# Civil Procedure
# Fall 2016
# Professor Lonny Hoffman

# Section 5
# (CM Pages 350 – 414)

**Jurisdiction by Consent, and Notice**
**Questions to Discuss**
**(Note: these questions cover several classes)**

Jurisdiction by Consent

1. According to Carnival Cruise, when can consent serve as a permissible basis for exercising personal jurisdiction?

2. According to Carnival Cruise, when is a forum selection clause not enforceable?

3. What is the difference between a forum selection clause and a choice of law clause?

Notice

1. The first question in an examination of judicial power over a defendant concerns notice. More precisely, there are two notice questions to consider.

2. Can you explain what it means to say that to determine whether a defendant received adequate notice, a court must first evaluate the manner of service that the legislative body has prescribed?

3. After satisfaction of any rule or statutory requirements for notice, what constitutional requirements apply? What did the Court say in this regard in *Jones v. Flowers*?

# CARNIVAL CRUISE LINES, INC.

v.

# SHUTE ET VIR

No. 89-1647.

**Supreme Court of the United States.**

Argued January 15, 1991
Decided April 17, 1991

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

586 *586 *Richard K. Willard* argued the cause for petitioner. With him on the briefs were *David L. Roll* and *Lawrence D. Winson*.

*Gregory J. Wall* argued the cause and filed a brief for respondents.

587 *587 JUSTICE BLACKMUN delivered the opinion of the Court.

In this admiralty case we primarily consider whether the United States Court of Appeals for the Ninth Circuit correctly refused to enforce a forum-selection clause contained in tickets issued by petitioner Carnival Cruise Lines, Inc., to respondents Eulala and Russel Shute.

## I

The Shutes, through an Arlington, Wash., travel agent, purchased passage for a 7-day cruise on petitioner's ship, the *Tropicale*. Respondents paid the fare to the agent who forwarded the payment to petitioner's headquarters in Miami, Fla. Petitioner then prepared the tickets and sent them to respondents in the State of Washington. The face of each ticket, at its left-hand lower corner, contained this admonition:

> "8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract *588 shall be litigated, if at all, in and before a Court located in the State of Florida, U. S. A., to the exclusion of the Courts of any other state or country." *Id.*, at 16.

Respondents boarded the *Tropicale* in Los Angeles, Cal. The ship sailed to Puerto Vallarta, Mexico, and then returned to Los Angeles. While the ship was in international waters off the Mexican coast, respondent Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. Respondents filed suit against petitioner in the United States District Court for the Western District of Washington, claiming that Mrs. Shute's injuries had been caused by the negligence of Carnival Cruise Lines and its employees. *Id.*, at 4.

Petitioner moved for summary judgment, contending that the forum clause in respondents' tickets required the Shutes to bring their suit against petitioner in a court in the State of Florida. Petitioner contended, alternatively, that the District Court lacked personal jurisdiction over petitioner because petitioner's contacts with the State of Washington were insubstantial. The District Court granted the motion, holding that petitioner's contacts with Washington were constitutionally insufficient to support the exercise of personal jurisdiction. See App. to Pet. for Cert. 60a.

The Court of Appeals reversed. Reasoning that "but for" petitioner's solicitation of business in Washington, respondents would not have taken the cruise and Mrs. Shute would not have been injured, the court concluded that petitioner had sufficient contacts with Washington to justify the District Court's exercise of personal jurisdiction. 897 F. 2d 377, 385-386 (CA9 1990).

589 *589 Turning to the forum-selection clause, the Court of Appeals acknowledged that a court concerned with the enforceability of such a clause must begin its analysis with *The Bremen v. Zapata Off-Shore Co.*, 407 U. S. 1 (1972), where this Court held that forum-selection clauses, although not "historically . . . favored," are "prima facie valid." *Id.*, at 9-10. See 897 F. 2d, at 388. The appellate court concluded that the forum clause should not be enforced because it "was not freely bargained for." *Id.*, at 389. As an "independent justification" for refusing to enforce the clause, the Court of Appeals noted that there was evidence in the record to indicate that "the Shutes are physically and financially incapable of pursuing this litigation in Florida" and that the enforcement of the clause would operate to deprive them of their day in court and thereby contravene this Court's holding in *The Bremen*. 897 F. 2d, at 389.

Both petitioner and respondents argue vigorously that the Court's opinion in *The Bremen* governs this case, and each
591 side purports to find ample support for its position in that *591 opinion's broad-ranging language. This seeming paradox derives in large part from key factual differences between this case and *The Bremen*, differences that preclude an automatic and simple application of *The Bremen*'s general principles to the facts here.

In *The Bremen*, this Court addressed the enforceability of a forum-selection clause in a contract between two business corporations. An American corporation, Zapata, made a contract with Unterweser, a German corporation, for the towage of Zapata's oceangoing drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. The agreement provided that any dispute arising under the contract was to be resolved in the London Court of Justice. After a storm in the Gulf of Mexico seriously damaged the rig, Zapata ordered Unterweser's ship to tow the rig to Tampa, Fla., the nearest point of refuge. Thereafter, Zapata sued Unterweser in admiralty in federal court at Tampa. Citing the forum clause, Unterweser moved to dismiss. The District Court denied Unterweser's motion, and the Court of Appeals for the Fifth Circuit, sitting en banc on rehearing, and by a sharply divided vote, affirmed. *In re Complaint of Unterweser Reederei, GmBH*, 446 F. 2d 907 (1971).

This Court vacated and remanded, stating that, in general, "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." 407 U. S., at 12-13 (footnote omitted). The Court further generalized that "in 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." *Id.*, at 15. The Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that
592 made it reasonable to enforce the clause at issue in *The Bremen* and *592 that, presumably, would be pertinent in any determination whether to enforce a similar clause.

In this respect, the Court noted that there was "strong evidence that the forum clause was a vital part of the agreement, and [that] it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.*, at 14 (footnote omitted). Further, the Court observed that it was not "dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum," and that in such a case, "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." *Id.*, at 17. The Court stated that even where the forum clause establishes a remote forum for resolution of conflicts, "the party claiming [unfairness] should bear a heavy burden of proof." *Ibid*

In applying *The Bremen*, the Court of Appeals in the present litigation took note of the foregoing "reasonableness" factors and rather automatically decided that the forum-selection clause was unenforceable because, unlike the parties in *The Bremen*, respondents are not business persons and did not negotiate the terms of the clause with petitioner. Alternatively, the Court of Appeals ruled that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner.

The Bremen concerned a far from routine transaction between companies of two different nations contemplating the tow of an 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." *Id.*, at 13. These facts suggest that, even
593 apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in *The* *593 *Bremen* to have expected Unterweser and Zapata to have negotiated with care in selecting a forum for the resolution of disputes arising from their special towing contract.

In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other **cruise** lines. See, *e. g.*, Hodes v. S. N. C. Achille Lauro ed Altri-Gestione, 858 F. 2d 905, 910 (CA3 1988), cert. dism'd, 490 U. S. 1001 (1989). In this context, it would be entirely unreasonable for us to assume that respondents—or any other **cruise** passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial **cruise** ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the **cruise** line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in *The Bremen*.

