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# Forum Clauses at the Margin

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## FORUM CLAUSES AT THE MARGIN

by James P. George\*

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## I. INTRODUCTION

In 1960, a simpler time when the California Law Review published articles by practitioners, attorney Merle Bergman sounded a warning about a pernicious trend:

Some loose language has come out of the Second Circuit since 1949 which has led some attorneys, and even some courts, to believe that the law has somehow done an about-face and that it now recognizes the validity of

contractual clauses limiting the forum in which a cause of action may be brought, whereas it previously denied validity to such clauses.<sup>1</sup>

Loose language indeed. Mr. Bergman's concern was about forum clauses and it no doubt became alarm in 1972 with the Supreme Court's decision in the *Bremen* case.<sup>2</sup> His view of history was mistaken—there was never a categorical rejection of forum clauses—but his concern was correct about the extreme rule that was coming.

A forum clause (also called a forum selection agreement or choice-of-forum clause) is a contractual provision for dispute resolution, often paired with a clause naming the applicable law. Forum clauses have five possible components that may occur in any combination:

- (1) location, which maybe be a specific site or court, or merely designate any court in the identified state or country;
- (2) scope, which usually includes claims arising on the contract containing the clause but may entail other claims;
- (3) mode of dispute resolution such as arbitration or litigation;
- (4) if litigation, the type of court such as state or federal; and
- (5) the clause's binding nature (permissive or mandatory).

The parties to a permissive clause consent to jurisdiction in the named forum but remain free to file elsewhere. A mandatory or exclusive clause limits litigation to the named forum.<sup>3</sup>

Forum clauses promote efficiency and predictability but can also be used in nefarious ways to give a venue advantage or even thwart access to a forum.<sup>4</sup> Because contracting parties sometimes don't see the disadvantage

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<sup>1</sup> G. Merle Bergman, *Contractual Restrictions on the Forum*, 48 CAL. L. REV. 438, 438 (1960) [hereinafter *Contractual Restrictions*].

<sup>2</sup> *The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 2 (1972).

<sup>3</sup> *E.g., id.* at 3; *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 52–53 (2013).

<sup>4</sup> Forum clauses can also accomplish specific judge shopping by designating a venue (state or federal) having only one judge, although plaintiffs can do the same forum shopping in choosing where to file. *See* 1 JAMES R. PRATT, III & BRUCE J. MCKEE, *LITIGATING TORT CASES* § 3:10 (2018).

until the dispute arises, and because the forum clause is bargains away something that is more of a public function than a private contract right, parties who perceive a disadvantage will often violate the clause. This happens in two scenarios. The first is where plaintiff files in the contractual forum and defendant objects to personal jurisdiction there. The second is where plaintiff files in another forum (in derogation of the clause), and defendant seeks to enforce the clause and have the case moved (by transfer or dismissal) to the contractual forum. In the first scenario, the only question is whether the forum clause operates as consent or the defendant is otherwise amenable to suit there. Although those cases can be decided either way, there is not a lot of controversy about them. The controversy lies in the second scenario with the derogating plaintiff, in which the initial forum must decide whether to honor the clause and decline jurisdiction.

How this question is decided may depend on the relationship between the derogating forum and the contractually-chosen one. There are five possible relationships: intra-jurisdictional (the chosen and derogating forums are in the same state or within the United States federal system);<sup>5</sup> interstate (two states in the United States);<sup>6</sup> state-federal;<sup>7</sup> state-foreign;<sup>8</sup> and federal-

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<sup>5</sup> *E.g.*, *Atlantic*, 571 U.S. at 52–53.

<sup>6</sup> *E.g.*, *Prof'l Ins. Corp. v. Sutherland*, 700 So.2d 347, 349 (Ala. 1997) (adopted the *Bremen* test for forum clause issues involving a sister state).

<sup>7</sup> *E.g.*, *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 113 (5th Cir. 1996) (applying *Bremen* to dismiss a case in deference to a forum clause pointing to California state courts); *In re Diaz Contracting, Inc.*, 817 F.2d 1047, 1050 (3rd Cir. 1987) (applying state law which incorporated *Bremen* standards to enforce a forum clause). For cases filed in state courts, facing a forum clause pointing exclusively to federal court, the remedy is removal rather than a motion to dismiss. Once removed, it may be transferred under 28 U.S.C. § 1404. *Atlantic*, 571 U.S. at 52.

<sup>8</sup> *E.g.*, *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 683 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (enforced clause designating the Netherlands).

foreign, many of which are further complicated by the claim's subject matter such as admiralty;<sup>9</sup> federal question;<sup>10</sup> or diversity of citizenship.<sup>11</sup>

The legal analysis varies among jurisdictions but in general there are two questions: Is the forum clause valid, and if so, should it be enforced?<sup>12</sup> The answers don't come easily. The varied components of forum clauses combine with the five possible settings and two lawsuit-filing categories (prorogating and derogating) to create permutations too complex to catalogue here. The simplest example is a prorogating permissive clause, where plaintiff filed in the chosen court, there's no other court to consider, and the only question is defendant's consent to jurisdiction. A more difficult example is a derogating mandatory clause where plaintiff filed in a different court and defendant responds both by invoking the forum clause in the initial jurisdiction and filing its own parallel action in the contractually-chosen jurisdiction.

My purpose is not to describe those permutations but to focus on the second example with a recent case illustrating the extreme forum-clause presumption now driving the analysis in federal courts. In 1972, the Court has increasingly raised the bar on contracting parties wishing to challenge forum clauses. The most recent case, *Atlantic Marine*, underscores the enforcement mandate and encourages a summary analysis designed to find a way to enforce clauses that should be rejected, or at least questioned more thoroughly than the Supreme Court's language directs.<sup>13</sup> In effect, the *Atlantic Marine* presumption instructs courts to find a way to enforce the clause.<sup>14</sup> The presumption's severity is not just in its wording, but in its application, which is suggested by the Court's instructions for applying the presumption.<sup>15</sup> "When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum

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<sup>9</sup> *E.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588 (1991).

<sup>10</sup> *E.g.*, *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (dismissed the securities case in deference to a forum clause designating "the courts of England").

<sup>11</sup> *E.g.*, *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 511 (9th Cir. 1988); *Afram Carriers v. Moeykens*, 145 F.3d 298, 301 (5th Cir. 1998).

<sup>12</sup> *See Bremen*, 407 U.S. at 1913, 1916.

<sup>13</sup> *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

specified in that clause. Only under extraordinary circumstances, unrelated to the convenience of the parties, should a § 1404(a) motion be denied.”<sup>16</sup> This may read like a routine contract rule but it produces strained examples of enforcement.

According to the original explanation in *Bremen*, the presumption is drawn from the Supreme Court’s rejection of an ill-conceived practice in English and American law.<sup>17</sup> The *Bremen* Court’s explanation of that practice, consistent with that of many lower courts and scholars, was that forum clauses suffered from near-total rejection which should be replaced by a reasoned acceptance.<sup>18</sup> That historical assessment was wrong. As a number of scholars (but few courts) have pointed out, this historical view was a popular myth.<sup>19</sup> Closer studies of history discredit this and provide nuances that tell a different story—forum clauses have been around for hundreds of years with varying acceptance, even though the majority of reported American cases rejected them.<sup>20</sup> The law has gone from that uneven acceptance to *Atlantic Marine*’s radical presumption favoring enforcement.

This article will first dispel the historical account and demonstrate an enforcement history that was reasoned and fairly consistent in England, but erratic in the United States, yielding to an ever-increasing contract-autonomy view after *Bremen*. The history concludes with concerns about what is now the *Bremen/Atlantic Marine* presumption (referred to under either case name depending on the context and time frame), including its encouragement of summary analysis and enforcement. To illustrate this extreme, the last section focuses on a Fifth Circuit decision that, with its cursory analysis and extreme favoring of enforcement, leaves significant questions unanswered—a result the law should not support but that *Bremen* and its progeny may promote.

## II. FORUM CLAUSE HISTORY IN THE ANGLO-AMERICAN SYSTEM

While it is possible to discuss the Supreme Court presumption from *Bremen* and *Atlantic Marine* in isolation, a historical view gives insight to

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<sup>16</sup> *Id.*

<sup>17</sup> *Bremen*, 407 U.S. at 9.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> See *infra* Part II.B.1.

<sup>20</sup> See *infra* Part II.B.2.

the often-misstated history from which the extreme presumption derives. That history necessarily includes litigation and arbitration clauses because of the tendency to intertwine the precedents. Although some English cases distinguished between arbitration and foreign-court clauses, the Common Law Procedure Act contained a provision providing for arbitration clauses which was used to allow non-arbitration forum clauses designating another forum.<sup>21</sup> United States case law mixed categories further, not only blending arbitration precedents with foreign-court clauses,<sup>22</sup> but going so far as to use English precedent in a case striking down a Wisconsin statute barring removal to federal court and fixing litigation in state court.<sup>23</sup>

### A. *English Predicates*

#### 1. Arbitration Clauses and the Doctrines of Revocability and Ouster

From the accounts available now, arbitration clauses led the development of forum clause jurisprudence. Arbitration clauses were in common use by the early Seventeenth Century, and challenges to those clauses brought about the concept of revocability, and then the ouster doctrine. Revocability was the idea that a contracting party could revoke an arbitration agreement, and the related ouster doctrine was that forum clauses (either for arbitration or a foreign court) could not oust an English court's jurisdiction.

The revocability doctrine came from vague dictum in a 1609 Lord Coke opinion in *Vynior's Case*.<sup>24</sup> Robert Vynior and William Wilde had an agreement with an arbitration clause secured by a bond for twenty pounds.<sup>25</sup>

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<sup>21</sup> See *Law v. Garrett*, (1878) 8 Ch. D. 26 (C.A.) at 37 (clause calling for litigation in Russia upheld under the Common Law Procedure Act's arbitration provision).

<sup>22</sup> See *Kelvin Eng'g Co. v. Blanco*, 210 N.Y.S. 10, 13 (1925) (forum clause pointing to litigation in Santiago, Chile approved under New York arbitration law).

<sup>23</sup> See *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874), discussed *infra* notes 136–39 and accompanying text.

<sup>24</sup> *Vynior's Case*, (1609) 77 Eng. Rep. 597, 598–99 (K.B.), discussed in Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 209 (2004) [hereinafter Carrington & Castle].

<sup>25</sup> Carrington & Castle, *supra* note 24, at 208.



When a dispute arose and Wilde refused to submit to arbitration, Vynior sued to collect on the bond.<sup>26</sup> The court ruled in Vynior's favor, enforcing his collection on the bond, but Lord Coke added the unnecessary explanation that although Wilde was obligated by bond to heed the arbitration agreement, "yet he might countermand it, for one cannot by his act make such authority, power or warrant not countermandable which is by the law or of its own nature countermandable."<sup>27</sup> That is, Wilde retained the power to revoke his arbitration agreement but would have to forfeit the bond.<sup>28</sup>

Lord Coke gave no further reason for the inherent right to revoke an arbitration clause and did not mention the later-evolving theory of jurisdictional ouster.<sup>29</sup> That came almost a century and a half later with *Kill v. Hollister* involving an insurance contract with an arbitration clause.<sup>30</sup> When the insured filed a lawsuit in defiance of the clause, defendant insurer pleaded the arbitration clause as a defense and plaintiff responded that there had been no submission to arbitration, thus rendering the clause void. The court held for plaintiff, observing that if the parties had submitted the case to arbitration, that submission would be honored, but absent such submission, the arbitration clause "cannot oust this Court."<sup>31</sup> The entire opinion was three sentences which gave no reason for its holding but the bare statement was sufficient to create a doctrine that pre-dispute agreements designating a forum did not defeat a contracting party's filing suit in a different forum.<sup>32</sup>

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<sup>26</sup> Carrington & Castle, *supra* note 24, at 208.

<sup>27</sup> *Id.* at 208–09.

<sup>28</sup> See Justice Story's description in *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (D. Mass. 1845) (No. 14,065). See also *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982 (2d Cir. 1942); Carrington & Castle, *supra* note 24, at 209.

<sup>29</sup> Carrington and Castle explain that common law judges of that time often gave no reasons for their opinions. See Carrington & Castle, *supra* note 24, at 210. They speculated that the revocability doctrine flowed naturally as a necessary curb on the otherwise unlimited power of arbitrators—the contracting party did not have to submit to their unlimited power but could revoke it, although revocation would cause bond forfeiture. *Id.* at 210.

<sup>30</sup> (1746) 95 Eng. Rep. 532, 532 (K.B.).

<sup>31</sup> *Id.*

<sup>32</sup> *Kill v. Hollister*, the progenitor of ouster cases, reads in its entirety:

This is an action upon a policy of insurance, wherein a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration; and the plaintiff

In 1799, a claim by a ship charterer seeking to bypass an arbitration clause provided a firmer statement:

[I]t is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters is difference to arbitration is not sufficient to oust the Court of Law or Equity of their jurisdiction.<sup>33</sup>

Based on speculative dictum in an 1856 case,<sup>34</sup> commentators have reported that courts were motivated by the need to guard their territory from non-judicial incursions.<sup>35</sup> That view, however, is historically unsupported, as noted by several later accounts. One of the best summaries of corrected history is Judge Wisdom's dissent in the Fifth Circuit *Bremen* opinion:

[U]ntil the Statute of Fines and Penalties, 8 & 9 Wm. III (1687), made the remedy impractical, courts consistently enforced arbitration agreements through the vehicle of penal bonds. With this remedy gone, pressure mounted to make arbitration agreements irrevocable. The courts resisted not on account of the fees involved, but because "arbitration proceedings were not regulated and the parties' only effective protection against an unfair or insufficient hearing

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avers in his declaration that there has been no reference. Upon the trial at Guildhall the point was reserved for the consideration of the Court, whether this action well laid before a reference had been? And by the whole Court-if there had been a reference depending, or made and determined, it might have been at Bar, but the agreement of the parties cannot oust this Court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

*Id.*

<sup>33</sup> *Thompson v. Charnock*, (1799) 101 Eng. Rep. 1310, 1310, 8 Term Rep. 139.

<sup>34</sup> In *Scott v. Avery*, (1856) 10 Eng. Rep. 1121, 1138 (H.L.), Lord Campbell wrote that the ouster doctrine ". . . probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

<sup>35</sup> See, e.g., Earl S. Wolaver, *Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 143 (1934) [hereinafter *Wolaver*]. See *infra* notes 68-72 and accompanying text for a further discussion of turf protection.

by the arbitrators was in revoking the submission before the award was given.” Not until the nineteenth century was the revocability of arbitration agreements simply premised on the courts’ opposition to ‘ouster’ from their jurisdiction. And then legislative action both in England and in the United States encouraged the courts to take a more benevolent view of such agreements.<sup>36</sup>

In any event, the ouster doctrine survived with exceptions and would later take on even stronger meaning in the United States.<sup>37</sup>

During this period, at least two English cases enforced arbitration clauses and led commentators to argue that the English courts were never bound up in the anti-arbitration doctrines of revocability and ouster.<sup>38</sup> The pro-arbitration view solidified with *Scott v. Avery* in 1856 when the House of Lords reversed a lower court and held an arbitration clause enforceable where it was merely a condition precedent to filing a court action.<sup>39</sup> The court reasoned that even though “[t]here is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction . . .” that courts nonetheless lack jurisdiction until the condition precedent is performed, that is, no action accrues until then, and parties have a right to craft the elements of a breach.<sup>40</sup> This opinion created a bifurcated rule that if the contract created a condition precedent to filing suit, then it was valid, but

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<sup>36</sup> *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, 899 (5th Cir. 1970) (citations and footnotes omitted). The court of appeals decision is referred to herein as *Zapata* and the Supreme Court’s opinion is *Bremen*.

<sup>37</sup> See generally *infra* Section II.B.

<sup>38</sup> See *Halfhide v. Fenning*, (1788) 29 Eng. Rep. 187, 188 (Ch.); *Wellington v. Mackintosh*, (1743) 26 Eng. Rep. 741, 741 (Ch.), discussed in *Wolaver*, *supra* note 35, at 140; *Carrington & Castle*, *supra* note 24, at 211.

<sup>39</sup> *Scott*, 10 Eng. Rep. at 1121.

<sup>40</sup> *Id.* at 1135.

if it merely bound the parties to arbitrate, it was unenforceable.<sup>41</sup> The enforceable arbitration clause became known as a “*Scott v. Avery* clause.”<sup>42</sup>

Two years before *Scott v. Avery*, Parliament enacted the Common Law Procedure Act of 1854<sup>43</sup> which enabled parties to make arbitration agreement irrevocable by applying to a court to make it a “rule of court.” This applied to all arbitration agreements except those that disallowed it; that is, it applied to agreements that provided for it and those that were silent on application for entry as a rule of court.<sup>44</sup> The *Scott v. Avery* decision two years later did not rely on the Act in upholding an arbitration clause, probably because the lower court record had been made before 1854. In any event, *Scott* retained its vitality as a drafting tool because its technique—making submission to arbitration a condition precedent for a breach claim—applied in both law and equity courts, while the Common Law Procedure Act regulated only common law courts.<sup>45</sup> In assessing this legislative protection for arbitration, it is important to note that the Act did not disturb judicial jurisdiction and in fact preserved the power of judicial review of arbitration decision,<sup>46</sup> and was merely seen as authorizing judicial discretion to stay litigation to allow the

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<sup>41</sup> See *Wolaver*, *supra* note 35, at 143. *Scott* did not refute the ouster theory and in fact cited *Kill v. Hollister* for the proposition. See *Scott*, 10 Eng. Rep. at 1124. Instead, *Scott* observed that an arbitration clause drafted as a condition precedent to breach became part of the contract and thus enforceable by the court. *Scott*, 10 Eng. Rep. at 1121, *passim*.

<sup>42</sup> Andrew Tweeddale & Keren Tweeddale, *Scott v Avery Clauses: O’er Judges’ Fingers, Who Straight Dream on Fees*, 77 *Arbitration* 423, 423 (2011). Another commentator disputes this history, noting:

The doctrine of condition precedent is earlier than *Scott v. Avery* and the case is only a reaffirmance of what was already the law. At best *Scott v. Avery* represents one of the various views of the English law of arbitration and is scarcely entitled to the exalted place it holds.

*Wolaver*, *supra* note 35, at 143.

<sup>43</sup> Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125 (Eng.) [hereinafter “Common Law Procedure Act”].

<sup>44</sup> Common Law Procedure Act, at § 27. See also Carrington & Castle, *supra* note 24, at 213–14.

<sup>45</sup> Common Law Procedure Act.

<sup>46</sup> See Carrington & Castle, *supra* note 24, at 214.

arbitration to proceed.<sup>47</sup> Even though that provision of the Act was limited to arbitration clauses, it took on an additional role of helping enforce forum clauses designating foreign courts for litigation, as explained below.

## 2. Foreign-Court Clauses in England

In a pre-*Bremen* article disputing the notion that foreign litigation clauses were not accepted in England, two commentators observed that “It has ‘long been settled’ that parties may agree to designate a forum of their choice, and the decisions date back to 1796.”<sup>48</sup> Although arbitration and foreign court clauses evolved somewhat distinctly, arbitration precedents were used to justify foreign court clauses.

English common law recognized a foreign court clause in 1796 with *Gienar v. Meyer*, and perhaps a key reason was that no English residents were involved—the two parties were a Dutch sailor who sued his Dutch shipmaster for unpaid wages.<sup>49</sup> The pertinent agreement was the ship’s articles, which designated the controlling law as the maritime code of Rotterdam and limited adjudication to Dutch courts.<sup>50</sup> The English court stayed the action in favor of litigation in Holland, noting that the contracting parties were foreigners and the contract was valid under Dutch law.<sup>51</sup> In 1811, an English court again enforced a foreign-forum clause,<sup>52</sup> and neither case provided a precedent or source for its power to stay the locally-filed suit.<sup>53</sup>

The *Gienar* precedent gave way to the use of the 1854 Common Law Procedure Act to approve fixed-site litigation clauses, as demonstrated in

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<sup>47</sup> See *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, n.9 (5th Cir. 1970) (Wisdom, J., dissenting).

<sup>48</sup> Zelman Cowen & Derek Mendes da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, from *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 AM. J. COMP. L. 157, 180 (1964) [hereinafter Cowen & da Costa] (quoting *Westcott v. Alsco Prods. of Canada Ltd.*, 26 D.L.R. 2d 281 (Newf. 1960), and referring to *Gienar v. Meyer*, (1796) 126 Eng. Rep. 728 (C.P.)).

<sup>49</sup> (1796) 126 Eng. Rep. 728, 728 (C.P.).

<sup>50</sup> Cowen & da Costa, *supra* note 48, at 182.

<sup>51</sup> *Id.*

<sup>52</sup> *Johnson v. Machielsne*, (1811) 170 Eng. Rep. 1300, 1300 (N.P.), Cowen & da Costa, *supra* note 48, at 182.

<sup>53</sup> See Cowen & da Costa, *supra* note 48, at 182.

*Law v. Garrett*.<sup>54</sup> In this case, there was an agreement between two English residents regarding a Russian partnership with an office in St Petersburg.<sup>55</sup> Their agreement had a forum clause requiring that disputes be submitted to a commercial court in St. Petersburg.<sup>56</sup> One of the partners sued for partnership dissolution in a London court, and the defendant raised the forum clause. The court ruled in the defendant's favor and granted a stay, citing the Common Law Procedure Act and characterizing the forum clause as one for arbitration, even though the clause did not mention arbitration and instead referred to a Russian court.<sup>57</sup> Noting the ouster argument, the court held that the Act had not ousted the court's jurisdiction but merely granted the court authority to stay the proceeding.<sup>58</sup> In so ruling, the court agreed with *Willesford v. Watson* that where "parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a prima facie duty is cast upon the Courts to act upon such arrangement."<sup>59</sup>

English courts thus enforced clauses designating foreign-court litigation under both common law and statutory authority. Based on these foundational cases, courts applied a discretionary standard that led both to enforcement<sup>60</sup> and rejection<sup>61</sup> of forum clauses.<sup>62</sup>

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<sup>54</sup> [1878] 8 Ch. D. 26 (C.A.) at 26. Cowen & da Costa, *supra* note 48, at 182.

