (factors included location of witnesses and evidence); Geiger v. Keilani, 270 F. Supp. 761, 766 (E.D. Mich. 1967) (factors included location of witnesses and which law governed agreement); Amicable Indus., Inc. v. S.S. Rantum, 259 F. Supp. 534, 537-38 (D.S.C. 1966) (factors included foreign ownership of vessel, location of witnesses, location of vessels when loaded, and appellant's knowledge of provisions under which cargo was shipped); Pakhuismeestern, S.A. v. The S/S Goettingen, 225 F. Supp. 888, 889 (S.D.N.Y. 1963) (factors included governing law and libellant's ability to bring action in foreign forum notwithstanding statute of limitations); Skins Trading Corp. v. The S/S Punta Del Este, 180 F. Supp. 609, 609-10 (S.D.N.Y. 1960) (factors included convenience of witnesses, accessibility of proof, contacts with forum, and alleged fraudulent conduct of party seeking enforcement of forum selection clause); Aetna Ins. Co. v. The Satrustegui, 171 F. Supp. 33, 34-35 (D.P.R. 1959) (factors included validity of agreement and location of evidence); Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886, 888-89 (S.D.N.Y. 1957) (factors included whether under foreign jurisdiction's law libelant would be deprived of remedy, whether parties have similar actions pending in local court, and convenience of witnesses and litigants).

83. Because the phrase "serious impairment" often arises in discussions of forum non conveniens issues, it is of concern that the reader may construe this formulation to be the same as, or a component of the forum non conveniens formulation. In fact, the formulations are quite dissimilar. Perhaps a more appropriate name in the forum selection clause context would be "total impairment," because "total impairment" more accurately describes the strictness of the standard. As described by an early advocate of the "serious impairment" formulation of reasonableness, a forum selection clause would be reasonable unless "the selected state would be an inappropriate, or manifestly inconvenient, place for the suit." Reese, supra note 38, at 189.

See Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344 (3d Cir. 1966) ("Such an agreement is unreasonable only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue his cause of action." ) (quoting Central Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d. 810, 816 (Pa. 1965)).
principles of procedure and agreements of private parties.\textsuperscript{84} Most importantly, the two formulations reflect the same division in approach that exists between the venue/fairness approach of \textit{Stewart} and the contract formation/reasonableness approach of \textit{The Bremen} and \textit{Shute}.\textsuperscript{85}

Under the forum non conveniens formulation,\textsuperscript{86} for purposes of enforcement, the agreement of the parties is subjected to judicial scrutiny, considering factors such as the relationship of the contractual forum to the subject matter of the dispute, the residence of the parties, the availability of evidence and witnesses, and the proposed forum’s interest in the litigation, etc.\textsuperscript{87} This scrutiny should ensure that the enforcement of a forum selection clause does not subvert the parties’ expectations of fundamental fairness in the procedural system.\textsuperscript{88} As

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\item \textsuperscript{84} The fact that the two formulations differed as to what constituted reasonableness is perhaps best illustrated by the Second Circuit’s opinion in Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951), the precursor to \textit{Mueller}. The DePasco court gave effect to a forum selection clause and upheld the trial court’s exercise of discretion in declining jurisdiction after analyzing traditional factors of forum non conveniens, such as the availability of witnesses and the relation of the facts giving rise to the claim to the contractual forum. \textit{Id.} at 991. Judge Clark concurred with the opinion but argued for a less strict standard for enforcement, one akin to the serious impairment standard in that it did not provide for trial judge discretion as to the appropriateness of the contractual forum based upon the forum non conveniens factors of fairness. \textit{Id.} (Clark, J., concurring).

I prefer to place my concurrence upon the validity, under the circumstances here disclosed, of the contract requiring all claims to be settled in Norway. The apparently wider discretion granted in the opinion to the district judge to pass upon the appropriateness of the forum may, perhaps, raise more extensive questions which we need not now face. \textit{Id.} (Clark, J., concurring) (citation omitted).

See also Bergman, \textit{supra} note 38, at 445-46 (discussing meaning of holding in \textit{Mueller} and questioning whether court had adopted forum non conveniens formulation or more strict “serious impairment” formulation); Reese, \textit{supra} note 38, at 191 (contrasting two approaches to enforcement as being “prima facie” enforcement versus “more convenient forum”). \textit{But see Restatement (Second) of Conflict of Laws} § 80 cmt. a (discussing view of reasonableness standard that merges together serious impairment (“a provision, however, will be disregarded if . . . the forum chosen . . . would be seriously inconvenient . . .”) and forum non conveniens formulations (“the provision will be given effect . . . if to do so would be fair and reasonable”)).

\textsuperscript{85} See \textit{infra} notes 267-70 and accompanying text for a discussion of the difference between the \textit{Stewart} approach and \textit{The Bremen/Shute} approach.

\textsuperscript{86} For a discussion of the application of the doctrine of forum non conveniens to the enforcement of forum selection clauses, see, e.g., Reese, \textit{supra} note 38, at 190-92 (uncertain how heavily courts rely upon forum non conveniens when considering forum selection clauses); Note, \textit{Enforcement and Effect of the Jurisdiction Clause in Admiralty}, \textit{supra} note 52, at 74-76 (lesser burden for enforcing forum selection clauses than for applying the forum non conveniens doctrine); Comment, \textit{Stipulations Ousting Admiralty Courts of Jurisdiction}, 28 \textit{Fordham L. Rev.} 506, 506-10 (1959-1960) (courts disagree on their requirements for dismissal based on forum selection clauses as opposed to forum non conveniens motions).

\textsuperscript{87} For a thorough discussion of the application of forum non conveniens factors to determine the reasonableness of a forum selection clause, the setting out of various forum non conveniens factors, and the listing of each forum selection clause case that considered a specific factor, see Gruson, \textit{supra} note 6, at 142-44.

\textsuperscript{88} For cases recognizing that forum selection clauses are not void but declining to enforce a clause after application of the reasonableness factors considered under the doctrine forum non conveniens, see, e.g., \textit{Hawaii Credit Card Corp. v. Continental Credit Card Corp.}, 290 F. Supp. 848, 851-52 (D. Haw. 1968) (declining to enforce clause specifying California as forum for litigation
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such, the parties' agreement should only be enforced if it is consistent with such expectations as determined by looking at the factors familiar from the doctrine of forum non conveniens.  

There was, however, some disagreement as to the proper application of the because “many” of witnesses and “most” of evidence located in Hawaii and because Hawaii was target of activities of defendant that gave rise to litigation; Skins Trading Corp. v. The S/S Punta Del Este, 180 F. Supp. 609, 610-11 (S.D.N.Y. 1960) (declining to enforce clause designating courts of Montevideo, Uruguay, as location for disputes arising under contract due to lack of any connection between events giving rise to litigation and Uruguay and to availability in New York of witnesses for both parties); Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886, 888-89 (S.D.N.Y. 1957) (declining to enforce clause designating courts of Rotterdam, Netherlands, as location for hearing disputes due to pendency in non-contractual forum of related action with which action in question might be consolidated, availability of witnesses in non-contractual forum and “hardship” to plaintiff of having to litigate action in Netherlands); Sociedade Brasileira De Intercambio Comercial E Industrial, Ltda. v. S.S. Punta Del Este, 135 F. Supp. 394, 395-96 (D.N.J. 1955) (declining to enforce clause specifying courts of Uruguay as location for hearing disputes because plaintiff’s choice of forum should not be disturbed unless there is a “balance strongly in favor of the defendant” that would require transfer of action to contractual forum); St. Paul Fire & Marine Ins. Co. v. The Republica de Venezuela, 105 F. Supp. 272, 273-74 (S.D.N.Y. 1955) (declining to enforce clause specifying courts of Amsterdam, Netherlands as location of suits due to uncertainty as to whether jurisdiction over defendant could be obtained in contractual forum, and due to availability of witnesses in New York, and connections between defendant and New York).  

89. See, e.g., Wm. H. Mueller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d. Cir.) (agreements enforced only if reasonable; parties cannot oust court's jurisdiction; reasonableness based on facts of case such as residency of parties and witnesses, availability of evidence and restrictiveness of alternate jurisdiction on libellant's recovery), cert. denied, 350 U.S. 903 (1955); Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 991 (2d Cir. 1951) (enforcement of clause based on facts such as minimum contact with United States, destination of cargo was European ports, ship's crew was neither in nor planned to visit United States, and libellant's ability to receive effective remedy in alternate forum); Geiger v. Keilani, 270 F. Supp. 761, 766 (E.D. Mich. 1967) (enforcement of clause based on facts of case such as location of all witnesses in foreign jurisdiction, foreign law governs contractual rights, and interpretation of agreement dependent upon foreign customs); Amicale Indus., Inc. v. S.S. Rantum, 259 F. Supp. 534, 537-38 (D.S.C. 1966) (enforcement of clause based on facts that vessel was foreign owned, location of witnesses, and libellant's knowledge of provisions under which cargo was shipped); Hernandez v. Koninklijke Nederlandsche Stoomboot Maatschappij N.V., 252 F. Supp. 652, 654 (S.D.N.Y. 1965) (enforcement of clause based on witness availability and foreign court's ability fairly to adjudicate issue in question); Pakhuismeesteren, S.A. v. The S/S Goettingen, 225 F. Supp. 888, 889 (S.D.N.Y. 1963) (enforcement of clause based on connection of case with United States, ship's home port, location of witnesses, governing law, and foreign court's experience with controversy); Takemura & Co. v. The S.S. Tunseshima Maru, 197 F. Supp. 909, 912 (S.D.N.Y. 1961) (enforcement of clause based on libellant's failure to show enforcement to be unreasonable when foreign jurisdiction is domicile of all parties and respondent agreed to waive foreign statute of limitations); Aetna Ins. Co. v. The Satrus tegui, 171 F. Supp. 33, 35 (D.P.R. 1959) (enforcement of clause based on facts that evidence only available in foreign jurisdiction, enforcement not against public policy, vessel owned by foreign jurisdiction and it was loaded by foreign citizens in foreign jurisdiction); Nieto v. The S.S. Tinnum, 170 F. Supp 295, 296 (S.D.N.Y. 1958) (enforcement of clause based on facts that foreign jurisdiction in best position to interpret controlling law, foreign court open to libellant, and foreign court able to adjudicate matter fairly); Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13, 15 (S.D.N.Y.) (enforcement of clause based on port where shipment originated, jurisdiction where bill of lading executed, validity of forum selection clause under law of tribunal provided for, statute of limitations, and domicile of parties), aff'd, 227 F.2d 519 (2d Cir. 1955); Export Ins. Co. v. Skinner, 115 F. Supp. 154, 155
forum non conveniens formulation of reasonableness. Under a motion to dismiss for forum non conveniens, the burden is on the defendant to show that the plaintiff's choice of forum should be disturbed. The existence of a forum selection clause has been considered to shift the burden in the forum non conveniens analysis to the plaintiff who filed suit in the noncontractual forum.

Other courts kept the burden on the defendant. Still others held that the existence of the forum selection clause reduced the defendant's burden. Finally, some courts concluded that the clause operated to remove the burden from either party and instead required the court to conduct an evenly balanced analy-

(S.D.N.Y. 1953) (motion to decline jurisdiction denied due to reference in bill of lading to United States and several points of contact between transaction and United States).


91. See, e.g., Gilbert, supra note 6, at 10-11 (presumption against dismissal in plaintiff's favor on grounds of forum non conveniens); Comment, Stipulations Ousting Admiralty Courts of Jurisdiction, supra note 86, at 508 (when stipulation to litigate in foreign forum, libellant has burden to prove stipulation unreasonable); Unterweser Reederei, GMBH Zapata Off-Shell Co. v. Bremen, 428 F.2d 888, 906 (5th Cir. 1970) (Wisdom, J., dissenting) (objecting to majority's opinion that declined to enforce forum selection clause but had argued in dicta that under forum non conveniens analysis, burden would remain with plaintiff, and arguing that "[t]he burden should rest upon the party objecting to that forum [the contractual forum] to show a significant balance of greater inconvenience in litigating in the designated forum"); Hernandez v. Koninklijke Nederlandsche Stoomboot Maatschappij N.V., 252 F. Supp 652, 654 (S.D.N.Y. 1965) ("The libellant in the case at bar, who challenges the provision to which he previously assented, has the burden of proving its unreasonable."); Takemura & Co. v. The S.S. Tsuneshima Maru, 197 F. Supp. 909, 912 (S.D.N.Y. 1961) ("It is incumbent upon the libellant, once the existence of such an agreement is shown, to prove that it is unreasonable and hence unenforceable.").

92. See, e.g., Carbon Black Export v. The SS Monrosa, 254 F.2d 297, 301 (5th Cir. 1958) (though declining to enforce forum selection clause, court discussed application of forum non conveniens factors with burden on defendant to determine reasonableness); Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886, 889 (S.D.N.Y. 1957) (motion to decline jurisdiction denied when balance strongly favoring defendant was not present) (citation omitted); Sociedade Brasileira de Intercambio Comercial E Industrial, Ltda. v. S.S. Punta Del Este, 135 F. Supp. 394, 397 (S.D.N.Y. 1955) (same); Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13, 16 (S.D.N.Y. 1955) ("Weighing thus this stipulation in the balance of conveniens, respondents [defendants] have sustained the burden of making out the inconvenience of this forum.").

Presumably, if a court discussed that an analysis of reasonableness of a forum selection clause was equivalent to an analysis under the doctrine of forum non conveniens, but did not discuss which party bore the burden, the burden remained with the defendant as under a traditional forum non conveniens analysis. See supra notes 86-89 and accompanying text for a discussion of validity of forum clauses when enforcement is in accord with factors considered under the doctrine of forum non conveniens.

93. See Note, Enforcement and Effect of the Jurisdiction Clause in Admiralty, supra note 52, at 75-76 (plaintiff's advantage in "clause cases" is minor factor when defendant need show only reasonableness or clause based on substantial relationship between case's subject matter and named jurisdiction). In support of its argument, the note compared Aetna Ins. Co. v. The Satrustegui, 171 F. Supp. 33 (D.P.R. 1959) (jurisdictional agreements enforced when not unreasonable or against public policy) with Koster v. (Am) Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947) (affirmed district court's refusal to exercise jurisdiction when defendant showed harrassment and plaintiff failed to show benefit in his choice of forum). Note, Enforcement and Effect of the Jurisdiction Clause in Admiralty, supra note 52, at 76 n.27. The author believes it is arguable whether the authority cited in the Note for this contention is actually supportive thereof.
sis as to the proper forum for the suit.94 This confusion as to how the forum non conveniens factors should be balanced and how the burden of persuasion should be allocated was most likely the root of Judge Clark's concern in his concurrence in Cerro De Pasco Copper Corp. v. Knut Knutsen.95 There, Judge Clark argued for the "serious impairment" formulation of reasonableness because of the potential questions that would be raised by the majority's adoption of the forum non conveniens formulation.96

Under the "serious impairment" formulation of reasonableness, the forum selection clause is afforded prima facie validity without scrutiny of any of the forum non conveniens factors. The parties are allowed to reorder contractually the principles of venue, personal jurisdiction, and choice of law as they see fit as long as one party is not completely prevented from pursuing her claim.97 The parties' agreement is not subject to a determination of whether fundamental fairness exists in regard to the forum designated by contract. The agreement is merely examined to determine whether its enforcement would result in gross injustice. A lawsuit can be relegated to a forum that has little, if any, connection with the lawsuit as long as either party is not totally prevented from bringing her claim as a result of the tenuous connection, or lack of connection, between the claim and the contractual forum.

Though the two formulations represent very different approaches to reasonableness and very different views as to the power of parties to alter principles of procedure by contract, the distinction has been rarely discussed.98 Because the

94. While it is not entirely clear as to where the following courts placed the burden, several courts appear to have conducted an even balancing as to which was the most convenient forum, the contractual forum or the forum in which plaintiff filed suit. See, e.g., Pakhuismeesteren, S.A. v. The S/S Goettingen, 225 F. Supp. 888, 890 (S.D.N.Y. 1963) (motion to decline jurisdiction granted on conditions allowing libellant to maintain action in foreign tribunal); Skins Trading Corp. v. The S/S Punta Del Este, 180 F. Supp. 609, 610-11 (S.D.N.Y. 1960) (forum selection clause unenforceable due to unreasonableness to give clause effect when one cause of action is fraudulent issue of bill of lading); Nieto v. The S.S. Tinnun, 170 F. Supp. 295, 296-97 (S.D.N.Y. 1958) (motion to decline jurisdiction granted when foreign court open to libellant and when it is in best position to interpret controlling law).

95. 187 F.2d 990 (2d Cir. 1951).

96. Id. at 991 (Clark, J., concurring) (without using term "serious impairment," concurrence expressed concern for majority's decision to confer "wider discretion" on district judges).

A similar concern later would be echoed by courts and commentators in the application of the Stewart standard of enforcement pursuant to § 1404(a). See infra notes 267-70, 321-22 and accompanying text for a discussion of criticism of Stewart's insertion of the exercise of judicial discretion in enforcement of forum selection clauses.

97. See Mullenix, Consensual Adjudicatory Procedure, supra note 6, at 302-03 ("The Bremen and its progeny [the successors to the serious impairment formulation], effectively supersede conventional standards for jurisdiction, venue, transfer and forum non conveniens, imposing variegated standards for forum selection not contemplated by those rules or doctrines;" and "[T]he imposition of contract principles on forum selection rules has, in many instances, stood jurisdictional principles on their head . . . .").

98. See, e.g., Borchers, supra note 6, at 61 (discussing that early cases that enforced forum selection clauses did so if agreement were "reasonable," but not discussing different formulations of reasonableness); Lee Goldman, My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts, 86 NW. U. L. REV. 700, 702 (1992) (Mueller and its
two views reflect the conceptual division that presently exists in the Supreme Court's pronouncements on forum selection clauses, the distinction between the two views of reasonableness is important. In an often cited quotation, Judge Frank of the Second Circuit ridiculed the ouster doctrine, the rejection of which prompted judicial acceptance of the forum selection clause: "Perhaps the true explanation [for decisions relying upon the ouster doctrine to refuse to enforce forum selection clauses] 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." 99

In putting the "bad dogma" to sleep, perhaps the courts were a bit hasty. For although it seems rudimentary that an agreement between parties does not operate to "oust" a court's jurisdiction, that does not necessarily justify the repudiation of the underlying principle of the ouster doctrine. The principle that underlies the ouster doctrine is that parties, by agreement, can neither affect the basic power of the court nor reorder the fundamental principles of procedure. Yet, in the prorogation context, a forum selection clause may operate to do just that if it designates that an action take place in a forum where venue or personal jurisdiction are otherwise improper.