In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account for the realities of form passage contracts. As an initial matter, we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a **cruise** line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a **cruise** ship typically carries passengers from many locales, it is not unlikely that a mishap on a **cruise** could subject the **cruise** line to litigation in several different fora. See *The Bremen*, 407 U. S., at 13, and n. 15; *Hodes*, 858 F. 2d, at 913. Additionally, a clause establishing *ex ante* the forum for dispute resolution has
594 the salutary *594 effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. See Stewart Organization, 487 U. S., at 33 (concurring opinion). Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the **cruise** line enjoys by limiting the fora in which it may be sued. Cf. Northwestern Nat. Ins. Co. v. Donovan, 916 F. 2d 372, 378 (CA7 1990)

We also do not accept the Court of Appeals' "independent justification" for its conclusion that *The Bremen* dictates that the clause should not be enforced because "[t]here is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." 897 F. 2d, at 389. We do not defer to the Court of Appeals' findings of fact. In dismissing the case for lack of personal jurisdiction over petitioner, the District Court made no finding regarding the physical and financial impediments to the Shutes' pursuing their case in Florida. The Court of Appeals' conclusory reference to the record provides no basis for this Court to validate the finding of inconvenience Furthermore, the Court of Appeals did not place in proper context this Court's statement in *The Bremen* that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." 407 U. S., at 17. The Court made this statement in evaluating a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." *Ibid.* In the present case, Florida is not a "remote alien forum," nor—given the fact that Mrs. **Shute's** accident occurred off the coast of Mexico— is this dispute an essentially local one inherently more suited to resolution in the State of
595 Washington than in Florida. In *595 light of these distinctions, and because respondents do not claim lack of notice of the forum clause, we conclude that they have not satisfied the "heavy burden of proof," *ibid.*, required to set aside the clause on grounds of inconvenience.

It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging **cruise** passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.

# SUPREME COURT OF THE UNITED STATES

No. 04–1477

GARY KENT JONES, PETITIONER *v.* LINDA K. FLOWERS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

[April 26, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property.

I

In 1967, petitioner Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas. He lived in the house with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock, and his wife continued to live in the North Bryan Street house. Jones paid his mortgage each month for 30 years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes

went unpaid, and the property was certified as delinquent.

In April 2000, respondent Mark Wilcox, the Commissioner of State Lands (Commissioner), attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address. See Ark. Code Ann. §26–37–301 (1997). The packet of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. See *ibid.*. Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened packet to the Commissioner marked "'unclaimed.'" Pet. for Cert. 3.

Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property. See §26–37–202(b). Several months later, respondent Linda Flowers submitted a purchase offer. The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." *Ibid.* Flowers purchased the house, which the parties stipulated in the trial court had a fair market value of $80,000, for $21,042.15. Record 224. Immediately after the 30-day period for postsale redemption passed, see §26–37–202(e), Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax sale. *Id.*, at 11 (Exh. B).

Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his prop-

erty without due process. The Commissioner and Flowers moved for summary judgment on the ground that the two unclaimed letters sent by the Commissioner were a constitutionally adequate attempt at notice, and Jones filed a cross-motion for summary judgment. The trial court granted summary judgment in favor of the Commissioner and Flowers. App. to Pet. for Cert. 12a–13a. It concluded that the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements.

II

A

Due process does not require that a property owner receive actual notice before the government may take his property. *Dusenbery*, *supra*, at 170. Rather, we have stated that due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U. S., at 314. The Commissioner argues that once the State provided notice reasonably calculated to apprise Jones of the impending tax sale by mailing him a certified letter, due process was satisfied. The Arkansas statutory scheme is reasonably calculated to provide notice, the Commissioner continues, because it provides for notice by certified mail to an address that the property owner is responsible for keeping up to date. See Ark. Code Ann. §26–35–705 (1997). The Commissioner notes this Court's ample precedent condoning notice by mail, see, *e.g.*, *Dusenbery*, *supra*, at 169; *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, 490 (1988); *Mennonite Bd. of Missions* v. *Adams*, 462 U. S. 791, 798 (1983); *Mullane*, *supra*, at 318–319, and adds that the Arkansas scheme exceeds constitutional requirements by requiring the Commissioner to use certified mail. Brief for Respondent Commissioner 14–15.

It is true that this Court has deemed notice constitu-

tionally sufficient if it was reasonably calculated to reach the intended recipient when sent. See, *e.g.*, *Dusenbery*, *supra*, at 168–169; *Mullane*, 339 U. S., at 314. In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, and we stated that "[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id.*, at 315; see also *Dusenbery*, *supra*, at 170. But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new wrinkle, and we have explained that the "notice required will vary with circumstances and conditions." *Walker* v. *City of Hutchinson*, 352 U. S. 112, 115 (1956). The question presented is whether such knowledge on the government's part is a "circumstance and condition" that varies the "notice required."

In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," 339 U. S., at 315, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment," *id.*, at 314.

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. See *Small* v. *United States*, 136 F. 3d 1334, 1337 (CADC 1998). This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Malone*, *supra*, at 37. Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available

It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*. But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

B

In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," *Greene*, 456 U. S., at 455, n. 9, if there were no reasonable addi-

tional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.

We think there were several reasonable steps the State could have taken. What steps are reasonable in response to new information depends upon what the new information reveals. The return of the certified letter marked "unclaimed" meant either that Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office, or that Jones no longer resided at that address. One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required. The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. Otherwise, "[c]ertified mail is dispatched and handled in transit as ordinary mail," United States Postal Service, Domestic Mail Manual §503.3.2.1 (Mar. 16, 2006), and the use of certified mail might make actual notice less likely in some cases—the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. Following up with regular mail might also increase the chances of actual notice to Jones if—as it turned out—he had moved. Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.

Other reasonable followup measures, directed at the possibility that Jones had moved as well as that he had simply not retrieved the certified letter, would have been

to post notice on the front door, or to address otherwise undeliverable mail to "occupant." Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. See n. 2, *supra*. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as "occupant") might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy. In fact, Jones first learned of the State's effort to sell his house when he was alerted by one of the occupants—his daughter—after she was served with an unlawful detainer notice.

Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones' mail marked "unclaimed" did not necessarily mean that 717 North Bryan Street was an incorrect address; it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector, see Ark. Code Ann. §26–35–705 (1997)—imposes burdens on the State significantly greater than the several relatively easy options outlined above.

* * *

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

# Notice Pleading Problem – Fall 2007 exam

Essay Question No 3. total points 23 1/3

Assume the State of Texas the following statute, which we will refer to as Art 1, that provides for service of process against a corporation. [Texas actually has something like this, but I have intentionally modified the statute in certain respects for purposes of this exam question].

Assume Art. 1 provides for service on the president, any vice presidents and/or registered agent of the corporation and that whenever a corporation shall fail to appoint or maintain a registered agent in this State, then the Secretary of State shall be an agent of such corporation upon whom any process may be served.

Furthermore, when process is served on the Secretary of State Art. 1 directs that the Secretary of State shall immediately cause one of the copies to be forwarded by registered mail, addressed to the corporation at its registered office and that this address shall be given to the Secretary of State by the person seeking that process be served.

Then, Art. 1 provides as follows:

> If the Secretary of State fails to mail the process to the correct address given to it by the person seeking that process be served, such service shall still be considered valid provided that the address given to the Secretary of State was correct and current as of the date of transmittal to the Secretary of State.

Assume that Paul sues D Inc., an Illinois corporation, in Texas state court and that D Inc. is supposed to (under another provision of Texas law) have a registered agent for service of process in the state but does not. Paul seeks to use Art. 1 to mail service to the Secretary of State and correctly gives D Inc.'s address to the Secretary of State as D, Inc., 1234 Wacker Drive, Chicago Illinois 60601. The Secretary of State receives the process from Paul but incorrectly mails it to D Inc. at the following address: 5678 Wacky Drive, Chicago Illinois 60602.

D Inc fails to appear and Paul obtains a default judgment. On notice of the default judgment (which Paul correctly mailed to D's actual address), D Inc. files a motion to set aside the default on the ground that this judgment violates their due process rights. How should the court rule?

**Arbitration,**
**Questions to Discuss**

1. What was the question the Court was answering in *Concepcion*?

2. Why do you think the parties in *Concepcion* were fighting so fiercely over whether the claim had to go to arbitration? What do you think the stakes are in this fight?

3. According to the Supreme Court precedents cited in *Concepcion*, what is the standard for determining the enforceability of an arbitration agreement?

4. According to the Supreme Court in *Concepcion*, why did the savings clause of section 2 of the FAA not invalidate the arbitration agreement in that case?