<sup>55</sup> [1878] 8 Ch. D. 26 (C.A.) at 27.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 37.

<sup>59</sup> *Id. Accord*, Austrian Lloyd S.S. Co. v. Gresham Life Assurance Soc'y [1903] KB 1 at 249, 252 (Eng.); Johnson v. Macheilsne, (1811) 170 Eng. Rep. 1300, 1300 (C.P.). See also Zapata Off-Shore Co. v. M/S Bremen, 428 F.2d 888, 900 (5th Cir. 1970) (Wisdom, J., dissenting); Cowen & da Costa, *supra* note 48, at 186.

<sup>60</sup> See cases listed at Cowen & da Costa, *supra* note 48, at 182; see also *supra* note 25 and accompanying text.

<sup>61</sup> See generally Cowen & da Costa, *supra* note 48, at 183.

<sup>62</sup> ". . . it is clear, as a matter of common law, that the [English] courts have a discretion to grant or refuse a stay." See Cowen & da Costa, *supra* note 48, at 183. For additional cases enforcing forum clauses, see *id.* at 181–86; *supra* note 25. For cases rejecting forum clauses, see Cowen & da Costa, *supra* note 48, at 183–85, reporting cases from Australia, Quebec, and *The Fehmarn*, [1958] WLR (CA) at 159 (Eng.), an English example "going to the verge of the law." See Cowen & da Costa, *supra* note 48, at 186.

*B. Forum Clauses in the United States*

The reporting of forum-clause evolution in the United States both coincides and contrasts with that in England. The coinciding is twofold: American law was drawn from English precedent, and both mixed the analysis between distinct doctrinal areas such as arbitration, admiralty, and foreign court litigation. The contrast is the greater American tendency to mix doctrinal areas, and a greater distortion in reporting history. The distorted reports drew a sharp line between *Bremen* and its predecessors, characterizing the years before 1972 as categorical rejection of forum clauses and *Bremen* and its progeny as a reasoned development of the law. The more insightful histories describe a nuanced treatment of forum clauses back to 1795, even though forum clause rejection was the majority view. The *Bremen* boundary is nonetheless appropriate because it marks the shift from ouster as a majority view to the strong presumption that *Bremen* put in motion and led to the extreme under *Atlantic Marine*.

A good example of divided American law and the ouster rule's non-uniformity was the differing statements in two first-series Restatements. The Restatement (First) Contracts, labeled forum clauses illegal if unreasonable,<sup>63</sup> while the Restatement (First) Conflict of Laws noted in a comment that courts would usually give effect to forum clauses unless they were unfair or unreasonable.<sup>64</sup> Although these two sections both support reasonable forum clauses, their wording nonetheless shows differing approaches which courts noted in struggling with the uncertain law.<sup>65</sup> The Restatement (Second) Contracts does not take a position on this issue<sup>66</sup> and the Restatement (Second) Conflict of Laws is consistent with its predecessor.<sup>67</sup>

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<sup>63</sup> "A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted, is illegal." RESTATEMENT (FIRST) OF CONTRACTS § 558 (AM. LAW INST. 1932).

<sup>64</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 617 cmt. a (AM. LAW INST. 1934).

<sup>65</sup> See, e.g., *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 808 (1955) (comparing the working of the two Restatements).

<sup>66</sup> See *Capital Bank & Tr. Co. v. Associated Int'l Ins. Co.*, 576 F. Supp. 1522, 1526 (M.D. La. 1984) (noting the absence of a forum clause provision in the Restatement (Second) of Contracts).

<sup>67</sup> See RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (AM. LAW INST. 1988).

### 1. Distorted Pre-*Bremen* Histories

Historical accounts of American forum-clause practice, both judicial and academic, have tended to paint with a bright line typified by the Supreme Court's account in *Bremen*:

Forum selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction of the court.'<sup>68</sup>

While the description "not been favored" is partly accurate in the sense that many courts rejected forum clauses under the ouster doctrine, it ignores the many cases enforcing forum clauses going back to 1796.<sup>69</sup> In addition, putatively accurate statements like this were summarized in even more misleading categorical terms:

Historically, American courts refused to enforce such provisions, usually on a theory that they constituted improper effort by private parties to 'oust' a governmental body, the judicial system, of its power over dispute resolution. The ouster theory started to wane in the mid-twentieth century in some state and lower federal courts, pushed by emerging embrace of freedom of contract.<sup>70</sup>

And another:

Early on, American courts refused to honor exclusive forum selection clauses on the theory that they effected an illegal 'ouster' of the court's jurisdiction. As of 1950, one commentator could report that with almost boring unanimity

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<sup>68</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

<sup>69</sup> *See, e.g.*, *Gienar v. Meyer*, (1796) 126 Eng. Rep. 728, 731 (C.P.).

<sup>70</sup> 14D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3803.1 (4th ed. 2013) (citing *Bremen*, 407 U.S. at 9–11) (footnotes omitted) [hereinafter 14D *Wright & Miller*]. Wright & Miller's historical account is based only on *Bremen* and an 1874 case, *Home Ins. Co. v. Morse*, 87 U.S. 445 (1874), and not a case analysis. In spite of my disagreement with this treatise's conclusion, it is an excellent source for post-*Bremen* issues.



American courts have refused to enforce contractual provisions conferring exclusive jurisdiction on a court or courts of a sister state or foreign country.<sup>71</sup>

This bright-line view is found in many cases and commentaries<sup>72</sup> and includes the notion that *Bremen* marked a sea-change to reasonable acceptance in 1972.<sup>73</sup> The second categorical conclusion is true not only because of the shift in presumption and burden of proof. In ensuing cases, that presumption strengthened like an Atlantic tropical storm, culminating fittingly with *Atlantic Marine*. In quantifying forum clause rejection in the United States, those studies fail to consider a crucial category—unreported dismissal which were not appealed.<sup>74</sup> A derogating plaintiff whose case is dismissed based on the forum clause has the option of filing in the contractual forum. Pursuing that alternative may be preferable to appealing in the original forum. In contrast, where the derogating forum rejects the forum clause and keeps the case, that defendant (often the deep pocket) may have a higher incentive to appeal in order to get the contracted-for forum and whatever advantages it offers. The accounts of ouster dominance assume that the appeal rate for these two categories is the same and that unreported dismissals

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<sup>71</sup> PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 11.3 at 536 (5th ed. 2010) (quoting Note 9, William E. Skye, *Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts*, 10 LA. L. REV. 293, 293 (1949) (which notes exceptions to its sweeping conclusion of “almost boring unanimity”)).

<sup>72</sup> Cases with categorical rejections are discussed throughout this section. For a relatively recent example of categorical forum-clause rejection, see *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554, 556 (Ala. 1980), *overruled by* *Prof'l Ins. Corp. v. Sutherland*, 700 So. 2d 347, 351 (Ala. 1997); *Dowling v. NADW Mktg, Inc.*, 578 S.W.2d 475, 475 (Tex. App.—Eastland 1979), *rev'd on other grounds*, 631 S.W.2d 726 (Tex. 1982); see also GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 436–42 (4th ed. 2007) [hereinafter *Born & Rutledge*]; James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 913 (1999) [hereinafter *George*].

<sup>73</sup> Professor Yackee used the sea-change metaphor in analyzing *Atlantic Marine* and noting the prevalence of admiralty settings in forum clause history. See Jason Yackee, *Choice of Law Considerations in the Validity and Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 U.C.L.A. J. INT'L & FOR. AFF. 43, 43 (2004).

<sup>74</sup> See, e.g., Francis M. Dougherty, Annotation, *Validity of Contractual Provisions Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 (1984).

would not alter the calculation. There is no way to capture that data, but the assumption of equivalence is questionable.

The more accurate historical accounts included contemporaries of the misstated histories. In a 1901 opinion, then Massachusetts Justice Holmes upheld a forum clause and noted that “courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one’s welfare but their own.”<sup>75</sup> In the 1919 Harvard Law Review, Joseph Beale pointed out a conflict between two recent forum-clause cases and concluded that, “in view of the paucity of authorities such a conflict of decision leave the law most uncertain.”<sup>76</sup> Beale was wrong about the paucity of authority and his sample was too small to justify his conclusion, but he was right about the law being inconclusive. Beale later took a position on the issue when he served as Reporter for the first Restatement of Conflict of Laws, which noted that contracting parties “may provide that all actions for breach of the contract shall be brought only in a certain courts, and the courts of other states will usually give effect to such a provision.”<sup>77</sup> The better accounts continued through the twentieth century, perhaps highlighted by Judge’s Wisdom’s dissent in the appellate *Bremen* opinion.<sup>78</sup>

Even with the correcting histories, myths persisted. Some myths defended the ouster doctrine, such as the argument that courts had always seen it this way and that it was an affront to justice to allow parties to agree on the litigation site.<sup>79</sup> Other myths attacked the ouster doctrine, and one was the

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<sup>75</sup> Daley v. People’s Bldg., Loan & Sav. Assoc., 59 N.E. 452, 453 (Mass. 1901).

<sup>76</sup> Joseph Beale, *Progress of the Law, 1918-19*, 33 HARV. L. REV. 1, 21–22 (1919), contrasting *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387, 388 (S.D.N.Y. 1918) (declined French forum clause) with *Mittenthal v. Mascagni*, 66 N.E. 425, 427 (Mass. 1903) (enforced forum clause).

<sup>77</sup> RESTATEMENT (FIRST) CONFLICT OF LAWS § 617 cmt. a (AM. LAW INST. 1934).

<sup>78</sup> See *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, 896–905 (5th Cir. 1970) (Wisdom, J., dissenting); see also ALBERT EHRENZWEIG, CONFLICT OF LAWS 147 et seq. (1959) [hereinafter *Ehrenzweig*] (first edition used here to utilize Ehrenzweig’s earliest view); Carrington & Castle, *supra* note 24, at 208–20; David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 993–1015 (2008) [hereinafter *Perils of Contract Procedure*].

<sup>79</sup> See, e.g., *Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958) (“[A]greements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to the public policy and will not be enforced.”).

idea that early English courts developed the ouster doctrine to protect their political and financial interests.<sup>80</sup> Of course, judges are not only human, but also political functionaries, and there are indeed examples of turf struggles, such as the battle between law and equity courts.<sup>81</sup> But those other turf struggles do not reduce every doctrine to political motives. As to the ouster doctrine in particular, history provides non-self-serving explanations.<sup>82</sup> Even so, the attribution of ill motive was a good way to ridicule the practice, and this happened with scholars and courts ranging from state courts<sup>83</sup> to the Supreme Court in *Bremen*:

The argument that such clauses are improper because they tend to ‘oust’ a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets.<sup>84</sup>

This language is a predicate for the extreme presumption now favoring forum clauses in every range of contract, even though sources well before *Bremen* persuasively refuted this, and ironically one was Judge Wisdom dissenting in *Bremen*’s appellate opinion.<sup>85</sup>

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<sup>80</sup> The judicial turf myth appears to have originated with Lord Campbell’s statement in *Scott v. Avery*, (1856) 10 Eng. Rep. 1121, 1138 (H.L.) (judicial hostility to arbitration clauses “probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would deprive one of them of jurisdiction.”). The court offered no supporting evidence and later analyses have refuted this. *See infra* notes 124–126.

<sup>81</sup> *See* F. W. MAITLAND, EQUITY 9 (A. H. CHAYTOR & W.J. WHITTAKER EDs., REV. 2d 1936) (referring to the “great quarrel between Lord Coke and Lord Ellesmere”).

<sup>82</sup> *See Zapata*, 428 F.2d at 899–900 (Wisdom dissenting); *See also* Carrington & Castle, *supra* note 24, at 210–11.

<sup>83</sup> “Courts guard with jealous eye any contract innovations upon their jurisdiction.” *First Nat’l Bank of Kan. City v. White*, 120 S.W. 36, 42 (Mo. 1909) (dictum commenting on the ouster doctrine in a confession of judgment case with a prorogating forum clause).

<sup>84</sup> 407 U.S. 1, 12 (1972).

<sup>85</sup> *See Zapata*, 428 F.2d at 899 (Wisdom dissenting); *See also* Carrington & Castle, *supra* note 24 at 210–11.

In spite of the misstated histories in cases and commentaries, it is nonetheless true that ouster was the majority rule and forum clauses were often rejected, in many cases by a rigid rule.<sup>86</sup> Whatever the degree of pendulum swing, *Bremen* marked a change that put the forum clause in a presumptively-favored position.<sup>87</sup> There are various theories for what drove the shift, with many attributing it to the emergence of contractual autonomy in the twentieth century.<sup>88</sup> That view tends to subscribe to the bright-line split before and after *Bremen* and ignores cases approving forum clauses back to 1795. Another view, tying into contractual autonomy, is the changing view of venue and even personal jurisdiction.<sup>89</sup>

## 2. Actual Pre-*Bremen* Case Law

The following cases illustrate the analytical and doctrinal jumble that spawned *Bremen* and *Atlantic Marine*. They are topically grouped here for comparison purposes, that is, cases involving aliens should have some doctrinal consistency. But the grouping also illustrates the tendency to mix topical areas, blending precedents not only for arbitration and foreign court litigation clauses (as England did),<sup>90</sup> but also such mixes as state courts using admiralty precedents<sup>91</sup> and federal courts using English arbitration precedents for conflicts between state and federal courts in removal cases.<sup>92</sup>

The ouster doctrine was merely the majority rule with notable exceptions going back to 1795 and before. In *Thompson v. The Catharina*, sailors filed

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<sup>86</sup> See, e.g., *Carbon Black Exp., Inc. v. The SS Monrosa*, 254 F.2d 297, 301 (5th Cir. 1958).

<sup>87</sup> Marcus, *supra* note 78, at 975–76.

<sup>88</sup> See, e.g., Arthur R. Miller, *What Are Courts for: Have We Forsaken the Procedural Gold Standard*, 78 LA. L. REV. 739, 773–86 (2018).

<sup>89</sup> David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMPLE L. REV. 785, 785–88 (1993) [hereinafter *Tale of Two Concepts*] (noting the conflicting concepts of venue/fairness versus contract autonomy).

<sup>90</sup> See 14D *Wright & Miller*, *supra* note 70, at 59; see also *Kelvin Eng'g Co. v. Blanco*, 210 N.Y.S. 10, 16 (N.Y. App. Div. 1925) (forum clause pointing to litigation in Santiago, Chile approved under New York arbitration law). For an English example, see *Law v. Garrett*, (1878) 8 Ch. D. 26, 37, 39 (C.A.) (the Common Law Procedure Act used to approve forum clause specifying litigation in Russia).

<sup>91</sup> See Marcus, *supra* note 78, at 1002–03, n.170, 171.

<sup>92</sup> See *infra* notes 153–74 and accompanying text.

an admiralty claim against their ship, *The Catharina*, for back wages.<sup>93</sup> Defendant ship owner moved to dismiss based on the claimants' prior agreement to bring all claims in the home port, which is not identified.<sup>94</sup> The court noted at the outset that it had experience with such claims and considered the forum clauses generally valid: "On several occasions, I have seen it part of the contract, that the mariners should not sue in any other than their own courts;—and I consider such a contract lawful."<sup>95</sup> Because this case involved both foreign and American sailors, the court split its ruling.<sup>96</sup> Noting that the foreign sailors were contractually obligated to return to the home port, the court dismissed their claims for filing there.<sup>97</sup> Two American sailors were awarded wages, not necessarily because they were forum citizens but because their contracts specified discharge in the United States.<sup>98</sup> The court based its forum-clause opinion in large part on a choice of law analysis,<sup>99</sup> a question still unresolved in the United States.

The first example of the ouster doctrine is said to be *Nute v. Hamilton* in 1856 even though *Nute* never mentioned the ouster doctrine or even used the term ouster.<sup>100</sup> It did, however, reject a forum clause as improperly supplanting venue.<sup>101</sup> *Nute* involved an insurance policy with a forum clause limiting litigation to Essex County in Massachusetts where the insurer was located.<sup>102</sup> When plaintiff's claim arose, he filed in his home county—Suffolk.<sup>103</sup> The two counties are adjacent and the county sits about twenty miles apart, and though that twenty miles would have been more significant in the mid-1800s, it is likely that the insurance company used the forum

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<sup>93</sup> 23 F. Cas. 1028, 1028 (D. Pa. 1795) (No. 13,949).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* 1028. The court's statement of its own experience with similar claims and defenses indicates favorable forum clause opinions before 1795.

<sup>96</sup> *Id.* at 1031, n.10.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id. passim.*

<sup>100</sup> 72 Mass. (6 Gray) 174 (1856).

<sup>101</sup> *Id.* at 174.

<sup>102</sup> *Id.* at 176.

<sup>103</sup> *Id.* at 175.

clause for goals other than saving the twenty-mile trip, as hinted in the court's opinion.<sup>104</sup>

The court disallowed the forum clause, noting that rejection was not based on public policy (nonetheless citing some), but on the basis that forum clauses would upset the symmetry of venue rules, bring justice into disrepute, and subject disputes to counties where a party had greater influence.<sup>105</sup> Rather than English or American precedent, the court based its decision on the distinction between rights and remedies.<sup>106</sup> Under the prevalent view then, rights could be created and modified by contract, but remedies—including forum selection—were public matters governed by forum law and not subject to contract.<sup>107</sup> In distinguishing the defendant insurer's argument for honoring the forum clause, the court noted that, "Most of the cases cited, both English and American, are conditions annexed to the contract . . ." <sup>108</sup> and thus substantive rights rather than the remedial right defendant was claiming here. The court referred to no ouster cases and concluded, "There being no authority upon which to determine the case it must be decided upon principle."<sup>109</sup> The court did not mention the ouster theory, although its public policy references seem to invoke an ouster basis—private agreements cannot displace jurisdiction or venue. With this, *Nute* became an American precedent for rejecting forum clauses although the reasoning seems too equivocal to bear that burden. Interestingly, Ohio did not overrule *Nute* until 1995.<sup>110</sup>

#### *a. Admiralty Cases*

When reading the 1795 *Thompson* case, it is tempting to dismiss admiralty examples as a distinct area governed by their own transnational law

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<sup>104</sup>"It might happen that a mutual insurance company, in which every holder of a policy is a member, and of course interested, would embrace so large a part of the men of property and business in the county, that it would be difficult to find an impartial and intelligent jury." *Id.* at 184.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* at 183–85.

<sup>108</sup>*Id.* at 184.

<sup>109</sup>*Id.* at 185.

<sup>110</sup>See *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 746 (Mass. 1995).

and special fact settings. That argument makes sense except that courts ignored those distinctions—admiralty and maritime cases have played a constant but erratic role in American forum clause development, from *Thompson* to *Bremen* and *Carnival Cruise*.<sup>111</sup> Because of admiralty's primary role in American forum-clause law, the summary here will briefly outline some points and then defer to the larger discussion of specific cases below.

Until *Bremen*, cases went both ways partly because of a circuit split, but also because of differing views at the time.<sup>112</sup> One instructive contrast is *Wm. H Muller & Co. v. Swedish American Linde, Ltd.*, a claim for lost cargo with a clause limiting litigation to Swedish courts.<sup>113</sup> The trial and appellate courts enforced it, but with the Second Circuit noting the conflicting views, including conflicts in the Restatements.<sup>114</sup> When a federal district court in Texas applied *Muller* to honor a forum clause pointing to Genoa, Italy, the Fifth Circuit Court of Appeals reversed it, announcing a categorical rule against forum clauses.<sup>115</sup>

The conflicting views existed not only between circuits and courts, but also in the changing views of particular judges. *Wood & Selick, Inc. v. Compagnie Generale Transatlantique* was an admiralty claim for damage to shipped goods, involving bills of lading with French forum clauses.<sup>116</sup> In rejecting those clauses and upholding jurisdiction, Judge Learned Hand stated:

We may at the start lay aside the clauses in the bills of lading, which apparently were intended to confine any litigation over the contracts to a French court. The respondent does not

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<sup>111</sup>See *infra* notes 147–63 and 179–97.

<sup>112</sup>Admiralty cases following the ouster doctrine include *Prince Steam-Shipping Co. v. Lehman* 39 F. 704, 704 (S.D.N.Y. 1889) and cases cited at Marus, *supra* note 78, at 999 and n.153. Cases enforcing forum clauses include *Thompson* and cases cited at Marcus, *supra* note 78, at 1000, n.156–57.

<sup>113</sup>224 F.2d 806, 806 (2d Cir. 1955).

<sup>114</sup>*Id.* at 808.

<sup>115</sup>See *Carbon Black Exp., Inc. v. The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958).

<sup>116</sup>43 F.2d 941 (2d Cir. 1930).

pretend that, so, construed, these would be valid, and it is of course well settled that they would not.<sup>117</sup>

In assessing Hand's position, it is important to keep in mind that admiralty cases provide common examples of honoring forum clauses.<sup>118</sup> We can conclude from his 1930 statement that Hand subscribed to the bright-line view of forum clause history. That changed by 1949. In his concurrence in a non-admiralty case in 1949, Hand deemed the law not to bar forum clauses categorically, but he "would hold such contracts unenforceable unless the road [sic] shows that the employee was fully advised of their effect upon his rights."<sup>119</sup>

### *b. Arbitration and the Scott v. Avery Clause*

American courts began citing *Scott v. Avery* in the same year it was rendered in England. In *Cobb v. New England Mutual Marine Ins. Co.*, the court rejected an arbitration clause on ouster grounds, but noted the *Scott v. Avery* decision and predicted a changing attitude in the law.<sup>120</sup> American courts cited *Scott* dozens of times in the decades after that, often to enforce its ouster language<sup>121</sup> but sometimes to approve an arbitration agreement that served as a condition precedent to litigation.<sup>122</sup> *Scott* was cited as approving the ouster doctrine<sup>123</sup> often enough that it may be that many American courts did not understand its conditioned approval of arbitration clauses. In 1890 the United States Supreme Court set that straight in two cases that accurately

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<sup>117</sup>*Id.* at 942.