The scope of repudiation of the ouster doctrine was limited to a rejection of the notion that forum selection clauses effectuate an ouster of a court's jurisdiction. Nevertheless, the underlying principle of the doctrine still has viability in determining whether reasonableness should be determined by the forum non conveniens formulation or by the serious impairment formulation. Accepting that the principles of procedure are an interactive mechanism for adjudication, once parties are allowed to contract to alter one aspect of the framework of the mechanism in regard to resolution of their dispute, as is the case with the serious impairment formulation but not the forum non conveniens formulation, it can only follow that other principles with which their agreement must interact might no longer function as intended 100. For example, a clause might designate as venue for an action a court that lacks personal jurisdiction over the defendant or
perhaps is so located that potential witnesses would be beyond the subpoena power of the court. Such unresolved issues have been the subject of much discussion by commentators and call for corrective legislative action.\(^{101}\)

### III. The Bremen: A Conceptual Choice by Default

The Supreme Court accepted certiorari in *The Bremen v. Zapata Off-Shore Co.*\(^ {102}\) to resolve a division in the circuits as to whether forum selection clauses should be enforced.\(^ {103}\) The Court, however, defined the circuit court division as being merely one of enforcement versus non-enforcement, without distinguishing the forum non conveniens\(^ {104}\) and serious impairment standards of enforcement.\(^ {105}\) The Eleventh Circuit's opinion below had set out these two differing standards of enforcement; the majority followed the forum non conveniens formulation, while Judge Wisdom in dissent advocated for the serious impairment formulation.\(^ {106}\) Yet, the Supreme Court failed to appreciate that the two formulations were separate and distinct and that the ability of parties privately to re-

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12 (Professor Reese failed to give credit to contrary authority and failed to address valid concerns regarding consensual agreements).

Professor Reese rejected the second reason as being without merit, stating that "there are no rules, other than those concerned with jurisdiction, which determine whether suit should be brought in one state rather than in another." Reese, *Choice of Forum, supra* this note, at 196-97; Reese, *The Contractual Forum, supra* note 38, at 188. His argument is in error. First, there are in fact other rules that determine where a suit should be brought. The venue statute of The Federal Judiciary Act, 28 U.S.C. § 1391, is most certainly a policy statement of Congress that lawsuits should be allocated to certain forums. Second, he overlooks the importance of the interactive nature of principles of procedure. Though choice of law issues do not determine where suit should be filed, where a suit is filed has significant implications on the choice of law question. Disturbing the choice of forum does in fact "disturb the symmetry of the law." Third, Professor Reese's argument neglects that there is a middle ground, and that the issue need not be one of all-or-nothing enforcement or non-enforcement. With the forum non conveniens formulation, enforcement can be effectuated within the symmetry of the law.

101. See *infra* notes 395-96 and accompanying text for a discussion of commentators' proposals for legislative action.


103. *Id.* at 2.

104. *Id.* at 7-8. As discussed *supra* at note 82, this approach was primarily used in the Second Circuit.

105. *Id.* at 10-11. As discussed *supra* at note 83, this approach was primarily taken in the Third Circuit.

106. The Eleventh Circuit majority interpreted Carbon Black Export v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), as holding that forum selection clauses were unenforceable as contrary to public policy. Unterweser Reederei, GMBH Zapata Off-Shore Co. v. The Bremen, 428 F.2d 888, 893 (11th Cir. 1970), *vacated*, 407 U.S. 1 (1972). Nevertheless, the majority acknowledged that "'At the very least . . . [Carbon Black] stands for the proposition that a choice of forum clause will not be enforced unless the selected state would provide a more convenient forum . . .'" (citing Reese, *The Contractual Forum, supra* note 38, at 191-92). *Id.* at 894. The majority then applied a forum non conveniens formulation analysis to the question of enforcement of the forum selection clause, with the burden on the defendant, and concluded that the plaintiff's choice of forum should not be disturbed. *Id.* at 894-95. The dissent argued that the more strict serious impairment formulation should be applied, and that the burden should lie with the plaintiff seeking to file suit in a noncontractual forum. *Id.* at 896, 901-02, 906 (Wisdom, J., dissenting).
order principles of procedure would be dramatically affected by the choice of formulation for determining "reasonableness." The Court then issued a decision that appears to allow parties in a wholesale fashion to reorder concepts of procedure and the fundamental jurisdictional power of the courts, and it did so with little discussion while relying on inapplicable precedent.

The Court's conceptual misappreciation was perhaps a result of the factual context in which the question of enforcement of forum selection clauses was presented to the Court—whether a plaintiff may bring suit in a forum other than that to which the parties had previously contracted to confine any litigation. When the forum selection clause issue arises in this context, that of a derogation clause, the question of enforcement raises the specter of the ouster doctrine. Though commentators have disagreed, it is the reverse situation of prorogation, in which a party seeks to file suit in a contractual forum that has no connection to the litigation or the parties, that brings to the forefront the more problematic question of to what degree parties should be able to reorder principles of procedure contractually. In the prorogation context, a court is confronted with the question of whether it should entertain a suit merely on the basis of a contractual arrangement and in contravention of established jurisdictional principles. In other words, may parties construct private principles of procedure and then have them enforced by the courts? The decision in *The Bremen* has been interpreted to mean that parties may do so in wholesale fashion. Yet, the issue was not presented to the Court, and such a holding was not contemplated.

107. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 n.1 (1972) (drawing analogy between approaches to enforcement of Second and Third Circuits as contrasted with Fifth Circuit view of enforncaseability as being contrary to public policy).

108. See infra notes 144-75 and accompanying text for a discussion of parties' ability to reorder concepts of procedure and the fundamental jurisdictional power of the courts.

109. See infra notes 156-60 and accompanying text for a discussion of *The Bremen* Court's use of precedent.

110. See supra notes 71-80 and accompanying text for a discussion of the ouster doctrine and its limited applicability.

111. See Mullenix, *Carnival Cruise Lines*, supra note 6, at 330-31 ("A much more serious problem [than that presented by the prorogation nature of forum selection clauses without sufficient regard to the due process concerns implicated in person and jurisdiction] is presented by the negative or derogation effect of forum provisions."); Mullenix, *Consensual Adjudicatory Procedure, supra* note 6, at 358-68 (court's new pro-defendant bias enables potential defendants to dictate in which forum plaintiff may bring action, without concern for plaintiff's due process rights).

112. See, e.g., Friedenthal, *supra* note 9, § 3.5, at 104 (parties can contract as to where adjudication will take place); Gilbert, *supra* note 6, at 6 (though not specifically referring to *The Bremen* as precedent, stated that "consent . . . may effectively enable a court properly to exercise in personam jurisdiction"); Gruson, *supra* note 6, at 192-93 (parties may contractually submit to be sued in jurisdiction that otherwise would not have had in personam jurisdiction); Mullenix, *Consensual Adjudicatory Procedure, supra* note 6, at 330 (stating that prorogative clauses are universally approved without sufficient regard to due process concerns or public policy determinations).
A. From "Ouster" to "Conferral" of Jurisdiction

In The Bremen,113 the Court considered the question of whether to discard the traditional American view disfavoring forum selection clauses114 in the context of an "international towage contract"115 between Zapata, a Delaware corporation located in Houston, Texas, and Unterweser, a German corporation.116 Pursuant to the contract, Unterweser was to tow Zapata's off-shore oil drilling rig, The Chapparal, from Louisiana to the Adriatic Sea off of Ravenna, Italy.117 The contract specified that any dispute under the contract "must be treated before the London Court of Justice."118

The Chapparal was damaged in a storm while in international waters in the Gulf of Mexico and, at the instructions of Zapata, was towed to Tampa, Florida, the nearest port of refuge.119 Zapata then commenced a suit in admiralty in the United States District Court for the Middle District of Florida for negligence and breach of contract.120 Unterweser responded by filing a motion to dismiss for lack of jurisdiction or, in the alternative, on the basis of forum non conveniens, and by filing a motion to stay prosecution of the action.121 Subsequently, Unterweser commenced an action against Zapata in the contractual forum in the High Court of Justice in London.122 Zapata unsuccessfully sought dismissal of that action, arguing that the English court did not have jurisdiction over it.123 Both the lower English court and the English Court of Appeal held that the forum selection clause conferred jurisdiction upon the English court and that the clause should be enforced.124

The United States District Court for the Middle District of Florida, relying on Carbon Black Export, Inc. v. The Monrosa,125 followed the traditional Amer-
ican view that forum selection clauses are unenforceable. The district court then considered the motion to dismiss under the standards of forum non conveniens, without regard to the forum selection clause, and denied Unterweser’s motion. The district court had previously denied the motion to stay.

On appeal, the United States Court of Appeals for the Fifth Circuit noted that Unterweser, at the trial level, had declined to pursue its motion to dismiss for either lack of jurisdiction or on the basis of forum non conveniens, and that Unterweser did not contend that the forum selection clause, if enforceable, operated as an ouster of the jurisdiction of the court. In considering the district court’s denial of the motion to stay, the Fifth Circuit relied on its previous decision in Carbon Black and held that “the forum-selection clause, in and of itself, did not compel the district court to stay proceedings so that the parties might litigate in England pursuant to its provisions.” Curiously, the Fifth Circuit hedged its bet and stated that the decision in Carbon Black had been analyzed by a commentator to mean that a forum selection clause would only be enforced if the contractual forum were “more convenient” than that in which the suit was brought. Though Unterweser had declined to pursue its motion to dismiss for forum non conveniens, the Fifth Circuit considered whether to enforce the forum selection clause under the forum non conveniens formulation of reasonableness with the burden on the defendant and held that “apart from the forum selection clause itself the circumstances [the forum non conveniens considerations of availability of witnesses, proximity of the event giving rise to the dispute to the forum, etc.] supported a retention and determination by the district court.”

127. The doctrine of forum non conveniens places a heavy burden on the party seeking dismissal of the action because “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
128. In re Unterwesser, 296 F. Supp. at 735 (“The balance of convenience is strongly in favor of litigation in this forum initially and to allow the same action to be prosecuted simultaneously elsewhere would cause extreme hardship.”).
129. Id.
130. Unterwesser Reederei, GMBH Zapata Off-Shore Co. v. M/S Bremen, 428 F.2d 888, 894 n.35 (citation omitted).
131. Id. at 893.
132. Id. at 894.
133. Id. at 894, 894 n.33. The Court cited Reese, The Contractual Forum, supra note 38, at 191-92, which argued that the Fifth Circuit precedent from Carbon Black stood for the proposition that “[a]t the very least ... a choice of forum clause will not be enforced unless the selected state would provide a more convenient forum than the state in which the suit is brought.” But the Court did not indicate whether that argument is correct. In the preceding paragraph, the Court cited Insurance Co. of N. Am. v. N.V. Stoomvart, 201 F. Supp. 76 (E.D. La. 1961), for the proposition that, “the Fifth Circuit’s holding in Carbon Black is applicable and such an attempt to oust the Court of its jurisdiction in advance will be stricken herewith as contrary to public policy and unenforceable.” Id. at 894.
134. See supra note 130.
It would have been impossible for the Fifth Circuit to reach any other decision on the basis of a forum non conveniens analysis because the contractual forum was the High Court of Justice in London. Though the Supreme Court in its subsequent consideration of the case seemed enamored with the fact that this was "a neutral forum," neutrality also meant that the London forum had no connection with the lawsuit. Neither of the parties, nor the facts giving rise to the cause of action, nor relevant witnesses or evidence had any connection whatsoever with England. Nevertheless, a neutral forum that is equally convenient, or equally inconvenient, does not necessarily warrant a disruption of the plaintiff's choice of forum.

In dissent, Judge Wisdom argued that the traditional view of non-enforcement of forum selection clauses should be rejected. Judge Wisdom disagreed with the majority's hedge toward the forum non conveniens formulation for enforcement and advocated for the much more strict "serious impairment" standard for enforcement which would place the burden upon the party seeking to avoid the contractual forum, here the defendant. Taken together, the Fifth Circuit's majority and dissenting opinions set out both sides of the question of whether to provide for enforcement of forum selection clauses and the differing formulations of the courts that had done so.

In deciding The Bremen, the Supreme Court first had to address the "ouster doctrine," as had the lower courts that had previously rejected the longstanding view of unenforceability of forum selection clauses. The Court did so by referring to the doctrine as "hardly more than a vestigial legal fiction." The Court then clarified that the fiction was not that parties could in fact "oust" a court of its jurisdiction, thereby allowing parties by private agreement to alter the fundamental power of courts, but that the enforcement of a forum selection clause effected an "ouster" at all.

The Court appeared to agree with the lower courts that had adopted the declination of jurisdiction approach to the ouster argument, reasoning that an agreement between parties, specifically a derogation clause, does not alter the jurisdiction of a court. Nevertheless, the enforcement of a forum selection clause in a prorogation context might in fact alter the jurisdictional reach of a court by allowing contracting parties to reorder basic procedural principles.

137. See supra notes 113-24 and accompanying text for a discussion of the facts of The Bremen.
138. See supra notes 86-88 for a discussion of factors to be weighed in a forum non conveniens analysis.
140. Id. at 906 (Wisdom, J., dissenting).
141. See supra notes 42-80 for a discussion of the lower courts' application of the "ouster doctrine."
143. Id. at 12 ("No one seriously contends in this case that the forum-selection clause 'ousted' the District Court of jurisdiction over Zapata's action.").
144. See supra notes 69-70 for a discussion of the cases where courts used a declination of jurisdiction approach to the ouster doctrine.
FORUM SELECTION CLAUSE

Such reordering by private agreement would contravene long-established principles of personal jurisdiction based on both a defendant's contacts with the forum and the notion of fundamental fairness.145

Though application of the forum selection clause in the prorogation context would alter existing jurisdictional principles, the Court did not limit its holding to derogation clauses. In fact, the Court's discussion of National Equipment Rental v. Szukhent 146 seemed to indicate that the Court intended to extend its holding to prorogation clauses.147 Its reliance upon Szukhent for that extension, however, is not warranted.

In Szukhent, the Court held that a party to a contract may designate an agent for service of process within the territorial boundaries of a state and thereby subject itself to personal jurisdiction.148 Though Szukhent is often cited for the proposition that a party may contractually consent to personal jurisdiction in a given forum even though jurisdiction would otherwise not be present,149 that view of Szukhent is more expansive than the case's actual holding. Szukhent held that a party may contract to "submit to the jurisdiction of a given court."150 It is the act of submitting that provides the basis for personal jurisd-

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145. The modern formulation of personal jurisdiction looks to the defendant's connection to the forum to determine whether jurisdiction may be asserted over the defendant. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."); see also Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985) ("The constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state."); Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.").

Personal jurisdiction based upon implied consent was also based upon a two-fold connection, between the defendant and the forum. The activities of the defendant within the forum were held to constitute consent to submit to the jurisdiction of the forum by means of service of process upon a statutorily designated agent within the forum. See Hess v. Pawloski, 274 U.S. 352 (1927); FRIEDENTHAL, supra note 9, § 3.5 at 105-09 (development of implied consent doctrine discussed).

146. 375 U.S. 311 (1964). For criticism of The Bremen Court's reliance upon Szukhent, see Mullenix, Consensual Adjudicatory Procedure, supra note 6, at 307-09 (Szukhent's authority stemmed from international waiver situations, and court's statement concerning consensual jurisdiction was dictum). See also Unterwesser Reederei, GMBH Zapata Off-Shore Co. v. The Bremen, 428 F.2d 888, 912 n.17 (Wisdom, J., dissenting) ("Szukhent is not significant authority . . . .").

147. See infra notes 156-63 and accompanying text.


149. See, e.g., Gilbert, supra note 6, at 6 ("It has been the generally accepted rule for some time that a court which is otherwise competent [referring to subject matter jurisdiction] may exercise personal jurisdiction bestowed upon it by the parties' consent . . . . [i]that is, consent, even prior to the existence of the dispute or cause of action may effectively enable a court properly to exercise jurisdiction.") (citing inter alia National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)); Reese, Choice of Forum Act, supra note 100, at 194 ("It is perfectly clear that consent is an effective basis of jurisdiction in the United States, and that an agreement that suit on a particular controversy should be brought in the courts of a chosen state amounts to a consent by the parties which subjects them to the jurisdiction of the chosen state with respect to that controversy.") (citing Szukhent).

150. Szukhent, 375 U.S. at 315-16.
diction.\textsuperscript{151} In \textit{Szukhent}, submission occurred because process was served upon an agent of the defendant who was within the forum’s jurisdictional reach.\textsuperscript{152} Service of process on a defendant agent does not extend or alter the existing jurisdictional power of the court.\textsuperscript{153} Instead, the presence of the defendant’s agent is considered to be a submission by the defendant to the court’s jurisdictional reach. To view \textit{Szukhent} as holding that parties may contractually create personal jurisdiction without the defendant’s submission contravenes the principles of \textit{International Shoe} and its progeny that base findings of personal jurisdiction on the existence of actual, albeit minimum contacts.\textsuperscript{154} Accord-

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\item \textsuperscript{151} Submission is the key to providing a court with personal jurisdiction over a defendant when the limitations on the court’s power to exercise such jurisdiction are rooted in both liberty interests of the Due Process Clause and concepts of state sovereignty. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980) (discussing that interests of federalism serve to limit extent of assertion of personal jurisdiction by forum). \textit{But see} Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1981) (“The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).

\item In a concurring opinion in \textit{Compagnie des Bauxites}, Justice Powell criticized the view that jurisdictional limitations were based only in the liberty interest of due process and did not also involve concerns of state sovereignty as a “theory [that] could require a sweeping but largely unexplicated revision of jurisdictional doctrine.” \textit{Id.} at 719 (Powell, J., concurring).

\item The Supreme Court’s most recent pronouncement on personal jurisdiction seems to reaffirm the assertion of jurisdiction based upon an exercise of power rooted in sovereignty. \textit{Burnham v. Superior Court}, 495 U.S. 604 (1990).

\item \textsuperscript{152} \textit{FED. R. Civ. P. 4(d)(1)} (“Service shall be made as follows: (1) Upon an individual . . . by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”). \textit{See Annotation, Agreements to Submit to Process of Foreign Courts}, 73 A.L.R. 1453, 1454 (1931) (consent to service of process on agent is valid means of establishing personal jurisdiction).

\item \textsuperscript{153} \textit{See Compagnie des Bauxites}, 456 U.S. at 702 (although disagreeing that federalism operates to restrict jurisdictional power of forum, acknowledging that if such were case, that jurisdictional reach of court could not be altered by private agreement, but individual could submit to jurisdiction of forum, and stating “[i]ndividual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected”).

\item \textsuperscript{154} \textit{See supra} note 145 for a discussion of \textit{International Shoe} and its progeny.

\item In \textit{Szukhent}, the Court took great pains to define narrowly the issue in terms of whether the agency in question was within the meaning of Federal Rule of Civil Procedure 4. The Court stated: The only question now before us is whether the person upon whom the summons and complaint were served was “an agent authorized by appointment” to receive the same, so as to subject the respondents to the jurisdiction of the federal court in New York. \textit{Szukhent}, 375 U.S. at 313.

\item Nowhere in the opinion does the Court attempt to fit its holding within the \textit{International Shoe} framework of jurisdiction based upon minimum contacts. \textit{International Shoe} exempted from its minimum contacts analysis the situation where the defendant “be not present within the territory of the forum.” \textit{International Shoe Co. v. Washington}, 326 U.S. 310, 316 (1945). Apparently the \textit{Szukhent} Court considered presence to have been established by means of the agency.

\item Of course, the Court has upheld jurisdiction based upon consent. \textit{See, e.g.}, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627-28 (1935) (non-resident business owner impliedly consents to suit in jurisdiction of business); Hess v. Pawloski, 274 U.S. 352, 356 (1927) (non-resident involved in automobile accident impliedly consents to be sued in jurisdiction of accident). Traditionally, a defendant consents to jurisdiction by virtue of her involvement in activities within the state, and the court exercises its power to regulate activities within its territory. Neither is present in a private
ingly, such a view would allow parties to create jurisdiction in a court with which the parties had no contact besides their mention of the forum in a contract.\textsuperscript{155}

In \textit{The Bremen}, the Court interpreted the \textit{Szukhent} holding too broadly, stating: "a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction."\textsuperscript{156} The Court missed the point of \textit{Szukhent} that a party is "found" within the jurisdiction when its agent is physically present there; it is the act of being present within the jurisdiction that creates the court's jurisdiction, not the contract.\textsuperscript{157} Consent to personal juris-

contractual consent. Therefore, \textit{The Bremen} Court's reliance on \textit{Szukhent} was misplaced because \textit{Szukhent}'s holding restricted the scope of personal jurisdiction to physical presence.