# LINKSYS SMART WI-FI TERMS OF SERVICE

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11 Arbitration Waiver of Classwide Arbitration Governing Law and Venue

***If you are located in the United States, the following clause applies to you:***

YOU AND LINKSYS EACH ACKNOWLEDGE AND AGREE THAT ANY CLAIM, DISPUTE OR CONTROVERSY BETWEEN YOU AND LINKSYS ARISING OUT OF OR RELATING TO (1) THIS AGREEMENT, *INCLUDING* THE VALIDITY OF THIS SECTION, AND (2) YOUR USE OF PRODUCT(S) AND/OR SERVICES UNDER THIS AGREEMENT (COLLECTIVELY, THE "DISPUTE") SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY A MUTUALLY AGREEABLE NATIONALLY RECOGNIZED ARBITRATION AUTHORITY PURSUANT TO ITS CODE OF PROCEDURES THEN IN EFFECT FOR CONSUMER-RELATED DISPUTES. YOU UNDERSTAND THAT WITHOUT THIS PROVISION YOU WOULD HAVE HAD A RIGHT TO LITIGATE A DISPUTE THROUGH A COURT BEFORE A JURY OR JUDGE, AND THAT YOU HAVE EXPRESSLY AND KNOWINGLY WAIVED THOSE RIGHTS AND AGREE INSTEAD TO RESOLVE ANY DISPUTES THROUGH BINDING ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.

THE ARBITRATION SHALL OCCUR BEFORE A SINGLE ARBITRATOR, WHO MUST BE A RETIRED JUDGE OR JUSTICE, IN ONE OF SIX REGIONAL VENUES CONSISTENT WITH THE VENUE PROVISION BELOW. WHETHER OR NOT YOU PREVAIL IN THE DISPUTE SO LONG AS YOUR CLAIM IS NOT FOUND TO BE FRIVOLOUS BY THE ARBITRATOR AS MEASURED BY RULE 11(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, YOU SHALL BE ENTITLED TO BE REIMBURSED FOR YOUR COSTS OF ARBITRATION, WITHIN THE SOLE DISCRETION OF THE ARBITRATOR. IF THE ARBITRATION AWARD IS EQUAL TO OR GREATER THAN THE AMOUNT YOU DEMANDED IN YOUR ARBITRATION CLAIM, LINKSYS WILL PAY FOR YOUR REASONABLE AND ACTUAL ATTORNEYS' FEES YOU HAVE INCURRED TO ARBITRATE THE DISPUTE, PLUS A MINIMUM RECOVERY OF $2,500. ANY DECISION OR AWARD BY THE ARBITRATOR RENDERED IN AN ARBITRATION PROCEEDING SHALL BE FINAL AND BINDING ON EACH PARTY, AND MAY BE ENTERED AS A JUDGMENT IN ANY COURT OF COMPETENT JURISDICTION. IF EITHER PARTY BRINGS A DISPUTE IN A COURT OR OTHER NON-ARBITRATION FORUM, THE ARBITRATOR OR JUDGE MAY AWARD THE OTHER PARTY ITS REASONABLE COSTS AND EXPENSES (INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES) INCURRED IN ENFORCING COMPLIANCE WITH THIS BINDING ARBITRATION PROVISION, INCLUDING STAYING OR DISMISSING SUCH DISPUTE.

NEITHER YOU NOR LINKSYS SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CONSUMERS OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. YOU UNDERSTAND THAT WITHOUT THIS PROVISION YOU MAY HAVE HAD A RIGHT TO ARBITRATE A DISPUTE ON A CLASSWIDE OR REPRESENTATIVE BASIS, AND THAT YOU HAVE EXPRESSLY AND

KNOWINGLY WAIVED THOSE RIGHTS AND AGREE INSTEAD TO ARBITRATE ONLY YOUR OWN DISPUTE(S) IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.

NOTWITHSTANDING THE ABOVE AGREEMENT TO ARBITRATE DISPUTES, YOU AND LINKSYS EACH ACKNOWLEDGE AND AGREE THAT EITHER PARTY MAY, AS AN ALTERNATIVE TO ARBITRATION, BRING AN INDIVIDUAL ACTION IN SMALL CLAIMS COURT TO RESOLVE A DISPUTE, SO LONG AS SUCH SMALL CLAIMS COURT DOES NOT PROVIDE FOR OR ALLOW FOR JOINDER OR CONSOLIDATION OF CLAIMS.

THIS AGREEMENT IS TO BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE INTERNAL LAWS OF THE STATE OF CALIFORNIA WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW RULE THAT WOULD CAUSE THE APPLICATION OF THE LAWS OF ANY JURISDICTION (OTHER THAN THE INTERNAL LAWS OF THE STATE OF CALIFORNIA) TO THE RIGHTS AND DUTIES OF THE PARTIES. HOWEVER, WITH RESPECT TO THE SERVICE PROVIDED, IF YOU ARE A CONSUMER AND YOU LIVE IN A COUNTRY WHERE LINKSYS MARKETS OR PROMOTES THE SERVICE, LOCAL LAW MAY REQUIRE THAT CERTAIN CONSUMER PROTECTION LAWS OF YOUR COUNTRY OF RESIDENCE APPLY TO SOME SECTIONS OF THIS AGREEMENT. EACH OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE UNITED NATIONS CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS IS HEREBY EXPRESSLY EXCLUDED AND WILL NOT APPLY TO THIS AGREEMENT.

EXCEPT FOR INDIVIDUAL SMALL CLAIMS ACTIONS WHICH CAN BE BROUGHT IN ANY SMALL CLAIMS COURT WHERE JURISDICTION AND VENUE ARE PROPER, ANY ARBITRATION, LEGAL SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY DISPUTE SHALL BE COMMENCED IN (1) NEW YORK, NEW YORK, (2) ATLANTA, GEORGIA, (3) CHICAGO, ILLINOIS, (4) DALLAS, TEXAS, (5) SEATTLE, WASHINGTON, OR (6) LOS ANGELES, CALIFORNIA, AND YOU AND LINKSYS EACH IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION AND VENUE OF ANY SUCH PROCEEDING. HOWEVER, FOR A DISPUTE OF $10,000 OR LESS, YOU MAY CHOOSE WHETHER THE ARBITRATION IN ANY OF THE SIX REGIONAL VENUES PROCEEDS IN PERSON, BY TELEPHONE, OR BASED ONLY ON SUBMISSIONS

*If you are located outside of the United States, the following clause applies to you:*

This Agreement will be governed by California law, without reference to conflict of laws principles. The state and federal courts of California shall have exclusive jurisdiction over any claim arising under, or in connection with, this Agreement. However, if you are a consumer and you live in a country where Linksys markets or promotes the Service, local law may require that certain consumer protection laws of your country of residence apply to some sections of this Agreement. The United Nations Convention on Contracts for the International Sale of Goods will not apply.

12 Other Important Legal Terms

Sometimes when you use the Service, you may use a service which is provided by another person or company. This includes downloading certain apps that are provided by third parties. Your use of these other services and apps may be subject to separate terms between you and the company or person providing the service or app, and you agree that Linksys shall have no liability or obligation relating to those services or apps.

The Service may contain links to other independent third-party websites ("Linked Sites"). These Linked Sites are provided solely as a convenience to you. Such Linked Sites are not under Linksys' control, and Linksys is not responsible or liable for and does not endorse the content or practices of such Linked Sites, including any information or materials contained on such Linked Sites. You will need to make your own independent judgment regarding your interaction with these Linked Sites.

Trade names, trademarks, service marks, logos, and domain names of each party are considered their respective "Marks." As to Linksys' Marks and the Marks of its suppliers, the Mark owner retains ownership of all proprietary rights in all its Marks associated or displayed with the Services. You may not frame or utilize framing techniques to enclose any Linksys Marks, or other proprietary information (including images, text, page

# Help

Browse help

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Bidding & buying

Selling & seller fees

Payment & shipping

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eBay acronyms
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Search the help pages
(Does not search for items or products) Example: 'payment methods' Search Tips

## eBay User Agreement

The following describes the terms on which eBay offers you access to our sites, services, applications, and tools.