<sup>118</sup>For an historical account of admiralty cases honoring forum clauses, see Marcus, *supra* note 78, at 996–1002 and 1005–07.

<sup>119</sup>*Krenger v. Pa. R.R. Co.*, 174 F.2d 556, 561 (2d Cir. 1949) (Hand, J., concurring). Hand's concurrence in *Krenger* can be read as limited to the statutory protection of employees under the Federal Employer's Liability Act, but is also interpreted as his changing view, or perhaps a correction of his hardline view in *Wood & Selick*. See *Contractual Restrictions*, *supra* note 1, at 442.

<sup>120</sup>72 Mass. (6 Gray) 192, 204 (1856).

<sup>121</sup>See *Hostetter v. City of Pittsburgh*, 107 Pa. 419, 429 (1884).

<sup>122</sup>See *Holmes v. Richet*, 56 Cal. 307, 313–14 (1880).

<sup>123</sup>The citations for *Scott v. Avery* on merely the point of endorsing the ouster doctrine included Judge Wisdom's otherwise well-reasoned dissent in *Zapata*. See *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, 899 (5th Cir. 1970).



stated the English doctrine. The two Supreme Court cases involved the same plaintiff (Hamilton, a tobacco merchant) with claims against different insurers whose policies required cost appraisal for damage claims prior to litigation.<sup>124</sup> Although the two *Hamilton* cases did not deal with arbitration clauses, per se, the Supreme Court used the English doctrine as an analytical tool, approving the clause in one case and rejecting it in the other case because that clause was not properly drafted as a condition precedent to litigation.<sup>125</sup> The Supreme Court's accurate application of *Scott v. Avery* led to equally accurate applications in lower courts.<sup>126</sup>

*c. Claims Involving Aliens*

The inclusion in a lawsuit of foreign people or entities provided an early basis to ignore the ouster rule and enforce a forum clause designating litigation or arbitration elsewhere. The lead example is also the first reported forum-clause case in the United States, *The Catharina*,<sup>127</sup> and it became common to honor forum clauses involving entirely foreign parties.<sup>128</sup> Of course, the degree of the foreign elements varied. The often-cited *Mittenthal v. Mascagni* was a dispute between plaintiffs referred to as "New York citizens" who had contractually designated their domicile in Florence, Italy, and the famous composer Italian Pietro Mascagni, regarding Mascagni's American tour.<sup>129</sup> When plaintiffs sued in Massachusetts, the court honored

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<sup>124</sup>See *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U.S. 242, 255 (1890) (clause approved as not ousting jurisdiction); *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 386 (1890) (clause disapproved as not being a proper condition precedent to litigation).

<sup>125</sup>*Liverpool*, 136 U.S. at 255; *Home*, 137 U.S. at 385.

<sup>126</sup>See, e.g., *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942) (Judge Jerome Frank reversing the trial court's rejection of the arbitration clause and criticizing its erroneous English and American history recital); *Mittenthal v. Mascagni*, 66 N.E. 425, 426 (Mass. 1903) (citing many other Massachusetts cases correctly applying *Scott v. Avery*); *Fontano v. Robbins*, 18 App. D.C. 402, 415 (1901) (citing both *Hamilton* cases in explaining the proper function of a *Scott v. Avery* clause).

<sup>127</sup>23 F. Cas. 1028 (D. Pa. 1795) (No. 13,949). See *supra* notes 93–99 and accompanying text.

<sup>128</sup>See cases cited at *Perils of Contract Procedure*, *supra* note 78, at 1000, n.157.

<sup>129</sup>66 N.E. 425 (honoring an Italian forum clause in a contract between a plaintiff residing in New York but maintaining Italian citizenship, and an Italian composer touring the United States).

the parties' Italian forum clause based on the Italian contacts and an inconvenient forum analysis.<sup>130</sup>

On the other hand, American courts were reluctant to enforce forum clauses in which an American had submitted himself to a foreign court or tribunal.<sup>131</sup> The presence of one foreign party raised a different question: should American courts enforce forum-court clauses where an American citizen contractually subjected himself to that court? Even here, though, there are exceptions enforcing the foreign-court clause. One example is *Kelvin Engineering Co. v. Blanco*,<sup>132</sup> involving a construction contract for a Cuban sugar mill with a forum clause limiting litigation to Santiago, Cuba. Although the parties' citizenship is not stated, one defendant lived in Cuba and the other two likely lived in Cuba as well, because the contract was made in Cuba for work to be done there.<sup>133</sup> Plaintiff Kelvin's home base can be inferred as American based on its choice of a New York forum. Defendants objected to the New York filing based on a forum clause limiting litigation to Santiago, Cuba.<sup>134</sup> The court characterized the clause as one for arbitration, even though it called for litigation, and cited English precedents applying the English arbitration statute to foreign litigation clauses.<sup>135</sup>

#### *d. Statutory Bars*

The Supreme Court noted in *Bremen* that forum clauses were not enforceable if they "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."<sup>136</sup> That is, statutes may bar forum clause enforcement. Although *Bremen*

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<sup>130</sup>*Id.* at 426–27; *See also* Cerro de Pasco Copper Corp. v. Knut Knutson O.A.S., 187 F.2d 990, 991 (2d Cir. 1951) (enforced forum clause on the basis of forum non conveniens where all parties and property were foreign); *See generally*, *Perils of Contract Procedure*, *supra* note 78, at 996–1005, *esp.* notes 130, 154–57, 170, 182–87.

<sup>131</sup>*See Ehrenzweig*, *supra* note 78, at 149 & nn. 21–26.

<sup>132</sup>210 N.Y.S. 10 (N.Y. App. Div. 1925).

<sup>133</sup>*Id.* at 12.

<sup>134</sup>*Id.* at 13.

<sup>135</sup>*Id.* at 732, citing inter alia Austrian Lloyd S.S. Co. v. Gresham Life Assurance Soc'y [1903] KB 1 at 249 (Eng.) and *Law v. Garrett* (1878) 8 Ch. D. 26 (C.A.).

<sup>136</sup>*The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 15 (1972), discussed at *Yackee*, *supra* note 73, at 79.

mentions the point only in passing, the point arose in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, where the court observed in dictum that, if the arbitration clause at issue denied parties access to their antitrust remedy, the clause would not be enforced:

... in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.<sup>137</sup>

In addition to the implied bar under the antitrust statutes, courts have read some federal statutes as express bars of contrary forum clauses.<sup>138</sup> Other cases, however, struggled with the issue. *Krenger v. Pennsylvania R. Co.* is an example, with three notable federal circuit judges taking different views, two rejecting the clause.<sup>139</sup> When Krenger was injured on the job, he signed a post-accident agreement with Pennsylvania Railroad not to file suit anywhere but the injury situs or his domicile at the time of the accident.<sup>140</sup> In return, his employer gave Krenger \$1,750 for interim expenses.<sup>141</sup> The accident occurred in Ohio where Krenger also lived, but Krenger disregarded it and sued in federal court in New York.<sup>142</sup> Judge Clark held for Krenger based on his interpretation of "liability" in the Federal Employers' Liability Act, which Clark concluded cast a critical eye, but not an absolute bar on post-accident agreements regarding litigation.<sup>143</sup> Judge Learned Hand concurred based on common law history for this statutory claim, from which Hand gleaned that "courts have for long looked with strong disfavor upon contract by which a party surrenders resort to any forum which was lawfully

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<sup>137</sup>473 U.S. 614, 637 n.19 (1985) (citations omitted), discussed at *Yackee, supra* note 73, at 63, n.104.

<sup>138</sup>*See, e.g.,* *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 54 (1941) (FELA venue statute barred contrary forum clause). The enactment of the intra-federal inconvenient forum statute, 28 U.S.C. § 1404 (2013) superseded *Kepner*. *See Ex parte Collett*, 337 U.S. 55, 58 (1949).

<sup>139</sup>174 F.2d 556 (2d Cir. 1949).

<sup>140</sup>*Id.* at 557.

<sup>141</sup>*Id.* at 557–58.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 559–60.

open to him.”<sup>144</sup> But Hand also noted that, “In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all . . . .”<sup>145</sup> Judge Swan dissented, with the argument that, because a plaintiff chooses venue when filing the suit, plaintiff should also be able to choose venue contractually before the suit.<sup>146</sup> Other federal statutes have voided forum clauses under the Carriage of Goods by Sea Act<sup>147</sup> and the Miller Act, for payment to a government subcontractor.<sup>148</sup> The purported statutory bar failed under the Age Discrimination in Employment Act,<sup>149</sup> the Credit Repair Organization Act,<sup>150</sup> a state anti-waiver provision for securities fraud class actions,<sup>151</sup> and, notably, in *Carnival Cruise* and *Atlantic Marine*.<sup>152</sup>

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<sup>144</sup>*Id.* at 560 (Hand, C.J., concurring).

<sup>145</sup>*Id.* at 561 (Hand, C.J., concurring) (citing RESTATEMENT (FIRST) OF CONTRACTS § 558 (AM. LAW INST., 1932)).

<sup>146</sup>*Id.* at 561 (Swan, J., dissenting).

<sup>147</sup>*Indussa Corp. v. S.S. Ramborg*, 377 F.2d 200, 204 (2d Cir. 1967) (invalidating a forum clause that violated the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300–1315 (1913)).

<sup>148</sup>40 U.S.C. §§ 270a, 270b, now codified as 46 U.S.C. §§ 3131, 3133 (2013), barring a forum clause in *United States v. Essential Const. Co.*, 261 F. Supp. 715, 718–19 (D. Md. 1966). See *Perils of Contract Procedure*, *supra* note 78, at 1011, n.224.

<sup>149</sup>See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (enforced arbitration clause).

<sup>150</sup>*CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (15 U.S.C. §§ 1679 et seq. (2013) did not bar a forum clause). See also Steven E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL’Y 1, 8 (2014).

<sup>151</sup>*Pong v. Am. Capital Holdings, Inc.*, No. CIV S-06-2527 LKK/DAD, 2007 WL 657790, at \*5 (E.D. Cal. Feb. 28, 2007) (Cal. Corp. Code § 25701, did not bar a forum clause).

<sup>152</sup>The Limitation of Vessel Owners Liability Act, 46 U.S.C. App. § 183C, now codified at 46 U.S.C. § 30509 (2013) invalidates contractual limitations on shipowners’ liability. The Supreme Court rejected plaintiffs’ argument that the Florida forum clause violated the Act because it rendered their remedy ineffective. See 499 U.S. 585, 596–97 (1991); See generally Michael E. Solomine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L. J. 51. 85–92 (1992) [hereinafter Solomine]. TEX. BUS. & COM. CODE ANN. § 272.001(b) (West Supp.) (the statute at the time of the litigation) bars forum clauses for construction contracts regarding real property located in Texas. In *Atlantic Marine*, the district court found Texas law inapplicable because the property was at Fort Hood, a United States Army post. See *United States ex rel. J-Crew Mgmt. Inc. v. Atl. Marine Constr. Co.*, No. A-12-CV-228-LY, 2012 WL 8499879, at \*3 (W.D. Tex. Aug. 6, 2012).

*e. Federalism*

American cases presented a category that did not exist in England—the relationship of state and federal courts. Two issues resulted: whether state or federal law governs a forum clause in federal court, and conflicts regarding the right to remove a case from state to federal court. Courts are still struggling with the first issue, but the second was resolved almost a century ago.

Governing law was not an issue at first. Admiralty claims account for many of the early (and even later) forum clause cases. Admiralty is federal common law, and the forum-clause law that developed in those cases was accordingly federal (even though the contract itself could arguably come under state law). But what law applies when the federal court sits in diversity? This was not a problem prior to 1938, but when the Supreme Court handed down *Erie Railroad Co. v. Tompkins*, parties were able to argue that oppositional state law (whether or not it used the term “ouster”) compelled the forum clause’s rejection, contrary to federal common law that was more inclined to honor the clauses.<sup>153</sup> In *Atlantic Marine*, the Supreme Court failed to address governing law.<sup>154</sup> The Fifth Circuit Court of Appeals provided a workable answer in *Weber*, the case on which this article focuses, but consensus still evades us both as to federal diversity cases in federal court,<sup>155</sup> and forum clauses in general.<sup>156</sup>

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<sup>153</sup>304 U.S. 64, 64 (1938); *See, e.g.*, *Int’l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 113 (5th Cir. 1996). *See also* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 332–33, n.214 (1988) [hereinafter *Another Choice of Forum*]; Stephen E. Sachs, *Five Questions After Atlantic Marine*, 66 *HASTINGS L. J.* 761, 767, n.40–41 (2015) [hereinafter *Five Questions*].

<sup>154</sup>*See Five Questions*, *supra* note 153, at 766 (citing to *Atl. Marine*, 571 U.S. at 62 n.5 for the point at which the Court assumed the forum clause’s validity without discussing which law determined it); Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 *HASTINGS L. J.* 795, 796 (2015) (discussing *Atlantic Marine*’s lack of any discussion of state law’s possible governing role in forum clause analysis).

<sup>155</sup>*See Five Questions*, *supra* note 153, at 766–71; Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 *HASTINGS L.J.* 643, 664–68 (2015) [hereinafter *Governing Law*]. *See also infra* note 222.

<sup>156</sup>*See* 811 F.3d 758, 770–75 (5th Cir. 2016) (applying the forum state’s choice of law rules to interpretation, and federal law to enforceability); *See infra* notes 214–15 and accompanying text.

The removal issue arose from state statutes penalizing removal to federal court. Forum clauses often benefit corporations but the anti-removal statutes were typically designed for local residents, assuring them a state forum and avoiding *Swift v. Tyson*'s federal general common law that tended to favor corporate interests.<sup>157</sup> Commercial entities, especially non-resident companies, understandably sought a federal forum that applied a more nationally uniform business law.<sup>158</sup> Although diversity removal was not possible if all parties were from the same state, non-resident corporations could remove as long as there was no co-defendant from the forum state.<sup>159</sup> And they did remove, often enough that some states passed laws penalizing the removing corporations. The typical penalty was withdrawal of authorization to do business in that state.

When defendants challenged these statutes, courts applied varying legal theories including the English common law's ouster doctrine and the constitutional right to a federal forum for diversity cases. Even the United States Supreme Court engaged in this mixed analysis, highlighted in three inconsistent opinions in Wisconsin-based cases. In the first case, Wisconsin had a statute requiring foreign insurers (that is, insurers from outside Wisconsin) to waive the right to remove a case to federal court as an incident of registering to do business in Wisconsin.<sup>160</sup> Wisconsin resident Morse filed a claim against New York-based Home Insurance Company in a Wisconsin state court.<sup>161</sup> At that time, removal procedure required defendant to file a petition for removal in the state court, which the state court was then required by federal law to turn over to a federal court.<sup>162</sup> The Wisconsin state court denied the petition on the basis of the Wisconsin insurance statute, and the

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<sup>157</sup>41 U.S. 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 64 (1938).

<sup>158</sup>*See generally* JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 4.1 at 197–200 (5th ed. 2015).

<sup>159</sup>*See* 28 U.S.C. § 1441(b) (2013) for the current statement of a removal limit that's been around in varying language since it first appeared in Section 12 of Judiciary Act of 1789, 1 Stat. 73 (Sept. 24, 1789); *see also* *Martin v. Snyder*, 148 U.S. 663, 664 (1893) (citing the Judiciary Act of 1887, Act of Congress of March 3, 1887 (24 St. p.552, c.373)).

<sup>160</sup>*See* *Home Ins. Co. v. Morse*, 87 U.S. 445, 445–46 (1874).

<sup>161</sup>*Id.* at 446.

<sup>162</sup>*Id.* at 446–47.

Wisconsin supreme court affirmed.<sup>163</sup> The United States Supreme Court used a thorough explanation of English and American ouster theory to invalidate Home Insurance's waiver of removal rights,<sup>164</sup> and further found the Wisconsin statute unconstitutional in obstructing defendant's right to federal court in a diversity case.<sup>165</sup>

Following *Morse*, the Supreme Court ruled the opposite in two cases and set up a precedent split that was not resolved until 1922. The first case, two years after *Morse* and involving the same Wisconsin statute, was *Doyle v. Continental Insurance Company*.<sup>166</sup> This time, the state statute won on the Supreme Court's reasoning that the defendant, a Connecticut insurer, had no constitutional right to do business in Wisconsin, that Wisconsin could impose limits on foreign insurers doing business there, and that defendant could choose between its right to remove a case and its privilege of doing business in Wisconsin.<sup>167</sup> The Court was able to distinguish its *Morse* ruling on the same statute, but three justices did not buy that distinction and dissented.<sup>168</sup> Thirty years after *Doyle*, in *Security Mutual Life Ins. Co. v. Prewitt*, the Supreme Court upheld a similar Kentucky statute forbidding removal rights, discussing *Morse*, *Doyle* and ouster.<sup>169</sup> At this point the Supreme Court precedent count was one for removal and two against. That balance shifted with two cases in 1914 and 1916. In *Harrison v. St. Louis & S.F.R. Co.*, the Supreme Court struck down an Oklahoma law imposing a removal penalty, and did so on constitutional grounds with no mention of ouster.<sup>170</sup> The opinion also failed to mention *Morse*, but did distinguish *Doyle*'s and

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<sup>163</sup>*Id.* at 447.

<sup>164</sup>*Id.* at 451–53.

<sup>165</sup>*Id.* at 458. In spite of the seemingly clear argument that the federally-guaranteed right of access to federal court pre-empted the Wisconsin prohibition of removal to federal court, two justices dissented on the grounds that a state had the right to deny access to foreign companies and could set the terms of their doing business locally.

<sup>166</sup>94 U.S. 535 (1876).

<sup>167</sup>*Id.* at 542.

<sup>168</sup>*Id.* at 543.

<sup>169</sup>202 U.S. 246, 246, 250, 254 (1906). *Morse* and *Doyle* are discussed throughout the case. Ouster is discussed at *Id.* at 250, 254.

<sup>170</sup>232 U.S. 318, 333–34 (1914).

*Prewitt*'s upholding of removal-barring state statutes.<sup>171</sup> *Donald v. Philadelphia Reading Coal & Iron Co.* involved yet another Wisconsin statute that directed secretary of state to revoke the license of any foreign corporation (not just insurers) who removed a state-filed case to federal court.<sup>172</sup> This time, a unanimous Supreme Court ruled in a short opinion that the Wisconsin statute violated a constitutional right<sup>173</sup> with no mention of *Doyle*, *Morse*, or the common law ouster doctrine.

With these several cases addressing similar, if not identical, state attacks on removal, using distinct doctrinal approaches and reaching opposing results, the Supreme Court finally got on one page with *Terral v. Burke Const. Co.* in 1922.<sup>174</sup> *Terral* dealt with an Arkansas statute instructing its secretary of state to revoke the doing-business privileges of any company that filed in or removed to federal court. The Supreme Court unanimously held the statute unconstitutional, overruled *Doyle* and *Prewitt*, and referred to *Morse* in the analysis.

### 3. *Bremen* and its Brethren

Whatever your assessment of forum clause history, 1972 marked a change in the United States. The erroneous histories report it as a shift from categorical rejection of forum clauses to a reasoned acceptance,<sup>175</sup> while critics see it as the start of the overly-strong presumption that led to *Atlantic Marine*.<sup>176</sup> The accurate histories are not entirely recent, but, in spite of their

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<sup>171</sup>*Id.* at 332.

<sup>172</sup>*Donald v. Phila. Reading Coal & Iron Co.*, 241 U.S. 329, 331 (1916).

<sup>173</sup>*Id.* at 333.

<sup>174</sup>257 U.S. 529, 533 (1922).

<sup>175</sup>See 14D *Wright & Miller*, *supra* note 70, § 3803.1 at 57; PETER HAY ET AL., *CONFLICT OF LAWS* 536, (5th ed. 2010), quoting Note 9, William E. Skye, *Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts*, 10 LA. L. REV. 293, 293 (1949); *George*, *supra* note 72, at 913; Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RES. 469, 473–78 (2006).

<sup>176</sup>See Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719, 754 (2015) [hereinafter *Gaming the System*]; *Another Choice of Forum*, *supra* note 153, at 314–15; *Perils of Contract Procedure*, *supra* note 78, *passim*; Elizabeth Thornburg, *Designer Trials*, 2006 J. Disp. Res. 181, *passim* (2006) [hereinafter *Designer Trials*]; Judith Resnik, *Whither and Whether*



availability, the erroneous history more often held sway in the *Bremen* shift that led to the current overly-strong presumption favoring forum clauses.<sup>177</sup> That shift is best understood in the language of six cases.<sup>178</sup>

a. *The Bremen v. Zapata Offshore Company*<sup>179</sup>

Houston-based Zapata Off-Shore Company contracted with Unterweser, a German company, to tow Zapata's ocean-going, self-elevating oil drilling rig (the Chaparral) from Louisiana to a point near Ravenna, Italy in the Adriatic Sea. The contract, drafted by Unterweser in bidding for the job, had a forum clause reading "Any dispute arising must be treated before the London Court of Justice."<sup>180</sup> A dispute did arise when Unterweser's tug, the Bremen, encountered rough seas in the Gulf of Mexico and was forced to limp into port at Tampa, Florida. Each party claimed the other was negligent: Zapata claimed that the Bremen was not a seaworthy tug and that its crew was negligent, and Unterweser claimed that the Chaparral was not a seaworthy rig.<sup>181</sup> Zapata ignored the contract's London forum clause and filed an admiralty action in federal court in Tampa.<sup>182</sup> Unterweser responded with an action in England, seeking to compel litigation there.<sup>183</sup> The Tampa federal court denied Unterweser's motion to enforce the forum clause and enjoined Unterweser from continuing in the latter-filed English action.<sup>184</sup>

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*Adjudication?* 86 BOSTON U. L. REV. 1101, *passim* (2006) [hereinafter Resnik]; *Davis & Hershkoff, Contracting for Procedure*, 53 WM & MARY L. REV. 507, *passim* (2011) [hereinafter *Contracting for Procedure*]; Solomine, *supra* note 152, *passim*.