Moreover, even when the Court has indicated that jurisdictional limitations are not based on concerns of state sovereignty but are merely liberty interests, the Court still has required contacts between the defendant and the forum seeking to assert jurisdiction. \textit{See Compagnie de Bauxite}, 456 U.S. at 701-02 (defendant's sanction for failure to comply with discovery requests may include finding of personal jurisdiction, apparently consent through bad acts). The Court stated:

[our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when the defendant fails to comply with court-ordered discovery.]

\textit{Id.} at 702 n.10.


The use of a forum selection clause as a basis for personal jurisdiction can involve an even more tenuous connection to the forum than the use rejected as insufficient in \textit{Burger King}. In \textit{The Bremen}, the Court spoke of the desirability of parties contracting for a "neutral forum" in which to resolve any dispute that may arise. The \textit{Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1, 12 (1972). Presumably, "neutral forum" means that neither of the parties is a resident of the forum. In contrast, \textit{Burger King} rejected jurisdiction based upon a single contract even though one of the parties was a resident. The residency of one party to the contract at least gives the forum some connection to the dispute.

\textit{But see} \textit{Heller Financial, Inc. v. Midwhey Powder Co., Inc.}, 883 F.2d 1286, 1292 n.4 (7th Cir. 1989) (citing \textit{Burger King} for support, court stated that "[o]bviously, a valid forum-selection clause, even standing alone, can confer personal jurisdiction").


157. In the context of venue, the Court has recognized the distinction between the creation of an agency that causes venue to exist in a forum where the agent is located and the attempt to directly
diction is confined to consent to a lawsuit arising from an act within the forum or contact with the forum.158 As a forum selection clause does not oust a court of jurisdiction,159 it also should not be considered to confer jurisdiction in a forum where it does not otherwise exist.160

Because the issue of forum selection enforcement was presented to The Bremen Court only in the derogation context,161 the Court perhaps did not recognize that its holding could be interpreted as allowing parties to affect basic principles of procedure and thereby create jurisdiction. It would have been very interesting indeed if the Court had been confronted with a forum selection clause in the prorogation context. For example, if the clause had designated the courts of Nebraska as the forum for any litigation arising under the contract, would the Court have enforced the clause, which would have entailed holding that the contract formed the basis for creating personal jurisdiction in Nebraska? As the Court has never held that a single contract standing alone forms the basis for establishing personal jurisdiction, the answer most likely would be no. Nevertheless, not only does the reasoning in The Bremen indicate the Court would have ruled to the contrary, but the Court also embraced the concept of allowing parties to reorder the power of a court when it stated that courts should enforce parties' choice to have disputes resolved in a "neutral forum."162 The Court's notion of neutral forum implies a forum that does not have any contacts with either party, let alone minimum contacts, as are required in a personal jurisdiction analysis, and it implies a forum that does not necessarily comply with statutory venue requirements.163

Concerns of whether a contractual conferral of jurisdiction would negate

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158. See supra notes 145, 153-54 and accompanying text for a discussion of the minimum contacts analysis of personal jurisdiction.

159. See supra notes 48-76 and accompanying text for a discussion of judicial rejection of the ouster doctrine.

160. But see Gruson, supra note 6, at 136 (arguing that exclusive forum selection clause operates as submission to jurisdiction of contractual forum). Mr. Gruson's argument misses the point. Without the necessary "minimum contacts" or service of process within the forum, perhaps by means of agency, the court does not have jurisdiction to which the defendant may submit. Mr. Gruson's argument would have the clause operate as both the contact that creates the jurisdiction and the submission to jurisdiction.

161. See supra notes 32-34 and accompanying text for a discussion of forum selection clauses in the derogation context.


163. See 28 U.S.C. § 1391 (choice of venue based on several concepts, all of which are based upon connection between forum and parties and/or claim presented, such as defendant residence, locale of events giving rise to claim, location where defendant is subject to personal jurisdiction).
minimum contacts requirements were not a problem, of course, for the High Court of Justice in London. The court rejected Zapata's objection to the exercise of jurisdiction over it and held that the contract conferred personal jurisdiction on the court.\textsuperscript{164} The English view as to the extent to which parties may confer personal jurisdiction upon a court is broader than the American view.\textsuperscript{165}

This being so, the English court's willingness to find personal jurisdiction solely by virtue of a contractual provision did not justify the United States Supreme Court's adoption of a view of forum selection clauses that stands principles of American civil procedure on its head. Yet the Court apparently did just that by reasoning that giving prima facie effect to forum selection clauses was essential in light of changing commercial markets to encourage and foster the participation of American business and industry in "expanding international trade."\textsuperscript{166}

Unfortunately, the Court did not mention that a potential effect of its holding is that parties will be able to confer jurisdiction on a court, even if neither party has any contacts with the forum in which the court is located.\textsuperscript{167}

\textsuperscript{164} The Bremen, 407 U.S. at 4.

\textsuperscript{165} Civil law jurisdictions also are more favorably disposed to the enforcement of forum selection clauses. \textit{See} Borchers, supra note 6, at 56 n.2 (citing authorities discussing that civil law traditions of party autonomy were much more favorable for enforcement of prorogation forum selection clause).

\textsuperscript{166} The Bremen, 407 U.S. at 15.

The Court also stated:

\begin{quote}
The expansion of American business and industry will hardly be encouraged, if notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.
\end{quote}

\textit{Id.} at 9.

\textsuperscript{167} There is no discussion in the Court's opinion of a forum selection clause contained in a purely domestic contract specifying a domestic forum. As mentioned, perhaps the Court was only concerned with forum selection clauses in the derogation context. Nevertheless, the holding of \textit{The Bremen} has not been limited to such a context. \textit{See} Gruson, supra note 6, at 149 ("Federal Courts have universally agreed that the teaching of \textit{The Bremen} is not limited to admiralty cases nor to
The skeptical reader may be thinking that if a party may confer jurisdiction upon a court with which the party lacks minimum contacts merely by appearing before the court and failing to raise a jurisdictional objection, or, if a party can confer venue upon a court that does not properly have statutory venue over the action by failing to raise a venue objection why not allow a party to confer jurisdiction upon the court contractually. The situations are simply not analogous.

Where a party waives its objection to a court's lack of personal jurisdiction or lack of venue by appearing before the Court, the party is not seeking to alter the extent of the court's power to hear a case. The party is, in fact, submitting to the existing jurisdictional reach of the court by appearing where an action has been filed and choosing to waive any jurisdictional or venue objections that the party may have. For purposes of conceptual clarity, that situation should be referred to as "procedural waiver." It is that act of submitting through appearance within the forum to the court's jurisdiction that distinguishes procedural

cases involving the selection of a foreign forum but applies to all forum selection clauses even if they select a domestic forum and even if they arise in a suit between parties of different states." See also infra notes 260-66 and accompanying text for a discussion of whether the holding of The Bremen can properly be limited to admiralty. The Bremen has additionally been applied in state courts. See, e.g., Gruson, supra note 6, at 149-50 (number of states have followed The Bremen); Solimine, supra note 2, at 56 (although The Bremen limited to admiralty cases with international overtones, has had precedential effect in state courts).

The Bremen Court specifically distinguished the contractual provision before it from a provision in a contract between domestic corporations specifying a foreign forum, and suggested that in the latter situation, a forum selection clause would not be enforced. See The Bremen, 407 U.S. at 17 ("We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum.") However, The Bremen's holding has not been so limited. See, e.g., Spradlin v. Lear Siegler Mgt. Co., 926 F.2d 865, 869 (9th Cir. 1991) (forum selection clause contained in employment contract enforced between American corporation and American employee designating Saudi Arabia as exclusive forum for disputes).

168. See FRIEDENTHAL, supra note 9, § 3.26 at 182-85 (party who enters general appearance in action without raising objection to improper venue will be deemed to have waived all jurisdictional objections). Objections to lack of personal jurisdiction can also be deemed waived by other conduct before the forum court, such as failing to comply with discovery requests. See also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704-05 (1982).

169. Pursuant to Fed. R. Civ. P. 12(h)(1), an objection to improper venue is deemed waived unless the defenses are raised in defendant's answer or motion filed prior to defendant's answer. See also FRIEDENTHAL, supra note 9, § 2.15 at 84-85 (discussing that "objections to venue of a particular court's venue are waived if not properly asserted").

170. Courts have in fact held that personal jurisdiction may be so contractually conferred. See, e.g., Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990) (forum selection clause that designated venue to be in specified county acted so as to confer personal jurisdiction in that court though defendant lacked any contacts with that forum, relying on argument "since a defendant is deemed to waive . . . objections to personal jurisdiction or venue simply by not making them in a timely fashion, a potential defendant can waive such objections in advance of suit by signing a forum selection clause"); Alexander Proudfoot Co. World Hqtrs. v. Thayer, 877 F.2d 912, 921 (11th Cir. 1989) (upholding exercise of personal jurisdiction on basis of forum selection clause and stating "[b]ecause the nonresident defendant in the present case contractually agreed to personal jurisdiction in Florida, the usual due process analysis need not be done"); Heller Fin., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1292 n.4 (7th Cir. 1989) ("Obviously, a valid forum-selection clause, even standing alone, can confer personal jurisdiction.").
waiver from the situation where a party, in advance of litigation, seeks to confer jurisdiction contractually on a court that might otherwise not have jurisdiction. That situation should be referred to as “procedural consent.”

Procedural waiver and procedural consent are not analogous.171 With procedural waiver, the parties do not affect the court’s existing jurisdictional power, but instead, they merely submit themselves to this power.172 This submission reflects considerations of minimum contacts and fairness. In contrast, with procedural consent, the parties seek to expand the court’s jurisdictional reach.173 In this situation, minimum contacts do not necessarily exist.174 Indeed, absent a voluntary submission, there has been no contact. Moreover, as the suit has not yet been filed, fairness cannot be assessed. Thus, these two concepts reflect very different views of the ability of parties to alter principles of procedure contractually. That the former is unquestionably permissible, is not authority for the existence of the latter. Similarly, the fact that parties are allowed to contract to submit to the existing jurisdictional reach of a court, as in Szukhent, is not justification for holding that parties may contractually expand the jurisdictional reach of a court. Nevertheless, that expansion is exactly what the Court did in

171. Though the terms consent and waiver are often used interchangeably, in common usage the terms have separate and distinct meanings that are consistent with those suggested herein. Waiver is a unilateral act from which results a legal consequence. BLACK’S LAW DICTIONARY 1580 (6th ed. 1990). As contemplated herein, that act is submitting to the jurisdictional reach of a court. See id. (defining waiver, in part, as “essentially unilateral, resulting as legal consequence from some act or conduct of party against whom it operates”). Consent is mutual agreement between two parties. Id. at 305. There is no act other than the agreement, and therefore, no actual submission to the power of a court as is present in a waiver. Cf. id. (defining waiver, in part, as “[a]greement; approval; permission; the act or result of coming into harmony and accord”).

See also General Contracting & Trading Co., LLC, v. Interpole, Inc., 940 F.2d 20, 22 (1st Cir. 1991) (“In terms of submission to a court’s jurisdiction, it is possible to attempt fine distinctions between ‘waiver’ and ‘consent.’ It can be argued, for example, that the distinction turns on whether the manifesting conduct took place within, or outside of, the confines of the suit in question.”).

172. As discussed supra, at note 151, personal jurisdiction limitations are based on concepts of both due process liberty interests and notions of state sovereignty.

173. See Insurance Corp. of Ireland, Ltd. v. Compagnie de Bauxite de Guinee, 456 U.S. 694, 702 n.10 (1982) (Court argued that “if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement. Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.”). The Court asserted that “no action by parties can confer subject-matter jurisdiction upon a federal court.” Id. at 702. The Court confused the concepts of waiver and consent, underscoring the necessity for the distinction. Limiting personal jurisdiction by concerns of federalism does not prevent a waiver to jurisdiction, but it does prevent a consent. As the Court indicated, a party may “subject” itself to the powers of the court. Id. The act of “subjecting” oneself to the court’s powers is a waiver. Id. It is consent when prior to litigation parties seek to confer jurisdiction contractually upon a forum that is unconnected to the litigation, that violates a view of personal jurisdiction that includes concepts of state sovereignty.

174. See, e.g. Northwestern Nat’l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990) (personal jurisdiction present over defendant who had no contacts with forum other than forum selection clause that stated that venue should lie in specified county within forum, and basing personal jurisdiction solely on existence of forum selection clause); Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1290 (7th Cir. 1989) (same).
The Bremen when it invited parties to seek "neutral forums" having no connection to the litigation for resolution of potential disputes. Moreover, the Court engaged in far too little, if any, consideration or discussion of the new power it was bestowing upon parties. Unfortunately, the Court has thereafter relied upon The Bremen for the proposition that prorogation clauses do not offend due process.\textsuperscript{175} As such, jurisdictional principles were disregarded without discussion or consideration.

B. A Very Broad View of What Is Reasonable

After the Court disposed of the ouster doctrine, and in so doing, created a doctrine of contractual jurisdiction, the Court then had to determine the proper standard for enforcement of forum selection clauses, that is, what should constitute "reasonableness." The Court adopted the broadest formulation of reasonableness, holding that "forum-selection clauses are prima facie valid and should be enforced unless it can be shown by the resisting party that enforcement would be 'unreasonable' under the circumstances."\textsuperscript{176} To establish unreasonableness, the resisting party must show that "trial in the contractual forum will be so gravely difficult and inconvenient that he [the party seeking to avoid the forum-selection clause] will for all practical purposes be deprived of his day in court."\textsuperscript{177}

In The Bremen, the Court did not discuss that two different standards of reasonableness had developed in the lower courts.\textsuperscript{178} Although the decision below set out the contrast between the forum non conveniens formulation, supported by the majority, and the serious impairment formulation, supported by the dissent, the Court apparently did not appreciate the differences between them. Without acknowledging the differences in these conceptual views of enforcement of the forum selection clause, the Court cited cases espousing each of the two formulations of reasonableness as precedent for the concept of enforcement of reasonable clauses.\textsuperscript{179} The Court also failed to appreciate that different views existed as to which party bore the burden in establishing reasonableness,

\textsuperscript{175} See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14, (1985) (Court mistakenly stated that The Bremen Court had determined that "freely negotiated" forum selection clauses that are not "unreasonable and unjust" do not offend due process) (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 5 1972)). The Bremen opinion contains no such analysis. See The Bremen, 407 U.S. at 15 (due process does not appear anywhere on page 15). Though one cannot disagree that the implication of The Bremen is that parties may lodge personal jurisdiction over a defendant in a court that would not otherwise have jurisdiction, it cannot be said that the Court engaged in any due process analysis.

\textsuperscript{176} The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

\textsuperscript{177} Id. at 18.

\textsuperscript{178} See supra notes 81-101 and accompanying text for a discussion of the two standards of reasonableness.

\textsuperscript{179} See The Bremen, 407 U.S. at 10, n.11 (citing Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir. 1966) (reasonableness presumed absent proof enforcement of forum selection clause will "subvert the interests of justice") and Cerro DePasco Copper Corp. v. Knut Knutsen, O.A.S. 187 F.2d 990, 991 (2d Cir. 1951) (reasonableness of forum selection clause determined through assessment of particular facts involved)).
citing the above authority for the principle that the party "resisting" the clause bore the burden when in fact the cited authority did not uniformly allocate the burden to the resisting party.\textsuperscript{180}

The adoption of the serious impairment formulation of reasonableness removed from consideration those factors that sought to ensure some degree of fairness to the litigants, including a weighing of the factors of the doctrine of forum non conveniens that would require a relationship between the contractual forum and the controversy sought to be litigated before it. Nevertheless, the Court sought to place some limitations upon enforcement. These limitations address contract formation issues,\textsuperscript{181} however, and not procedural fairness.\textsuperscript{182} The limitations would deem a forum selection clause unenforceable if the clause "was invalid for fraud or overreaching."\textsuperscript{183} The agreement must be between "experienced and sophisticated" business persons,\textsuperscript{184} and must have been "freely negotiated"\textsuperscript{185} at "arm's-length."\textsuperscript{186} Additionally, the Court appeared to limit its holding to cases in admiralty\textsuperscript{187} arising in the limited factual context

\textsuperscript{180} See The Bremen, 407 U.S. at 10 (citing Central Contracting, 367 F.2d at 345 and S. S. Littlejohn, 346 F.2d at 287).

\textsuperscript{181} See The Bremen, 407 U.S. at 9 (principles of doctrine of forum non conveniens inconsistent with modern international commercial dealings and contracts). Two main factors may have contributed to the Court's emphasis on contract formation issues. First, for Judge Hand, the trend toward judicial acceptance of forum selection clauses indicated that forum selection clauses should only be enforced when each party is "fully advised" of the effect of the claim. Krenger v. Pennsylvania R.R. Co., 174 F.2d 556, 562 (2d Cir. 1949). Judge Hand noted that whether a person voluntarily agreed to a forum selection clause would be decided using principles of contract formation. \textit{Id.} Second, in National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964), the Court addressed the question of whether a submission to jurisdiction was a constitutional waiver subject to the knowing, voluntary, and intelligent standard analysis, or was a contract question to be governed by "mere contract law," deciding that the question was jurisdictional in nature. The Court's attention to these contract formation factors may have been its attempt to address the question of the standard for civil waiver.

\textsuperscript{182} But see The Bremen, 407 U.S. at 15-16 (discussing that forum selection clause would be found invalid if "enforcement would contravene a strong public policy of the forum in which suit is brought"). Unfortunately, confusion as to the meaning of this factor minimizes its application in a calculus of enforcement considerations.

Commentators differ on whether public policy is a separate factor to be considered, or is part of the "unreasonable" prong. \textit{See e.g.}, Covey & Morris, \textit{supra} note 113, at 839 (public policy factor is separate consideration and part of "four-prong test"); Gruson, \textit{supra} note 6, at 149 (\textit{The Bremen} standard involves two factors, unreasonableness and contractual defenses of fraud and overreaching).

\textsuperscript{183} \textit{The Bremen}, 407 U.S. at 15.

\textsuperscript{184} \textit{Id.} at 12.

\textsuperscript{185} \textit{Id.} To determine whether the clause had been freely negotiated and not the result of undue influence or overwhelming bargaining power, the Court considered whether: (1) the clause was part of a pre-printed form contract; (2) several companies had bid for the contract; and (3) the parties had in fact engaged in negotiations that resulted in "numerous changes in the contract." \textit{Id.} at 12 n.14, 13 n.15.

\textsuperscript{186} \textit{Id.} at 12.