### Introduction

Welcome to eBay. By using eBay (including eBay.com and its related sites, services, applications, and tools), you agree to the following terms and the general principles for the sites of our subsidiaries and international affiliates. If you reside in the United States, you are contracting with eBay Inc. If you reside outside of the United States, you are contracting with one of our international eBay companies. In countries within the European Union, your contract is with eBay Europe S.à r.l.; in India, your contract is with eBay India Private Limited. In all other countries, your contract is with eBay International AG.

This User Agreement is effective upon acceptance for new users. For current users, this Agreement is effective July 1, 2013 and supersedes all previous versions of the eBay User Agreement. You accept this User Agreement by clicking the Submit button when registering an eBay account; accessing or using eBay's sites, services, applications, and tools; or as otherwise indicated on a specific site, service, application, or tool. The previous amendment to the eBay User Agreement was effective for all users on March 26, 2013.

**Please be advised: This User Agreement contains provisions that govern how claims you and we have against each other are resolved (see Disclaimer of Warranties; Limitation of Liability and Legal Disputes Sections below). It also contains an Agreement to Arbitrate, which will, with limited exception, require you to submit claims you have against us to binding and final arbitration, unless you opt-out of the Agreement to Arbitrate (see Legal Disputes, Section B ("Agreement to Arbitrate")). Unless you opt-out: (1) you will only be permitted to pursue claims against eBay on an individual basis, not as a plaintiff or class member in any class or representative action or proceeding and (2) you will only be permitted to seek relief (including monetary, injunctive, and declaratory relief) on an individual basis.**

### Scope

Before you may become a member of eBay, you must read and accept all of the terms in, and linked to, this User Agreement and the eBay Privacy Policy. We strongly recommend that, as you read this User Agreement, you also access and read the linked information. By accepting this User Agreement, you agree that this User Agreement and Privacy Policy will apply whenever you use eBay sites, services, or applications, or when you use the tools that are made available to interact with eBay sites and services. Some eBay sites, services, applications, and tools may have additional or other terms, agreements, or policies that govern their availability and use. Your use of and access to such sites, services, applications, and tools are subject to any and all terms, agreements, or policies applicable to them.

Contact us

Have a question? We can help

Contact us

Ask eBay members

Get help from other eBay members. Visit the Answer Center to post a question.

Related help topics

eBay Privacy Policy

## Notices

Except as explicitly stated otherwise, legal notices shall be served on eBay's national registered agent (in the case of eBay) or to the email address you have designated on your account (in your case). Notice to you shall be deemed given 24 hours after the email is sent. Alternatively, we may give you legal notice by mail to the Registration Address associated with your account, as identified in your My eBay. In such case, notice shall be deemed given three days after the date of mailing.

## Legal Disputes

**You and eBay agree that any claim or dispute at law or equity that has arisen or may arise between us relating in any way to or arising out of this or previous versions of the eBay User Agreement (hereafter "User Agreement" in this section entitled "Legal Disputes"), your use of or access to eBay's sites, services, applications, and tools, or any products or services sold or purchased through eBay's sites, services, applications, or tools will be resolved in accordance with the provisions set forth in this Legal Disputes Section. Please read this Section carefully. It affects your rights and will have a substantial impact on how claims you and we have against each other are resolved.**

### A. Applicable Law

You agree that the laws of the State of Utah, without regard to principles of conflict of laws, will govern the User Agreement and any claim or dispute that has arisen or may arise between you and eBay, except as otherwise stated in the User Agreement.

### B. Agreement to Arbitrate

**You and eBay each agree that any and all disputes or claims that have arisen or may arise between you and eBay relating in any way to or arising out of this or previous versions of the User Agreement, your use of or access to eBay's sites, services, applications, and tools, or any products or services sold or purchased through eBay's sites, services, applications, or tools shall be resolved exclusively through final and binding arbitration, rather than in court, except that you may assert claims in small claims court, if your claims qualify. The Federal Arbitration Act governs the interpretation and enforcement of this Agreement to Arbitrate.**

1. **Prohibition of Class and Representative Actions and Non-Individualized Relief**

   **YOU AND EBAY AGREE THAT EACH OF US MAY BRING CLAIMS AGAINST THE OTHER ONLY ON AN INDIVIDUAL BASIS AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE ACTION OR PROCEEDING. UNLESS BOTH YOU AND EBAY AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE OR JOIN MORE THAN ONE PERSON'S OR PARTY'S CLAIMS, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A CONSOLIDATED, REPRESENTATIVE, OR CLASS PROCEEDING. ALSO, THE ARBITRATOR MAY AWARD RELIEF (INCLUDING MONETARY, INJUNCTIVE, AND DECLARATORY RELIEF) ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF NECESSITATED BY THAT PARTY'S INDIVIDUAL CLAIM(S). ANY RELIEF AWARDED CANNOT AFFECT OTHER EBAY USERS.**

2. **Arbitration Procedures**

   Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, and court review of an arbitration award is very limited. However, an arbitrator can award the same damages and relief on an individual basis that a court can award to an individual. An arbitrator also must follow the terms of the User Agreement as a court would.

   The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute arising out of or relating to the interpretation, applicability, enforceability or formation of this Agreement to Arbitrate, any part of it, or of the User Agreement including, but not limited to, any claim that all or any part of the Agreement to Arbitrate or User Agreement is void or voidable.

   The arbitration will be conducted by the American Arbitration Association ("AAA") under its rules and procedures, including the AAA's Supplementary Procedures for Consumer-Related Disputes (as applicable), as modified by this Agreement to Arbitrate. The

AAA's rules are available at www adr org. A form for initiating arbitration proceedings is available on the AAA's site at http //www adr org In addition to filing this form with the AAA in accordance with its rules and procedures, you must send a copy of the completed form to us at the following address to initiate arbitration proceedings: eBay, Inc c/o National Registered Agents, Inc , 2778 W. Shady Bend Lane, Lehi UT 84043.

The arbitration shall be held in the county in which you reside or at another mutually agreed location. If the value of the relief sought is $10,000 or less, you or eBay may elect to have the arbitration conducted by telephone or based solely on written submissions which election shall be binding on you and eBay subject to the arbitrator's discretion to require an in-person hearing, if the circumstances warrant. Attendance at an in-person hearing may be made by telephone by you and/or eBay, unless the arbitrator requires otherwise

The arbitrator will decide the substance of all claims in accordance with the laws of the State of Utah, including recognized principles of equity, and will honor all claims of privilege recognized by law The arbitrator shall not be bound by rulings in prior arbitrations involving different eBay users but is bound by rulings in prior arbitrations involving the same eBay user to the extent required by applicable law The arbitrator's award shall be final and binding and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof

3 Costs of Arbitration

Payment of all filing administration and arbitrator fees will be governed by the AAA's rules unless otherwise stated in this Agreement to Arbitrate If the value of the relief sought is $10 000 or less, at your request, eBay will pay all filing administration, and arbitrator fees associated with the arbitration Any request for payment of fees by eBay should be submitted by mail to the AAA along with your Demand for Arbitration and eBay will make arrangements to pay all necessary fees directly to the AAA. If the value of the relief sought is more than $10,000 and you are able to demonstrate that the costs of arbitration will be prohibitive as compared to the costs of litigation eBay will pay as much of the filing administration, and arbitrator fees as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive In the event the arbitrator determines the claim(s) you assert in the arbitration to be frivolous you agree to reimburse eBay for all fees associated with the arbitration paid by eBay on your behalf, which you otherwise would be obligated to pay under the AAA's rules

4 Severability

With the exception of any of the provisions in Section 1 of this Agreement to Arbitrate ("Prohibition of Class and Representative Actions and Non-Individualized Relief"), if an arbitrator or court decides that any part of this Agreement to Arbitrate is invalid or unenforceable the other parts of this Agreement to Arbitrate shall still apply If an arbitrator or court decides that any of the provisions in Section 1 of this Agreement to Arbitrate ("Prohibition of Class and Representative Actions and Non-Individualized Relief") is invalid or unenforceable, then the entirety of this Agreement to Arbitrate shall be null and void The remainder of the User Agreement and its Legal Disputes Section will continue to apply

5 Opt-Out Procedure

IF YOU ARE A NEW EBAY USER, YOU CAN CHOOSE TO REJECT THIS AGREEMENT TO ARBITRATE ("OPT-OUT") BY MAILING US A WRITTEN OPT-OUT NOTICE ("OPT-OUT NOTICE"). THE OPT-OUT NOTICE MUST BE POSTMARKED NO LATER THAN 30 DAYS AFTER THE DATE YOU ACCEPT THE USER AGREEMENT FOR THE FIRST TIME. YOU MUST MAIL THE OPT-OUT NOTICE TO EBAY INC., ATTN: LITIGATION DEPARTMENT, RE: OPT-OUT NOTICE, 583 WEST EBAY WAY, DRAPER, UT 84020.