<sup>177</sup>See Ehrenzweig, *supra* note 78, at 145–53, esp. p. 147 ("Neither history nor rationale thus bear out the much-repeated general axiom that parties may not 'oust' the courts from their jurisdiction."); see also Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897).

<sup>178</sup>The text discussing the next five cases (all but *Atlantic Marine*) is drawn from *George*, *supra* note 72, at 913–23 and used with permission of Baylor Law Review. The text has slight changes and my opinion has significant changes.

<sup>179</sup>*The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>180</sup>*Id.* at 2.

<sup>181</sup>*Id.* at 3–4.

<sup>182</sup>*Id.*

<sup>183</sup>*Id.* at 4.

<sup>184</sup>*Id.* at 6.

The English court responded by denying Zapata's motion to stay or dismiss that action.<sup>185</sup> Back in the United States, the Fifth Circuit Court of Appeals upheld the district court's ruling against Unterweser based on the ouster doctrine already adopted in the Fifth Circuit,<sup>186</sup> and further based on the in rem nature of Zapata's admiralty claim and the convenience of litigating in Florida near the site of the damage.<sup>187</sup> The Fifth Circuit later reaffirmed its holding in a sharply-divided en banc opinion, with eight judges favoring the prior holding and six opposed.<sup>188</sup>

The Supreme Court reversed, and in doing so shifted the analysis for forum clauses, or reversed it if you believe the ouster doctrine was the law. The policy underlying the change was clear, with strong references to the "expansion of overseas commercial activities" and the demise of the "barrier of distance that once tended to confine a business concern to a modest territory."<sup>189</sup> Applying this policy shift, the Court noted that the contracting parties were sophisticated companies from different countries, and that the contract was for a specific one-time service towing of "a[n] extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea."<sup>190</sup> The fact that the towing would pass through many distinct national jurisdictions, and that a problem could have occurred at any point

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<sup>185</sup>Unterweser Reederei GMBH. v. Zapata Off-Shore Co., 2 Lloyd's Rep. 158 (C.A. 1968).

<sup>186</sup>*In re* Unterweser Reederei GMBH, 428 F.2d 888, 893 (5th Cir. 1970) ("[A]greements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to the public policy and will not be enforced." (quoting Carbon Black Export, Inc. v. The SS Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958))).

<sup>187</sup>*Unterweser*, 428 F.2d at 894.

<sup>188</sup>*In re* Unterweser Reederei, GMBH, 446 F.2d 907, 908 (5th Cir. 1971), vacated sub nom; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>189</sup>*Bremen*, 407 U.S. at 8. The Court continued:

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. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

*Id.* at 9.

<sup>190</sup>*Id.* at 13.

along the way, justified the honoring of their contracting for a neutral forum.<sup>191</sup> The Court then generalized the new rule:

[I]n the 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. . . . [I]t seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.<sup>192</sup>

*Bremen* also addressed a concern that in some cases, the enforcement of a forum clause would subject a local party to an unfriendly forum or unfair law; the Court thus held that a forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.<sup>193</sup> Having stated this, the Court embraced the dissenters' view from the *Bremen* appellate opinion, finding that the enforcement of the clause in *Bremen* did not violate public policy because the conduct occurred outside United States territory, and that "we should not invalidate the forum clause here unless we are firmly convinced that we would thereby significantly encourage negligent conduct within the boundaries of the United States."<sup>194</sup>

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<sup>191</sup>"It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the *Bremen* or *Unterweser* might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 13–14 (footnote omitted).

<sup>192</sup>*Id.* at 15.

<sup>193</sup>*Id.* at 15 (citing *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263 (1949)).

<sup>194</sup>*Id.* at 16 (quoting *In re Unterweser Reederei GMBH*, 428 F.2d 888, 907–08 (5th Cir. 1970)).

The Court further held that an “unreasonable” forum clause is unenforceable, but limited unreasonableness to situations where the chosen forum was “seriously inconvenient.”<sup>195</sup> The Court placed the burden for establishing unreasonableness on the party challenging the clause, noting that “it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”<sup>196</sup> This language is the start of what is now the *Atlantic Marine* presumption, and it seemed reasonable in this context.<sup>197</sup>

*b. Scherk v. Alberto-Culver*<sup>198</sup>

Arbitration clauses were the next step in expanding forum clauses, occurring with two federal statutory claims for which Congress had precluded binding arbitration. The crucial factor was the presence of foreign parties and the choice of a foreign forum, which a slim majority of the Court thought sufficient to override the policy of barring arbitration agreements in federal securities cases. Arbitration clauses matter in forum-clause analysis because courts have tended to mix the precedents from arbitration rulings with other categories.<sup>199</sup> *Bremen* is one example.<sup>200</sup> In *Scherk*, the Court considered whether the parties’ freely-negotiated arbitration clause, designating the International Chamber of Commerce in Paris, should be enforced against a domestic corporation’s wish to litigate its securities fraud claim in the United States.<sup>201</sup> The case arose from Illinois-based Alberto-Culver’s expansion into the European market. One of its initial moves was to contract with German businessman Fritz Scherk to acquire his rights to three interrelated business entities organized under German and Liechtenstein law.

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<sup>195</sup>*Id.* at 16.

<sup>196</sup>*Id.* at 18.

<sup>197</sup>*Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 59–60 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988)).

<sup>198</sup>417 U.S. 506 (1974).

<sup>199</sup>*See* 14D *Wright & Miller*, *supra* note 70, § 3803.1, at 59, esp. note 11. *See also* *Kelvin Engineering Co. v. Blanco*, 210 N.Y.S. 10, 13 (1925) (forum clause pointing to litigation in Santiago, Chile approved under New York arbitration law).

<sup>200</sup>*See* 407 U.S. at 13–14, nn. 15 & 16.

<sup>201</sup>417 U.S. at 508.

Scherk's express warranty that he was conveying "the sole and unencumbered ownership of these trademarks" was overstated and Alberto-Culver sued for securities fraud in federal court in Illinois. Scherk sought to enforce the contract's arbitration clause, but the lower courts denied Scherk's motion, drawing from the holding in *Wilko v. Swan* that actions under the Securities Act of 1933 were exempt from arbitration clauses. This in turn was based on statutory language in the 1933 Act that barred "[a] condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter."<sup>202</sup> The *Wilko* opinion noted the policy clash between this language and the policies underlying the United States Arbitration Act, 9 U.S.C. §§ 1 et seq. As recounted in *Scherk*:

The [*Wilko*] Court found that '[t]wo policies, not easily reconcilable, are involved in this case.' On the one hand, the Arbitration Act stressed 'the need for avoiding the delay and expense of litigation,' and directed that such agreements be 'valid, irrevocable, and enforceable' in federal courts. On the other hand, the Securities Act of 1933 was '[d]esigned to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale,' by creating 'a special right to recover for misrepresentation . . . .'<sup>203</sup>

While *Wilko* struck this balance in favor of litigation of securities fraud claims and the non-enforcement of arbitration clauses, *Scherk* did the opposite, finding that the strong international flavor of *Scherk*'s facts called into play policy interests that dictated an opposite result from *Wilko*. *Scherk* also noted that neither an arbitration clause nor any other forum clause could be defeated by allegations of securities fraud (or presumably any other fraud). That is, a mere allegation of fraud did not negate the contract containing the choice of forum agreement. However, the forum clause could be defeated by showing the "inclusion of that clause in the contract was the product of fraud or coercion."<sup>204</sup> Notably, this is the expansion of *Bremen*'s point that fraud is

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<sup>202</sup>*Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

<sup>203</sup>*Scherk*, 417 U.S. at 512 (quoting *Wilko*, 346 U.S. at 431, 438).

<sup>204</sup>*Id.* at 519, n.14 (emphasis original).

grounds to set aside the clause, to one that the fraud must go to the forum clause rather than the contract as a whole.<sup>205</sup>

There was significant dissent in *Scherk*. While *Bremen*'s enforcement of a forum clause was an 8-1 decision, *Scherk*'s enforcement of a foreign arbitration agreement was a 5-4 vote, owing to concerns about federal securities policy rather than the distinction between adjudication and arbitration. The four dissenters would have enforced the arbitration clause had it been a mere trademark dispute, but argued that the Congressional policy underlying securities fraud claims compelled support for the plaintiff's choice of a federal judicial forum, and that the majority's "invocation of the 'international contract' talisman" was insufficient to override that policy.<sup>206</sup>

c. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>207</sup>

Eleven years after *Scherk*, the Court had another close vote along similar lines, this time with antitrust as the non-arbitral federal right. In *Mitsubishi*, the Court held by a 5-3 vote that, in international cases, unlike domestic ones, the federal policy favoring enforcement of arbitration clauses prevailed over a conflicting federal policy that made antitrust claims non-arbitrable. The case arose from a dispute between car maker Mitsubishi (a joint venture of Chrysler International, a Swiss corporation, and Mitsubishi Heavy Industries, a Japanese corporation) and Soler, a Puerto Rican corporation located in Pueblo Viejo, Puerto Rico. Two years into the parties' distributorship agreement, Soler's sales declined and it sought to delay or cancel some shipments, and "transship" other cars to be sold in the continental United States and Latin America. Mitsubishi refused. When attempts to resolve the dispute failed, it sued in federal court in Puerto Rico, seeking to compel arbitration under the terms of the distributorship agreement. Solar objected

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<sup>205</sup>In *Bremen*, the Court stated that forum clauses (at least in transnational admiralty settings), should be enforced unless the derogating party could show that enforcement "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 407 U.S. at 15. By enforcing a forum clause in a fraud claim, *Scherk* narrowed the fraud defense to the clause itself, at least implying that evidence of contractual fraud as a whole is irrelevant to forum clause enforcement. 417 U.S. at 518.

<sup>206</sup>*Scherk*, 417 U.S. at 529 (Douglas, J. dissenting, joined by Brennan, White and Marshall).

<sup>207</sup>473 U.S. 614 (1985).

to arbitration and counterclaimed for violations of the Sherman Antitrust Act<sup>208</sup> and the related Automobile Dealers' Day in Court Act.<sup>209</sup> The district court ordered arbitration of all claims. The First Circuit reversed as to the antitrust claims, following *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*,<sup>210</sup> which had held that antitrust claims were non-arbitrable.

The Supreme Court reversed, focusing narrowly on the arbitrability of an antitrust claim arising in an international agreement. Recognizing that not all controversies "implicating statutory rights are suitable for arbitration,"<sup>211</sup> the Court nonetheless found that the concerns raised in *American Safety* were insufficient in international cases to overcome the federal presumption favoring arbitration clauses. The majority further noted that where foreign arbitration did not, in hindsight, protect antitrust concerns, that the problem could be addressed at the award-enforcement stage (although this assumes that the award would be enforced in a United States court):

As in *Scherk v. Alberto-Culver Co.*, we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.<sup>212</sup>

In a lengthy dissent, Justices Stevens, Brennan and Marshall contested the concept that "vague notions of international comity" compelled a different treatment for international disputes than for local ones regarding antitrust claims. The dissent derided the majority's "repeated incantation of the high ideals of 'international arbitration' [that] creates the impression that this case involves the fate of an institution designed to implement a formula for world peace."<sup>213</sup>

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<sup>208</sup>15 U.S.C. §§ 1–38 (2012). *See Mitsubishi*, 473 U.S. at 618.

<sup>209</sup>15 U.S.C. §§ 1221–26. (2012). *See Mitsubishi*, 473 U.S. at 618.

<sup>210</sup>*Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968).

<sup>211</sup>*Mitsubishi*, 473 U.S. at 627.

<sup>212</sup>*Id.* at 629 (citation omitted).

<sup>213</sup>*Id.* at 665.

d. *Stewart Organization, Inc. v. Ricoh Corporation*<sup>214</sup>

In 1988, after the steady doctrinal shift favoring forum clauses, the Court hit a bump when considering forum clauses' effect in diversity cases, where *Erie* arguably required state law control over the contract issues. New Jersey-based Ricoh Corporation had a dealership agreement with Stewart Organization, a closely-held Alabama corporation, containing a forum clause providing that "the courts in New York City, the borough of Manhattan, would 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.'"<sup>215</sup> In 1984, Stewart sued in federal court in Alabama for breach of contract and related claims, as well as antitrust claims.<sup>216</sup> Invoking the forum clause, Ricoh moved for a § 1404(a) transfer to the Southern District of New York.<sup>217</sup> The federal district court denied the motion on the grounds that this was an issue of contract law and thus controlled, under the *Erie* Doctrine, by Alabama law which disfavored forum clauses.<sup>218</sup>

The Eleventh Circuit reversed.<sup>219</sup> It agreed that the *Erie* Doctrine applied, but determined that the issue was one of venue, not contract, and that for venue issues the *Erie* analysis favored federal law.<sup>220</sup> In doing so, the appellate court obviously believed that § 1404(a) did not apply, and in the absence of federal law on point, the Eleventh Circuit applied the federal common law found in *Bremen*.<sup>221</sup>

The Supreme Court affirmed, but on different grounds under the *Erie* Doctrine, setting the stage for a circuit split on what law governs forum clauses in federal courts.<sup>222</sup> The Court agreed with the Eleventh Circuit that

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<sup>214</sup>487 U.S. 22 (1988).

<sup>215</sup>*Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067 (11th Cir. 1987), *aff'd and remanded*, 487 U.S. 22 (1988).

<sup>216</sup>*Id.* at 1067

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>*Id.* At 1071.

<sup>220</sup>*Id.* at 1067-1068

<sup>221</sup>*Id.* at 1069

<sup>222</sup>*Stewart*, 487 U.S. at 25-27.



this was a venue issue, but noted that there was a federal statute on point—§ 1404(a). The *Erie* Doctrine flows from the Rules of Decision Act, which provides that state law is the rule of decision in federal courts, “except where the Constitution or treaties of the United States or Act of Congress otherwise require or provide . . . .”<sup>223</sup> In this case, Congress has otherwise provided by enacting § 1404(a), which the Court found on point.<sup>224</sup> In doing so, the Court took care to highlight the difference between the Eleventh Circuit’s analysis under *Bremen* and its own under § 1404(a). *Bremen* enforces the parties’ forum clause as a contractual obligation, with comity as an additional consideration. Section 1404(a) does not automatically enforce the forum clause, but uses it as a trigger for a 1404(a) analysis, in which the parties’ expectation is an element, along with convenience and economy, and “those public-interest factors of systematic integrity and fairness under the heading of ‘the interest of justice.’”<sup>225</sup> All this is to be done in an “individualized, case-by-case consideration of convenience and fairness.”<sup>226</sup>

e. *Carnival Cruise Lines, Inc. v. Shute*<sup>227</sup>

No doubt the most controversial, *Carnival Cruise* is also the most factually succinct of the cases. It was a straightforward slip and fall claim that led to the expanded enforcement of forum clauses from *Bremen*’s “freely negotiated agreement” standard to one honoring even fine print clauses in adhesion contracts. *Carnival* is the reason that most of us have now unwillingly agreed to litigate or arbitrate in a faraway place.

The case began with the Shutes’ purchase of tickets through a local Seattle travel agency for a Pacific cruise departing from Los Angeles. Among other fine print in the three attached pages, the ticket had a clause requiring that all related suits be litigated in Florida. Mrs. Shute was injured in a fall aboard ship off the west coast of Mexico, allegedly caused by *Carnival*’s negligence. As Professor Mullenix explained in her contemporaneous article, the resulting five years of non-merits litigation “belie[d] the purported utility

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<sup>223</sup>28 U.S.C. § 1652 (2012).

<sup>224</sup>*Stewart*, 487 U.S. at 29–32.

<sup>225</sup>*Id.* at 27–30.

<sup>226</sup>*Id.* at 29 (quoting *Van Dusen v. Barrak*, 376 U.S. 612, 622 (1964)).

<sup>227</sup>499 U.S. 585 (1991).

of forum-selection clauses.”<sup>228</sup> Briefly recounted, the Shutes sued Carnival in federal court in Washington. Carnival moved for summary judgment on two grounds, amenability and the mandatory Florida forum clause. The district court granted the summary judgment only on personal jurisdiction grounds and dismissed the case. The Ninth Circuit Court of Appeals reversed on jurisdiction and further rejected Carnival’s attempt to enforce the forum clause, finding that it was not freely negotiated and that the Shutes were physically and financially incapable of pursuing the litigation in Florida.<sup>229</sup> At this point the Court of Appeals delayed its opinion to submit a certified question to the Washington Supreme Court, asking its view on the Washington long arm statute’s reach. The Washington Supreme Court found the long arm embraced Carnival’s local activities, and with that the Court of Appeals issued its opinion establishing personal jurisdiction and rejecting the boilerplate forum clause.

Professor Mullenix points out that at this point, the litigation was about personal jurisdiction. That view is further supported in Carnival’s appeal to the United States Supreme Court, in which both parties’ briefs focused primarily on personal jurisdiction. The Court never reached that question and instead switched to the enforceability of the ticket’s fine-print, the boilerplate forum clause which required “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.”<sup>230</sup>

Up to then, a pre-printed forum clause would not have been considered because it fit none of the *Bremen* guidelines. It was not negotiated, the parties’ bargaining power was uneven, it did not involve an international claim or foreign parties (except that Florida-based Carnival was incorporated in Panama), and it did not reflect the needs of international commerce. Nonetheless the Court’s majority found the clause reasonable based on Carnival’s interest in avoiding litigation in various locales where its ships sail (even though this forum was the site of the ticket sale), sparing litigants and

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<sup>228</sup>See Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L. J. 323, 332 (1992).

<sup>229</sup>*Carnival*, 499 U.S. at 589.

<sup>230</sup>*Id.* at 587–88.

judges the time and expense of forum fights, and optimizing the passenger benefit in lower litigation costs.<sup>231</sup> In spite of considerable criticism of its questionable economic analysis, Carnival Cruise took the forum-clause presumption to new extremes by holding that adhesion contracts could limit litigation to distant forums in spite of the relative burden on consumer plaintiffs.

*f. Atlantic Marine*

Atlantic Marine Construction Company is incorporated and based in Virginia, and does construction work “from Virginia to California” according to its website.<sup>232</sup> In 2009, it contacted with the United States Army Corps of Engineers to build a child-development center at Fort Hood, Texas, and pertinent to that, it entered a subcontract with J-Crew Management Inc., for certain work on the project.<sup>233</sup> Their contract had a forum clause requiring that disputes between the parties “shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.”<sup>234</sup> When a payment dispute occurred, J-Crew ignored the forum clause and filed a federal diversity claim against Atlantic Marine in the Western District of Texas.<sup>235</sup>

Although J-Crew had filed in the district where the dispute arose, Atlantic Marine moved to dismiss for wrong venue (arguing that the forum clause invalidated venue anywhere but the parties’ chosen forum),<sup>236</sup> and alternatively for inconvenient-forum transfer. The district court denied both motions, holding that venue was not at issue, that § 1404 was the exclusive remedy for enforcing forum clauses pointing to another federal forum, and that Atlantic Marine had not meet its burden of showing the Texas forum inconvenient for a local matter. Atlantic Marine petitioned for a writ of

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<sup>231</sup>*See id.* at 593–94. The Court also found no evidence of lack of fundamental fairness such as bad faith, fraud, overreaching or lack of notice. *See id.* at 595.

<sup>232</sup>Atlantic Marine Construction Company Inc., <http://www.amccinc.com/about.html> (last visited on August 7, 2017).

<sup>233</sup>*See* Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court, 571 U.S. 49, 52–53 (2013).

<sup>234</sup>*Id.* at 53.

<sup>235</sup>*Id.*

<sup>236</sup>Atlantic Marine’s argument was based on 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3). *Id.* at 55.

mandamus, and lost again when the United States Court of Appeals for Fifth Circuit denied the writ because Atlantic Marine failed to show “a clear and indisputable” right to relief. The appellate court also affirmed the trial court as to § 1404 being the exclusive remedy for enforcing a forum clause designating another federal forum, and noted in dictum that if the contractually-designated forum was not a United States federal court, then the remedy is Rule 12(b)(3) to dismiss for lack of personal jurisdiction. A concurring opinion disagreed on the lack of a venue remedy and urged Atlantic Marine to seek Supreme Court view, which it did.

In its unanimous reversal, the Supreme Court aligned with none of the parties’ arguments or lower judges’ conclusions. The Court disagreed with Atlantic Marine and the concurring judge on venue as a remedy, and thus affirmed the Fifth Circuit majority on the remedy as exclusively one of inconvenient forum,<sup>237</sup> but reversed the outcome and in doing so, clarified several important points for forum clause practice. In particular, the Court agreed with the appellate majority that the venue statute and procedural rule do not apply and that 28 U.S.C. § 1404 is the only remedy for enforcing a forum clause involving federal forums. The Court took pains to explain that the venue laws allow for dismissal only when venue is “wrong” or “improper” as spelled out in those laws. Whether venue is “wrong” or “improper” depends exclusively on federal venue statutes,<sup>238</sup> and a forum clause “has no bearing on whether a case falls into one of the specified districts.”<sup>239</sup>

In resolving the remedy category—wrong venue versus chosen venue—the court briefly commented on two related points that were not present here. First, this was an intra-federal contest. The ruling briefly instructed that 1404 applied under these modified guidelines did not apply to cases involving a non-federal court. Thus, forum clauses pointing to a jurisdiction other than another federal district (that is, a state or foreign court) are enforced through

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<sup>237</sup>*Id.* at 55–61.