\textsuperscript{187} \textit{See id.} at 10 (this is correct doctrine to be followed by federal district courts sitting in admiralty).
of international agreements.\textsuperscript{188}

The enforcement of a forum selection clause freely agreed to and negotiated by experienced and sophisticated international corporations cannot be said to be unfair or unjust. The difficulty created by adopting the serious impairment formulation of reasonableness is that the Court removed much of the trial judge's discretion to make determinations of when enforcement is reasonable.\textsuperscript{189} Consequently, the phrase "prima facie valid" was routinely invoked to enforce forum selection clauses almost automatically,\textsuperscript{190} even in contexts where enforcement may not have been fair or just.\textsuperscript{191}

\begin{itemize}
\item \textsuperscript{188} See id. at 12-17.
\begin{itemize}
  \item The Court repeatedly emphasized that it was considering enforcement of the forum selection clause in the context of an international agreement:
  \begin{itemize}
    \item There are compelling reasons why a freely negotiated private international agreement . . . such as that involved here, should be given full effect.
  \end{itemize}
  \textit{Id.} at 12-13.
  \item In this case, for example, we are concerned with a far from routine transaction between companies of two different nations.
  \textit{Id.} at 13.
  \item Thus, in light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.
  \textit{Id.} at 15.
  \item Those considerations [the towage business in American waters] are not controlling in an international commercial agreement.
  \textit{Id.} at 17.
  \item We are not dealing here with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum.
  \textit{Id.} at 17.
  \item This case, however, involves a freely negotiated international commercial transaction.
  \textit{Id.} at 17.
  \item [S]election of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction.
  \textit{Id.} at 12-17.
\end{itemize}
\item \textsuperscript{189} See id. at 20 (White, J., concurring) (district court best equipped to adjudge matters of forum selection clause enforceability).
\item \textsuperscript{190} See, e.g., Solimine, supra note 2, at 52 (recent judicial trend is almost invariable enforcement of forum selection clauses); Lederman, supra note 31, at 432 (\textit{Bremen} test almost always results in enforcement of forum selection clause).
\item \textsuperscript{191} The enforcement of forum selection clauses contained in employment contracts presents one of the greatest opportunities for unfairness because of the inequality of bargaining power between employer and employee. See Spradlin v. Lear Siegler, 926 F.2d 865 (9th Cir. 1990) (enforcing forum selection clause designating Saudi Arabia as exclusive forum for disputes arising from employment contract between American citizen and Delaware corporation in suit by employee who had been terminated from employment in Saudi Arabia and ordered to leave country).
\end{itemize}
C. Circling Back to an Altered Starting Point

It is an interesting circle in which the Court reasoned in bringing the forum selection clause from repudiation to prima facie validity. It began with a rejection of the "ouster doctrine" in order to find forum selection clauses enforceable as a declination of jurisdiction by the courts, rather than an "ouster" of jurisdiction by the parties. Thereafter, the circuitous path enabled parties to confer jurisdiction where it would otherwise not exist. Relying on precedent erroneously interpreted to mean that parties may confer jurisdiction on a forum led the Court to adopt a standard of reasonableness—the serious impairment formulation—which placed a heavy burden on a resisting party. This formulation allowed for little, if any, trial court discretion. Conversely the concept of declining jurisdiction implies that the declination is not pro forma but discretionary. Nevertheless, when there is limited opportunity for the exercise of discretion because the enforcement standard gives effect to forum selection clauses in almost all situations, the result certainly resembles an ouster of the court's power by an agreement of the parties. Yet, the Court thought there to be no question that a forum selection clause did not effectuate an ouster. Thus, although a forum selection clause technically does not oust jurisdiction, practically speaking, the Court's analysis permits the clause to alter a court's jurisdictional power. The Court had circled back to its starting point, but the concept that parties cannot contractually alter a court's jurisdictional power that set its reasoning in motion was now seriously altered, if not reversed.

V. Stewart v. Ricoh: A Very Different Conceptual View

The Supreme Court granted certiorari in Stewart Organization, Inc. v. Ricoh to resolve the Erie question of whether enforcement of a forum selection clause in an action in diversity was a question of state or federal law. The Court held that the enforcement of a forum selection clause was governed by federal law. The applicable federal law, however, was not that of The

194. See Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (federal district court sitting in diversity should apply state law to substantive issues and federal law to procedural issues); Stewart, 487 U.S. at 24. The circuits were split on the issue. The Ninth and Eleventh Circuits had considered the question of the enforcement of a forum selection clause to be procedural and applied federal law. See, e.g., Pelleport Investors, Inc. v. Budco Quality Theaters, Inc., 741 F.2d 273, 279 (9th Cir. 1984); Crown Beverage Co. v. Cerveceria Moctezuma, S.A., 663 F.2d 886, 888 (9th Cir. 1981) (enforcement of forum selection clause controlled by federal law); Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1068 (11th Cir.) (federal law governed enforcement of forum selection clause) (per curiam) (en banc), aff'd on other grounds, 487 U.S. 22 (1987). The Third Circuit treated the question of the enforcement of a forum selection clause as a question of substantive state contract law. See, e.g., General Eng'g Corp. v. Martin Marietta Alumina, Inc. 783 F.2d 352, 356-57 (3d Cir. 1986) (enforceability of forum selection clauses governed by state law).
Bremen but rather, the transfer of venue statute.196

Commentators faulted the holding for its resolution of the Erie question and its failure to address at least some of the outstanding questions concerning forum selection clause enforcement.197 In actuality, the Stewart decision did not dodge the issues surrounding forum selection clauses. Instead, it reconceptualized the forum selection clause from its previous view in The Bremen and attempted to rein in the ability of parties to reorder procedure. Under the Stewart approach, the forum selection clause does not reorder procedural principles but is merely a factor to be considered in determining where venue is proper.198 This view of the forum selection clause is the same as that applied by lower courts prior to The Bremen that utilized the forum non conveniens formulation of reasonableness.199 Thus, the Stewart Court’s view of forum selection clauses was very different from The Bremen’s view fifteen years prior. Unfortunately, the Court did not reverse The Bremen and made only an inadequate attempt to distinguish it.200

The decision in Stewart represents the Court’s narrowest view of the ability of parties privately to reorder procedure. Contrary to commentator criticism, this narrow view serves to resolve many of the questions alleged to have been left unaddressed in Stewart, such as what is the proper procedural mechanism for enforcement, and how does a forum selection clause affect choice of law concerns.201 Nevertheless, one fundamental issue is not resolved: why two such different conceptualizations of the forum selection clause?

A. Redefining the Concept

Stewart presented the Court with the opportunity to consider the enforcement of a forum selection clause imported from The Bremen context of an action in admiralty involving international trade to the context of a diversity action involving a domestic contract.202 Stewart Organization, a closely-held

196. See id. at 28 (federal transfer of venue statute governs enforcement of forum selection clause).

Title 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.”

197. See infra note 290 and accompanying text for a partial list of these commentators.

198. Stewart, 487 U.S. at 29.

199. See supra notes 82, 86-96 and accompanying text for a discussion of these cases.


201. See infra notes 390-93 and accompanying text for discussion of how these concerns are resolved.

Alabama corporation, and Ricoh Corporation, a New Jersey corporation with its principal place of business in New York that manufactured copiers for nationwide distribution, entered into an agreement for Stewart to become a dealer in Alabama of defendant's copiers. The agreement contained a clause specifying that disputes arising under the contract could be litigated only in a Manhattan court.

A dispute arose, and Stewart filed state and federal claims against Ricoh in the United States District Court for the Northern District of Alabama. Ricoh responded by seeking to have the forum selection clause enforced either by means of a motion to transfer venue to the Southern District of New York pursuant to 28 U.S.C. § 1404(a) or by a motion to dismiss for improper venue under 28 U.S.C. § 1406. These alternative motions placed the conceptual issue of the fundamental nature of the forum selection clause squarely before the Court. A motion under § 1404(a) is premised upon an action having proper venue, while a motion under § 1406 is appropriate where venue is improper. Therefore, the Court faced the issue of whether a forum selection clause reorders the fundamental procedural principles as to where venue is proper.

Alabama law considered forum selection clauses to be contrary to public policy and therefore unenforceable. Thus the Erie question was formed. If the court applied state law, the defendant's motions would be denied because the


203. Stewart, 487 U.S. at 24-25.
204. Id. at 24 n.1. The clause stated: Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

205. Id. at 24.
206. Id.
207. See supra note 196 and accompanying text for a discussion of transfer of venue.
208. See 28 U.S.C. § 1406(a) ("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.")
209. See infra notes 271-89 and accompanying text for a discussion of this point.
clause would not be considered valid. If the court applied federal law, the standards of enforcement from *The Bremen* would be implicated, and, therefore, the decision would resolve the issue of whether the holding in *The Bremen* was to be limited to actions in admiralty involving international trade or would extend to purely domestic disputes.\(^1\) It also would clarify what limits the language "freely negotiated" places on the enforceability of such clauses.\(^2\) For although Stewart was not an unsophisticated business person,\(^3\) other factors that the *The Bremen* Court had said were necessary to indicate that a clause had in fact been freely negotiated were not present.\(^4\) The clause was in a pre-printed form contract for which Stewart did not negotiate and apparently had no power to alter.\(^5\)

The district court held that state law governed the question of the enforceability of a forum selection clause and consequently refused to enforce the clause.\(^6\) On interlocutory appeal, the United States Court of Appeals for the

\(^1\) Though the language of the opinion in *The Bremen* may have indicated a limited application of its holding, see supra notes 190-91 and accompanying text, the opinion was applied outside that context. See Gruson, supra note 6, at 149 ("Federal courts have universally agreed that the teaching of *The Bremen* is not limited to admiralty cases nor to cases involving the selection of a foreign forum but applies to all forum-selection clauses even if they select a domestic forum and even if they arise in a suit between parties of different states.").

\(^2\) See supra note 185 and accompanying text for a discussion of the "freely negotiated" language.

\(^3\) See Stewart, 779 F.2d at 644. The Court described Mr. Stewart, one of the two controlling figures of the closely held plaintiff corporation, as "a man afflicted with the Midas touch." Id. Mr. Stewart was attributed to having been involved in several ventures, each with multi-million dollar profits. Id. He had taken the local copying business that was the subject of this dispute from a "$750,000 indebtedness to sales of $1.8 million in one year." Id. Though multi-million dollar profits do not necessarily indicate sophistication in business matters, their existence would appear to make such a conclusion not unjustified.

\(^4\) See *The Bremen* v. Zapata Off Shore Co., 407 U.S. 1, 12 (1972) (courts should also consider whether clause was part of preprinted contract, whether parties had negotiated as to contract terms, and whether several companies had bid for contract). See supra note 185 and accompanying text for a discussion of the "freely negotiated" language.

\(^5\) See Stewart, 779 F.2d at 644-45 ("Mr. Bob Banks of Ricoh presented Mr. Stewart with a printed 'Dealer Sales Agreement'... Banks stated that the contract was standard and no changes of substance would be permitted, and he pushed Stewart to sign it so that Banks could catch his plane back to Atlanta. Stewart never did read the clause until his counsel pointed it out to him prior to this suit.").

\(^6\) Id. at 645. The district court also placed weight upon the fact that Stewart had brought additional claims that would not have been covered by the forum selection clause because such claims did not arise under the contract that contained the clause, but arose under federal law. Id. The Supreme Court viewed this issue somewhat differently, phrasing it in terms of an *Erie* problem. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988). That is, if state law were applied to the diversity claims requiring the clause to not be enforced under Alabama law, severance of the action would then be necessitated because the application of *The Bremen* standard to the federal question claims would have required the transfer of those claims to a Manhattan forum if the clause was enforced. This issue was not addressed by either the Supreme Court or the Eleventh Circuit for different reasons. The Eleventh Circuit treated the case as a diversity case, see Stewart, 779 F.2d at 647 (venue in diversity action is "manifestly" governed by federal law), while the Supreme Court viewed the issue as academic in light of its holding that the federal venue transfer statute governs the enforceability question. See *Stewart*, 487 U.S. at 20 (plain language of venue statute controls appli-
Eleventh Circuit reversed.\textsuperscript{217} The appellate court echoed the reasoning of past courts in regard to the ouster doctrine—enforcement of a forum selection clause does not oust jurisdiction but merely is a declination of jurisdiction.\textsuperscript{218} An Erie doctrine analysis then led the Eleventh Circuit to hold that enforcement was a matter of federal procedural law.\textsuperscript{219} The court applied the practical impairment formulation from \textit{The Bremen}, which had been termed "an exceptionally heavy burden," and held the clause to be reasonable.\textsuperscript{220} The Eleventh Circuit found that enforcement was prevented neither by a serious impairment to plaintiff of having to pursue litigation in Manhattan, nor by the lack of negotiation that is inherent in a pre-printed contract presented on a take-it-or-leave-it basis.\textsuperscript{221}

Upon rehearing \textit{en banc}, the Eleventh Circuit was badly divided.\textsuperscript{222} A majority of eight judges held that the Erie question was governed by federal law.\textsuperscript{223} Five judges dissented on this issue.\textsuperscript{224} The eight judge majority, however, was split as to what that federal law was.\textsuperscript{225} Five judges applied the severe impairment formulation of \textit{The Bremen},\textsuperscript{226} while three judges, concurring in the holding as to the Erie question, advocated for a standard of enforcement that harkened back to the forum non conveniens formulation of reasonableness.\textsuperscript{227} That is, these three judges proposed a standard that, though providing for enforcement of a forum selection clause, does not allow parties by contract to alter existing principles of procedure. Under this reasoning, the contract may be enforced, but only within the existing procedural framework by means of a motion

\textsuperscript{217} Stewart, 779 F.2d at 651.
\textsuperscript{218} See id. at 647 ("There is no question that Alabama courts have jurisdiction; the only question is whether they are the appropriate venue."). See \textit{supra} notes 141-45 and accompanying text for a discussion of the Supreme Court's treatment of the ouster doctrine.
\textsuperscript{219} Stewart, 779 F.2d at 647.
\textsuperscript{220} \textit{Id.} at 649.
\textsuperscript{221} \textit{Id.} at 649-50.
\textsuperscript{222} Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1067 (11th Cir. 1987) (eight to five decision) (per curiam), \textit{aff'd}, 487 U.S. 22 (1988).
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 1071 (Godbold, J., dissenting) (joined by Vance, J., Hatchett, J., Clark, J., and Edmondson, J.).
\textsuperscript{225} See \textit{id.} at 1067 (whether individuals can contractually alter forum discussed); \textit{id.} at 1071 (Tjoflat, J., concurring) (district court erred by not considering choice of forum clause).
\textsuperscript{226} See \textit{id.} at 1066-71 (\textit{per curiam}, joined by Roney, C. J., Hill, J., Fay, J., Johnson, J., and Tuttle, Senior J., applying \textit{The Bremen} test).
\textsuperscript{227} See \textit{id.} at 1071-76 (Tjoflat, J., specially concurring joined by Kravitch, J. and Anderson, J., applying reasonableness standard).

The commentators have not discussed the divergent approaches to the applicable standard for enforcement reflected in the majority and concurring opinions. Though one might not ordinarily expect discussion of a concurring opinion, in this instance it is crucial to an understanding of the Supreme Court's decision in \textit{Stewart}. The much criticized opinion of the Court largely adopts Judge Tjoflat's concurring opinion in the Eleventh Circuit. \textit{See Stewart}, 487 U.S. at 25 n.2 (citing \textit{Stewart}, 810 F.2d at 1071 (Tjoflat, J., concurring)). Most importantly, Judge Tjoflat's opinion answers many of the questions commentators have stated were left unanswered by \textit{Stewart}. \textit{See Stewart}, 810 F.2d at 1072 (Tjoflat, J., concurring).
to transfer pursuant to 28 U.S.C § 1404(a). The agreement of the parties is merely one factor to be considered in deciding the motion.

Judge Tjoflat, writing a specially concurring opinion, discussed several important conceptual points in regard to the ability of parties privately to reorder procedure. First, parties may not contractually confer jurisdiction upon a court in which jurisdiction would otherwise not be present. Judge Tjoflat recognized that acceptance of a derogation clause would not necessarily result in acceptance of a prorogation clause, as the differing contexts present very different questions as to the extent to which parties may contractually reorder procedural principles.

Second, Judge Tjoflat recognized that a forum selection clause does not oust a court of venue. Therefore, a plaintiff who signed a forum selection clause but filed suit in a forum other than the contractual forum is not subject to having the suit dismissed for improper venue if the selected venue is otherwise proper within the federal venue statute, 28 U.S.C. § 1392. Because venue is otherwise proper, the question of whether to enforce the forum selection clause becomes a question of whether the case should be transferred to the contractual forum pursuant to the federal venue transfer statute, 28 U.S.C. § 1404. Because § 1404 codifies the principles of the forum non conveniens doctrine with the mitigated consequence of transfer instead of dismissal, this approach is

228. Id. at 1072 (Tjoflat, J., specially concurring).
229. Id. at 1075 (Tjoflat, J., concurring) ("[J]ust as parties may not confer jurisdiction on an Alabama court, 'contract provision which attempts to limit the jurisdiction of the courts of this state are unenforceable.'" (quoting Redwing Carriers, Inc. v. Foster, 382 So. 2d 554, 556 (1980)).
230. Id. at 1073 (Tjoflat, J., specially concurring, joined by Kravitch, J. and Anderson, J.) (Northern District of Alabama constituted proper venue because Ricoh did business in that district as well as New York; district court, therefore, properly denied Ricoh's § 1406(a) motion to dismiss).
231. See supra notes 42-76 and accompanying text for a discussion of the reasoning that a forum selection clause does not oust a court of jurisdiction, which seems to be analogous to Judge Tjoflat's reasoning about venue ouster.
232. Stewart, 810 F.2d at 1074 (Tjoflat, J., specially concurring).
233. See 28 U.S.C. § 1404(a) ("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); see also 28 U.S.C. § 1404(a) revisor's note (statute drafted in accord with doctrine of forum non conveniens, allowing transfer to more convenient forum, although venue is proper).

Under the doctrine of forum non conveniens, even though venue is proper, a district court can dismiss an action if the forum in which the suit was filed was not considered to be appropriate based upon considerations of party and forum convenience. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-12 (1947) (suit dismissed where proper venue inappropriate based on location of witnesses and events leading to suit). Dismissal, however, can effectively prevent refiling if the statute of limitations has run. See Norwood v. Kirkpatrick, 349 U.S. 29, 31-32 (1955). The transfer provision of subsection 1404(a) mitigates against this harsh result by allowing a district court to transfer rather than dismiss the suit. Id. Therefore, transfer under § 1404(a) may be available upon a lesser showing than under the doctrine of forum non conveniens. Id. at 32. Because a district court can only transfer an action to another district court and cannot effectuate a transfer to a state or foreign court, the doctrine of forum non conveniens retains vitality in those situations. See generally Hon. Irving R. Kaufman, Observations on Transfers Under Section 1404(a) of the New Judicial Code, 10 F.R.D. 595, 600 (1951) (§ 1404(a) does not replace forum non conveniens when foreign litigants are involved since it only applies to transfers to district courts); Herbert J. Korbel, The Law of Federal
directly analogous to the forum non conveniens formulation of "reasonableness" developed by earlier courts. Both avenues of analysis provide for the exercise of judicial discretion in weighing factors of party convenience, availability of evidence, etc. in determining the appropriate forum for litigation. This stands in sharp contrast to The Bremen standard, in which the forum agreement of the parties obviated the need for judicial discretion in determining enforcement, except in a few very limited areas, mostly related to contract formation considerations.

Third, Judge Tjoflat concluded that a forum selection clause has no effect on other principles of procedure and is simply a venue fixing device. Judge Tjoflat discussed at some length that choice of law principles remain intact.