For your convenience, we are providing an Opt Out Notice form you must complete and mail to opt out of the Agreement to Arbitrate You must complete the Opt Out Notice form by providing the information called for in the form, including your name, address (including street address, city, state and zip code), and the user ID (s) and email address(es) associated with the eBay account(s) to which the opt-out applies You must sign the Opt Out Notice for it to be effective This procedure is the only way you can opt-out of the Agreement to Arbitrate. If you opt out of the Agreement to Arbitrate, all other parts of the User Agreement and its Legal Disputes Section will continue to apply to you Opting out of this Agreement to Arbitrate has no effect on any previous, other, or future arbitration agreements that you may have with us

6 Future Changes to the Agreement to Arbitrate

Notwithstanding any provision in the User Agreement to the contrary, you and we agree that if we make any change to this Agreement to Arbitrate (other than a change to any notice address

or site link provided herein) in the future, that change shall not apply to any claim that was filed in a legal proceeding against eBay prior to the effective date of the change The change shall apply to all other disputes or claims governed by the Agreement to Arbitrate that have arisen or may arise between you and eBay We will notify you of changes to this Agreement to Arbitrate by posting the amended terms on www ebay com at least 30 days before the effective date of the changes and by providing notice through the eBay Message Center and/or by email. If you do not agree to these amended terms, you may close your account within the 30 day period and you will not be bound by the new terms

Moreover, if we seek to terminate the Agreement to Arbitrate as included in the User Agreement, any such termination shall not be effective until 30 days after the version of the User Agreement not containing the Agreement to Arbitrate is posted to http //www ebay com and shall not be effective as to any claim that was filed in a legal proceeding against eBay prior to the effective date of termination

C Judicial Forum for Legal Disputes

Unless you and we agree otherwise in the event that the Agreement to Arbitrate above is found not to apply to you or to a particular claim or dispute, either as a result of your decision to opt-out of the Agreement to Arbitrate or as a result of a decision by the arbitrator or a court order, you agree that any claim or dispute that has arisen or may arise between you and eBay must be resolved exclusively by a state or federal court located in Salt Lake County, Utah. You and eBay agree to submit to the personal jurisdiction of the courts located within Salt Lake County Utah for the purpose of litigating all such claims or disputes

## Additional Terms

You agree to abide by all policies posted on our sites Such policies (including, but not limited to the following) are part of this User Agreement and provide additional terms and conditions related to specific services offered on our sites

Outage Policy - http //pages ebay com/help/policies/everyone-outage html

Prohibited and Restricted Items -
http //pages ebay com/help/policies/items-ov html

Discussion Boards Usage Policy -
http //pages ebay com/help/policies/everyone boards html

Rules for Listings - http //pages ebay com/help/policies/listing ov html

How to Report Inappropriate Buying and Selling -
http //pages ebay com/help/buy/report-trading html

Real Estate Policy - http //pages ebay com/help/policies/real-estate html

Community Content Policy (covers Reviews, Guides, Blog Entries Wiki Articles and Member-Created Product Descriptions) -
http //pages ebay com/help/policies/member created content ov html

eBay Groups Guidelines http //pages ebay com/help/policies/group guidelines html

Rules about Intellectual Property -
http //pages ebay com/help/policies/intellectual property ov html

eBay Buyer Protection Policy -
http //pages ebay com/help/policies/buyer protection html

Half com Polices - http //pages half ebay com/help/policy/index html

Fees for Selling on eBay - http //pages ebay com/help/sell/fees html

Mobile Device: Additional End User License Terms –
http //pages ebay com/help/policies/mobiledevice terms html

International Selling Policy -
http //pages ebay com/help/policies/international selling html

The policies posted on our sites may be changed from time to time Changes take effect when we post them on the eBay sites When using particular eBay services, applications, or tools, you are subject to any posted policies or rules applicable to services, applications or tools you use, which may be posted from time to time All such policies or rules are hereby incorporated into this User Agreement

## General

eBay Inc is located at 2145 Hamilton Ave , San Jose, CA 95125 eBay Inc s North American Customer Service Operations Center is located at 583 West eBay Way, Draper, UT 84020 eBay Europe S à r l. is located at 22-24 Boulevard Royal, L-2449 Luxembourg eBay International AG is located at Helvetiastrasse 15/17, 3005, Bern, Switzerland eBay India Private Limited is located at 14th Floor, North Block, R-Tech Park, Western Express Highway,

# SUPREME COURT OF THE UNITED STATES

No. 09-893

AT&T MOBILITY LLC, PETITIONER *v.* VINCENT CONCEPCION ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 27, 2011]

JUSTICE SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LCC (AT&T).[1] The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." App.

[1]The Concepcions' original contract was with Cingular Wireless. AT&T acquired Cingular in 2005 and renamed the company AT&T Mobility in 2007. *Laster* v. *AT&T Mobility LLC*, 584 F. 3d 849, 852, n. 1 (CA9 2009).

to Pet. for Cert. 61a.[2] The agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions. The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.[3]

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they

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[2]That provision further states that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." App. to Pet. for Cert. 61a.

[3]The guaranteed minimum recovery was increased in 2009 to $10,000. Brief for Petitioner 7.

were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT&T's motion. It described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promp[t] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. *Laster* v. *T-Mobile USA, Inc.*, 2008 WL 5216255, *11–*12 (SD Cal., Aug. 11, 2008). Nevertheless, relying on the California Supreme Court's decision in *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. *Laster*, 2008 WL 5216255, *14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank*. *Laster* v. *AT&T Mobility LLC*, 584 F. 3d 849, 855 (2009). It also held that the *Discover Bank* rule was not preempted by the FAA because that rule was

simply "a refinement of the unconscionability analysis applicable to contracts generally in California." 584 F. 3d, at 857. In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that "'class proceedings will reduce the efficiency and expeditiousness of arbitration'" and noted that "'*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.'" *Id.*, at 858 (quoting *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F. 3d 976, 990 (CA9 2007)).

We granted certiorari, 560 U. S. ___ (2010).

II

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. See *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 581 (2008). Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983), provides, in relevant part, as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

We have described this provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone*, *supra*, at 24, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. ___, ___ (2010) (slip op., at 3). In line with these principles, courts must place arbitration

agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989).

The final phrase of §2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996); see also *Perry* v. *Thomas*, 482 U. S. 483, 492–493, n. 9 (1987). The question in this case is whether §2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." Cal. Civ. Code Ann. §1670.5(a) (West 1985). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz* v. *Foundation Health Pyschcare Servs., Inc.*, 24 Cal. 4th 83, 114, 6 P. 3d 669, 690 (2000); accord, *Discover Bank*, 36 Cal. 4th, at 159–161, 113 P. 3d, at 1108.