<sup>238</sup>The Court explained that 28 U.S.C. § 1391 is the general venue statute and it governs unless there’s a more specific venue statute. “[If] a case falls within one of [§ 1391(b)’s districts]. . . . [V]enue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a).” *Id.* at 56.

<sup>239</sup>*Id.* at 56 (relying on *Van Dusen v. Barrack*, 376 U. S. 612 (1964) and *Stewart Org. Inc., v. Ricoh Corp.*, 487 U.S. 22 (1988)). *See id.* at 56–59.

the common law doctrine of forum non conveniens. The Court noted that “1404(a) is a codification of that [common law] doctrine for the subset of cases in which the transferee forum is another federal court.”<sup>240</sup> Second, the Court noted but declined to consider an alternative remedy that Atlantic Marine failed to raise: in a contract action (which this was) involving a derogating forum clause (which this did), could defendant move to dismiss under Rule 12(b)(6) (which Atlantic Marine did not do). Atlantic Marine had not raised this point, and the Court declined because it wasn’t argued or briefed other than by amicus.<sup>241</sup>

Having disposed of the venue arguments, the Court moved on to explain *Atlantic Marine*’s § 1404 remedy. Because this forum contest involved two federal districts in the United State, that remedy is the federal inconvenient forum statute— 28 U.S.C. § 1404 —and its judicially-created balancing test minus the private convenience factors which are subsumed in the parties’ forum agreement.<sup>242</sup> Further clarifying, the Court emphasized three analytical points about derogating forum clauses in an intra-federal setting:

- Plaintiff’s choice of forum is not presumptively valid, and instead plaintiff bears the burden of proving that defendant’s requested transfer to the contractually-chosen forum is unjustified under the 1404 public factors test as modified in *Atlantic Marine*.<sup>243</sup>
- The 1404 balancing test is modified to discard the private convenience factors (which the Court held were

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<sup>240</sup>*Id.* at 60 (citing *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007)).

<sup>241</sup>*See* Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party, *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court*, 571 U.S. 49 (2013) (No. 12-929), 2013 WL 3362094.

<sup>242</sup>*See Atl. Marine*, 571 U.S. at 62–68. The omitted private interest factors include “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* at 62 n. 6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6 (1981)).

<sup>243</sup>*See id.* at 63–64.

conceded in the forum clause), leaving only the public factors as the test for enforcement.<sup>244</sup>

- The transfer to the contractually-chosen forum does not include the transferor forum's choice of law rules, contrary to *Van Dusen v. Barrack*, such that the transferee forum's law will determine the governing law.<sup>245</sup>

Applying the revised test, the Court found that the court of appeals improperly placed the burden on Atlantic Marine to prove that transfer to the parties' contractually-chosen forum was appropriate instead of requiring that J-Crew, the derogating party, show that public-interest factors overwhelmingly disfavored a transfer. The appellate court also erred in giving weight to the parties' private interests outside those expressed in the forum clause, and finally, the appellate court's holding that public interests favored keeping the case in Texas because Texas contract law is more familiar to federal judges in Texas than those in Virginia rested in part on the District Court's mistaken belief that the Virginia federal court would have been required to apply Texas' choice-of-law rules instead of Virginia's. The Court also disagreed with the appellate court's view that Virginia judges weren't capable of applying Texas law.

### C. Post-*Bremen* Analytics

The current canon for forum clauses, at least in federal practice, is built on a distorted history. A *post hoc* question arises here—the *Bremen / Atlantic Marine* formula is based on a misstated legal history, but is that erroneous history the cause of the extreme formula? That is, the Court could have reached the same conclusion with a proper historical assessment. But in a common law system based on *stare decisis*, changes are often conceived as calculated pendulum swings, and a miscalculation of the pendulum's beginning point necessarily affects the validity of its end point. In the forum-clause swing, the Supreme Court perceived the pendulum as far to one side and attempted to move it to the middle. In fact, the pendulum was much closer to the middle and the move shifted it to an extreme.

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<sup>244</sup>*See id.* at 64.

<sup>245</sup>*See id.* at 64–66 (deviating from *Van Dusen v. Barrack*, 376 U.S. 612 (1964)).

Even though a proper account shows a tempered view of forum clauses (even if some courts routinely rejected them), the official-but-erred narrative was an unreasonable categorical rejection of forum clauses being replaced by a reasoned acceptance.<sup>246</sup> The true history was mixed, with reasonably clear lines of approval in English law and erratic approval in the United States where state and federal courts readily mixed case categories. This began to change in 1972 when *Bremen* directed that forum clauses in admiralty disputes be presumptively valid and enforceable. The fact that a prima facie contract is presumptively enforceable is unremarkable in itself but the Court has continually upped the burden. The presumption was expanded to international arbitration with *Scherk* and *Mitsubishi*, not only approving arbitration clauses but also overcoming federal statutes barring their use in securities and antitrust cases. *Stewart* enlarged forum-clause approval to diversity cases (one involving a choice of state court) which thwarted plaintiff's Article III right to federal court. *Atlantic Marine* clarified the use of the inconvenient-venue test over wrong-venue remedies and raised the derogating plaintiff's burden in avoiding the forum clause.

The *Bremen* sextet is limited to federal courts, because the rulings are phrased in terms of venue transfers or dismissals.<sup>247</sup> More specifically, the *Bremen* series deals with forum-clause enforcement in federal courts whose jurisdiction was invoked in derogation of a mandatory forum clause.<sup>248</sup> In spite of this limit to federal practice, *Bremen*'s influence has either ushered or mirrored similar expansion in state courts.<sup>249</sup>

Understanding the courts' analytical process requires a look at the myriad of related issues briefly explained in the introduction. First, is the clause permissive, merely consenting to jurisdiction, or mandatory, designating an exclusive forum? Second, is the clause prorogating, supporting the plaintiff's filing, or derogating, attacking plaintiff's chosen forum? Third, what is the

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<sup>246</sup>See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–18 (1972).

<sup>247</sup>See *Atl. Marine*, 571 U.S. at 59–60.

<sup>248</sup>Permissive forum clauses consent to jurisdiction but do not limit it, and thus do not trigger a *Bremen* analysis. See *supra* note 12.

<sup>249</sup>See 14D *Wright & Miller*, *supra* note 70, § 3803.1, esp. note 102 and accompanying text; *Born & Rutledge*, *supra* note 72, at 442–43 (outlining varying approaches in different jurisdictions in the United States but noting the predominant favor shown to forum clauses in international commercial cases).

relationship between the contractually chosen forum and plaintiff's choice for filing the case? Is it intrafederal, state-federal, interstate, state-foreign, or federal-foreign? The permutations for these three categories can require differing analyses and often produce different results.<sup>250</sup> Courts and commentators have come up with a number of analytical frameworks which differ not only on the answers but also on the questions posed and the steps in the analysis.<sup>251</sup> From these various approaches, a number of thorny issues have emerged, starting with the analytical approach to be used. Is forum clause approval a matter of public venue law or private contract?<sup>252</sup> If the

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<sup>250</sup>For example, if the forum clause is permissive and designates Texas, and if plaintiff files in Texas, then it's a prorogating permissive clause. If defendant objects to Texas jurisdiction, the question is whether the forum clause is consent under Texas law. On the other hand, if the forum clause names New York as the exclusive forum and plaintiff files in Texas, then the clause is a derogating mandatory clause. If defendant objects, the Texas court will have to decide if the clause is valid, applicable and enforceable—all complex questions. For a discussion of these permutations, see 14D *Wright & Miller*, *supra* note 70, § 3803.1, esp. at 56–57 and 107–33; *Parallel Litigation*, *supra* note 72, at 912–42.

<sup>251</sup>The Supreme Court's failure to address this may be the most common criticism. See e.g. *Gaming the System*, *supra* note 176, at 731 (identifying three questions: what governing law, decided by which court, and when—at the outset of a more complicated inquiry); *Governing Law*, *supra* note 155, *passim* (identifying the key issues as interpretation and enforceability and proposing the chosen law for interpretation and the derogating forum's law for enforceability); *Steinman*, *supra* note 154, *passim* (endorsing federal court's use of state law at least in diversity cases); *Five Questions*, *supra* note 153, at 766 (discussing the use of state law); *Yackee*, *supra* note 73, *passim* (criticizing the overuse of the derogating forum's law, *id.* at 67, and proposing greater deference to the parties' chosen law, *passim*, and for contracts lacking a choice of law clause, imputing a default choice of the designated forum's law, *id.* at 90–91); *Forum Selection Defense*, *supra* note 150, at 1–2 (arguing that contract law should be subordinated to the derogating forum's procedural law); William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L. A. L. Rev. 9, 17 (2006) (describing a three step contractually-based approach) (hereinafter *Woodward*).

<sup>252</sup>Commentators have engaged in more thorough discussions of the public versus private function in contracting for dispute resolution. See *Perils of Contract Procedure*, *supra* note 78 at 984 (“contractual default rules and procedural doctrine do not share the same source of legitimacy”); *Resnik*, *supra* note 176; *Designer Trials*, *supra* note 176; *Yackee*, *supra* note 73, at 47–62.



issue is contract, what distinctions must be made between interpretation and construction?<sup>253</sup>

Moving beyond the threshold issue of characterizing the inquiry, what makes for a valid forum clause? That is, if a valid clause triggers enforcement, what does it look like?<sup>254</sup> The question of validity could stand alone as a forum procedure question, but approached differently can be a perplexing choice of law question—what law governs the contract? Should the contract’s governing law also govern the venue or jurisdiction question? If so, what law?

Just so this issue isn’t too easily resolved, there’s an interesting *a priori* problem with which comes first, clause validation or choosing the law to govern validation.<sup>255</sup> These issues all go to clause validity and interpretation and we still haven’t reached the essential question of clause enforcement. Even if the validity question should be characterized as one of contract, is that also true for enforcement or is that a jurisdiction/venue question under forum law.

In federal courts, diversity cases raise the *Erie* issue: Does federalism require the court to turn to the local state’s law on forum clauses?<sup>256</sup> Until

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<sup>253</sup>See *Governing Law*, *supra* note 155, at 647 n. 7 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 204 cmt. a (AM. LAW INST. 1971)) (distinguishing interpretation and construction); *Id.* at 654 n. 39.

<sup>254</sup>The *Atlantic Marine* opinion refers twelve times to the need for a valid forum clause, *see Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. Of Texas*, 571 U.S. 49 (2013), *passim*, but merely assumed its existence in a footnote with no guidance on validity. *See* 571 U.S. at 62, n. 5, (“Our analysis presupposes a contractually valid forum-selection clause.”) Professor Sachs notes the paradox of the Supreme Court’s virtually automatic enforcement of “valid” forum clauses without defining validity or the law governing its determination. *See Five Questions*, *supra* note 153 at 766. *See also Gaming the System*, *supra* note 176, at 732–33.

<sup>255</sup>Unlike the rhetorical meaning of *a priori*, *see* B. Russell, “A Priori Justification and Knowledge,” *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2017/entries/apriori/>>, the choice-of-law decision with forum clauses is not inherently deducible. For that reason, it’s more aptly described as the chicken-and-egg question, coined by Judge Anderson in *Beilfus v. Huffly Corp.* 685 N.W.2d 373, 376 (Wis. Ct. App. 2004). *See also Governing Law*, *supra* note 155, at 644, 651–52; *Gaming the System*, *supra* note 176, at 730. In spite of the problem’s inherent non-deducibility, courts routinely lay the egg without a chicken.

<sup>256</sup>In *Stewart*, the majority avoided this question by deciding that 28 U.S.C. § 1404 governed in diversity cases, and that as part of the 1404 analysis the court could decide how much weight to

*Atlantic Marine*, the question was also open whether federalism directed local state law for clause enforcement in diversity cases. The Court's answer is no, so that's at least one choice of law question resolved for forum clauses in diversity cases.<sup>257</sup>

Taken together, these factors mean that choosing the governing law is difficult.<sup>258</sup> Courts and scholars disagree on the approach<sup>259</sup> and in assessing various approaches, sometimes misreport the results.<sup>260</sup> More telling than the disagreement and misreporting, there is a historic failure to address the choice-of-law issue.<sup>261</sup>

Because of this complexity, forum clauses raise issues that deserve better than summary analysis. Even so, in *Atlantic Marine* the Court continued in the direction of simple resolution with an extreme formula: a purported mandatory forum clause is deemed valid and must be enforced unless the derogating plaintiff demonstrates extraordinary circumstances, which cannot include plaintiff's inability to defend in the contractual forum. This

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give the parties forum clause. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988). Justice Scalia dissented that this approach ignored the incumbent *Erie* question of the local state law's position on forum clauses. See *id.* at 33–41 (Scalia, J., dissenting).

<sup>257</sup>Federal common law, specifically the public/private factors test in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) imposed on the transfer authority in 28 U.S.C. § 1404, controls forum clause enforcement in federal diversity cases. See *Atl. Marine*, 571 U.S. at 59–61 (explaining the Court's prior holding in *Stewart*).

<sup>258</sup>See *Gaming the System*, *supra* note 176, at 727–36; *Five Questions*, *supra* note 153 at 766. But see *Governing Law*, *supra* note 155, *passim* (arguing that the question is not difficult if Professor Clermont's proposal is followed).

<sup>259</sup>See *Gaming the System*, *supra* note 176, at 756 (criticizes the overuse of contract law instead of forum procedural law in consumer cases); Solomine, *supra* note 152 at 69–85 (praises party autonomy and proposes treating forum clauses like any other contract); *Steinman*, *supra* note 154 (promotes the *Erie*-designated contract law for validity and enforcement); *Governing Law*, *supra* note 155 (arguing that interpretation should be governed by the parties choice of law clause, or if none, the law selected by the forum's choice of law rule, and that enforcement be governed by forum law); *Woodward*, *supra* note 251 (proposes a three-step analysis using conflicts principles and contract law); *Yackee*, *supra* note 73, at 62–76 (argues alternatively for the use of conflict of laws principles to guide both validity and enforcement, and for the parties' chosen law to govern).

<sup>260</sup>See *Governing Law*, *supra* note 155, at 652 n. 22.

<sup>261</sup>See *Five Questions*, *supra* note 153, at 766 (“So far, the Court has decided plenty of forum-selection cases without identifying any governing law.”) See also *Governing Law*, *supra* note 155 at 649; *Yackee*, *supra* note 73, at 67.

presumption is extreme not only in its language but in its encouragement of summary analysis that allows marginal fact settings to breeze through.

### III. *ATLANTIC MARINE* AT THE MARGIN: A CASE STUDY

Criticism is commonly aimed at forum clauses in adhesion contracts,<sup>262</sup> but negotiated contracts also provide examples of *Atlantic Marine*'s extreme presumption, leading to questionable summary enforcement. The Fifth Circuit Court of Appeals recently offered an example. The following discussion is split into an explanation of the case's trial and appellate opinions and a distinct critical assessment, with a few redundancies that I thought necessary to the analysis.

#### A. *The Weber Opinion*

PACT XPP Technologies, A.G., is a German-incorporated, non-producing entity that owns a United States patent related to highly-parallel processing.<sup>263</sup> In spite of that German incorporation, PACT's focus was the United States.<sup>264</sup> As the magistrate judge found, "PACT is a German corporation with its principal business being the licensing and enforcement of its U.S. patents in this country."<sup>265</sup> The appellate opinion echoed this by noting that, "The company is incorporated in Germany, but—during the relevant period—its primary business activities were in the United States."<sup>266</sup>

To pursue that business plan, PACT sought help from California resident Peter Weber in 2002. His agreement was to defer compensation until he made a profit for PACT in pursuing infringers.<sup>267</sup> When the profit came in 2012 – a \$ 15 million judgment from a Texas federal court – PACT immediately

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<sup>262</sup>*See, e.g.,* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 110 (2012) (Ginsburg, J. dissenting). *See also* Carrington & Castle, *supra* note 24, at 218; *Gaming the System*, *supra* note 176; *Another Choice of Forum*, *supra* note 153 at 360–66; *Resnik*, *supra* note 176; *Contracting for Procedure*, *supra* note 176.

<sup>263</sup>*Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 763 (5th Cir. 2016).

<sup>264</sup>*Id.*

<sup>265</sup> *Weber v. PACT XPP Techs., AG*, No. 2:13-CV-0995-JRG-RSP, 2015 WL 13297959 (E.D. Tex. Feb. 25, 2015) at \*1 (not designated for publication).

<sup>266</sup>*Weber*, 811 F.3d at 763.

<sup>267</sup>*Id.* at 763.

fired Weber without pay and told him the contract was illegal.<sup>268</sup> Negotiation attempts failed and Weber sued PACT in the same federal district where he'd obtained PACT's judgment.<sup>269</sup> In response, PACT filed a parallel action in a German court and challenged Texas venue based on a vague clause in the contract it had declared void.<sup>270</sup>

Weber had three arguments in support of the position that the federal court in Texas was the proper forum. The first argument was that the forum clause did not name a forum, but merely described its attribute as PACT's base of operations, which Weber argued was the United States.<sup>271</sup> The second argument was that the contract's lack of a choice of law clause that should compel German law's application.<sup>272</sup> The third argument was based on PACT's own assertion that the contract was invalid, which Weber argued also invalidated the forum clause and left Weber with his quantum meruit and promissory estoppel claims in the United States.<sup>273</sup> In the trial and appellate courts, the resulting forum clause analysis was both consistent with *Atlantic Marine* and an example of that case's severe favoring of questionable contracts over sound venue policy.

### 1. The District Court

PACT filed a two-fold motion to dismiss, challenging personal jurisdiction in Texas and raising the German forum clause.<sup>274</sup> The district court referred the motions to the magistrate judge, who first found personal jurisdiction in a cursory analysis based on the Supreme Court's 2014 decision in *Walden v. Fiore*.<sup>275</sup> Although the *Weber* analysis was short and omitted

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<sup>268</sup>*Id.*

<sup>269</sup>*Id.* at 764.

<sup>270</sup>*Id.* at 763–64.

<sup>271</sup>*Id.* at 768–70.

<sup>272</sup>*Id.* at 770–71.

<sup>273</sup>*Id.* at 774–75.

<sup>274</sup>*Weber v. PACT XPP Techs., AG*, No. 2:13-CV-0995-JRG-RSP, 2015 WL 1329759 (E.D. Tex. Feb. 25, 2015) at \*1, aff'd 811 F.3d 758 (5th Cir. 2016) (not designated for publication).

<sup>275</sup>*Id.*

essential components,<sup>276</sup> the facts cited justified personal jurisdiction. Specifically, the magistrate judge noted that:

PACT selected this forum and spent several years prosecuting its lawsuit here, going all the way through a jury trial, which was attended by officers of PACT. There is no dispute that the contract at issue in the current suit addressed the conduct of Plaintiff, as an officer of PACT, in attending that trial here in Texas. Furthermore, the proceeds of the judgment arising from that trial are the object of the recovery sought by Plaintiff from Defendant in this case.<sup>277</sup>

These facts had equal bearing on the forum clause analysis but were never mentioned again in the district court or on appeal. Calling the jurisdictional analysis cursory is not to say it was legally inadequate, because any inadequacy was mooted by the dismissal on forum-clause grounds. That shorthand analysis is, however, an example of the summary disposition that continued in the case, and that I believe is encouraged by the severe *Atlantic Marine* presumption.

Turning to the forum clause, the magistrate judge found the following points pertinent:

- the parties' original contract was in German with an English translation attached to Weber's complaint;<sup>278</sup>

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<sup>276</sup>The magistrate judge's opinion found personal jurisdiction without mentioning the long arm statute or the fair play and substantial justice test. Reference to the long arm statute is arguably unnecessary because Texas is a limits-of-due-process state, that is, its long arm defers to the minimum contacts test. See *Int'l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016). It is nonetheless standard to explain that because the due process/minimum contacts test itself is nothing more than a limit on long arm jurisdiction. See *id.* The omission of the fair play and substantial justice test may be the result of that test's analytical absence in *Walden*, although that misses the point that *Walden* and *Weber* had opposite holdings on personal jurisdiction. The omission was proper in *Walden* because the Supreme Court found no contacts, thus obviating the fair play test. In *Weber*, the magistrate judge found contacts and based personal jurisdiction on that alone, which missed the second half of the due process test. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

<sup>277</sup>*Weber*, 2015 WL 13297959 at \*1.

<sup>278</sup>*Id.*

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## FORUM CLAUSES AT THE MARGIN

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- the contract was executed in both the United States (where Weber signed) and Germany (where PACT's agent signed);<sup>279</sup>
- Weber was a citizen of both the United States and Germany;<sup>280</sup>
- PACT is a German corporation “with its principal business being the licensing and enforcement of its U.S. patents in this country;”<sup>281</sup>
- the contract was a “compact agreement entitled Remuneration Arrangement” and contained a forum clause which according to Weber’s translation read, “To the extent permitted by law, jurisdiction and place of performance shall be the residence of PACT AG.”<sup>282</sup>

In the original German, the forum clause used the term *sitz*, which Weber translated as “residence.”<sup>283</sup> PACT disagreed and translated *sitz* as “seat” and that was the focus of the disputed translation.<sup>284</sup> That is, Weber read the clause as naming PACT’s corporate residence, or where the operations were conducted, while PACT read it as corporate seat, the board’s location.<sup>285</sup> Based on these facts, and with no further analysis, the magistrate judge concluded that, “Despite Plaintiff’s arguments about the varying meanings of “residence” in English, the Court finds that the contract clearly contemplates the selection of a forum in Germany.”<sup>286</sup>

Weber’s position was weak on the disputed meaning of *sitz*. As the appellate opinion notes, Weber’s own expert did not contest PACT’s

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<sup>279</sup>*Id.*

<sup>280</sup>*Id.* The appellate opinion does not repeat the factfinding of Weber’s German citizenship but does note his birth there. *See Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 772 (5th Cir. 2016).