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*Venue and Choice of the Most Convenient Forum*, 15 Rutgers L. Rev. 607, 611-12 (1961) (§ 1404(a) applies only when there are at least two district courts in which venue would be proper); Richard S. Mattingly, *Venue in the Federal Courts - The Problem of the Inconvenient Forum*, 15 Miami L. Rev. 237, 239 (1961) (forum non conveniens still has vitality when more convenient forum lies in state or foreign court); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 Notre Dame L. Rev. 443 (1990); *Note, Transfer of Civil Actions Under 28 U.S.C. § 1404(a)*, 36 Ind. L.J. 344, 347 (1961) (district court may dismiss suit under forum non conveniens when there is no other federal district court to transfer to).

There is one other important difference between a § 1404(a) transfer and a forum non conveniens dismissal. When an action is transferred, the transfer only changes the place of the trial; choice of law considerations are not affected. See infra notes 238-39 and accompanying text for a discussion of choice of law considerations in a § 1404(a) transfer. Therefore, when a defendant seeks a transfer, the court to which an action is transferred (the transferee court) applies the law that would have been applied in the court from which the action was transferred (the transferor court). Van Dusen v. Barrack, 376 U.S. 612, 639-40 (1964); see also John D. Currien, *Note, Choice of Law in Federal Court After Transfer of Venue*, 63 Cornell L. Rev. 149, 163 (1977); *Note, Choice of Law After Transfer of Venue*, 75 Yale L. J. 90, 130-37 (1965). This general rule equally holds true in situations where the plaintiff seeks the transfer. See Feren v. John Deere Co., 494 U.S. 516, 521-32 (1990) (transferee court must apply law of transferor court regardless of who initiates transfer). But see Ursula Marie Henninger, *Note, The Plaintiff's Forum Shopping Gold Card: Choice of Law in Federal Courts After Transfer of Venue Under Section 1404(a) - Ferens v. John Deere Co., 26 Wake Forest L. Rev. 809, 825 (1991) (Feren decision overly generous to plaintiffs and encourages forum shopping); Michael B. Rodden, *Comment, Is 28 U.S.C. § 1404(a) a Federal Forum-Shopping Statute?*, 66 Wash. L. Rev. 851, 870 (1991) (law of transferee court should apply to plaintiff-initiated transfer); Candace J. Smith, *Note, Plaintiff-Initiated Transfers Under 28 U.S.C. § 1404(a) - The Solution to the Van Dusen v. Barrack Mystery: Feren v. John Deere Co., 19 N. Ky. L. Rev. 171, 193, 207 (1991) (Feren goes against history and intent of federal courts' role in adjudicating diversity cases).

234. See supra notes 82, 86-96 and accompanying text for a discussion of the forum non conveniens formulation of reasonableness in determining the enforcement of a forum selection clause.

235. See supra notes 19, 86-89 and accompanying text for a discussion of the forum non conveniens and § 1404(a) factors that courts consider in determining the appropriate forum.

236. See supra notes 181-91 and accompanying text for a discussion of the presumption of validity of forum selection clauses unless contract formation is invalid.


238. See id. at 1072 (Tjoflat, J., specially concurring). For discussion of choice of law questions that are raised by the existence of a forum selection clause, see, e.g., Borchers, supra note 6, at 78-81 (choice of law discussed with regard to many cases, including when forum selection clause is accompanied by choice of law clause); Freer, supra note 202, at 1134-39; Gruson, supra note 6, at 185-92 (choice of law question may depend on where suit filed, whether court views it as matter of proce-
Although the clause may specify a forum other than that in which the action is filed, the choice of law rules of the forum state will be applied in both the forum state and the contractual state if the case is transferred.239

Together, Judge Tjoflat's conclusions form a very different conceptual view of the forum selection clause from that of The Bremen. According to Judge Tjoflat, although parties may contract as to the appropriate venue of an action, the enforcement of that agreement is subject to judicial discretion that considers the convenience of the parties and the interests of justice. The parties may not create jurisdiction where it otherwise would not exist and may not alter other related principles of procedure.

Unfortunately, Judge Tjoflat did not explain why The Bremen did not have to be followed.240 The concurrence suggests that the defendant's choice of seeking enforcement by a transfer motion implicates this reconceptualization of the forum selection clause.241 This attempt at distinguishing Stewart from The Bremen would lead to being ignored easily by litigants. If the effect of a forum selection clause were dictated by the defendant's choice of enforcement mechanism, no defendant would seek enforcement by a transfer motion because enforcement would be less likely than under the view of The Bremen.242 Judge Tjoflat's reasoning, however, would make a transfer motion the only method of seeking enforcement in a derogation context; because the clause itself does not make venue in a noncontractual forum improper, the existence of the clause is not grounds for dismissal for improper venue.243 Also, the reasoning under which the ouster doctrine was previously held not to be an obstacle to forum selection clause enforcement necessitates that an action not be dismissed for lack of jurisdiction.244

As to the Erie question, the concurrence held that, although enforcement of the clause was a question of federal law within the auspices of the transfer of venue statute, state law would govern whether the clause should be given effect...
in considering the defendant's transfer motion. Judge Tjoflat disagreed with the majority, however, as to the proper rule in Alabama. It was his view that Alabama law did not prohibit enforcement.

Judge Tjoflat's concurrence reasoned that the existence of a valid forum selection clause altered the discretion to transfer under § 1404(a) because it "creates a conclusive presumption" as to the lack of inconvenience in the contractual forum. This presumption then operates to shift the burden in a transfer motion to the party opposing the motion—the plaintiff who has filed in the non-contractual forum. Judge Tjoflat argued that plaintiff had not carried the burden, and, therefore, the action should be transferred to the contractual forum.

Thus, in its consideration of Stewart, the Supreme Court was faced with the Erie question of whether to apply state or federal law in determining the enforcement of the forum selection clause and with the court of appeals' divided view as to whether the applicable source of federal law was common law developed in The Bremen or the federal venue transfer statute. The Court adopted the reasoning of Judge Tjoflat's concurrence and held that the transfer of venue statute governed the question of enforcement. By adopting this reasoning, the Court surely must have adopted the same conceptual view of forum selection clauses generally. Unfortunately, the Court did not explain its view with the clarity of Judge Tjoflat.


246. Id. at 1075-76 (Tjoflat, J., specially concurring).

247. Id. at 1074 (Tjoflat, J., specially concurring).

248. Id. at 1075 (Tjoflat, J., specially concurring).

249. Judge Tjoflat's discussion concerning the shifting of the burden sounds very similar to The Bremen's discussion concerning the prima facie validity of a forum selection clause and the very heavy burden borne by the party opposing enforcement of the clause. See supra notes 176-91 and accompanying text for a discussion of The Bremen approach to enforcing forum selection clauses. This similarity weakens the attempt at formulating a conceptual view different from that of The Bremen.

Additionally, a conclusive presumption as to the convenience of the contractual forum is in error for several reasons. First, convenience in terms of § 1404(a) includes convenience of both the parties and witnesses. See 28 U.S.C. § 1404(a) (transfer evaluated in light of convenience of parties and witnesses). Though a party may be bound as to its own convenience, that party cannot anticipate what will be convenient to the witnesses. Second, even if a forum selection clause did create a conclusive presumption as to convenience of the contractual forum, it does not necessarily follow that the burden is shifted in a § 1404(a) motion. There are factors considered other than convenience, such as the interest of justice. Third, if a presumption is created, it should be rebuttable. There can be many intervening factors between the entering and enforcement of a forum selection clause, such as availability of evidence and witnesses, that could render a forum extremely inconvenient although it did not seem so earlier. Fourth, if the choice of forum by a plaintiff in filing an action does not create a conclusive presumption as to convenience, why should the earlier event of agreeing to a forum selection clause be a conclusive presumption? Cf. Friedenthal, supra note 9, § 2.17, at 93 (transfer under § 1404(a) is available to plaintiff and defendant alike).

249. Stewart, 810 F.2d at 1075 (Tjoflat, J., specially concurring).

250. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 1, 25 n.2, 28 (1988) (federal law governs venue dispute under § 1404(a)).

251. Id. at 32.
The lack of conceptual clarity in the Supreme Court's opinion arises because the Court did not address whether a forum selection clause confers jurisdiction upon a court, or whether a forum selection clause alters choice of law considerations. These two omissions led to much discussion by commentators that the related issues were unresolved. Though the Court did not directly discuss the jurisdictional aspects of a forum selection clause, it would seem that by holding that forum selection clause enforcement was a venue question governed by the transfer of venue statute, the Court strongly implied that a forum selection clause simply is a matter of venue and is not jurisdictional in any sense.

The Court discussed that a forum selection clause does not operate to effect an ouster of venue from a noncontractual forum, but the discussion was placed inconspicuously in a footnote and rather vaguely explained. This conceptual view that a forum selection clause does not cause otherwise proper venue to be improper appears to have gone unnoticed, because after Stewart, courts held that when a defendant seeks enforcement of a forum selection clause by means other than a § 1404(a) transfer motion, such as a motion to dismiss for improper venue, the holding of Stewart need not be followed. The point in Stewart has

252. See supra notes 158-67 and accompanying text for a discussion of the inability of forum selection clauses to confer jurisdiction on a court.

253. See supra notes 238-39 and accompanying text for a discussion of how forum selection clauses have no effect on choice of law considerations.

254. See infra notes 390-93 and accompanying text for a discussion of the unresolved issues with respect to forum selection clauses.

255. As in The Bremen, Stewart dealt with enforcement of a derogation clause. Therefore, the question of whether a forum selection clause confers personal jurisdiction was not before the Stewart Court, as it was not in The Bremen. See supra note 161 and accompanying text.

256. Some commentators have called for a merger of the concepts of personal jurisdiction and venue into one doctrine. See, e.g., Kevin M. Clermont, Restating Territorial Jurisdiction and Venue for State and Federal Courts, 66 CORNELL L. REV. 411, 437 (1981) (reasonableness of jurisdiction and fairness of venue represent same constitutional concept and should be merged); Albert A. Ehrenzweig, From State Jurisdiction to Interstate Venue, 50 ORE. L. REV. 103, 107 (1971) (state jurisdiction must yield to interstate venue thereby safeguarding defendants procedural rights); David L. Seidelson, Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions, 37 GEO. WASH. L. REV. 82, 100 (1968) (venue statutes restrict personal jurisdiction and should be eliminated to allow plaintiff to choose forum). Nevertheless, venue and personal jurisdiction remain separate and independent requirements each of which must be satisfied if suit is to be maintained in specific forum.

257. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 n.8 (1988) ("The parties do not dispute that the District Court properly denied the motion to dismiss for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama."); see also 28 U.S.C. § 1391(c) (venue proper in judicial district where corporation is doing business). One must reason by implication that the forum selection clause does not oust venue from the fact that a motion to dismiss for improper venue is properly dismissed if the plaintiff has filed in a forum within the general venue statute, 28 U.S.C. § 1391, even though the venue is other than specified in the forum selection clause.

But see Freer, supra note 202, at 1118 ("Giving complete effect to the parties' selection would lead to the conclusion that only the parties' contractual choice was proper [venue].").

258. See infra note 318 and accompanying text for a discussion of courts that failed to follow Stewart in contexts other than a § 1404(a) transfer.
been missed that if venue cannot be ousted, venue in a noncontractual forum is not improper if other venue requirements are met. Therefore, a transfer motion is the only proper method of enforcing the clause, and Stewart should be controlling in any action to which the transfer of venue statute is applicable.259

The question then to be addressed is, can Stewart and The Bremen be reconciled, or did Stewart overrule The Bremen? The Stewart Court appears to have distinguished The Bremen because it was an action in admiralty.260 Nevertheless, considering that the Federal Rules of Civil Procedure and the Federal Judiciary Act are applicable to actions in admiralty, this distinction does not appear meaningful.261 Therefore, a forum selection clause specifying a district court other than that in which an action in admiralty has been filed should be enforced pursuant to § 1404(a). The ability of federal courts to develop federal common law in admiralty actions does not include the ability to supersede a federal rule or statute. If the contractual forum did not include a district court, then § 1404(a) would not be applicable,262 but the reasoning of Stewart would imply that enforcement should be considered under the common law doctrine of forum non conveniens.263

Distinguishing The Bremen as an international admiralty action is logically inconsistent with Stewart. The Bremen standard is much broader, requiring enforcement in all but a few limited areas.264 The Stewart standard is narrower, allowing for judicial discretion to balance transfer of venue considerations in determining enforcement. The remedy sought is only transfer of the action in the Stewart approach, while the harsher remedy of dismissal is that which is sought in The Bremen approach.265 While it would seem that the narrower Stewart standard should apply to the stricter remedy, the opposite is the case when one standard is utilized in admiralty, and one standard is utilized in diversity. Attempting to distinguish The Bremen instead of overruling it leads to that logically inconsistent result. Nevertheless, the Court did not overrule The Bremen and apparently was content with its attempt to distinguish it.266

259. But see Mullenix, Consensual Adjudication Procedure, supra note 6, at 338 (narrowest reading of Stewart suggests that it only applies in diversity cases when issue involves § 1404(a) transfer motion).

260. See Stewart, 487 U.S. at 28, 29 (The Bremen instructive in resolving parties' dispute, even though it involved question of admiralty jurisdiction, but main issue is whether § 1404(a) controls enforcement of forum selection clause).


262. See supra note 233 and accompanying text for a discussion of the requirements of § 1404(a).

263. See supra note 233 and accompanying text for a discussion of the doctrine of forum non conveniens and of § 1404(a) which require analogous considerations of whether judicial discretion should be exercised in dismissing or transferring an action respectively.

264. See supra notes 176-91 and accompanying text for a discussion of The Bremen standard and its limitations.

265. See supra notes 233-36 and accompanying text for a discussion of the divergent remedies in Stewart and The Bremen.

266. Though the approach to the question of enforcement is very different, four justices who were in the majority in The Bremen, White, Marshall, Blackmun and Rehnquist, were also in the
The essence of the conceptual difference between *Stewart* and *The Bremen* lies in the discretion afforded the trial judge under § 1404(a) to determine whether enforcement would be fair. Though a clause may be considered valid and, therefore, enforceable under the contract formation standard of *The Bremen*, it may not necessarily be enforced under the *Stewart* standard due to considerations of fundamental fairness as expressed in § 1404(a). Under *Stewart*, therefore, a court may consider the relative bargaining power of the parties in regard to fairness in addition to a consideration of contract formation. *Stewart*'s view of forum selection clause enforcement is the exact view that Bergman argued in 1960 was intended by Judge Hand's *Krenger* dicta.

*Stewart* and *The Bremen* thus represent contrasting views of the extent to which parties may privately reorder principles of procedure. *Stewart* allows private ordering subject to fairness principles, while *The Bremen* allows parties to...
reorder procedure with only a few limited exceptions. Not only does the *Stewart* view provide for greater protection to the parties, it also resolves many of the conceptual difficulties that have arisen in forum selection clause litigation—that is, if one accepts that the majority shared Judge Tjoflat's view that a forum selection clause does not affect procedural principles in terms of conferring jurisdiction, ousting venue, or reordering choice of law issues.270

B. How Much of a Conceptual Change?

How far *Stewart's* redefined conceptual view of forum selection clauses extends would have been answered in a question that, unfortunately, was not presented factually to the Court.271 That is, may parties by contract confer venue on a forum where it would not otherwise be present? Pursuant to § 1404(a), an action may be transferred to "any other district or division where it might have been brought."272 An interesting question surfaces which, depending upon its answer, would go far to explain the extent of *Stewart's* concept of the forum selection clause and the ability of parties to reorder principles of procedure: may a contractually specified forum that would not be appropriate venue for the action pursuant to the general venue statute273 be considered by a court "where [the action] might have been brought" as a result of the forum selection clause? If the answer is yes, a forum selection clause is not limited by the applicable venue statute. If the answer is no, the ability of parties to reorder procedure by means of a forum selection clause is sharply curtailed. Parties would be able to contract among themselves for the selection of venue only from among those provided by statute. Though considerably narrowing the possible scope of a forum selection clause, this limitation would help ensure an element of fairness by allowing a transfer only to a court that Congress has statutorily determined to be an appropriate forum for the particular action.

In *Hoffman v. Blaski*,274 the Court held that the phrase "might have been brought" did not include a district where venue was not proper within the general venue statute, but where defendant had moved to have the action transferred and would consent to venue.275 The Court stated that the "power of a

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270. See infra notes 390-92 and accompanying text for a discussion of how the related issues are resolved.

271. See *Stewart*, 487 U.S. at 24, n.1 (forum selection clause in question specified contractual forum as borough of Manhattan). Venue was appropriate in the Southern District of New York, within which the borough of Manhattan is located, because Ricoh maintained its corporate headquarters there. See 28 U.S.C. § 1391(c) (venue proper where corporation conducts business).


275. Id. at 342-43. For discussions criticizing this decision, see, e.g., Michael J. Waggoner, *Section 1404(a), "Where It Might Have Been Brought": Brought By Whom?*, 1988 B.Y.U. L. REV. 67, 75 (1988) (better interpretation of where action might have been brought is in any district where party seeking transfer might have brought it); Wayne Emery, Comment, *District Court May Not Transfer Civil Action on Defendant's Motion to Another District or Division if Defendant Could Have Objected to Venue or Avoided Service, Had Action Been Brought There Originally*, 49 GEO. L. J. 765, 768 (1961) (*Hoffman* interpretation frustrates fundamental purpose of § 1404(a)); Comment, *Mean-
district court under § 1404(a) to transfer an action is made not to depend upon the wish or waiver of the defendant . . . ."276 Hoffman recognized the distinction between a defendant waiving an objection to improper venue by not raising it and a defendant creating venue by consent where it otherwise was not proper. Consequently, the Court held that the ability of a party to do the former was not authority for the latter.277

Perhaps as often as the false axiom that parties may contractually consent to jurisdiction is stated, it is also stated that parties may contractually consent to venue.278 But as with the erroneous view of personal jurisdiction where the concepts of procedural waiver and procedural consent are improperly equated, so too is the case with venue. Two cases, Commercial Casualty Insurance Co. v. Stone Co.279 and Neirbo Co. v. Bethlehem Corp.,280 are most often cited for the proposition that venue can be created by consent,281 yet neither actually reached that holding. Commercial Casualty dealt with waiver, often confused with consent,282 and held that a party waives an objection to improper venue by not raising the objection in a timely fashion.283 Neirbo, on the other hand, addressed submission to existing authority of a court through designation of an agent, holding that such designation of an agent for service of process within a state satisfies venue requirements.284 As with Szukhent in the personal jurisdiction context, submission to existing court power must be distinguished from con-
tracting to create a power where it otherwise would not be present.285 Thus, neither Neirbo nor Commercial Casualty held that a contractual provision alone may directly confer venue upon a court.286

Construing Stewart and Hoffman together, therefore, leads to the conclusion that a forum selection clause does not render venue improper in other than the contractual forum.287 Therefore, a clause may be enforced only by means of the transfer of venue statute which injects trial court discretion to ensure fundamental fairness.288 If enforcement is sought, it may only be to a forum where venue is proper within the meaning of the applicable venue statute.289 This view of the forum selection clause is much more narrow than The Bremen view, but it supports the view of courts that construed reasonableness prior to The Bremen according to the forum non conveniens formulation.

C. A Chorus of Critics

That the Stewart decision was not well received is an understatement of monumental proportions. It has been criticized by commentators with a near uniform voice,290 and most often misapplied or ignored by courts.291 The crit-

285. See supra notes 168-74 and accompanying text for a discussion distinguishing the concepts of procedural waiver and procedural consent.