In *Discover Bank*, the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

"[W]hen the waiver is found in a consumer contract of

> adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.*, at 162, 113 P. 3d, at 1110 (quoting Cal. Civ. Code Ann. §1668).

California courts have frequently applied this rule to find arbitration agreements unconscionable. See, *e.g.*, *Cohen* v. *DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1451–1453, 48 Cal. Rptr. 3d 813, 819–821 (2006); *Klussman* v. *Cross Country Bank*, 134 Cal. App. 4th 1283, 1297, 36 Cal Rptr. 3d 728, 738–739 (2005); *Aral* v. *EarthLink, Inc.*, 134 Cal. App. 4th 544, 556–557, 36 Cal. Rptr. 3d 229, 237–239 (2005).

## III

### A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA §2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well. See *America Online, Inc.* v. *Superior Ct.*, 90 Cal. App. 4th 1, 17–18, 108 Cal. Rptr. 2d 699, 711–713 (2001).

When state law prohibits outright the arbitration of a

particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston* v. *Ferrer*, 552 U. S. 346, 353 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry* v. *Thomas*, 482 U. S. 483 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Id.*, at 493, n. 9.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank*, *supra*, at 161, 113 P. 3d, at 1109 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by §2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

California's *Discover Bank* rule similarly interferes with arbitration.

JEAN R. STERNLIGHT*

# Tsunami: *AT&T Mobility LLC v. Concepcion* Impedes Access to Justice

## III
## THE IMPACT OF *CONCEPCION* AND ITS PROGENY

To date *Concepcion* is having a huge impact only on those companies that had the foresight to impose arbitral class action waivers on their consumers, employees, or others. Such companies, as we have seen, are using their waivers to block ongoing as well as proposed class actions.[73] However, prior to *Concepcion*, not all companies had used arbitration clauses to impose class action waivers. The use of such clauses varied by industry, by jurisdiction, and by time period. A 2001 study showed that thirty-five percent of the consumer contracts in an average California consumer's life required arbitration,[74] and thirty-one percent of those excluded class actions.[75] On the other hand, a more recent study showed that seventy-five percent of studied consumer contracts contained arbitration clauses, all of which contained class action waivers.[76]

In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus. Prior to *Concepcion*, some companies may have feared that inserting an arbitral class action waiver would backfire—leading them into lots of costly litigation over the viability of the clause and perhaps ultimately being held invalid by the courts.[77] Now, however, *Concepcion* and its progeny are giving companies reason to believe that an arbitral class action waiver would be upheld, so it is likely that many more companies will choose to impose such waivers.

For those companies that fear being sued in class actions it will be quite easy to insert class action waivers into small-print documents or online provisions that they send or make available to their customers or employees. Under the FAA, an arbitration clause need not even be signed to be valid, so long as it is written.[78] For example, Starbucks recently updated the online terms and conditions associated with its gift cards to require that any consumers resolve disputes pertaining to the cards using individual arbitration in Seattle, rather than litigation.[79] Companies will also have no problem amending relationships with existing customers or employees, as most courts that have considered the question have allowed such changes to ongoing relationships.[80] Thus, given that most companies would prefer not to be sued in class actions, we may soon see the possibility of class actions only in rare contexts in which the company and potential plaintiffs do not have a prior relationship. For example, it might not be possible for a trucking company to avoid a class action that arises out of an accidental spill of toxic chemicals on the highway, in that the company has no way of predicting who might be a potential plaintiff. However, you can be sure that creative attorneys are working already to think about how to impose arbitration and thus class action waivers on pharmaceutical customers, recipients of

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[77] *See* Drahozal & Wittrock, *supra* note 75, at 290–93 (outlining the diverse approaches courts took to arbitral class action waivers prior to *Concepcion*).

[78] 9 U.S.C. § 2 (2006).

[79] STARBUCKS CARD TERMS AND CONDITIONS, STARBUCKS, http://www.starbucks.com/card/card-terms-and-conditions (last visited Jan. 1, 2012).

[80] Occasionally consumers or employees have tried to argue that revising an ongoing relationship to require arbitration does not result in an enforceable agreement, but courts often find that consumers consented to arbitration by continuing to use a product or service, and that employees consented to the revised clause by continuing to work at the job. *See, e.g.*, F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS ENFORCEABILITY AND OTHER TOPICS § 5.2.3.3 (5th ed. 2007).

medical devices, and perhaps even concertgoers. For example, even prior to *Concepcion* a Whataburger franchisee in East Texas had sought to bind its customers to arbitration by posting a sign on the door stating:

> Arbitration Notice
>
> By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation. No suit or action may be filed in any state or federal court. Any arbitration shall be governed by the FEDERAL ARBITRATION ACT, and administered by the American Mediation Association.[81]

Perhaps pill bottles, concert tickets, and implant inserts will soon all contain similar statements?

Assuming that arbitral class action waivers become more widespread, what impact will this have? We can expect to see an impact on prospective defendants, representative plaintiffs, absent class members, and society at large. Each of these impacts will be briefly discussed below.

### *A. Impact of* Concepcion *on Defendants*

Many prospective defendants will be thrilled rather than troubled by the prospect of a new virtually class action free world.[82] Such companies often argue, as they did in amicus briefs in *Concepcion*, that class actions are extremely expensive and burdensome for companies,[83] and that they allow plaintiffs and their attorneys to use

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[81] Stephanie Mencimer, *Eat Burger, Waive Right to Sue*, MOTHERJONES (Jan. 31, 2008, 9 07 AM), http //motherjones.com/mojo/2008/01/eat-burger-waive-right-sue.

[82] In a fascinating blog, Charles Silver and Maria Glover have noted that upon occasion companies may actually prefer to be sued in class actions rather than individually Maria Glover & Charles Silver, *Zombie Class Actions*, SCOTUSBLOG (Sept. 8, 2011, 10.16 AM), http://www scotusblog com/2011/09/zombie-class-actions. These commentators have recognized that at times a company is better off settling claims with a class (on the cheap of course) than litigating many individual claims Yet *Concepcion* may serve the interests of these defendants as well because even having forced plaintiffs to waive their class claims the company can reverse course, waive its own objection to class claims brought by friendly class counsel, and thereby enter into a cozy settlement that eradicates the potential claims of individual claimants. Silver and Glover call this the creation of "zombie" classes "whose mission will be to feed on and suck the life from live claims." *Id.*

[83] Brief of the Center for Class Action Fairness as Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3167314; Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 131 S Ct

the cost of class actions to extort settlements from companies with little or no liability.[84] Such companies have, with some success, been seeking to use legislation and rule changes to rein in class actions for many years.[85] However, by using the private tool of arbitration, corporate defenders will be able to achieve far more than they have been able to achieve through Congress or the federal and state rules committees: the total elimination of class actions in many contexts. These defendants will largely say "good riddance" to class actions.[86]

### *D. Impact of* Concepcion *on the Public*

How will the public be impacted if prospective defendants are able to use arbitral class action waivers without fearing unconscionability attacks?[101] For starters, we are likely to see a substantial reduction in the number of class actions brought in federal and state court. While good empirical data on numbers of class actions are notoriously scarce,[102] a report by the Federal Judicial Center showed that in 2007 more than 1500 labor class actions (mostly FLSA) and consumer fraud class actions were filed in or removed to federal court, making up 67.7% of the federal class action docket.[103] In the future, as more companies realize that they can use arbitral class action waivers to protect themselves from class actions, we can expect fewer and fewer claims. This reduction in the number of class actions will certainly decrease the extent to which companies are deterred from engaging in illegal conduct.

Proponents will defend this elimination of class actions, perhaps arguing that most class actions present weak legal claims, that class actions are not beneficial for class members, that arbitration can be structured to ensure greater access to justice than is provided by class actions, that government enforcement actions can take the place of any worthy class actions, or that any benefits of class actions are outweighed by their detriments. Yet, these arguments all fail.