<sup>281</sup>*Weber*, 2015 WL 13297959 at \*1.

<sup>282</sup>*Id.*

<sup>283</sup>*Id.*

<sup>284</sup>*Id.*

<sup>285</sup>*Id.*

<sup>286</sup>*Id.*

translation of *sitz* as being a German term of art meaning “corporate seat.”<sup>287</sup> Of course, terms of art can mislead non-lawyers like Weber. What’s more, the German legal meaning does not render Weber’s generic understanding unreasonable, especially in light of Weber’s negotiation and signing of the contract in California,<sup>288</sup> PACT’s initial corporate headquarters in California,<sup>289</sup> and, most tellingly, PACT’s stated corporate purpose as “the licensing and enforcement of its U.S. patents,”<sup>290</sup> which could only happen in the United States. More importantly, the court’s reliance on the German term of art *sitz* was an implicit choice of German law as controlling the translation, interpretation, and construction of the parties’ contract, all done without a choice of law analysis. The magistrate judge’s opinion was based solely on Weber’s expert’s failure to rebut the German legal meaning of *sitz*, and there was no evidence of Weber having any understanding of *sitz* other than corporate residence.<sup>291</sup> Weber’s understanding was supported by the location of PACT’s original office<sup>292</sup> and the focus of its licensing and enforcement activities, both in the United States.<sup>293</sup>

Weber had another argument: in Germany, where PACT had filed a parallel action, the German court issued an interlocutory judgment declaring Weber’s contract invalid.<sup>294</sup> Weber used this judgment to argue that, if his employment contract failed, so did the forum clause. Back in Texas, the federal magistrate judge rejected this, applying the severability doctrine and holding that “the forum selection clause was not infected by the illegality that underlies the declaration of invalidity of the overall agreement.”<sup>295</sup> In

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<sup>287</sup>*Weber*, 811 F.3d at 769.

<sup>288</sup>*Weber*, 2015 WL 13297959 at \*1.

<sup>289</sup>As of September 23, 2017, PACT’s Bloomberg entry stated that “PACT XPP Technologies AG was founded in 1996 and is based in Los Gatos, California.” See Software Company Overview of PACT XPP Technologies AG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=21842619> (last visited Sept. 23, 2017).

<sup>290</sup>*Weber*, 2015 WL 13297959 at \*1.

<sup>291</sup>See *Weber*, 811 F.3d at 769.

<sup>292</sup>See *supra* note 289.

<sup>293</sup>See *Weber*, 2015 WL 13297959 at \*1.

<sup>294</sup>*Id.* at \*2.

<sup>295</sup>*Id.*

reaching the conclusion that an otherwise per se invalid contract can have a lone non-substantive clause that survives, the court relied on *Afram Carriers, Inc. v. Moeykens*.<sup>296</sup> In *Afram*, the contract was a partial settlement agreement for a wrongful death claim arising in Peru. The agreement paid the decedent's family \$2,000 in return for an agreement to litigate in Peru. Plaintiff sought to set aside the contract as fraudulently obtained while defendant argued for enforcement. The *Afram* court noted that it could not inquire of the settlement contract itself without getting to the merits of the case and thus undermining the contract's designation of Peruvian courts to determine the merits.<sup>297</sup> *Afram* is an example of the well-criticized chicken-and-egg problem with forum clauses,<sup>298</sup> but, even if *Afram*'s logic is valid, it doesn't apply in *Weber*. The reason is that *Afram* involved a plaintiff's allegation of contract invalidity, while in *Weber*, it was defendant PACT—the forum clause proponent—who not only challenged the validity of the parties' contract but had already obtained a judgment invalidating it.

With the survival of the forum clause in an otherwise completely invalid contract, the magistrate judge noted the next step—the application of the forum-non-conveniens balancing factors dictated by *Atlantic Marine*.<sup>299</sup> Without articulating the doctrine's elements or the supporting facts, the magistrate judge concluded that, “[t]he Court finds that just as in *Atlantic Marine*, there are no circumstances here that would lead the Court to disregard the term of the forum selection clause.”<sup>300</sup>

The magistrate judge's recommendation for dismissal is an example of the short-handed analysis that the *Atlantic Marine* presumption encourages. There was no discussion of the forum clause being permissive or mandatory. There was no choice of law analysis but instead a simple application of legal rules that appear to be drawn from a mix of federal common law and German

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<sup>296</sup>*Id.* (discussing *Afram Carriers v. Moeykens*, 145 F.3d 298, 301 (5th Cir. 1998)).

<sup>297</sup>*See Afram*, 145 F.3d at 301.

<sup>297</sup>*See Afram*, 145 F.3d at 301.

<sup>298</sup>*See infra* notes 425–468 and accompanying text.

<sup>299</sup>*Weber*, 2015 WL 13297959 at \*2 (quoting *Atl. Marine*, 571 U.S. at 60).

<sup>300</sup>*Id.*



law. There was no analysis of the public factors in the forum-non-conveniens test as required by *Atlantic Marine*.<sup>301</sup>

The district court summarily adopted the magistrate judge's recommendation with one paragraph reciting that the court had reviewed Weber's objections and found the magistrate judge's recommendation neither clearly erroneous nor contrary to law.<sup>302</sup> The court addressed none of Weber's points but did note that most of his arguments were not previously pleaded or addressed in the earlier briefs.<sup>303</sup> In making this criticism, the court did not distinguish the inappropriate points from those it had assessed in dismissing the case. As for the newly-raised points, the court's docket shows that Weber presented a motion to reconsider to the magistrate judge which was declined without being addressed.<sup>304</sup>

## 2. Appellate Review

The Fifth Circuit Court of Appeals upheld the dismissal but corrected the trial court's cursory analysis. The appellate opinion started with a persuasive resolution of two post-*Atlantic Marine* issues—the standard of appellate review and the governing law—both first-impression analyses. On standard of review, Weber argued for a de novo review to displace any deference to the trial court's dismissal of his case. PACT argued for an abuse-of-discretion standard. The court adopted a mixed review standard, examining clause interpretation and enforceability de novo and the balancing-of-convenience factors under abuse of discretion.<sup>305</sup>

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<sup>301</sup>*See id.* (citing *Atl. Marine*, 571 U.S. at 60–62 and concluding that its factors did not favor Weber).

<sup>302</sup>*Weber*, 2015 WL 13298144 at \*1.

<sup>303</sup>*Id.*

<sup>304</sup>*See* court docket entry numbers 29 & 30, filed May 2, 2014, *Weber v. PACT XPP Techs.*, AG, No. 2:13-CV-0995-JRG-RSP, 2015 WL 13298144 [hereinafter "Weber Court Docket"]. As the Weber Court Docket states, docket entry number 29 & 30 are sealed and thus unavailable for review. They are cited here only for the notation that certain motions and responses were filed, and not for the content of those motions and responses.

<sup>305</sup>*See Weber*, 811 F.3d at 767–68. Prior to *Atlantic Marine*, the Fifth Circuit had used de novo review for the entire forum clause analysis because it deemed the issue to be wrongful venue governed by Fed. R. Civ. P. 12(b)(3). *Id.* at 767 (citing *Chalix-Chacon v. Glob. Int'l Marine, Inc.*, 493 F.3d 507, 510 (5<sup>th</sup> Cir. 2007)). *Atlantic Marine* clarified the issue as one of convenient forum

With the standard of review compelling de novo consideration of the forum clause's interpretation, the court noted that the initial question was whether the clause was mandatory or permissive. A permissive clause merely waives a party's objection to the chosen jurisdiction and does not forbid filing elsewhere.<sup>306</sup> Thus, if the German clause was permissive, Weber would be subject to German jurisdiction but not barred from pursuing a parallel Texas action. On the other hand, under *Atlantic Marine* a valid mandatory clause designating a foreign court requires a federal court to dismiss the action in deference to that foreign court unless extraordinary circumstances compel retention.<sup>307</sup>

Noting that "shall" does not always create a mandatory forum clause,<sup>308</sup> the *Weber* court devised a three-step approach: (1) find the best translation for the German-language forum clause to determine its mandatory/permissive nature; (2) follow the *Erie* Doctrine's directive to apply Texas choice of law rules to select a governing substantive law; and (3) apply that law to determine if the clause is mandatory.<sup>309</sup> Although the court labeled this function as "interpretation" (assessing the contracting parties' intent), it was limited to construing the legal meaning of the German term *sitz*, ignoring the term's alternate meaning of "residence."<sup>310</sup> To be clear,

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without announcing the standard of review because that case was remanded for the application of the new guidelines. *See Atl. Marine*, 571 U.S. at 68.

<sup>306</sup>*See Weber*, 811 F.3d at 768.

<sup>307</sup>*See Atl. Marine*, 571 U.S. at 60–61; *see also Weber*, 811 F.3d at 768 for discussion of mandatory clauses.

<sup>308</sup>*See Weber*, 811 F.3d at 768, 768 n.14.

<sup>309</sup>*Id.* at 769. As to step 2 and the *Erie* Doctrine, the court gave no reason for its switch from federal common law to *Erie*, although that approach is endorsed by some courts and commentators. The *Erie* view is certainly a valid argument, looking at forum clauses as contract questions governed by state law. There's an equally good argument that forum clauses are jurisdiction-allocating questions and thus procedural even though a contract is involved. The contract/procedure split takes on added significance in federal court where the *Erie* approach would defeat uniform treatment, although that problem arises with any state law question in federal court.

<sup>310</sup>*Id.* at 768–71; for the distinction between interpretation and construction, *see* RESTATEMENT (SECOND) CONFLICT OF LAWS § 204 cmt. a (AM. LAW INST. 1971), discussed at *Governing Law*, *supra* note 155 at 654 n.39. The court cited no evidence of Weber's own understanding other than he thought *sitz* meant principle place of business, *see Weber*, 811 F.3d at 769, which he interpreted as his operating site as CEO. On the related point of governing law, the court later acknowledged

it is not necessarily wrong to use German law to translate a German-language contract, even prior to the choice-of-law analysis, especially as to the substantive provisions. It becomes a stretch when applying German law to ascertain a vaguely-identified forum, and in doing so, ignoring non-legal definitions that a party might have reasonably relied on. Specifically, the only cited evidence of Weber's understanding was that *sitz* meant PACT's principal place of business where the CEO Weber operated, as explained below.

*a. Clause Interpretation/Construction in Three Steps*

Step one was to “determine the best possible English rendering of the forum clause.”<sup>311</sup> In spite of the forum clause's vague forum identity, the court of appeals easily settled on PACT's translation that *sitz*, as used in the Remuneration Arrangement, was a German term of art meaning “corporate seat.”<sup>312</sup> Weber's argument was based only on his understanding of the generic language as meaning “residence” which he thought the equivalent of “principal place of business.”<sup>313</sup> He offered no legal support regarding the German term of art, and his own expert conceded PACT's translation that the German *legal* meaning was corporate seat, which by this time was Munich.<sup>314</sup> The court thus adopted PACT's translation because it found PACT's argument to be unrebutted.<sup>315</sup> Unrebutted arguments generally win, but the problem here is that the court's conclusion rested not merely on German language, but on German law at a point prior to any choice of law analysis. That decision, ironically, was made as a means of setting up the choice of law analysis, an example of the chicken-and-egg problem that can plague forum-clause analytics.<sup>316</sup> German law, of course, is appropriate to construe

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that there was no evidence indicating that Weber understood the contract pointed to German law. See *Weber*, 811 F.3d at 773 (“This factor is more or less a wash . . .”).

<sup>311</sup>*Weber*, 811 F.3d at 769.

<sup>312</sup>*Id.*

<sup>313</sup>*Id.*

<sup>314</sup>*Id.*

<sup>315</sup>*Id.*

<sup>316</sup>See *infra* notes 425–428 and accompanying text for a discussion of the chicken and egg problem in forum clause analysis.

the meaning of German terms of art, but contract interpretation is not necessarily dependent on legal terminology. The unrefuted evidence was that Weber understood *sitz* to mean the corporation's residence, which at the outset was in Los Gatos, California.<sup>317</sup>

Step two was to “apply Texas choice of law rules to determine which substantive law governs forum-clause interpretation.”<sup>318</sup> Because *Atlantic Marine* did not address the law governing forum clauses,<sup>319</sup> and because *Weber*'s magistrate judge and district court did not consider the issue, the Fifth Circuit Court of Appeals addressed it freshly.<sup>320</sup> Weber argued for federal common law as the interpretive standard and PACT argued for German law.<sup>321</sup> The court first conceded that Weber's approach (focused on the forum clause's contract issues as ancillary to the underlying venue question) had been used in the Fifth Circuit, and further noted differing approaches in other circuits.<sup>322</sup> The court then shifted its view from a venue approach to contract which led to the *Erie* Doctrine and local state law.<sup>323</sup>

Accordingly, the court looked to what it deemed the appropriate Texas choice-of-law rule, the Restatement (Second) Conflict of Laws.<sup>324</sup> This choice ignored a superseding Texas statute on corporate internal affairs, but

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<sup>317</sup>See *supra* note 289 (citing Software Company Overview of PACT XPP Technologies AG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=21842619> (last visited Sept. 23, 2017)).

<sup>318</sup>*Weber*, 811 F.3d at 769.

<sup>319</sup>See *Five Questions*, *supra* note 153 at 766–68.

<sup>320</sup>*Id.*

<sup>321</sup>*Weber*, 811 F.3d at 770–73. Other possible choices in a federal diversity case are (1) the law chosen by in parties' contract (inapplicable here), (2) federal venue law, see *Wong v. Party Gaming Ltd.*, 589 F.3d 821, 827 (6th Cir. 2009) (describing cases from six circuits to this effect), discussed at *Five Questions*, *supra* note 153 at 768. For arguments on the *Erie* approach, see *Another Choice of Forum*, *supra* note 153 at 332–39.

<sup>322</sup>See *Weber*, 811 F.3d at 770–71.

<sup>323</sup>*Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 641 (1938) and *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). The court's adherence to *Erie* apparently rests on the notion that forum clause issues require contract analysis under state law. In spite of the logic there, most federal courts characterize forum clause analysis as a private agreement affecting jurisdiction or venue and accordingly apply federal common law. See *Five Questions*, *supra* note 153 at 768 (also making an argument for *Erie* and state law).

<sup>324</sup>See *Weber*, 811 F.3d at 771–73.

the result would have been the same.<sup>325</sup> To the extent Peter Weber had nothing but a contract claim and to the extent the Restatement governed, the court did a thorough analysis under both the general balancing test and the specific contract sections.<sup>326</sup> The court gave special attention to Restatement section 196's rule that service contracts are presumptively governed by the place of service, with the presumption strengthened in contracts designating the place of service.<sup>327</sup> Weber's Remuneration Agreement was in fact couched in those terms, although the court treated it as designating Munich, Germany when it only designated the corporate *sitz*.<sup>328</sup> Nonetheless, the court made an otherwise-supportable finding that *sitz* meant Munich, even though it depended on an application of German law that had not yet been chosen.<sup>329</sup> This was the second time the court applied German law before finishing its choice of law analysis.<sup>330</sup>

The court then matched the dispute's ample German contacts to various Restatement factors, appropriately conceding a few neutral factors,<sup>331</sup> and concluded that German law controlled the contract's interpretation.<sup>332</sup> Peter Weber's contract focused on his service to the PACT board, and that service

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<sup>325</sup>See TEX. BUS. ORGS. CODE §§ 1.102–.103, 1.105 (West 2009) (designating the law of the state of incorporation to govern a corporation's internal affairs). For further discussion, see *infra* notes 432–434 and accompanying text.

<sup>326</sup>*Weber*, 811 F.3d at 771–73.

<sup>327</sup>*Id.* at 772. The court quoted a well-known Texas precedent on that point, an irony because that Texas case rejected the employment contract's choice of law clause in favor of Texas forum law. See *id.* (quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex. 1990)).

<sup>328</sup>See Exhibit A to Complaint, *Weber v. PACT XPP Techs. AG*, No. 2:13-CV-0995-JRG-RSP, 2015 WL 13297959 (E.D. Tex. Feb. 25, 2015), report and recommendation adopted, No. 2:13-CV-09995-JRG-RSP, 2015 WL 13298144 (E.D. Tex. Mar. 24, 2015), *aff'd*, 811 F.3d 758 (5th Cir. 2016) [hereinafter *Remuneration Agreement*].

<sup>329</sup>See *Weber*, 811 F.3d at 772–73.

<sup>330</sup>See *supra* note 310 and accompanying text.

<sup>331</sup>The court noted, for example, that the place-of-contracting and place-of-negotiation factors were neutral because they were done in both the United States and Germany, and that justified expectations did not clearly favor Germany. See *Weber*, 811 F.3d at 772–773.

<sup>332</sup>*Id.*

was contractually defined as occurring at the corporate *sitz* which was now legally defined as Munich, Germany.<sup>333</sup>

If his claim was limited to that contract, then its forum clause designating the German *sitz* would be appropriate. Weber's complaint, however, included a quantum meruit claim for his work done over a five-year period in the Texas litigation.<sup>334</sup> When the Texas Supreme Court adopted the Restatement's most significant relationship approach for cases not governed by statutes, it specifically included what is known as a *dépeçage* requirement.<sup>335</sup> *Dépeçage* is the practice of splitting the choice of law analysis on an issue-by-issue basis in order to limit the application of non-Texas law to appropriate issues.<sup>336</sup> As discussed in the section below, the court ignored *dépeçage* and imputed the contract conclusions to the non-contractual claims.<sup>337</sup>

Step three was to "apply that substantive law to the forum clause language to decide whether it is mandatory or permissive"<sup>338</sup> With German law applying, the court plugged in PACT's expert's conclusion that German law viewed the clause as valid and mandatory.<sup>339</sup> Weber's expert did not oppose, and the court concluded its three-step approach with findings that Weber's remuneration contract referred to a German situs, that Texas choice-of-law rules pointed to German law as controlling the contract's interpretation (although that decision had already been used in step one), and that German

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<sup>333</sup>*Id.* It is interesting how the contract, drafted by PACT, is neatly tailored to focus on Weber's service as limited to board service in Munich, when the contemplated effort was exploiting PACT's United States patent. The contract also contemplated Weber's compensation as coming from either licensing or patent-infringement damages in the United States, which is what happened. This is reflected in part by the magistrate's judge's finding that Weber's contract was payment for profit from the Texas patent suit. *See Weber*, 2015 WL 13297959 at \*1. The express terms of Weber's contract did not address that, and Weber accordingly brought equitable claims for quantum meruit based on his successful efforts in the patent-infringement litigation.

<sup>334</sup> *Weber*, 811 F.3d at 764.

<sup>335</sup> *Maxus Exploration Co. v. Moran Bros.*, 817 S.W.2d 50, 53 (Tex. 1991).

<sup>336</sup> *Id.*

<sup>337</sup> *See infra* notes 388–439 and accompanying text.

<sup>338</sup> *Id.* at 769.

<sup>339</sup> *Id.* at 773. The court appropriately stopped short of giving preclusive effect to the German decision, presumably because it was not final.

law would enforce the forum clause.<sup>340</sup> There was no discussion of that process's application to Weber's non-contractual claim.<sup>341</sup>

*b. Enforceability Under Forum Non Conveniens*

With the German *sitz* clause deemed an agreement for a German forum, the court addressed the final *Atlantic Marine* question, the clause's enforceability under federal common law. The court began by noting again the Supreme Court's strong enforceability presumption for valid forum clauses.<sup>342</sup> Again the court failed to address the elements of validity or whether they exist here other than to say they are presumed, and that the presumption may be overcome by forum non conveniens factors, limited to the public factors, and with the burden on plaintiff.<sup>343</sup> Weber had four arguments for nonenforcement and the first was his lack of a remedy in Germany where equity is unavailable.<sup>344</sup> There had been a dispute between the experts with PACT's expert testifying that German law had remedies akin to equity while Weber's expert testified he would lose because of German law regarding work done by corporate directors.<sup>345</sup> The court found for PACT on this, noting that the lack of an equivalent remedy was not grounds for denial. Instead, it is the availability of remedy that mattered, not predictions of his winning on those theories.<sup>346</sup>

Weber's second argument was PACT's use of a forum clause from a contract already held invalid at PACT's request.<sup>347</sup> This was the severability

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<sup>340</sup> *Id.* at 770, 776.

<sup>341</sup> *Id.* at 773.

<sup>342</sup> *Id.* (quoting *Haynsworth v. Corp.*, 121 F.3d 956, 962–63 (5th Cir. 1997), in turn quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)).

<sup>343</sup> *See Weber*, 811 F.3d at 773–74.

<sup>344</sup> *Id.* at 765.

<sup>345</sup> *Id.* at 773. PACT's second expert report on which the court relied is sealed and unavailable for evaluation. *See Weber Court Docket*, *supra* note 304 at document entry numbers 29 & 30.

<sup>346</sup> *See Weber*, 811 F.3d at 773–74. This point is standard for both forum clauses, *see e.g. Bremen*, 407 U.S. 1, 15–16 and forum non conveniens, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). It would be valid if Weber had knowingly agreed to a German forum instead of the *sitz* forum.