286. Hoffman cited two other cases, however, for the proposition that venue may be conferred upon a district court by consent. Hoffman v. Blaski, 363 U.S. 335, 360 (1960) (Frankfurter, J., dissenting) (citing General Inv. Co. v. Lake Shore Ry. Co., 260 U.S. 261 (1922); Lee v. Chesapeake & Ohio Ry., 260 U.S. 653 (1922)). Both cases address different issues of whether a defendant may remove an action from a state court to a district court where venue would not have been proper if the suit had originally been brought there. Holding that a defendant may do so, the Hoffman Court relied upon the principle that venue is a “personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming the privilege.” General Inv. Co., 260 U.S. at 272 (citations omitted). These cases, however, do not represent a consent situation. Instead, the defendant is waiving his or her objection by appearing in the state court action and seeking removal to the district court.

287. See supra notes 271-77 and accompanying text for a discussion of the Stewart and Hoffman views on venue in noncontractual forums.

288. See supra notes 267-69 and accompanying text for a discussion of the court’s discretion under the transfer of venue statute when used to consider enforcement of a forum selection clause.

289. See supra notes 271-87 and accompanying text for a discussion of the appropriate venue when enforcing forum selection clauses under Stewart and Hoffman.

290. See, e.g., Borchers, supra note 6, at 70-71 (criticizing Stewart because it “failed to clarify the Court’s position on forum selection agreements”); Freer, supra note 202, at 1128-31 (criticizing Erie doctrine analysis of Stewart and use of § 1404(a), as opposed to § 1406(a), as appropriate procedural mechanism by which to transfer action for purposes of forum selection clause enforcement); Mullenix, Consensual Adjudicatory Procedure, supra note 6, at 337-39 (criticizing Stewart for its approach to Erie question, for “missing a number of nagging problems”); Lederman, supra note 31, at 467 (primarily discussing court’s Erie analysis and arguing that Stewart was decided wrongly and that standard for enforcement from The Bremen should be applied in every situation). But see Buckingham, supra note 202, at 1431-33 (praising decision for giving discretion to district courts to enforce forum selection clauses on case-by-case basis and thereby promoting “interest of justice” goal of § 1404(a)).

291. The decision in Stewart has been misinterpreted by courts in a variety of ways. Courts have failed to recognize that under the Stewart view, venue in the forum of filing is not rendered
cism stems, in large part, from a failure to recognize that *Stewart* constituted a major conceptual change in viewing the forum selection clause. Nowhere is that failure more clearly manifested than in the treatment of *Stewart* upon remand.\(^2\)

The district court, although having previously applied Alabama law in holding the clause unenforceable, upon remand considered the issue under federal law.\(^2\) Judge Acker first addressed the question of whether the forum selection clause shifted the burden of proof in a §1404(a) transfer motion from the movant to the party seeking to avoid enforcement of the clause.\(^2\) Though Judge Tjoflat's special concurrence, much of which the *Stewart* majority had adopted, had argued for such a shift in the burden,\(^2\) the Supreme Court in *Stewart* did not directly address the question of burden shifting. Judge Acker reasoned that the burden did not shift from the moving party because of the forum selection clause.\(^2\) He then considered the private interests of availabil-

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improper by a contractual designation of a different forum, and, therefore, that §1404(a) is the only proper procedural mechanism for enforcement. Additionally, such courts have held that when enforcement is sought by a procedural mechanism other than §1404(a) *Stewart* is not applicable. See, *e.g.*, Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 512 n.2 (9th Cir. 1988) (*Stewart* not applicable when motion to dismiss involved); Crescent Int'l, Inc. v. Avatar Communities, 857 F.2d 943, 944 (3rd Cir. 1988) (*Stewart* not applicable when motion to transfer is not involved).

Similarly, courts have applied *The Bremen* instead of *Stewart* when enforcement is sought by a means other than §1404(a) even though the contractual forum is one to which the action could be transferred, without discussion as to why *Stewart* is not applicable. See, *e.g.*, Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 763 (9th Cir. 1989) (citing *The Bremen* for rule that forum selection clause is valid unless enforcement is unreasonable).

Though *Stewart* did not address who bears the burden in an action seeking forum selection clause enforcement, one could reasonably infer that such lack of discussion indicates that the usual burden in a transfer motion remains with the party seeking the transfer. After *Stewart*, however, courts have held that a forum selection clause operates as a party's waiver of a claim of inconvenience in the contractual forum. This approach goes beyond a shifting of the burden in transfer motions, by creating an irrebuttable presumption as to the convenience factor of the enforcement by means of transfer calculus. The presumption harkens back to the prima facie enforcement approach of *The Bremen*. See, *e.g.*, Heller Fin. Inc. v. Midway Powder Co., Inc., 883 F.2d 1286, 1293 (7th Cir. 1989) (forum selection clause operates as waiver of defendant's right to argue that noncontractual transferee forum is inconvenient when action is filed in contractual forum).

\(^{292}\) The *Stewart* Court remanded the action so the district court could determine the appropriate effect of the parties' forum selection clause under federal law on the §1404(a) motion. *Stewart* Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988). Subsequently, the United States Court of Appeals for the Eleventh Circuit remanded the matter to the district court for consideration of defendant Ricoh's §1404(a) motion to transfer the action to the Southern District of New York as designated in the forum selection clause. *Stewart* Org., Inc. v. Ricoh Corp., 855 F.2d 762, 762-63 (11th Cir. 1988) (per curiam).


\(^{294}\) *Id.* at 586.

\(^{295}\) See *supra* notes 247-49 and accompanying text for a discussion of Judge Tjoflat's analysis of the relative burdens in the enforcement of a forum selection clause.

\(^{296}\) *Stewart*, 696 F. Supp. at 580. Judge Acker reached this holding by first distinguishing *The Bremen* on the basis of its being an international contract. *Id.* He then followed the *Stewart* language that the clause should receive "neither dispositive consideration . . . nor no consideration" and treated the clause as a factor upon which the moving party can rely in a §1404(a) motion. *Id.* at 587. Though it does not operate to shift the burden on the motion, the forum selection clause factor
ity of witnesses and documents, finding both to be more readily available in Alabama. Judge Acker similarly determined that the public interests of the closer connection of Alabama to the suit, as well as the fact that Alabama law would be applied to most, if not all, of the issues presented weighed in favor of Alabama as the proper forum. Reasoning that the plaintiff’s choice of forum should be afforded deference and that the defendant had not carried its burden of establishing that a transfer was warranted, the district court exercised its discretion under § 1404(a) and denied the motion to transfer the case to the contractually specified forum. The district court directly followed the Supreme Court’s holding in Stewart and its very different view of the forum selection clause as compared to The Bremen.

Upon petition for a writ of mandamus to compel the district court to transfer the action to the contractual forum, the Court of Appeals ignored the majority opinion in Stewart and granted the petition. Without even attempting to explain why it did not have to follow the majority opinion in Stewart, the court of appeals cited its earlier opinion in Stewart and the concurrence of Justice Kennedy in Stewart to support its holding that no deference should be afforded to plaintiff’s choice of forum and that the venue directed by a forum selection clause will rarely be outweighed by other § 1404(a) considerations. This reasoning was a return to The Bremen and represents an inexplicable attempt by a circuit court to ignore the Supreme Court's reasoning.

is not without consequence for it does weigh toward the transfer to the contractual forum. Id. Finally, he reasoned that the silence of the Supreme Court on the issue meant that no shift of the burden had occurred. Id. at 586-87.

297. Id. at 588-90.
298. Id. at 590-91.
299. Id.
300. In re Ricoh Corp., 870 F.2d 570 (11th Cir. 1989) (per curiam).
301. Id. at 573 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) and Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1075 (1987)). See Stewart, 487 U.S. at 33 (Kennedy, J., concurring) (question of whether to transfer case pursuant to § 1404(a) should be determined by use of enforcement standards of The Bremen). As discussed, the enforcement standards of The Bremen differ significantly from those of a § 1404(a) transfer. That fact makes Justice Kennedy’s concurrence quite perplexing. He apparently viewed the existence of a forum selection clause to obfuscate the usual factors of, for example, convenience and fairness, to be considered in a transfer motion. Under this view, § 1404(a) is merely a vehicle to accomplish a task automatically, and such an application is bereft of any discretion by the trial court.
302. In re Ricoh Corp., 870 F.2d at 573.
303. Id.
304. See Stewart, 487 U.S. at 25 (“The Court of Appeals then applied the standards articulated in the admiralty case of The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).... We now affirm under somewhat different reasoning.”). The Eleventh Circuit, however, acknowledged The Bremen considerations, finding that there was no fraud and that the contract had been negotiated by experienced business persons. Stewart, 310 F.2d at 573-74. This reasoning is exactly the same as that which the court of appeals had previously utilized, and from which the Supreme Court had chosen to differ.

Later that same year, Judge Acker was again confronted with the question of enforcement of a forum selection clause. With either great courtesy or diplomacy, he stated that the Eleventh Circuit had earlier "misread" the majority opinion in Stewart. Stewart v. Dean-Michaels Corp., 716 F. Supp. 1400, 1402 (N.D. Ala. 1989). Although he believed that in the case before him, the applica-
While courts have either ignored or not appreciated the holding of Stewart, commentators have criticized the decision. The criticism stems from a less than full appreciation of the shift in the conceptual view of forum selection clauses manifested in the opinion. Echoing Justice Scalia’s dissenting opinion, commentators have decried the Stewart majority’s phrasing of the Erie question, as whether a federal rule or statute covered the issue, as compelling the conclusion that federal law must control. Justice Scalia agreed that whether § 1404(a) governed the issue was the starting point of the relevant inquiry, but disagreed with the majority about what the inquiry actually was. Justice Scalia framed the inquiry as what law should be applied to determine the “validity” of the clause in question. The majority viewed the issue as whether the clause should be enforced; that is, whether the clause should compel the transfer of the action. Under The Bremen’s view of forum selection clauses, in most instances, validity compels transfer because parties are able to privately order procedure with little or no interference by the courts. Under the Stewart view, enforcement does not necessarily follow from a contractually valid clause because the other § 1404(a) factors are also considered, possibly preventing enforcement.

The majority’s framing of the Erie issue as whether § 1404(a) controlled the transfer question was not an evasion of the true issue. Instead, it was a major shift in the conceptualization of what a forum selection clause is. The majority relegated the forum selection clause to a factor within the existing procedural framework. Justice Scalia disagreed with the reconceptualization because he did not agree that § 1404(a) factors should be utilized to determine the question of enforcement to ensure that the “interest of justice” is served. Further, he did not agree that the question of enforcement should include considerations of “the
bargaining power of the parties and the presence or absence of overreaching. . . ." He preferred to retain The Bremen's conceptualization of forum selection clauses under which parties may privately order the procedural operation of disputes outside the constraints of the existing procedural framework. Because Justice Scalia viewed there to be no inquiry other than contract validity, it is in fact he who framed the issue so as to compel the answer that state law should control the question of enforcement of a forum selection clause because enforcement becomes merely a contract question.

In contrast, the answer that federal law controls is not necessarily compelled by the Erie question under the majority's conceptualization. Judge Tjoflat, in his special concurrence, took the same conceptual view as the Stewart majority, yet he reached the opposite conclusion. He opined that state law should be considered to determine whether a clause is valid and, therefore, is a factor to be considered in a § 1404(a) analysis of whether to enforce a forum selection clause. The Stewart majority disagreed, apparently based upon the desirability of uniform federal consideration of forum selection clauses, but that conclusion was not necessitated by the manner in which the issue was framed. The framing of the issue was compelled by the conceptual shift.

Commentators have also criticized the Stewart opinion for leaving issues unanswered. Most commonly, the criticism revolves around the question that would arise if a party sought to enforce a forum selection clause by a procedural mechanism other than a § 1404(a) transfer in a suit brought in a forum other than the contractual forum. Several courts have not applied Stewart's holding when the defendant has sought enforcement by a procedural mechanism.

313. Id. at 34-35 (Scalia, J., dissenting).
314. See supra notes 229-51 and accompanying text for a discussion of Judge Tjoflat's concurrence.
315. See supra notes 245-46 and accompanying text.

This issue apparently is diminishing in importance as the number of states that view clauses as invalid is decreasing. For example, Missouri recently changed its position from invalidity to validity. High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 504 (1992). See de By, supra note 202, at 1071 (in Alabama, Georgia, Missouri, and Texas, forum selection clauses are void as contrary to public policy). Perhaps these few hold-out states will follow the trend toward recognizing forum selection clauses as valid.

317. See, e.g., Borchers, supra note 6, at 70-71 (questions which law applies to non-admiralty case where enforcement sought by means other than § 1404(a) transfer motion, whether procedural mechanisms besides § 1404(a) are available to enforce clause, and why forum selection clause is afforded less weight when transfer is sought under § 1404(a) rather than by other procedural means); de By, supra note 202, at 1074-76 (Stewart limited to enforcement under § 1404(a); state law should be used to determine validity of clause when enforcement is sought by motion to dismiss for improper venue); Lederman, supra note 31, at 456-57 (better reading of Stewart would limit it to § 1404(a) motions, although unclear whether Stewart applies outside § 1404(a) context); Kornfield, supra note 31, at 191 (Stewart addressed the narrow issue of § 1404(a) motions to transfer, giving little guidance on the influence of forum selection clauses when enforcement is sought by motion to dismiss); Mullenix, Consensual Adjudicatory Procedure, supra note 6, at 338 (narrow reading of Stewart does not resolve Erie question of jurisdictional challenges, Rule 12(b)(6) dismissals, § 1406
other than a § 1404(a) transfer. This criticism and misapplication misses the point that Stewart viewed forum selection clauses very differently than had The Bremen. Under Stewart, forum selection clauses are narrowly interpreted as a reordering of venue only within the existing procedural framework. A clause does not render venue improper, deny a court jurisdiction, or confer jurisdiction on a court. Therefore, the only appropriate procedural mechanism for enforcement of a clause when plaintiff has filed in a noncontractual forum is a § 1404(a) transfer motion. Under Stewart, the clause does not render venue in a noncontractual forum improper because the clause does not reorder procedure.

Finally, Stewart has been criticized for injecting judicial discretion into the enforcement analysis because the opportunity for the exercise of discretion will result in increased litigation and unpredictability of result. Such criticism overlooks the fact that while predictability is a worthy goal of an adjudicatory system, it should not be pursued at the expense of fundamental fairness. A predictably unfair result is more damaging to the system than a result that, although not entirely predictable, is predicated on the discretionary consideration of fairness. The standard of enforcement and conceptual view of The Bremen achieves predictability by providing for enforcement in almost every situation. It was, however, predicated upon a freely negotiated exchange between sophisticated business persons. Removed from that context, as in Carnival Cruise Lines, Inc. v. Shute, the need becomes apparent for judicial discretion in the enforcement analysis to protect the interests of justice.

VI. AW SHUTE!: UNREASONABLE, UNBARGAINED, AND ENFORCEABLE

Because the Supreme Court had expressed two very different conceptual views of the forum selection clause in The Bremen and in Stewart, the question remained as to how and why the two differing conceptual views could exist si-

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318. See, e.g., Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) (Stewart's reasoning does not apply to motions to dismiss); Seward v. Devine, 888 F.2d 957, 962 (2d Cir. 1989) (applying The Bremen standards rather than Stewart analysis in enforcing forum selection clause by means of motion to dismiss for lack of subject matter jurisdiction); Manetti-Farrow v. Gucci Am., 858 F.2d 509, 512 n.2 (9th Cir. 1989) (Stewart analysis inapplicable because it involves motion to dismiss rather than to transfer venue).

319. See supra notes 271-89 and accompanying text.

320. See supra note 287 and accompanying text.

321. See, e.g., Freer, supra note 202, at 1126-27 (§ 1404 allows for discretion and thereby promotes unpredictability and increased litigation); Kornfeld, supra note 31, at 191 (because Stewart removes certainty of contracts, contracting parties lose predictability and certainty in their contractual relationship); Lederman, supra note 31, at 438 (Stewart affords district courts enormous discretion in deciding § 1404(a) motions based on forum selection clauses, eliminating predictability of weight to be afforded these clauses). But see Buckingham, supra note 202, at 1380 (praises Stewart for giving discretion to district courts to enforce forum selection clauses on case-by-case basis and promotes "interest of justice" goal of § 1404(a)).

322. See 28 U.S.C. § 1404(a) ("[T]he interest of justice, federal district court may transfer any civil action to any other district or division where it might have been brought . . . . ").
multaneously. In *Carnival Cruise Lines, Inc. v. Shute*, the Court had an opportunity to do a bit of conceptual sorting out, or at least a bit of distinguishing and reconciling. *Shute* presented the Court with a forum selection clause in an action in admiralty, thereby implicating the standard for enforcement of *The Bremen*. Nevertheless, the clause was in a domestic contract and specified a domestic forum, thereby implicating the enforcement standard of *Stewart* because the action could be transferred from the Western District of Washington to a district court in Florida. *Shute* presented a scenario that would seem to have forced the Court to distinguish or reconcile its two conflicting standards for enforcement, yet the *Shute* Court did nothing to clarify its previous divergent conceptual views of the forum selection clause. The Court merely applied the holding of *The Bremen*. In so doing, the court “refined” the reasonableness standard so as to remove any serious inquiry into questions of contract formation from the question of enforcement.

Additionally, the forum selection clause in question was presented in a derogation context, but the Court failed to mention that derogation and prorogation clauses were not to be considered in like fashion. Therefore, as *The Bremen* has been extended improperly to mean that parties may confer personal jurisdiction upon a court by a contractual clause and nothing more, so too might *Shute* be misconstrued to mean that a passenger ticket, and nothing more, can confer personal jurisdiction over the ticket holder. With *Shute*, private reordering of principles of procedure was brought back with a vengeance, and the dangers involved with that conceptual view of forum selection clauses became manifestly evident.