It is no doubt true that some class actions present weak substantive claims, and that some class actions serve the interests of plaintiffs' counsel or defendants more than the actions serve the interests of plaintiffs. On the other hand it is also true that many class actions serve the interests of both plaintiffs and members of the public, protecting them against illegal and unfair business practices. Congress, as well as federal and state rules committees, have been working hard to revise class action procedures to ensure that class actions function as fairly and effectively as possible. These groups, rather than companies themselves, are best positioned to weigh the benefits and drawbacks of class actions and refine the rules as needed. We should not allow companies to shortcut the legislative process by using arbitration to abolish class actions.[104]

If we allow companies to insulate themselves from class actions, we are effectively allowing companies to escape many legal regulations and thereby eliminating a great deterrent to company misconduct. As we have seen above, it is unrealistic to expect absent class members to bring individual claims.[105] Nor is it realistic to assume that federal or state enforcement agencies can pick up the slack and bring all necessary actions to enforce federal and state consumer and employment laws. Those agencies have never been particularly well funded,[106] and now in these times of economic hardship are even less able to bring many enforcement actions.[107] Unlike many European countries, we have chosen to use private lawsuits to enforce many of our laws.[108] Unless we substantially strengthen government enforcement efforts, which seems presently unlikely, eliminating class actions will simply take the teeth out of many of our substantive laws. As one author notes, "[P]rivate parties, at least as a functional matter, are often necessary for meaningful enforcement of regulatory directives to occur."[109] For those who believe that our existing substantive laws do serve the public interest, eliminating enforcement of those laws will not benefit society.

Draft of Dec. 18, 2007

# Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts

Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin*

## I. Introduction

Arbitration clauses are common features of American consumer agreements. Popular products such as cellular phone service, credit cards, and discount brokerage typically come with fine-print contracts in which customers waive their right to litigate disputes in court. More or less consciously, the customer agrees to submit disputes to arbitration and, in most cases, agrees not to participate in class proceedings, either in court or before an arbitrator.

Mandatory arbitration clauses have been controversial among academic commentators and others, praised by some for their efficiency and condemned by others as one-sided, exploitative, and contrary to the ideals of public justice.[1] Arbitration clauses have also been a recurrent subject of litigation. Customers challenging company practices have filed class actions in court, and companies have invoked mandatory arbitration clauses in defense. Plaintiffs typically respond that standard-form contract provisions combining mandatory arbitration with class action waivers are unconscionable under state contract law. In the ensuing litigation, the parties have vigorously debated the justifiability of arbitration clauses...

This study adds to the empirical arbitration literature by studying whether particular firms vary use of arbitration clauses depending on the type of contract. Given a firm, will it uniformly include arbitration clauses or vary its practice based on the nature of the contract? The study is not designed to measure the frequency of arbitration clauses across a broad range of consumer agreements, which others have done.[11] Instead, our aim is to explore the common assertion by companies that employ mandatory arbitration clauses that arbitration is a preferable dispute resolution forum for all parties involved in light of those companies' own actual contractual practices.

The results are striking. Over three-quarters of the studied companies' consumer agreements provided for mandatory arbitration of disputes. Yet less than ten percent of their negotiated nonconsumer, non-employment contracts included arbitration clauses. The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers. Systematic eschewing of arbitration clauses also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses. Large corporations' assertions that mandatory consumer arbitration is justified because it provides consumers with a superior form of dispute resolution thus appear to be disingenuous.

This raises the question of why companies choose arbitration for consumer disputes. From the perspective of rational corporate self-interest, the reasons why companies might insert arbitration clauses in standard-form consumer contracts are fairly easy to reconstruct. The evidence from the pattern of contract clauses relating to arbitration and class actions indicates, as others have suggested, that companies' primary motive for requiring arbitration is to avoid class actions by consumers.[45]

Companies may wish to suppress consumer class actions for several reasons. The explanation most favorable to companies is that class actions, with their potential for large judgments in favor of consumers, put significant pressure on risk-averse corporations to settle claims even when the claims are weak.[46] More cynically, companies may hope that if class actions are not available, consumers will not find it worthwhile to assert even meritorious claims on an individual basis.[47] Disputes arising under the types of consumer agreements we examined are likely to involve small losses to each consumer, making individual legal action impractical. Whatever slant one puts on corporate motivation, the consistent opposition consumer products companies have voiced to expansive interpretation of class action rules leaves little doubt that minimizing exposure to class actions is a substantial influence on their contractual patterns.

If companies are primarily interested in avoiding class actions by consumers, the question arises as to why they do not simply prohibit class actions, without also requiring

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[45]See, e.g., Gilles, supra note 1, at 391-412; Sternlight & Jensen, supra note 1.

[46]See Richard A. Nagareda, Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 Colum. L. Rev. 1872, 1879-95 (2006) (discussing legitimate and illegitimate settlement pressures).

[47]See Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157, 170-77 (2006) (noting that consumers cannot afford to arbitrate small claims on an individual basis); Sternlight & Jensen, supra note 1, at 86-87 (same).

arbitration of individual claims? In fact, we found no stand-alone class action waivers. In all cases, class action waivers were embedded in mandatory arbitration clauses.

One likely answer is that using arbitration as a tool to preclude class actions provides a layer of doctrinal insulation not available through clauses directly waiving class actions without relying on mandatory arbitration clauses. By using arbitration clauses to effectively preclude class actions, corporations impose a substantial legal hurdle that must be overcome before courts can even address the substantive merits of precluding class actions. A straight class action waiver clause can be directly tested for its validity. Limiting class actions through arbitration first requires an attack on arbitration itself. That attack must succeed before the anti-class action strategy becomes vulnerable.

Corporations did not randomly choose arbitration as the vehicle through which to implement their attack on class actions. The link between class action waivers and mandatory arbitration can be traced to the Federal Arbitration Act (FAA) and the U.S. Supreme Court's interpretations of that act.[48] The FAA validates pre-dispute arbitration agreements and requires state courts to enforce arbitration agreements on the same conditions as they enforce other contracts.[49] In a series of decisions toward the end of the twentieth century, the Supreme Court concluded that the FAA established a "federal policy favoring arbitration."[50] In the wake of

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[48]For a lively description of the history of judicial decisions under the FAA and legal strategies developed in response, see Gilles, supra note 1, at 393-99 (describing, among other things, a class action against credit card issuers alleging that banks and their lawyers had conspired to suppress class actions).

[49]9 U.S.C. §§ 1-14 (2000). At the same time, the FAA preserves the power of state courts to set aside particular arbitration contracts based on generally applicable state law. Id. § 2.

[50]Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983); see Mitsubishi Motors v. Soler Chrysler-Plymouth Corp., 490 U.S. 614, 626 (1985); Greentree Financial Corp. v. Bazzle, 529 U.S. 444, 452 (2003); Gilles, supra note 1, at 393-95; Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 593, 619-20 (2005).

these decisions, and coincident with an increase in corporate anxiety over the prospect of large consumer class actions,[51] companies in consumer industries began to incorporate arbitration clauses, together with class action waivers, in consumer agreements.[52]

**B. Softening Arbitration Terms to Preserve the Anti-Class Action Strategy**

Federal and state courts typically have enforced arbitration clauses in standard-form consumer agreements unless they contain specific provisions found to violate state contract law. Recently, however, some state courts, including California's, have found class action waivers in consumer arbitration agreements to be unconscionable and therefore contrary to generally applicable state law, at least when the consumers' claims were too small to support individual actions.[53] Company lawyers responded to these adverse decisions by softening other terms pertaining to arbitration, while retaining the class action waiver. For example, companies may subsidize the costs of arbitration, use larger print for arbitration clauses, or may permit customers to opt out of arbitration (within a short time after purchasing the product).[54] The apparent purpose of these kinder and gentler arbitration clauses is to avoid the appearance of one-sidedness, and thus to protect both the basic choice of arbitration over litigation and the connected waiver of class proceedings from challenges based on unconscionability.[55]

This sequence of judicial decisions and contractual responses further suggests that company lawyers have turned to arbitration as a source of protective cover for class action waivers. The prevalence of non-severability clauses in arbitration agreements reinforces this inference. If a class action waiver contained in an arbitration clause is found to be unconscionable, companies prefer to litigate, probably because litigation preserves their right to appeal both the initial certification and a final judgment in favor of consumers and because defendants or defense lawyers have substantial experience in litigating class actions.