<sup>347</sup> *Id.* at 774.

issue.<sup>348</sup> The court treated this argument as though Weber were *alleging* the Remuneration Arrangement's invalidity which ignored the German court's declaration of invalidity.<sup>349</sup> The Fifth Circuit Court of Appeals concluded that Weber had misstated PACT's litigation position in the German case along with the German court's ruling.<sup>350</sup> Specifically, the Fifth Circuit Court of Appeals explained that neither PACT nor the German court took the position that no contract was ever formed.<sup>351</sup> Instead, according to the Fifth Circuit Court of Appeals, PACT and the German *court* took the position that the forum clause was not only valid, but also severable from the contract's substantive provisions.<sup>352</sup> The Fifth Circuit Court of Appeals reasoned that this made sense because the German court decision was based not on contract law but on corporate law governing compensation of board members.<sup>353</sup> This conclusion overlooks the obvious point that the German corporate law in question was dealing with a contract for payment for services, of which the forum clause was an integral part. In any event, the Fifth Circuit Court of Appeals concluded:

Thus, the parties validly contracted for the FSC itself—they just did not comply with regulatory forms as to the compensation provisions because the shareholders never voted in favor of that arrangement.<sup>354</sup>

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<sup>348</sup> *Id.*

<sup>349</sup> *See Weber*, 811 F.3d at 774–75 (stating that Weber's theory “misstates both the litigation position that PACT adopted in the German litigation and the actual ruling of the German court.”) The Fifth Circuit Court of Appeals goes on to note the German court's ruling based on severability, ignoring the Weber's argument that the substantive contract was invalid from the start. *Id.*

<sup>350</sup> *Id.* at 776.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *See generally id.* Interestingly, on this point the court was willing to split the choice-of-law analysis on the issue of corporate law and contract law, a practice called *dépeçage* that is required by Texas choice of law rules. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). The court veered from Texas law when it declined *dépeçage* when considering Weber's distinct remedies under contract law (for services on the board) and equity (for work done in Texas). *See infra* notes 438–439 and accompanying text.

<sup>354</sup> *Weber*, 811 F.3d at 775.



Regarding severability, instead of relying on *Afram* as the magistrate judge had, the appellate court invoked *Haynsworth v. The Corp.*, a 1997 Fifth Circuit case involving a fraud claim against a Lloyd's insurer by its syndicate members.<sup>355</sup> The holding was the same as that in *Afram*, for the same reason.<sup>356</sup> Those cases, along with *Scherk*, hold that a derogating plaintiff may not raise fraud or overreaching by attacking the overall contract, but must attack the forum clause specifically.<sup>357</sup> The reason is that, to reach the contract issues would be litigating the merits that, if the forum clause is valid, should be litigated in the chosen forum. That ignores Weber's challenge, where the underlying contract had already been invalidated by the chosen German forum.

The court also pointed out that Weber's attack only went to the contract as a whole and not to the forum clause.<sup>358</sup> But that's the point—the contract as a whole was invalid. The court's view is that Weber contracted separately for the forum clause as a distinct agreement, addressing it this way:

Arguments that go to the validity of the contract as a whole do not prevent enforcement of an FSC; instead, the party seeking to avoid enforcement must demonstrate that the FSC is invalid rather than merely claim the contract is invalid. In effect, the court is to treat the FSC as both severable and presumptively valid.<sup>359</sup>

The court thus deemed Weber to have contracted for a German forum apart from his right to be compensated.<sup>360</sup>

Weber's third argument for non-enforcement was estoppel based on PACT's reliance on a contract it had now legally voided.<sup>361</sup> This argument

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<sup>355</sup> *Haynsworth v. Corp.*, 121 F.3d 956 (5th Cir. 1997), discussed at *Weber*, 811 F.3d at 774.

<sup>356</sup> *Weber v. PACT XPP Techs.*, AG, No. 2:13-CV-0995-JRG-RSP, 2015 WL 1329759 (E.D. Tex. Feb 25, 2015) at \*4 (not designated for publication).

<sup>357</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301 (5th Cir. 1998); *Haynsworth*, 121 F.3d at 964.

<sup>358</sup> *Weber*, 811 F.3d at 775.

<sup>359</sup> *Id.* at 773–74 (citation omitted).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

also failed because of severability.<sup>362</sup> His fourth argument was based on PACT's unclean hands, arguing that PACT acted inequitably when it invoked the contract's invalidity.<sup>363</sup> The court rejected this on two grounds. First it relied on its recent holding in that a plaintiff cannot "deny a defendant access to equitable remedies just by alleging fraud . . . ."<sup>364</sup> Second, the court stated that Weber was putting the cart before the horse by raising the Remuneration Arrangement's validity, an issue on the merits which should be done in Germany if the forum clause was enforceable.<sup>365</sup> Once again, both grounds mischaracterize Weber's position as relying only on PACT's allegations of contract invalidity rather the German court's holding of invalidity.<sup>366</sup> As to carts before horses, and getting to the merits, the German court had already ruled on the merits of this issue.<sup>367</sup>

Disposing of Weber's four arguments for non-enforcement, the court took up the last step—the forum non conveniens public balancing factors, with the private factors eliminated under the *Atlantic Marine* formula.<sup>368</sup> The court of appeals listed the factors<sup>369</sup> and then noted *Atlantic Marine*'s emphasis on the light weight to be given public interest factors in forum clause analyses:

And the Court in *Atlantic Marine*, 134 S.Ct. at 582, made certain its view that the public-interest actors would outweigh a valid forum clause only in truly extraordinary cases: The factors "will rarely defeat a transfer motion," so "the practical result is that [FSCs] should control except in

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<sup>362</sup>*Id.* at 775.

<sup>363</sup> *Id.* at 765.

<sup>364</sup>In re Lloyd's Register N. Am., Inc., 780 F.3d 283, 293 (5<sup>th</sup> Cir. 2015), *cert. denied*, Pearl Seas Cruises, LLC v. Lloyd's Register N. Am., Inc., 136 S. Ct. 64 (2015).

<sup>365</sup>*Weber*, 811 F.3d at 775.

<sup>366</sup>*Id.* at 765 (noting the German declaratory judgment in August, 2014).

<sup>367</sup> *Id.*

<sup>368</sup>*See id.* at 767 (citing *Atl. Marine*, 571 U.S. at 65–66).

<sup>369</sup>"The public-interest factors for FNC include 'administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.' *Piper Aircraft*, 454 U.S. at 260 n. 6, 102 S. Ct. 252 (internal quotations omitted)." *Weber*, 811 F.3d at 776.

unusual cases.” “Although it is ‘conceivable in a particular case’ that the district court ‘would refuse to transfer a case notwithstanding the counterweight of [an FSC],’ such cases will not be common.” (citation omitted).<sup>370</sup>

The court’s only other consideration in the balancing test was to observe that Weber offered a two-page argument which the court summarized as “variations on the claim that Texas and the United States have an interest in protecting their citizens from abuse by foreign corporations.”<sup>371</sup> The court did not parse the two pages of variations any further and held that they were not the sort of exceptional circumstances required to set aside a forum clause. With that, the court of appeals affirmed the dismissal with the closing language:

Given the Supreme Court’s strong admonitions in favor of dismissal and against retention save for extraordinary matters, the district court was well within the bounds of its considerable discretion in dismissing.<sup>372</sup>

#### *B. Concerns in Weber’s Discretionary Application of Atlantic Marine’s Severe Presumption*

In *Weber*, three judges agreed that the ephemeral PACT forum clause should be enforced.<sup>373</sup> Their decision is consistent with the *Atlantic Marine* presumption and it resulted in the dismissal of a compensation claim for work done in the United States, mostly in Texas.<sup>374</sup> Although the contract’s wording was limited to events that PACT argued happened in Munich, the dismissal occurred without reference to that work and the related quantum meruit claim, and instead focused only on the contract limited to Munich service, and whose substantive provisions were wholly invalid.<sup>375</sup> The judges further agreed that the contract’s substantive invalidity did not negate the

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<sup>370</sup>*Weber*, 811 F.3d at 776.

<sup>371</sup>*Id.*

<sup>372</sup>*Id.*

<sup>373</sup> *Id.* at 776.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 775.

binding nature of its sole surviving provision, a venue clause which failed to name a forum.<sup>376</sup> Altogether, there are six troubling points, all traceable to the extreme *Atlantic Marine* presumption.

### 1. Validity

Starting with *Bremen* in 1972, commentators have criticized the Supreme Court's weak attention to forum clause validity. The current validity approach originated with *Bremen*'s statement that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."<sup>377</sup> The Supreme Court provided no direct explanation for the quotes around "unreasonable"<sup>378</sup>—they may refer to the Judge Wisdom's dissent in the *Bremen* appellate opinion, but are also ironic in light of subsequent case law like *Carnival Cruise*. The *Bremen* Court goes on to discuss defenses to enforcement including (1) fraud, (2) overreaching, (3) the designated forum's neutrality, (4) the strong public policy of the derogating forum (statutory or judicial), and (5) serious inconvenience.<sup>379</sup> Another formulation is Justice Kennedy's concurring praise of the *Stewart* majority's adoption of § 1404(a) for non-admiralty cases, which "should be exercised so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases."<sup>380</sup> Once again, this formulation assumes a valid clause, without guidance as to assessing a validity.

Critics, throughout the years since 1972, have pointed out the judiciary's leap over validity and other issues. Professor Taylor attributes the confusion to the use of two distinct analytical approaches – contract (*Carnival Cruise*) and venue (*Stewart*).<sup>381</sup> The confusion is not limited to that doctrinal conflict, as Taylor explains further:

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<sup>376</sup> *Id.* at 765.

<sup>377</sup> *M.S. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 15–19.

<sup>380</sup> *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J. concurring).

<sup>381</sup> See generally *Tale of Two Concepts*, *supra* note 89.

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. They have merged the concepts of jurisdiction, venue, and choice of law into the forum selection clause.<sup>382</sup>

*Atlantic Marine* did not improve on these conceptual shortcomings. Under its supposed improvement of the *Bremen* formula, validity continues to have the paradox of being crucial but undefined and presumed. As Professor Sachs explains, the presumptively valid clause's enforcement is "virtually automatic" except in extraordinary circumstances, and yet the crucial analysis is reduced to a footnote explanation that validity is presupposed.<sup>383</sup> The court offered no discussion of validity's components other than the presence of the parties' contract, and no discussion of whether the validity is the same as for substantive contracts, or if there is anything special about a contract for venue and jurisdiction.<sup>384</sup> It is simply a given, with the burden on the derogating plaintiff to negate validity according to unclear guidelines.<sup>385</sup>

In *Weber*, there was no discussion of elements of forum clause validity other than the presumption favoring them, which is consistent with *Atlantic Marine*.<sup>386</sup> That's not to say that "validity" is unimportant to the opinion, but

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<sup>382</sup>*Tale of Two Concepts*, *supra* note 89 at 786–87 (footnotes omitted).

<sup>383</sup>*See Five Questions*, *supra* note 153 at 766; *Gaming the System*, *supra* note 176 at 727–30. The Court's repeated reliance on the undefined term "extraordinary circumstances" raises an interesting question: The edict's corollary phrasing is that forum clauses are entitled to presumed validity and enforcement under ordinary circumstances. Many lawsuits arise from circumstances outside the ordinary, and outside those contemplated by the parties at the time of drafting. Even so, I'm not aware of this approach being used.

<sup>384</sup>*Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 67 (2013).

<sup>385</sup>*See Id.* at 62 n. 5.

<sup>386</sup>The *Weber* appellate opinion appropriately invoked the *Atlantic Marine* presumption but, as Circuits are inclined to do, attributed it to its own circuit precedent. *See Weber v. PACT XPP Techs.*, A.G., 811 F.3d 758, 773 (5th Cir. 2016), citing *Haynsworth v. Corp.*, 121 F.3d 956, 962–63 (5th Cir. 1997), in turn quoting *Bremen*, 407 U.S. at 7.

its role is limited to word use. The *Weber* appellate opinion uses some form of “valid” (validity, invalid, etc.) twenty-eight times, with sixteen referring specifically to forum clause validity.<sup>387</sup> All sixteen are descriptive or conclusory. None are analytical. Although the court repeatedly identified issues as validity and enforceability,<sup>388</sup> it analyzed the issues as (1) identifying the FC as mandatory or permissive, and (2) enforceability.<sup>389</sup>

Peter Weber had no hope of contesting validity because the court linked validity to the contract’s legal meaning under German law. Because Weber’s view was based on his own understanding of corporate seat rather than knowledge of German terms of art, he had no means of challenging the contract’s assumed validity.<sup>390</sup> To the extent the court’s characterization of this service contract is accurate, it all flows from a clause that fails to name a forum and instead merely lists one attribute—the corporate seat—and in doing so uses language that also supports an interpretation of the seat at where the it was founded (California) and where it’s CEO executes his duties.<sup>391</sup>

Validity also raises choice-of-law questions: which law governs validity, is it a procedural or substantive question, and whether federal courts should apply state or federal law. Although the Fifth Circuit Court of Appeals did not analyze validity in *Weber*, it found that the German court had ruled the forum clause to be valid and enforceable.<sup>392</sup> While German law might be appropriate for contract interpretation or construction in *Weber*, it is not clear at all that German law should apply to initial validity. *Atlantic Marine* did not hold that. [OBJ]<sup>393</sup>

The Supreme Court has never defined validity and, instead, presumes validity, shifting the burden to the derogating plaintiff to prove invalidity under a steep burden governed by an undefined law.<sup>394</sup> But the Court has never given guidance for plaintiff’s burden other than suggesting defenses

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<sup>387</sup> *Id.* at 763-776.

<sup>388</sup> *Weber*, 811 F.3d at 763, 764, 775 n. 26, 776.

<sup>389</sup> *Id.* at 763, 765-66, 767, 770.

<sup>390</sup> *Id.* at 765.

<sup>391</sup> *Id.* at 763.

<sup>392</sup> *See Id.* at 774.

<sup>393</sup> *Atl. Marine*, 571 U.S. 49 at 60.

<sup>394</sup> *Id.*

that are raised once the clause is determined valid.<sup>395</sup> What is the effect if the entire substantive contract is invalid? That was true in *Weber*, but the contract's substantive invalidity did not matter because of the conclusion-assuming function the court used under the current Bremen formula.<sup>396</sup> That failure goes not so much to the Fifth Circuit Court of Appeals, but to the Supreme Court's ill-founded approach.

## 2. Forum Identity—Are Hints Enough?

The *Weber*/PACT contract did not name a jurisdiction and instead merely described its attribute as the company's residence or seat.<sup>397</sup> A purported mandatory forum clause that fails to name a forum should arguably be per se invalid, or at least lose its presumed validity and place a burden on the proponent.<sup>398</sup> The *Weber* appellate opinion addressed the concept of specificity before ignoring it:

An FSC is mandatory only if it contains clear language specifying that litigation *must* occur in the specified forum—and language merely indicating that the courts of a particular place “shall have jurisdiction” (or similar) is insufficient to make an FSC mandatory.<sup>399</sup>

This quote refers to specificity for the forum clause's mandatory or permissive nature but also mentions “the specified forum.”<sup>400</sup>

Venue laws, of course, also fail to name the forum and instead merely describes its attributes, such as defendant's residence or where the cause of action arose.<sup>401</sup> Those descriptions can lead to litigation. But in those cases,

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<sup>395</sup>See generally *Gaming the System*, *supra* note 176. See also *Five Questions*, *supra* note 153 at 766–68.

<sup>396</sup> *Weber*, 811 F.3d at 776.

<sup>397</sup> *Id.* at 763.

<sup>398</sup>“Floating forum clauses” anticipate multiple litigation sites and are ambiguous by design. See Paul H. Cross & Hubert Oxford IV, “Floating” *Forum Selection and Choice of Law Clauses*, 48 S. TEX. L. REV. 125 (Fall 2006). That concept does not apply in *Weber* even though the clause is worded in a way that would support a floating clause.

<sup>399</sup>*Weber*, 811 F.3d at 768.

<sup>400</sup> *Id.*

<sup>401</sup> Tex. Civ. Prac. & Rem. Code Ann. § 15.002.

the concepts are (1) governed by the forum's procedural law, (2) drawn from tighter concepts and precedents, and (3) do not involve party intent except the objective intent with residency. With the current law of forum clauses, the analytical boundaries are an ill-defined mix of substantive and procedural law.

In the real world of contracting dynamics, if describing the forum instead of naming it did not confuse a contracting party, then the failure to name would not be important. But in this case, the failure to name Germany left room for Weber to believe that PACT's *sitz* was California, PACT's original base of operations.<sup>402</sup> The *Weber* trial and appellate courts noted the ambiguity and then found that ambiguity in the drafter's favor based not on the parties' mutual understanding but on the unambiguous legal meaning of the German term of art *sitz*.<sup>403</sup>

As discussed in this article's history section, the late twentieth century saw a shift to contract theory for forum clause analysis.<sup>404</sup> The contract view is dominant now but venue analysis still has support. Whichever theory is used, failing to name the forum seems to violate contract law (no meeting of the minds on an essential term) and venue basics (due process notice). Jurisdictions have names and forum clauses should use them.

### 3. Severability and Alice's Cheshire Cat

Peter Weber initially had an oral agreement with PACT that his compensation would be deferred until his efforts made a profit for the company.<sup>405</sup> In 2008 the parties reduced that to writing signed by Weber and a PACT board representative, but never ratified by PACT's shareholders.<sup>406</sup> When PACT fired Weber and refused to pay, Weber sued in the United States and PACT invoked two crucial features of the Remuneration Agreement. One, the substantive provisions were invalid for lack of shareholder approval, and two, the forum clause limited litigation to Munich Germany.<sup>407</sup> At the

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<sup>402</sup> *Weber*, 811 F.3d at 772.

<sup>403</sup> *Id.*

<sup>404</sup> *See supra* at Part II.C, Post-*Bremen* Analytics.

<sup>405</sup> *Weber*, 811 F.3d at 763.

<sup>406</sup> *See Remuneration Agreement, supra* note **Error! Bookmark not defined.**

<sup>407</sup> *Weber*, 811 F.3d at 764.



trial level in the United States, the federal magistrate judge concluded that the forum clause was severable from the contract's substantive provisions and thus recommended dismissal in favor of the German litigation already underway.<sup>408</sup> The district court approved and dismissed the case.<sup>409</sup> On appeal, the Fifth Circuit Court of Appeals made the same severability finding based on a different Fifth Circuit precedent.<sup>410</sup>

Contract severability is a commonly-used and well-accepted doctrine that the contracting parties' mistaken inclusion of illegal terms should not void the entire contract, but how far should it go? Perhaps it rests on the parties' mutual intent, but what if essential terms are void? What if a majority of the terms are void? What if all substantive provisions of the contract are illegal, but the otherwise illegal contract has a forum clause designating a jurisdiction that will hold the contract illegal. Does one purely procedural clause survive when the rest of the contract fails? *Weber's* answer is an unquestioned yes, based on cases in which those facts were not present.<sup>411</sup>

*Weber's* use of the severability doctrine is the legal equivalent of Alice's Cheshire cat who could disappear except for its toothy grin.<sup>412</sup> Just like the cat, the PACT remuneration agreement disappeared as to all substance and left only the forum clause's grin, imposing a jurisdiction which had already made interim rulings negating *Weber's* legal and equitable claims. Some may argue that the contract's nonexistence is entitled to adjudication in a pre-selected forum, but this takes the argument too far. It is one thing to have a clause bolstering a contract's performance but quite another to use a clause reinforcing its failure from the outset.

The contract's only substantive function was *Weber's* remuneration.<sup>413</sup> With that invalidated, nothing remained except the contract for procedure to litigate something that was per se invalid in that forum, at least according to

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<sup>408</sup> *Id.* at 765-766.

<sup>409</sup> *Id.* at 776.

<sup>410</sup> *Id.* at 775.

<sup>411</sup> *Id.* at 763, 765.

<sup>412</sup> Lewis Carrol, *Alice's Adventures in Wonderland*, 89 (1869).

<sup>413</sup> *See Id.* *See also* the Magistrate Judge's opinion in *Weber v. PACT XPP Techs., A.G.*, No. 2:13-CV-0995-JRG-RSP, 2015 WL 13297959 at \*1 (E.D. Tex. Feb. 25, 2015).

the contract's drafter.<sup>414</sup> The severability function in an invalid contract left a forum clause mandating a foreign forum for a contract that didn't exist.

The severability doctrine has its place in forum clause discussions, as the United States Supreme Court explained *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>415</sup> The idea is that the forum-derogating plaintiff may not defeat a forum clause by alleging the contract's illegality, and specifically by alleging fraud in the inducement.<sup>416</sup> That concept does not apply in *Weber* where, ironically, it was the non-derogating party PACT who alleged the contract's invalidity but wanted its grinning Cheshire cat forum clause to survive.<sup>417</sup>

#### 4. Governing Law—Questions Begged and Conclusions Assumed

Choice of law is a difficult and disputed issue in adjudicating forum clauses.<sup>418</sup> There are two choice-of-law questions: what law governs validity (defined as “interpretation” in *Weber*),<sup>419</sup> and what law governs enforceability. *Atlantic Marine* reaffirmed the answer to the second question (federal law controls enforcement) but left open the validity question.<sup>420</sup> That issue—the law governing validity—was ripe in *Weber*, although it went unaddressed in the district court which may show how fast the case went through.<sup>421</sup> On appeal, the court used an elastic choice-of-law analysis that it shaped to fit the strong *Atlantic Marine* presumption.<sup>422</sup> That analysis invites scrutiny if not rejection on three points.

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<sup>414</sup> *Weber*, 811 F.3d at 769.

<sup>415</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), further applying the precedents in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 399, 403–04 (1967), and *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>416</sup> See *Yackee*, *supra* note 73 at 59–60.

<sup>417</sup> *Weber*, 811 F.3d at 763.

<sup>418</sup> See *supra* at Part II.C, C. Post-*Bremen* Analytics.

<sup>419</sup> See *Weber*, 811 F.3d at 769 (“we apply Texas choice of law rules to determine which substantive law governs the interpretation of the FSC”).

<sup>420</sup> *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 134 S. Ct. 568, 63 (2013)

<sup>421</sup> *Weber*, 811 F.3d at 764.