324. Id. at 1525.
325. Id. See supra notes 260-66 and accompanying text for a discussion of *Stewart*’s attempt to distinguish *The Bremen* as an action in admiralty.
327. See supra notes 260-66 and accompanying text for a discussion of why the reasoning of *Stewart* should apply equally to an admiralty action in which transfer could be sought to enforce the forum selection clause.
328. See supra notes 161-75 and accompanying text for a discussion of the Court’s analysis in *The Bremen* and its implications.
329. For discussion of the decision in *Shute*, see, e.g., Borchers, supra note 6, at 71-73 (*Shute* decision erodes *The Bremen* standard of reasonableness); Goldman, supra note 98, at 707-14 (*Shute* places heavy burden on consumers because it validates forum selection clauses in most consumer transactions); Mullenix, *Carnival Cruise Lines*, supra note 6, at 352-70 (*Shute* criticized for promoting use of adhesive forum selection clauses in consumer contracts); Solimine, supra note 2, at 52 (*Shute* illustrative of trend of courts to reject challenges to enforcement of forum selection clauses); Julie H. Bruch, Comment, *Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum*, 23 LOY. U. CHI. L.J. 329 345-48 (1992) (*Shute* decision left unanswered question as to whether courts should refuse to enforce forum selection clauses in adhesion contracts and favors business interests over consumer protection); see also Ganter, supra note 38, at 42-58 (general discussion of *Shute* case).
A. More Conceptual Murkiness

The forum selection clause considered in *Shute* was printed on the back of a passenger cruise ship ticket. 330 Russell and Eulala Shute had purchased tickets from a travel agent in their home state of Washington for a week long cruise aboard the *Tropicale*, a passenger ship owned by Carnival Cruise Lines. 331 After paying the travel agent for the tickets, who in turn forwarded the payment to Carnival Cruise Lines in Florida, the *Shutes* received their non-refundable tickets. 332 On the back of the tickets were twenty-five paragraphs of boilerplate terms. 333 The eighth paragraph contained a forum selection clause specifying that all disputes arising in connection with the ticket should be litigated exclusively in a court located in the State of Florida. 334

Two days into the cruise, when the *Tropicale* was in international waters, Mrs. Shute slipped, fell, and was injured. 335 Thereafter, she filed suit in the United States District Court for the Western District of Washington seeking to recover from Carnival Cruise Lines for her injuries. 336 Her complaint invoked the admiralty jurisdiction of the district court and alleged that “Carnival Cruise Lines was doing business in the Western District of Washington.” 337 Two of the nine affirmative defenses Carnival Cruise Lines raised in its answer became the focus of the action: a defense of lack of personal jurisdiction over the defendant because there was no connection between Carnival Cruise Lines and Washington; 338 and, that the forum selection clause required that the suit must be brought in a Florida court. 339 Though the ouster doctrine had long since been

330. *Shute*, 111 S. Ct. at 1536. It is of interest that the dissenting opinion of Judge Wisdom of the Fifth Circuit in *The Bremen*, adopted in large part by the Supreme Court, see *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972) (“[w]e hold, with the six dissenting members of the Court of Appeals”), recognized the troublesome nature of giving effect to a forum selection clause contained in a passenger ticket due to the adhesive nature of the contract. See In re Unterweser Reederei, GMBH Zapata Off-Shore Co. v. M/S Bremen, 428 F.2d 888, 906 n.25 (5th Cir. 1970) (to deny plaintiff his/her forum based on contractual stipulation may be good rationale to refuse to enforce forum selection clauses in travel tickets).
332. *Id*.
333. *Id.* at 1536-38.
334. *Id.* at 1536. The forum selection clause stated:
8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

*Id.*
335. *Id.* at 1524.
336. *Id*.
337. *Id*.
338. See Amended Answer of Defendant, at ¶ 9, Joint Appendix, Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991) (No. 89-1647) (“Carnival is a foreign corporation which is not doing business in the State of Washington and, therefore, this Court lacks jurisdiction over the person of defendant, Carnival.”).
339. See Amended Answer, ¶ 12 (“The Passenger Ticket Contract at paragraph 8 requires that all lawsuits brought against defendant Carnival must be filed with a court located within the State of Florida. Therefore, this court lacks jurisdiction over the person of defendant Carnival.”).
laid to rest, Carnival Cruise argued that the forum selection clause operated to deprive the court of personal jurisdiction over it and that the action should be dismissed or transferred to the Southern District of Florida pursuant to 28 U.S.C. § 1406.340

Nevertheless, because § 1406(a) applies only to actions filed in an improper venue, the defendant's affirmative defense based upon the forum selection clause must also have been intended to argue that the forum selection clause rendered venue improper. It is unclear from defendant's Answer and Brief to the Supreme Court whether the defendant's argument that venue was improper was based upon the forum selection clause or upon the allegation that defendant was not doing business in Washington.341 It is odd, however, that if venue for the action were improper under the venue statute that defendant did not seek dismissal for improper venue pursuant to Rule 12(b)(3),342 thereby sparing itself the forum selection clause problem and possibly the personal jurisdiction fight. Yet, Stewart held that a forum selection clause in a diversity action did not render improper venue that otherwise was proper.343 Though Stewart distinguished itself from The Bremen on the ground that The Bremen was an action in admiralty, there is no rational reason for holding that a forum selection clause in diversity does not render venue improper in a location other than the contractual forum, but that in admiralty it does. The fallacy of this distinction is particularly apparent when the noncontractual filing forum and the contractual forum are both district courts and transfer is available.

In short, the parties, primarily the defendant Carnival Cruise Lines, presented the forum selection clause issue to the district court in a conceptual haze. The defendant alleged that the forum selection clause deprived the court of personal jurisdiction, which was stated not to be doctrinally sound in The Bremen, and that it also deprived the court of venue, which was stated not to be doctrinally sound in Stewart.344 It is precisely this lack of conceptual clarity as to the appropriate basis for a moving party's forum selection clause objections, and the basis of the ruling of the court in question, that has brought total confu-


Pursuant to 28 U.S.C. § 1406(a), a court may transfer an action from a district court that does not have proper venue to a district court with proper venue even though the transferring court does not have proper jurisdiction over the parties. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962). Nevertheless, § 1406(a) does not provide for transfer on the basis of lack of personal jurisdiction.

341. See supra notes 338-40 and accompanying text for a discussion of defendant's answer and brief to the Supreme Court. The general venue statute effective at the time that the action was filed provided for venue over corporations where a corporation "is doing business." 28 U.S.C. § 1391(c), Act of June 25, 1948, 62 Stat. 935.


343. See supra notes 257-59, 271-89 and accompanying text for a discussion of the Stewart holding regarding improper venue.

344. The brief to the Supreme Court of Carnival Cruise Lines was primarily devoted to the personal jurisdiction question. See Mullenix, Carnival Cruise Lines, supra note 6, at 338 n.81 (forum selection clause given relatively little weight in Supreme Court briefs). Also, the argument in regard to the enforcement of the forum selection clause did not address what enforcement means. For instance, is personal jurisdiction lacking, is venue improper; should jurisdiction be declined?
sion to the consideration of forum selection clauses. Unfortunately, the Shute decision did nothing to resolve this confusion.

The district court did not consider the question of the forum selection clause, but instead held that Carnival Cruise Lines did not have sufficient minimum contacts with Washington to sustain the exercise of personal jurisdiction by the district court in Washington over Carnival Cruise Lines. The Ninth Circuit reversed on the personal jurisdiction question, finding that Carnival Cruise Lines had sufficient contacts to sustain personal jurisdiction. The court of appeals then turned its attention to the question of the forum selection clause even though the district court had not considered the issue.

Faced with the two very different approaches of The Bremen and Stewart, the Ninth Circuit first had to decide the applicable law. The court distinguished Stewart and stated that “the starting point for analysis is the Supreme Court’s decision in [The Bremen].” The court distinguished Stewart not because of the admiralty/diversity distinction, but because of the fact that Stewart applied only when the motion in question is a transfer under § 1404(a) and here, the motion in question was a § 1406(a) motion to dismiss or transfer. This dis-

345. Commentators who have addressed the Shute decision have not been much clearer. See, e.g., Mullenix, Carnival Cruise Lines, supra note 6, at 335 (stating that forum selection clause issue presented by Shute was “whether its [Carnival Cruise Lines] contractual forum-selection clause should be honored . . . ” but not discussing whether honoring it affects, for example, venue, personal jurisdiction); Ganter, supra note 38, at 508 (stating that Carnival Cruise Lines moved for summary judgment on grounds that forum selection clause prevented suit outside Florida, but not addressing whether venue, personal jurisdiction, or something else, was present only in Florida, or lacking in Washington as result of forum selection clause).


As is indicated by the full citation for the case, it actually followed a long procedural trail before making it to final disposition by the Ninth Circuit. 1988 Am. Mar. Cases 591 (W.D. Wash. 1987), rev’d, 863 F.2d 1437 (9th Cir. 1988), withdrawn, 872 F.2d 930 (9th Cir. 1989) (mem.), modified, 897 F.2d 377 (9th Cir. 1990), rev’d, 111 S. Ct. 1522 (1991). A recitation of the procedural history of the treatment of the forum selection clause, for the protracted litigation concerned the personal jurisdiction questions. For a discussion of the long procedural history, see generally Mullenix, Carnival Cruise Lines, supra note 6, at 332-36.

348. See Shute, 897 F.2d at 387 n.8 (“Although the district court did not reach this issue, both parties request that, in the interest of judicial economy, this court determine the applicability of the forum selection provision on appeal, rather than remanding to the district court. Because some of the factual issues are similar to those raised in the jurisdiction context, and because the record is sufficiently well-developed, we can decide the forum issue efficiently.”).

This request by the Shutes would prove to be a fatal strategic error. The Supreme Court would later decide that the record did not contain facts to support the finding of the Ninth Circuit that the Shutes were incapable of pursuing the litigation in Florida. See Shute, 111 S. Ct. at 1527-28. Perhaps on remand they could have made a record that would have supported the finding and allowed them to meet the heavy burden that The Bremen placed on a litigant seeking to avoid enforcement so as to deprive the party of its day in court. Perhaps the Shutes, or more accurately their counsel, can be excused for thinking that after Stewart, The Bremen was not applicable.

349. Shute, 897 F.2d at 388.

350. Id. Other courts of appeals have distinguished Stewart on this basis. See Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988) (“Our case involves a motion to dismiss,
Forum Selection Clause makes no sense. It allows a moving party to select the applicable law by means of the party’s choice of motion. Consensual reordering of procedure is problematic enough; unilateral reordering is perniciously absurd.

Instead, the choice of motion should be dictated by what aspect of the court’s power to hear a case the forum selection clause speaks to. That is, what is the concept? If it renders venue improper, a Rule 12(b)(3) motion to dismiss or § 1406(a) motion to transfer is appropriate. If the clause does not render venue improper, a transfer motion pursuant to § 1404(a) is appropriate. Though Stewart appeared to resolve this question, courts have held Stewart to be inapplicable in situations where a § 1404(a) motion was not involved and have ignored its reasoning.

Applying The Bremen standards for enforcement, the Ninth Circuit found the forum selection clause to be unenforceable. The court of appeals looked to the formation considerations that are the only exception to enforcement under The Bremen and found the clause to be unreasonable for two reasons. First, the clause was not part of a freely negotiated contract, but rather, was contained in a pre-printed passenger ticket. Second, requiring the Shutes to litigate their claim in the contractual forum would deprive them of their day in court due to the grave inconvenience of the forum.

The Supreme Court, faced with the questions of whether personal jurisdiction could be asserted over Carnival Cruise Lines and whether the forum selection clause should be enforced, did not address the personal jurisdiction issue, finding the forum selection clause issue to be dispositive. The Court began its inquiry by stating that because it was an admiralty case, federal law would govern enforceability of the forum selection clause. The question generated by this statement was: what federal law was the question of the moment? Was it the standard from The Bremen, or was it the § 1404(a) standard in accord with the reasoning in Stewart that forum selection clauses are matters of venue? The Ninth Circuit had applied The Bremen on the basis of the procedural mecha-

351. See supra note 318 for a discussion of how courts have refused to apply the Stewart holding to situations where enforcement of a forum selection clause is sought by a procedural mechanism other than a § 1404(a) motion.

352. Shute, 897 F.2d at 388-89 (Mrs. Shute “physically and financially incapable” of pursuing suit in Florida).

353. Id. at 388.

354. Shute, 111 S. Ct. at 1525 (citing Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis, J., concurring)).

The refusal to hear the personal jurisdiction question took many commentators by surprise. See, e.g., Borchers, supra note 6, at 72 (grant of certiorari in Shute led to “confident speculation that Carnival Cruise would produce yet another ‘minimum contacts’ opinion”); Mullenix, Carnival Cruise Lines, supra note 6, at 338-39 (decision in Shute “caught many . . . observers off-guard . . . [and] was startling not so much for what it decided as for what it didn’t decide”); Winton D. Woods, Carnival Cruise Lines v. Shute: An Amicus Inquiry Into the Future of “Purposeful Availment,” 36 Wayne L. Rev. 1393, 1401 (1990) (predicting that Shute would produce watershed opinion of personal jurisdiction jurisprudence).
nism employed by the party seeking enforcement, but the Supreme Court apparently embraced the admiralty/diversity distinction. It did so, however, with no explanation other than that the action was in admiralty.\textsuperscript{356} Stewart was hardly mentioned and then cited with a "cf." for the proposition that federal law governed the forum selection clause question.\textsuperscript{357}

The question whether federal law governed the enforceability of the forum selection clause was not really open to discussion after Stewart. The true question, as previously stated, involved determining what was the federal law. This question was of particular interest because much of the reasoning from Stewart was applicable to Shute. Both were filed in a district court other than the contractually selected forum, and both involved a district court as the contractual forum to which the action could be transferred. Though Shute was an action in admiralty, could not the same transfer reasoning of Stewart apply?\textsuperscript{358} The Court simply did not answer the question. The only explanation for the applicability of the standard of The Bremen is that "[b]oth petitioner and respondent argue vigorously that the Court's opinion in The Bremen governs the case."\textsuperscript{359}

\textsuperscript{356} Id.

\textsuperscript{357} According to the Blue Book, a "Cf." signal indicates that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, "cf." means 'compare.' The citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations (citation omitted), however brief, are therefore strongly recommended." A Uniform System of Citation § 1.2, at 23 (15th ed. 1991). The Court did not provide a parenthetical explanation to clarify how its proposition as to the applicable federal law differed from that of less than three years earlier.

\textsuperscript{358} The standard to be applied is critical, for arguably, the application of the Stewart standard would have led to a different result. Considering factors of, for example, convenience and availability of witnesses, not to mention the interests of justice, would have allowed an exercise of discretion to keep the suit in Washington.

\textsuperscript{359} Shute, 111 S. Ct. at 1526.

A review of the Shutes' argument does not support the statement that they argued vigorously that The Bremen governed the forum selection clause issue. Instead, their brief merely responded to arguments by Carnival Cruise Lines that the reasoning of The Bremen supports enforcement. The Shutes argued that The Bremen does not support enforcement. Respondent's Brief in Opposition, Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991) (No. 89-1647).

Carnival Cruise Lines had argued that The Bremen applied because this was an action in admiralty and that "[t]here is no indication that Stewart was intended to modify the holding of The Bremen." Brief for the Petitioner, Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991) (No. 89-1647).

Arguably, reconciling Stewart and The Bremen was one of the most difficult, if not the most difficult questions facing the Court. In regard to another very difficult question, whether the Shutes had notice of the forum selection clause (Justice Stevens writing for the dissent, strongly argued that the Shutes did not have notice of the clause and even attached a copy of the ticket to his dissenting opinion to show how it would not come to the attention of the traveler. Id. at 1529, 1534-37 (Stevens, J., dissenting)), the Court also based its determination of this issue upon what the parties had determined and not on its own analysis. See id. at 1525 ("[W]e do not address the question of whether respondents had sufficient notice of the forum selection clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision.").

See also Borchers, supra note 6, at 72 n.148 (noting that in previous jurisdictional case, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), Court also had concluded that parties had conceded crucial issue).
Therefore, the Court considered the enforcement of the forum selection clause by looking at the formation questions presented in *The Bremen* without considering the § 1404(a) factors of convenience and the interests of justice as *Stewart* would have required.

Deciding that the standard from *The Bremen* was applicable to the forum selection clause in *Shute* did not resolve what aspect of the court’s power to hear the case the forum selection clause applied—jurisdiction, venue, or both.360 *Stewart* had held that forum selection clauses were a matter of venue.361 In *The Bremen*, it is not clear what procedural concept the Court considered the forum selection clause to have addressed. Because the contractual forum was a court of a foreign country, honoring the clause required dismissal whether it addressed jurisdiction, venue, or both.362 Additionally, the defendant in *The Bremen* had argued in the alternative for dismissal based upon lack of jurisdiction and forum non conveniens.363 *The Bremen* decision shed little light on whether the clause was a matter of jurisdiction or venue. The reference by *The Bremen* Court to *Szukhent* indicates that the Court may have been considering jurisdiction,364 while the discussion as to whether the contractual forum was so seriously inconvenient as to deprive plaintiff of a day in court indicates venue.365

Because *Shute* involved questions of personal jurisdiction and a contractual forum to which the action could be transferred, it presented the Court with the perfect opportunity to resolve what the conceptual nature of the forum selection clause was—venue, jurisdiction, or both. Unfortunately, the Court missed the opportunity. Its discussion does not clarify what aspect of procedure it was addressing, but instead speaks in general terms such as where suit “must be brought” and the “correct forum.”366 The disposition of *Shute* is equally unenlightening for the Court merely stated that “[t]he judgment of the Court of Ap-

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360. See Mullenix, *Consensual Adjudicatory Procedure*, supra note 6, at 322-27 (discussing confusion in courts as to whether forum selection clauses are matter of venue or jurisdiction).
361. See supra note 251.
362. See supra note 233.
363. See supra note 121 and accompanying text for the statement of defendant Unterwesser’s motions.
364. See supra notes 146-60 and accompanying text for a discussion of the personal jurisdiction implications of *The Bremen*’s reliance on *Szukhent*.
365. See supra notes 176-77 and accompanying text for a discussion of *The Bremen* analysis that a forum must be “gravely” inconvenient to deprive plaintiff of due process.
366. Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522, 1527 (1991). The Court speaks in terms of where suit must be brought, but does not explain whether the context is venue, personal jurisdiction, or both. A typical statement was:

Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum, and conserving judicial resources that otherwise would be devoted to deciding those motions. See Stewart Organization, 487 U.S., at 33, 108 S.Ct., at 2249 (concurring opinion).

*Shute*, 111 S.Ct at 1527.

It is most interesting that the Court cited to the concurring opinion of *Stewart*, which took a very different approach to forum selection clauses and had been cited to by the Eleventh Circuit in its issuing of a writ of mandamus in *Stewart* upon remand that essentially overruled the Supreme
peals is reversed." As the Ninth Circuit had reversed the district court's dismissal, apparently the Supreme Court's disposition results in the reinstatement of that dismissal. What the Court did not explain was why it did not transfer, or at least discuss the transfer of the action to Florida. Perhaps the Court was fearful that mention of transfer would invoke the ghost of Stewart past and therefore would require a different result if the inability of Mrs. Shute to pursue her action in Florida and the interests of justice were considered in regard to enforcement.

Resolving the nature of the concept of the forum selection clause is more than just an exercise in academic labeling. Shute, as did The Bremen, involved a forum selection clause in a derogation context. The Shute Court only had to consider whether a clause should be enforced, so as to require refiling elsewhere. Nevertheless, the holding of The Bremen has been extended by some courts to stand for the proposition that a forum selection clause confers personal jurisdiction on the contractual forum. Considering the forum selection clause in Shute in a prorogation context, does a forum designation on the back of a ticket for a commercial carrier create personal jurisdiction? More specifically, on the basis of the ticket alone, would Florida have personal jurisdiction over the Shutes to entertain a suit brought against them by Carnival Cruise Lines? Because American forum selection clause jurisprudence has not recognized a difference between the derogative and prorogative nature of forum selection clauses, the answers would apparently be yes. One might argue that any other result would render a forum selection clause meaningless, otherwise there would be no reason to designate a forum contractually in which a party was not subject to personal jurisdiction. In fact, lower courts have used this reasoning to find that a forum selection clause confers personal jurisdiction. Instead of allowing parties to reorder principles of procedure and to stand traditional juris-

Court's decision. See supra notes 300-04 and accompanying text for further discussion about the Eleventh Circuit's issuance of a writ of mandamus in Stewart.

367. Shute, 111 S. Ct at 1529.

For discussion of the confusion created by the Court's disposition, see generally Borchers, supra note 6, at 75.

368. See Borchers, supra note 6, at 75 (by not remanding case, court implied that unconditional dismissal of district court could be reinstated).