<sup>422</sup> *Id.* at 767.

*a. Chickens and eggs*

The court used German law prematurely to construe the contract.<sup>423</sup> That is, it used German law, not just German language, to construe *sitz* before entering the choice of law step. Instead of prematurely applying German law, the court should have applied German language at large to the term *sitz* which would have focused the court more on its ambiguity. To be clear, it is not wrong to use foreign law to translate a foreign-language document, especially as to substantive legal terms. But it stretches the process to apply foreign law to a dispute-resolution term that is already vague and only comes to light as a legal term when considered under that foreign law, while ignoring a party's understanding based on other meanings under that foreign language, all prior to the choice-of-law analysis. The court did not analyze drafting ambiguity so it's difficult to say if that would have come out, but it would have resolved the ambiguity issue in a proper light.<sup>424</sup> If it came out in Weber's favor, then the clause might have called for PACT's original corporate location which was California. It could also be interpreted as a floating forum clause which would recognize the relocation to Munich, but even then it would give credence to Weber's misunderstanding.

This is the chicken-and-egg problem in forum clause analysis. The foremost example occurs in disputes where the parties' contract had both a choice-of-law clause and a forum clause. If the choice of law clause is considered first and found applicable, it will likely validate the issues that follow since parties seldom choose a governing law that invalidates their objectives.<sup>425</sup> As Professor Mullenix points out, the chicken-egg problem is not limited to cases involving choice-of-law clauses, but instead implicates "a confounding host of chicken-and-egg-like issues relating to a threshold determination of the validity and enforceability of forum-selection-clauses."<sup>426</sup>

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<sup>423</sup> *Id.* at 770.

<sup>424</sup> *Id.* at 769.

<sup>425</sup> See e.g., *Beilfus v. Huffly Corp.*, 685 N.W.2d 373, 376 (Wis. Ct. App. 2004), discussed at *Governing Law*, *supra* note 155 at 644.

<sup>426</sup> See *Gaming the System*, *supra* note 176 at 731. See also *Another Choice of Forum*, *supra* note 153 at 347–350.

Discussing the same analytical problem, Professor Sachs notes that forum law governs initial matters in forum-clause analytics.<sup>427</sup> Although it is true that German law would uphold this clause, that conclusion is appropriate only after German law has been selected. In *Weber*, before any choice of law analysis was attempted (and before the *Erie* path was chosen), the court treated *sitz* as a German term of art, applied German law, and thus assumed a conclusion affecting interpretation and validity. That is, the *Weber* court endorsed the PACT contract's implicit choice of German law when the contract never mentioned any consideration of what law would govern.<sup>428</sup>

*b. Erie and the Texas choice of law rules*

At some point choice of law analysis is necessary in analyzing forum clauses. Consistent with many circuits, the Fifth Circuit Court of Appeals used federal common law prior to *Weber*, apparently under the view that the question is one of venue requiring contract analysis.<sup>429</sup> A number of courts and scholars argue for an *Erie* approach—that state law should control forum-clause validity, at least in diversity cases, because of the underlying issues of substantive contract law.<sup>430</sup> Using *Erie* for the validity phase underscores the contract autonomy view and enhances *Atlantic Marine*'s already-heightened presumption for forum clause adherence. That's not to say that the *Erie*/state law approach is necessarily wrong for this federal venue question, but it is to say that we should realize its function in steepening an already harsh presumption.

In *Weber*, the Fifth Circuit adopted the *Erie* approach to use forum state law in assessing contracts governing federal venue.<sup>431</sup> In Texas the relevant law is the most significant relationship test from the Restatement (Second)

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<sup>427</sup>See generally *Forum Selection Defense*, *supra* note 150.

<sup>428</sup>See *Weber*, 811 F.3d at 771.

<sup>429</sup>*Id.* at 770.

<sup>430</sup>See *Steinman*, *supra* note 154; *Gaming the System*, *supra* note 176 at 732–34; *Five Questions*, *supra* note 153 at 766–68; *Forum Selection Defense*, *supra* note 150 at 14–24; *Yackee*, *supra* note 73 at 64–67; *Another Choice of Forum*, *supra* note 153 at 332–39; *Perils of Contract Procedure*, *supra* note 78 at 1023–25; *Governing Law*, *supra* note 155 at 664–68. The Supreme Court considered the *Erie* approach in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), but only as to the law governing enforcement.

<sup>431</sup>See *Weber*, 811 F.3d at 770.

Conflict of Laws—except when there’s a superseding statute, which there is for internal corporate affairs.<sup>432</sup> As noted above, the *Weber* court’s omission is harmless because the statute likely reaches the same result applying German law,<sup>433</sup> but the oversight is another example of the haste with which forum clauses are approved. Properly applied, the internal affairs statute should invoke German law but only to Weber’s contract claims as a board member.<sup>434</sup> His quantum meruit claim probably fell outside the statute’s scope, although that is difficult to tell with no court analysis.<sup>435</sup>

The court in *Weber* overlooked the internal affairs doctrine and went straight to the Restatement’s multi-factor balancing tests, and that’s where the bigger mistake occurred.<sup>436</sup> The Texas Supreme Court adopted the most significant relationship test in 1984 for all choice of law issues not governed by statute.<sup>437</sup> In that adoption, the Texas Supreme Court expressly invoked *dépeçage*, the principle that choice of law is done on an issue-by-issue basis.<sup>438</sup> The fact that German law governs Weber’s contract claim does not mean it governs his other claims. Had the court followed Texas law, it would have considered separately what law governed Weber’s non-contractual claim for quantum meruit.<sup>439</sup> A likely solution is that German law would

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<sup>432</sup>See Tex. Bus. Org. Code §§ 1.102–.103, 1.105, quoted in *U. S. Bank Nat’l Assoc. v. Verizon Commc’ns, Inc.*, 892 F. Supp. 2d 805, 828 (N.D. Tex. 2012). See also Restatement (Second) Conflict of Laws § 302 (Am. Law Inst. 1971).

<sup>433</sup> See discussion *supra* III.B.4.a.

<sup>434</sup>It is not a given that the corporate affairs doctrine applies. Its application to rights and liabilities does not necessarily render it applicable to procedural issues like forum contests. But to the extent this forum contest has to be answered with a contract question, the doctrine would seem to apply. See TEX. BUS. ORG. CODE §§ 1.102–.103, 1.105 (West 2009); RESTATEMENT (SECOND) CONFLICT OF LAWS § 302 (AM. LAW INST. 1971)

<sup>435</sup> *Weber*, 811 F.3d at 765.

<sup>436</sup> Restatement (Second) Conflict of Laws § 188.

<sup>437</sup>See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

<sup>438</sup>“[I]n all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship *to the particular substantive issue* will be applied *to resolve that issue*.” *Id.* at 421 (emphasis added). See also Restatement (Second) Conflict of Laws § 188 (1) & (2) and cmt. d; Willis Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

<sup>439</sup>For an example of *dépeçage*, see *In re Park Central Global Litig.*, No. 3:09-CV-0765-M, 2010 WL 3119403 (N.D. Tex. Aug. 5, 2010) (following the internal affairs doctrine to apply

govern claims under the Remuneration Agreement and Texas law would govern the equity claims for Weber's work done in Texas, the same work that generated the profit at issue in the case. The issue-splitting analysis is so fundamental to the primary Texas choice-of-law rule that the court should have applied it even if Weber didn't argue it.<sup>440</sup>

Of course, if the forum clause was to be enforced, then the court was never going to reach the case's merits. But that's the point: the forum clause was in the Remuneration Agreement with a scope limited to payment for Weber's service on the board in Munich. Weber's claims for his work in Texas fell outside the Remuneration Agreement but were not considered on their own. That's the purpose of *dépeçage* and the court did not address it, instead finding comfort in the *Atlantic Marine* presumption and the rush to enforce the forum clause.

*c. Texas public policy*

The forum state's public policy is a primary factor in choice of law analysis. This is reflected throughout the Restatement, including its places as the second factor in the most significant relationship test.<sup>441</sup> The *Weber* appellate opinion did not weigh Texas policy even though the dispute concerned, at least in part, Weber's rightful share of the patent infringement damages *from a federal case in Texas*.<sup>442</sup> To the extent the court was focused on the contract claim limited to Weber's service on the PACT board, the lack of Texas interests is accurate. If the focus shifts to Weber's work done in

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Delaware law to Delaware entities and Texas law to other parties). On the point of forum law governing remedies, see Restatement (Second) Conflict of Laws § 131 cmt. a (1971), discussed in regard to forum clauses at *Forum Selection Defense*, *supra* note 150 at 14 n. 77 and accompanying text. See also Restatement (Second) Conflict of Laws § 124. ("The local law of the forum determines the form in which a proceeding may be instituted on a claim involving foreign elements.").

<sup>440</sup>Once a party invokes a basic law, for example the forum state's choice-of-law rule, the court should apply that basic law accurately. To the extent it was not done correctly in the trial court, appellate courts have the power of plain-error review. See *Contracting for Procedure*, *supra* note 176 at 563 & n. 213, citing HARRY T. EDWARDS AND LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS, 55–56 (2007).

<sup>441</sup>See Restatement (Second) Conflict of Laws § 6(2)(b).

<sup>442</sup>*Weber*, 811 F.3d at 763.

Texas for at least five years, the court's analysis is wrong. Ironically, the court quoted the *DeSantis* case for the point that a service contract's designation of place of service is ordinarily determinative of governing law.<sup>443</sup>

The *DeSantis* holding is instructive. The case involved a non-compete agreement between a Florida-based security company and its Houston-based regional manager, DeSantis, who'd broken away to start his own company.<sup>444</sup> DeSantis's prior employment contract had a non-compete agreement which was valid in Florida, and the contract specified Florida law as governing.<sup>445</sup> The Texas Supreme Court rejected the Florida choice-of-law clause as violating Texas public policy because it affected DeSantis's Texas employment.<sup>446</sup> DeSantis supports Weber's conclusion if we limit our focus to Weber's claim on PACT's narrowly-drafted contract for board meeting in Munich. When we consider Weber's equity claim for work done in Texas, *DeSantis* lends the opposite support for the point that Texas has a strong interest in Texas-based employment.<sup>447</sup> Neither that policy nor the fact of Weber's Texas efforts were factors in the court's decision.<sup>448</sup>

A full analysis of Texas policy requires looking at a later case commenting on *DeSantis*. *In re Autonation Inc.*<sup>449</sup> was a non-compete dispute involving lawsuits in Florida and Texas. Florida-based Autonation sued first in Florida to enforce a non-compete agreement against Hatfield, its former Texas-based manager. Hatfield counter-sued in Texas seeking a declaration of the non-compete's unenforceability here, based on *DeSantis*. The lower courts agreed with Hatfield but the Texas Supreme Court reversed, based on the Florida case being the first-filed, and on its filing there being consistent with the parties' express choice of Florida as an exclusive forum. In so ruling, the Texas Supreme Court was careful to note the ongoing interest in Texas law applying to Texas litigation concerning work in Texas.<sup>450</sup>

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<sup>443</sup>*See Id.* at 772, quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex. 1990).

<sup>444</sup>*Id.* at 675.

<sup>445</sup>*Id.*

<sup>446</sup>*Id.* at 680.

<sup>447</sup>*Id.* at 776.

<sup>448</sup>*Id.*

<sup>449</sup>*In re Autonation, Inc.*, 228 S.W.3d 663, 664 (Tex. 2007).

<sup>450</sup>*Id.* at 669.

If read on the simplest basis, *Autonation* seems to support PACT's argument that Texas law favors mandatory forum clauses related to Texas employment. That conclusion ignores crucial distinctions related to the concerns discussed in this article. In the *Autonation* contract, the forum clause was express, *Autonation* did business both in the Florida forum and throughout the United States (making centralized litigation efficient), and *Autonation* filed first consistent with that express clause. In contrast, the PACT enterprise was limited to patent exploitation in the United States with the German activities being nothing more than board meetings, rendering irrelevant the efficiency of centralized litigation since Weber was the only active employee. Weber's contract failed to name a forum, was expressly limited to Weber's board service, and was entirely invalid as to substance leaving only the vague forum clause. Weber sued first, raising claims both on the contract and the Texas work. None of the factors cited in *Autonation*'s distinguishing its holding from *DeSantis* apply. All this is not to say that Texas policy interests exceeded Germany's interests, certainly not on the narrowly-drawn contract, but it is to say that Texas had an interest in Weber's non-contract claims for work done in Texas. Those Texas interests did not register in the analysis.

### 5. Scope

The PACT contract was limited to Weber's services to the PACT board, specifying Munich as the performance in question. Like the PACT contract generally, this focus on Munich can be deemed vague and ambiguous because of Weber's significant work for PACT in the United States. As far as we know, the only thing that happened in Munich was the board meetings, and that was the contract's clear focus. The forum clause makes no mention of claims arising outside the contract, and if its scope is limited to the contracted-for service,<sup>451</sup> then Weber's work in Texas falls outside the contract and the forum clause does not apply. The court, however, did not address the forum clause's scope and instead gave the clause the most expansive reading possible, covering Weber's quantum meruit claim expressly directed to the work in Texas which earned \$15 million.<sup>452</sup>

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<sup>451</sup>See e.g. *Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 392 (2d Cir. 2007) (quantum meruit claims related both to contract and copyright did not arise under the contract).

<sup>452</sup>See Complaint, para. 56.



## 6. Enforcement—The *Gulf Oil* Balancing Factors

Having decided that German law governed and the clause was mandatory, the court moved to the clause enforcement stage. Because the dispute involves a United States federal forum and a foreign country, the analysis is governed by federal common law and the forum non conveniens balancing factors under *Gulf Oil Corp. v. Gilbert*.<sup>453</sup> Under *Atlantic Marine*'s revised formula, this calls for a thumb-on-the-scale analysis of the public factors and no analysis of the private factors.<sup>454</sup> The court's public-factor analysis was accurate and fair as to Weber's contract claim which was expressly limited to his service on the board in Munich.<sup>455</sup> It was silent on his equity claim for his Texas work.<sup>456</sup> As pointed out in the choice-of-law critique, the public factors analysis should have included the Texas policy interest for five years of work in Texas.<sup>457</sup>

In addition to the court's disregard of Weber's entitlement to payment for obtaining the Texas judgment, the *Weber* case is instructive of the need for private factor analysis at the enforcement stage. The best illustration of that role is summarized in the magistrate judge's recitation of why PACT was amenable to Texas jurisdiction:

PACT selected this forum and spent several years prosecuting its lawsuit here, going all the way through a jury trial, which was attended by officers of PACT. There is no dispute that the contract at issue in the current suit addressed the conduct of the Plaintiff, as an officer of PACT, in attending that trial here in Texas. Furthermore, the proceeds of the judgment arising from that trial are the object of the recovery sought by Plaintiff from Defendant in this case.<sup>458</sup>

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<sup>453</sup>*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

<sup>454</sup>*Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013).

<sup>455</sup>*See Weber v. PACT XPP Techs., A.G.*, 811 F.3d 758, 773 (5th Cir. 2016).

<sup>456</sup>*See id.*

<sup>457</sup>*See supra* notes 368–372 and accompanying text.

<sup>458</sup>*Weber v. PACT XPP Techs., A.G.*, No. 2:13-CV-0995-JRG-RSP, 2015 WL 13297959, at \*1 (E.D. Tex. Feb. 25, 2015).

Had the private factors been used in regard to the Texas-based equity claim, the only German factor was the situs of one of the contracting parties.<sup>459</sup> All other contacts point to Texas or California.<sup>460</sup> The private factors raise important points about the nature of this dispute, the limited nature of the parties' contract, and the separate viability of Weber's equity claim. The magistrate judge considered those facts only for PACT's jurisdictional objection, and the court of appeals did not consider them at all.<sup>461</sup>

It can be argued that the jurisdictional issue is distinct from forum-clause enforcement, and it is, but the underlying facts do not disappear. This was a Texas-centered dispute in which plaintiff sought payment for work done in Texas, and that claim was upended by the weakest of forum clauses whose scope was limited to a narrowly-drafted contract that did not address the Texas contacts. The inclusion of private-factor analysis could have shifted the focus back to that Texas-based claim.

This is not to say that private factors should have the same weight as they do in a routine forum-non-conveniens analysis, either under 28 U.S.C. § 1404 or *Gulf Oil*. The Supreme Court is correct that the parties' forum clause agreement anticipated those elements and agreed about private convenience. But those pre-dispute anticipations are subject to changed circumstances, and venue agreements are best viewed in light of the facts at the dispute's outset. The burden should remain on the clause-derogating party, but the factors should remain in play.

#### IV. CONCLUSION

Perhaps Peter Weber deserved to lose. He's was an experienced businessman who made a number of mistakes. Like many sophisticated contracting parties, he may have brushed past the forum clause and given it no thought, not anticipating litigation at that moment. Instead he should have had a German attorney advise him. Or he may have given it thought and assumed that the corporate *sitz* was California, based on PACT's stated purpose of enforcing its United States patent in United States courts, PACT's initial headquarters in California, and his role at the chief executive officer.

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<sup>459</sup> *See id.*

<sup>460</sup> *See id.*

<sup>461</sup> *See id.*

PACT may have been justified in terminating Weber. The contract contemplated company earnings far exceeding the single \$15 million judgment Weber obtained.<sup>462</sup> Weber may have underperformed, and there may be other good reasons for his termination.

Then again, Weber may be the victim of *Bremen*'s overweighted presumption and its capacity for summary enforcement and cursory rejection of inconsistent views.<sup>463</sup> Weber sued in a Texas federal court for compensation for years of work that earned PACT \$15 million.<sup>464</sup> He was fired with no pay.<sup>465</sup> The court dismissed the case in compliance with a forum clause that failed to name a jurisdiction, was part of a contract whose entire substance was invalid and was applied to claims unrelated to the contract.<sup>466</sup> In spite of those ambiguities and contractual failures, the court enforced the clause as though it read:

The parties agree that their relationship, if any, shall be governed by German law and litigated in a German court. The parties further agree that in the event the relationship described herein does not exist or is otherwise invalid, Weber's other rights to remuneration from PACT shall be limited to those provided by German law, to be determined exclusively in a German court.<sup>467</sup>

Whatever the proper outcome here, the *Weber* decision is based on troubling concepts that underscore concerns about the *Bremen* presumption, especially in its *Atlantic Marine* incarnation. It encourages cursory review that minimizes or ignores inconsistent factors. It encourages courts to find a

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<sup>462</sup> See Complaint, para. 56.

<sup>463</sup> As Professor Sachs notes, "*Atlantic Marine* places enormous weight on whether a forum selection clause is valid and enforceable. If it is, enforcement is virtually automatic; '[o]nly under extraordinary circumstances' will a plaintiff be allowed to litigate somewhere other than the chosen forum. Yet the opinion says nothing about which clauses are valid in the first place." *Five Questions*, *supra* note 153 at 766, quoting *Atl. Marine Constr. Co. v. U.S. District Court*, 571 U.S. 49, 62 (2013).

<sup>464</sup> *Weber v. PACT XPP Techs., A.G.*, 811 F.3d 758, 773 (5th Cir. 2016).

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 776.

<sup>467</sup> *Id.*

way to enforce the clause. It is not a presumption regarding burdens of proof but a predisposition that alters judicial assessment.

In the *Weber* case, there is no particular concept that should be barred. Forum clauses that fail to name a forum can be appropriate, for example when limiting litigation to multiple sites where the claims might arise. On forum clause severability, parties should be able to have an appropriately-worded dispute resolution contract that stands alone, although that does not justify the severability application that occurred here. The chicken-and-egg choice of law function is troubling but perhaps unavoidable in some instances of legal analysis.<sup>468</sup> To the extent contract autonomy should preempt the forum's jurisdiction and venue rules, the *Erie* approach is logical though not the only choice. The most difficult concession is *Atlantic Marine's* exclusion of the private interest factors in the clause enforcement phase. While it is tenable in the abstract to say that the parties already contracted on that issue, the reality is that the private factors not only measure fairness, but also illuminate essential contractual issues such as party intent and changed circumstances.

Because forum clauses should be assessed on a case-by-case basis like personal jurisdiction, it is difficult to design standard rules. Within that limitation, several points come to mind. In considering forum clauses, the derogating court should:

- presume against clauses that do not name a forum;
- presume against ambiguous clauses;
- apply the concept of contract severability sparingly rather than liberally presume in *Weber*;
- consider the forum clause's scope—to what actions does it apply—and construe it narrowly if the current lawsuit arises in the derogating forum;
- restore the *Gulf Oil* private factors test but keep the presumption against the derogating plaintiff's choice of forum.

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<sup>468</sup>The chicken-egg presumption brings to mind the illogical-but-necessary leap taken in *Ex Parte Young*, 209 U.S. 123 (1908) (holding that suing state officers acting within the scope of their authority was not a lawsuit against the state).

Choice of law issues are more difficult and the solution depends on the derogating forum's approach to forum clauses—are they venue issues or contract issues? If venue, then forum law will control most if not all aspects but perhaps at the expense of otherwise valid contractual obligations. If contract, then the problem lies with avoiding the chicken-and-egg problem of whether to applying the contract's governing law (designated or not) to validate the clause. In any event, the derogating court should not apply a foreign law to validate a clause without first confirming that law's applicability through the forum's choice of law rule.

The *Weber* opinion is an example of all these issues, but is merely the product of bad law and not the originator. Five judges agreed, and were within the legal and discretionary bounds of *Atlantic Marine's* mandate. The decision was driven by *Atlantic Marine's* extreme presumption that functions more as a predisposition to enforce forum clauses. The presumption is too strong, if not in outright wording then at least in application. Lawsuits to enforce substantive contracts do not typically pose preconceived outcomes, even if the prima facie contract is presumed valid. Neither should forum clause analysis.