369. See Borchers, supra note 6, at 75 (transfer would most certainly bar refiling this action in Florida because statute of limitations had run five years after filing of original action).

370. See supra notes 33-35 and accompanying text for a discussion of the derogation context of forum selection clauses.

371. See supra note 174 for cases in which a forum selection clause has been held to confer personal jurisdiction.

372. See Mullenix, Carnival Cruise Lines, supra note 6, at 367-68 (criticizing Shute for creating personal jurisdiction by contract and going against traditional concepts of personal jurisdiction based upon "affiliating circumstances"); Borchers, supra note 6, at 77-78 (discussing that Shute "clearly contemplated" creation of personal jurisdiction by contract, but arguing that it is positive development).

373. See, e.g., Solimine, supra note 2, at 65 ("It does no good to preselect the forum if one party can still contest personal jurisdiction or other venue requirements.").

374. See supra notes 160, 174 for a discussion of courts and commentators that have viewed forum selection clauses as conferring personal jurisdiction.
dictional notions on their heads, the better result would simply be to consider such clauses unenforceable due to the absence of jurisdictional prerequisites because *Shute* and *The Bremen* should not be read to constitute such a dramatic shift in the nature of personal jurisdiction without even a single word of discussion.

**B. The Need for Fairness: Unpredictability May Not Be That Bad**

Though the Ninth Circuit had relied on the principles of *The Bremen* to deny enforcement of the forum selection clause because of the adhesive nature of the contract and the inability of plaintiff to pursue her action in Florida, the Supreme Court “refined” the reasonableness test from *The Bremen*, distinguished the cases factually, and held the clause to be enforceable. The Court put forth three reasons for its holding. First, because Carnival Cruise Lines’ ships carry passengers from many locales, a cruise line has a “special interest” in limiting the fora in which it would be subject to suit. Second, such clauses eliminate confusion as to where suit can be brought, thus conserving litigant and judicial resources. Third, passengers benefit by receiving reduced fares because the forum selection clause results in savings to the cruise line. Commentators have uniformly criticized this reasoning for, among other things, opening the door to the use of forum selection clauses in consumer contracts.

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375. When forum selection clauses are considered to be matters of venue, a suit filed in other than the contractual forum can be transferred only to a district court where it could have been brought originally. If personal jurisdiction is not present in the contractual forum, the case cannot be transferred. See Friedenthal, *supra* note 9, § 2.17 at 92. Similarly, if suit is filed in the contractual forum, an independent basis of personal jurisdiction must be present. See Solimine, *supra* note 2, at 65 (discussing that “the clauses in *The Bremen*, *Stewart*, and *Carnival* did not explicitly waive the minimum contacts barrier” but arguing that cases should be read as if such barrier were waived).

376. See supra notes 347-48 and accompanying text for a discussion of the Ninth Circuit’s reliance on *The Bremen* in deciding *Shute*.


379. *Id.*

380. *Id.*

381. *Id.*

382. See, e.g., Mullenix, *Carnival Cruise Lines*, *supra* note 6, at 342 (referring to *Shute* as “patently bad decision” and stating that “each rationale the Court offered in support of its holding cannot withstand legal analysis or intuitive common sense”); Borchers, *supra* note 6, at 74 (discussing with a bit more understatement that “[t]here are many troubling aspects” to *Shute*); Gantner, *supra*, note 38, at 539 (“[I]t is difficult to support the Court’s determination to allow the cruise line’s interests in convenience and lowered costs to interfere with the Shute’s lawful and valid interest in pursuing their legal claim.”); Bruch, *supra* note 329, at 345 (discussing that *Shute* “ignored the fundamental concepts of unconscionability”); Goldman, *supra* note 98, at 701 (stating that “economic analysis cannot support the result or reasoning in *Shute*”).

The commentators have sufficiently pilloried this aspect of *Shute*. The author will spare the reader a recitation of what has adequately been previously discussed.
Shute demonstrates the danger of removing judicial discretion from the standard of enforcement. The reasonableness standard for enforcement from The Bremen, now "refined," allowed for enforcement that was contrary to the interests of justice because Florida bore almost no connection to the Shute litigation, and the plaintiff could not pursue her action in Florida for physical and financial reasons. The Court's reasons for enforcing the clause do not bear scrutiny. It is difficult to accept that whatever, if any, reduction in the price of her ticket Mrs. Shute received as a result of the forum selection clause was a fair trade for being prevented from pursuing compensation for her injuries. Additionally, while it was certainly a benefit to Carnival Cruise Lines to have the clause enforced, a lopsided unilateral benefit does not justify enforcement if such is blatantly unfair.

Nevertheless, there remains the Stewart concept that forum selection clauses simply are matters of venue subject to judicial discretion for enforcement. Application of the Stewart standard of enforcement would most likely have resulted in the clause not being enforced. Thus, the result in Shute demonstrates why the narrow and often criticized view of the forum selection clause from Stewart is the more reasoned approach.

VII. DEFINING AND NARROWING THE CONCEPT

The Court has struggled to construct a standard for enforcement of forum selection clauses and has arrived at two very different approaches because each approach encompasses very different concepts of what a forum selection clause is, and of the ability of parties privately to reorder procedure. The existing confusion has led to calls for legislative reform. A review of these proposals indicates that although they seek to resolve the existing confusion, they do so without addressing the ultimate source of the confusion—defining the conceptual scope of forum selection clauses. In order to end the confusion, it is first necessary to define the conceptual scope of the forum selection clause. Only then can a workable enforcement standard be developed.

A. Stewart: A Narrow but Preferable Approach

The narrow view of Stewart is the preferable approach. Under Stewart, the forum selection clause is merely one of several factors to be considered in determining the appropriate venue. The forum selection clause is enforceable only if the contractual forum is one in which venue would otherwise be proper and is one to which the action should be transferred after a consideration of the factors of § 1404(a) of party and witness convenience and the interest of justice.

384. See supra note 31.
385. Stewart, 487 U.S. at 29.
386. Id. In situations where the contractual forum is a foreign court, and therefore, is not a forum to which the action can be transferred, enforcement should be sought under the doctrine of forum non conveniens, the precursor to the Stewart conceptual view and approach to enforcement.
Three main reasons support the validity of the *Stewart* approach.

First, any other formulation allows the forum selection clause to effect a disruptive reordering of procedural principles that can result in a denial of the fundamental fairness that these principles were designed to protect. Having only considered the question of enforcement of a forum selection clause in a derogation context, where the sole necessary determination is whether the court should decline jurisdiction, the Supreme Court perhaps has not had full opportunity to appreciate the reordering of procedural principles that the forum selection clause can effect in its prorogation context. Enforcement in the prorogation context involves both the conferring of personal jurisdiction and venue on the contractual forum as well as affecting the choice of the applicable law. Therefore, it is apparent from the prorogation context that defining the concept as anything more than a factor in a determination of whether the action should be transferred to a different venue reorders several basic concepts of civil procedure. To appreciate this unique aspect of the forum selection clause, two false analogies must be disregarded.

The first false analogy is that a prorogation forum selection clause is analogous either to a waiver of an objection to lack of personal jurisdiction or a waiver of an objection to improper venue by a party who enters an appearance in an action and proceeds to defend it on the substantive issues in the case. An acceptance of the distinction between procedural waiver and procedural consent is necessary to appreciate that the analogy is improper. The true analogy is between the forum selection clause and procedural consent. In the situation of procedural waiver, there is no reordering of procedural principles. The party making the waiver is submitting herself to a court in which an action has been filed, and the party is not seeking to reorder procedural concepts that bypass fundamental considerations of jurisdiction and venue. In the situation of procedural consent, parties are seeking to reorder procedural principles prior to the filing of an action by contractually determining the jurisdictional power of a court, as well as supplanting the legislative determination of where litigation should occur that is reflected in venue. Traditional judicial acceptance of procedural waiver is not authority for the acceptance of the reordering of procedural principles by procedural consent with a forum selection clause.

The second false analogy is that devices such as an arbitration clause are analogous to the forum selection clause. Forum selection agreements constitute a private reordering of procedural principles within the existing procedural framework, while an arbitration agreement acts to remove an action from the jurisdiction of the court.

As discussed *supra* in note 233 and accompanying text, analogous factors of party and witness convenience and the interest of justice would be involved in the decision to decline to exercise jurisdiction.

Where the contractual forum is a state court to which the action cannot be transferred, the clause should not be enforced. *See supra* note 375 and accompanying text.

387. *See supra* notes 171-74 and accompanying text for a discussion of the distinction between procedural waiver and procedural consent.

388. *See supra* notes 159-75 and accompanying text for a discussion of the reordering of procedural rules by procedural consent, including use of the forum selection clause.
judicial system. An arbitration agreement does not reorder procedural principles. Instead, it removes an action from the reach of judicial procedural principles, an effect separate and distinct from that of a forum selection clause.\textsuperscript{389} Because the analogy is false, judicial acceptance of the arbitration clause should not be considered authority for judicial acceptance of the forum selection clause.

Additionally, \textit{Stewart} is preferable because its narrow view of the forum selection clause eliminates the unresolved issues that have dominated the discussion of the forum selection clause.\textsuperscript{390} For example, it resolves choice of law questions of whether the designation of a contractual forum causes the application of the choice of law rules of the contractual forum instead of those of the forum of filing.\textsuperscript{391} Because procedural principles are not reordered, choice of law rules are applied without alteration.

Questions concerning the proper procedural mechanism to be employed in seeking enforcement and the attendant questions of whether the choice of remedy determines the standard of enforcement to be applied are also resolved by \textit{Stewart}.\textsuperscript{392} Because under the \textit{Stewart} approach the forum selection clause is merely a factor in determining venue and does not make the contractual forum the only forum with proper venue, the only proper procedural mechanism for enforcement is a motion to transfer venue. Additionally, conceptualizing the forum selection clause as a venue factor eliminates the question of whether the contractual designation of a state court as the exclusive forum requires dismissal of the action if filed in federal court or requires remand after removal to federal court.\textsuperscript{393} The justifications for acceptance of a forum selection clause do not support its use for such a purpose, particularly where the state and federal court houses are across the street from each other. When used to designate a state court as the exclusive forum, the forum selection clause is not used for the purpose of determining the location for potential litigation, rather it becomes a forum shopping device that harkens back to the ouster doctrine’s original repudiation of the forum selection clause.

Of course, the issues of choice of law, proper mechanism of enforcement, remand/removal, etc. are not resolved; they actually are eliminated by defining

\textsuperscript{389}. \textit{But see} William W. Wiggins, Jr., Comment, \textit{Application of the Forum Clause to Commercial Contracts}, 8 Hous. L. Rev. 739, 744 (1971) (rejecting as invalid drawing of distinction between arbitration agreement and forum selection clause on basis that arbitration agreements remove action from judicial framework). See also \textit{supra} note 68 for additional discussion of why the arbitration clause and forum selection clause are not analogous.

\textsuperscript{390}. See \textit{supra} notes 30, 317-18 and accompanying text for a discussion of forum selection issues that remain unresolved.

\textsuperscript{391}. See \textit{supra} notes 238-39 and accompanying text for a discussion of the choice of law issues.

\textsuperscript{392}. See \textit{supra} notes 30, 317-18 and accompanying text for a discussion of unresolved forum selection issues.

\textsuperscript{393}. For discussion of the enforcement of a forum selection clause designating a state or federal forum when concurrent subject matter jurisdiction is present, see Borchers, \textit{supra} note 6, at 88-89 (subject to The Bremen’s standards parties may contract to subject matter jurisdiction only when state and federal courts have concurrent jurisdiction); Mullenix, \textit{Consensual Adjudicatory Procedure}, \textit{supra} note 6, at 334-46 (forum must have jurisdiction in first place to remand, thus “lack of jurisdiction” argument is illogical).
the concept narrowly so as to remove them from applicability. But the existence of these issues when a broader concept is attributed to the forum selection clause, as in *The Bremen* and *Shute*, demonstrates what happens when the procedural framework is allowed to be privately reordered in part. Related procedural concepts are thrown into turmoil.

Finally, the *Stewart* approach is the most preferable because it permits the exercise of judicial discretion in deciding questions of enforcement, thereby protecting the interests of justice. The need for judicial discretion is demonstrated by results such as those reached in *Shute*. By adopting the original forum non conveniens formulation, resurrected in *Stewart*, basic considerations of fairness can be protected while at the same time addressing commercial interests that seek to reduce litigation expenses by determining where litigation relative to a contract should take place. Though the *Stewart* approach is very narrow, its limited scope does not render forum selection clauses superfluous. In light of both expansive present day notions of personal jurisdiction and the recent amendment to the general venue provision specifying that a corporation shall be deemed to reside for venue purposes in any district in which it is subject to personal jurisdiction, corporations are subject to suit in a potential multitude of forums. The *Stewart* view of forum selection clauses would allow a corporation to limit the breadth of possible locations where it would otherwise have to defend itself, while a consideration of the interest of justice would remain the final arbiter in deciding enforcement.

B. The Calls for Legislation: First Define the Concept

The legislative proposals of commentators that address the unresolved issues are worthy efforts to restrict the use of the forum selection clause to situations that could be considered fair. But the proposals merely impose artificial restrictions that do not add clarity to what the concept is. As much of the confusion surrounding the forum selection clause is attributable to the failure of the courts to define the underlying concept before embarking on defining a standard for enforcement, legislative proposals would be most useful if they addressed the ultimate source of the confusion—what is the conceptual scope of the forum selection clause? Of course, the task is made easier by defining the concept in the narrow fashion of *Stewart*. Preferably, the Court would reverse *The Bremen* and *Shute* and adhere to the conceptual view of the forum selection clause that formed the basis for its holding in *Stewart*. Because the Court was unwilling, or perhaps unable, to reconcile the differing views of *Stewart* and *Shute*, issued within three years of each other, such reversal seems unlikely.

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394. 28 U.S.C. § 1391(c).
395. See supra note 31 and accompanying text for a discussion of commentators' legislative proposals.
396. See Borchers, supra note 6, at 110 (proposal does not define forum selection clause, just excepts from enforcement forum selection clauses in contracts having aggregate value of less than $50,000, in pre-dispute employment contracts, in pre-dispute contracts for goods and services if outside scope of trade or business of one of parties, or where substantially unjust).
Therefore, corrective legislation may be the only means by which the concept can be clarified.

Codification of the forum selection concept of *Stewart* can be accomplished with two simple additions to Title 28. The first would clarify that a forum selection clause is only a matter of venue and does not supplant venue that otherwise would be proper under the applicable venue statute.\(^{397}\) Additionally, the provision would dictate that a forum selection clause can only specify as venue for potential litigation that which would be proper under the statute. This amendment would resolve any question as to the proper procedural mechanism for enforcement and choice of law questions. It would also effectively eliminate the false view that a contractual provision in and of itself is sufficient to confer personal jurisdiction.

Though it follows that the only procedural mechanism for enforcement is § 1404(a), an amendment to the transfer statute would not only clarify that point, but would also resolve the effect of a forum selection clause as to the attendant burden in seeking enforcement through transfer.\(^{398}\) A clause is best considered as creating a rebuttable presumption of convenience to the parties that can be overcome by circumstances intervening between enactment and enforcement of the clause. The burden would remain upon the moving party to establish the other § 1404(a) factors. The questions of contract formation from the standard of *The Bremen* should not be abandoned.\(^{399}\) Thus, the amendment recognizes that only forum selection clauses contained in an otherwise enforceable contract should be given consideration.

**CONCLUSION**

The attempts of the Court to fashion a standard for enforcement of the

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397. The legislative proposal suggested herein would amend 28 U.S.C. § 1391 by adding the following paragraph:

(f) Parties to a civil action may designate by contract the district or division in which any action between them as to the contract will be brought, provided that such designation specifies a venue as provided for in subsections (a)-(f). An action brought in a district court that is a forum other than that specified in a contractual forum selection clause, but where venue lies pursuant to any provision of subsections (a)-(f), will not be considered to have been brought in an improper venue, and enforcement of the contractual designation, if sought, shall be pursuant to section 1404(a). If the contractual forum is a foreign court to where a transfer cannot be effectuated, enforcement of the contractual designation, if sought, shall be pursuant to the doctrine of forum non conveniens. If the contractual designation is a state court, the forum selection clause shall be unenforceable.

398. The legislative proposal suggested herein would amend 28 U.S.C. § 1404 by adding the following paragraph:

(e) upon motion of a party, a district court may transfer any civil action to any other district or division where the parties have designated by an enforceable contract that any action pursuant to the contract shall be brought and where the considerations of subsection (a) warranting transfer are present, provided that such contractual designation as to where any action shall be brought constitutes a rebuttable presumption as to the convenience of the parties in regard to the contractually designated district or division.

399. The "refinement" of the reasonableness standard in *Shute* should be abandoned. Forum selection clauses contained in contracts of adhesion should not be enforced.
FORUM SELECTION CLAUSE

Forum selection clause have resulted in conflicting approaches fraught with confusion in application because the Court has failed first to define the concept for which it was fashioning the enforcement standard. Scrutinizing the development of the conflicting standard for enforcement reflected in The Bremen and Shute as compared to that of Stewart reveals that the conflict is due to a fundamental difference in their respective underlying conceptual views of the forum selection clause. The conceptual difference lies in the extent to which procedural principles may be privatized by contractual agreement.

Due largely to the derogation context in which the Court has considered the forum selection clause, the discussion of the concept has focused almost entirely on repudiating the "ouster doctrine" as being inapposite to the question presented. It was recognized that enforcement of a forum selection clause did not constitute a private alteration of the fundamental jurisdictional power of a court thereby requiring dismissal of an action. Instead, enforcement was an exercise of discretion to decline to exercise jurisdiction that was unaltered by private agreement. Once that was accomplished, the development of a sound doctrine also required consideration of the prorogation context of the forum selection clause, for it is there that the question of the extent to which principles of procedure should be privately reordered is best framed. In the prorogation context, the forum selection clause does alter the fundamental jurisdictional power of a court because it can provide the sole basis for jurisdiction and venue that, but for the clause, would not be present.

The analysis of the forum selection clause in the prorogation context has not taken place. The rush to utilize the forum selection clause as an element of expediency in dispute resolution bypassed the discussion. Additionally, false analogies have been drawn between the forum selection clause and the waiver of objections to lack of personal jurisdiction and venue, as well as to the arbitration clause, and these false analogies have been used to justify the use of the forum selection clause in the prorogation context. The analogies are false because the forum selection clause involves a unique private reordering of procedure within the existing procedural framework. Procedural principles, however, are interdependent. Therefore, this reordering results in unresolved issues in the interdependent procedural areas discussed by commentators. The reordering also results in the patent unfairness in a decision like Shute.

As the reasoning of Learned Hand was relied upon to begin the shift toward forum selection clause acceptance, it is perhaps best that Hand's reasoning also guides the extent of the concept of the forum selection clause as well as the ability of parties privately to reorder procedural principles. Hand's early conceptual view of the forum selection clause, thereafter manifested in the forum non conveniens formulation of reasonableness and presently reflected in Stewart, is the most sound of the two conceptual views of the forum selection clause that have existed from the inception of its judicial acceptance. That view does not allow parties privately to reorder the procedural system. Instead, it allows parties to provide an element of predictability to potential litigation by allowing them contractually to indicate a preference for where venue should lie in the event there is litigation relative to the contract. Nevertheless, that contractual
preference must be one that is within the existing procedural system, thereby preserving a basic concern for the interests of justice, interests that are best protected by judicial discretion.