Moreover, apart from the role of arbitration clauses in shoring up the validity of class action waivers, it is not clear why consumer arbitration would appeal to companies. Particularly when the company has agreed to subsidize a portion of the consumers's costs, fair arbitration provides little clear advantage for companies. Arbitration may be cheaper, but a cheaper forum invites more claims. Compensatory claims arising under the types of consumer agreements we studied are inherently limited, therefore civil juries are unlikely to assess large damage awards. Companies may worry about punitive damages in court, but arbitrators are capable of awarding

punitive damages, and contractual provisions barring punitive damages in arbitration increase the chance that the arbitration clause will be stricken as unconscionable.[56]

Companies might also worry about the res judicata effects of judicial decisions in favor of consumers. Yet, the Restatement of Judgments accords the same effect to adverse outcomes in arbitration as it does to adverse outcomes in court.[57] In any case collateral estoppel may not be available if courts (or arbitrators) have reached varied conclusions in prior cases.[58]

Finally, it is possible that companies, as repeat players in arbitration and the source of much business for arbitrators and the organizations to which they belong, anticipate favoritism from arbitrators. Yet studies do not show that biased outcomes have emerged. Thus, from the perspective of corporate self-interest, concern over class actions remains the most likely explanation for the prevalence of arbitration clauses in consumer agreements.

**Venue, Transfer and Forum Non Conveniens**
**Questions to Discuss**

Venue

1. Are venue limitations statutory or constitutional? Explain.

2. What is the difference between a general venue provision and a more specific one? Which controls if both seem to apply?

3. If jurisdiction is satisfied, is it also necessary to establish venue?

4. How does venue work in federal cases? In state cases?

Transfer

1. If a suit is filed in a state court in State X, but venue is only proper in State Y, can the judge transfer the case to State Y?

2. What if the case was filed in a federal court in State X, but venue is only proper in a federal court in State Y? Now can the judge transfer?

3. What is the standard used under section 1404 to determine whether to transfer a case?

Forum Non Conveniens

1. What is the difference between a motion to transfer and a motion to dismiss on forum non conveniens grounds?

2. What are the two steps in a federal forum non conveniens analysis, according to *Piper*?

3. What is an adequate alternative forum? What is an available alternative forum?

4. What difference does it make in considering private and public interest factors that the plaintiff is or is not a resident of the forum?

5. While all private and public interest factors must be weighed, what is the special significance of forum interest ("local interest in having localized controversies decided at home")?

## Venue Problems

1. Peter and Dennis are in a car accident. Peter is a Massachusetts citizen. Dennis from New York and his home is in Brooklyn, which is in the Eastern District of New York. The accident occurred in Maine. Assume that Peter brings a lawsuit in federal court and that his claim is for more than $75,000.

   (A) In what federal district courts would venue be proper?

   (B) Now assume Peter decides to sue Dennis in the United States District Court for the District of Vermont. (There is only one district in Vermont.) Assume Dennis resides in Vermont while attending college there. Is venue proper in Vermont?

   (C) Now assume Dennis is a citizen of France. Where would venue be proper now? Would it matter if he were admitted for permanent residence? See 28 U.S.C. 1332(a).

   (D) Now assume Peter sues Dennis in the United States District Court for the District of Massachusetts. (There is only one federal district in MA.) If Peter sues Dennis while Dennis is in Massachusetts, on vacation, is venue proper there?

2. Suppose Peter decides to sue Car, Inc., the manufacturer of her car, alleging defective design and manufacture of the vehicle. Car, Inc. is incorporated in Delaware with its headquarters and a factory in the Western District of Michigan. It also has factories in the Western District of Tennessee and the Northern District of Georgia. Assume that Peter's claim exceeds $75,000.

   (A) In Peter v. Car, Inc. where is venue proper?

   (B) Assume that Car, Inc. did not acquire the factory in Tennessee until after the accident between Peter and Dennis. In Peter v. Car, Inc. would venue be proper in the Western District of Tennessee?

   (C) In addition to the facts described above, Car, Inc. is licensed to do business in New York and has an agent for service of process there. The agent is located in the Western District of New York. Currently, Car, Inc. has no operations in New York. In Peter v. Car, Inc. would venue be proper in the Western District of New York? The Eastern District of New York?

   (D) Assume that the facts are as described in 2(C). Peter sues Dennis and Car, Inc. Would venue be proper in the Western District of Michigan? The Eastern District of New York? The Western District of New York? The Western District of Tennessee?

3. Assume that in Questions 1 and 2 above there was federal question jurisdiction. Would this change any of your answers?

# SUPREME COURT OF THE UNITED STATES

No. 12-929

ATLANTIC MARINE CONSTRUCTION COMPANY, INC., PETITIONER *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 3, 2013]

JUSTICE ALITO delivered the opinion of the Court.

The question in this case concerns the procedure that is available for a defendant in a civil case who seeks to enforce a forum-selection clause. We reject petitioner's argument that such a clause may be enforced by a motion to dismiss under 28 U. S. C. §1406(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure. Instead, a forum-selection clause may be enforced by a motion to transfer under §1404(a) (2006 ed., Supp. V), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." When a defendant files such a motion, we conclude, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer. In the present case, both the District Court and the Court of Appeals misunderstood the standards to be applied in adjudicating a §1404(a) motion in a case involving a forum-

selection clause, and we therefore reverse the decision below.

I

Petitioner Atlantic Marine Construction Co., a Virginia corporation with its principal place of business in Virginia, entered into a contract with the United States Army Corps of Engineers to construct a child-development center at Fort Hood in the Western District of Texas. Atlantic Marine then entered into a subcontract with respondent J-Crew Management, Inc., a Texas corporation, for work on the project. This subcontract included a forum-selection clause, which stated that all 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.'" *In re Atlantic Marine Constr. Co.*, 701 F. 3d 736, 737–738 (CA5 2012).

When a dispute about payment under the subcontract arose, however, J-Crew sued Atlantic Marine in the Western District of Texas, invoking that court's diversity jurisdiction. Atlantic Marine moved to dismiss the suit, arguing that the forum-selection clause rendered venue in the Western District of Texas "wrong" under §1406(a) and "improper" under Federal Rule of Civil Procedure 12(b)(3). In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia under §1404(a). J-Crew opposed these motions.

The District Court denied both motions. It first concluded that §1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum. The District Court then held that Atlantic Marine bore the burden of establishing that a transfer would be appropriate under §1404(a) and that the court would "consider a nonexhaustive and nonexclusive list of public and private interest factors," of which the "forum-

selection clause [was] only one such factor." *United States ex rel. J-Crew Management, Inc.* v. *Atlantic Marine Constr. Co.*, 2012 WL 8499879, *5 (WD Tex., Apr. 6, 2012). Giving particular weight to its findings that "compulsory process will not be available for the majority of J-Crew's witnesses" and that there would be "significant expense for those willing witnesses," the District Court held that Atlantic Marine had failed to carry its burden of showing that transfer "would be in the interest of justice or increase the convenience to the parties and their witnesses." *Id.*, at *7–*8; see also 701 F. 3d, at 743.

Atlantic Marine petitioned the Court of Appeals for a writ of mandamus directing the District Court to dismiss the case under §1406(a) or to transfer the case to the Eastern District of Virginia under §1404(a). The Court of Appeals denied Atlantic Marine's petition because Atlantic Marine had not established a "'clear and indisputable'" right to relief. *Id.*, at 738; see *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 381 (2004) (mandamus "petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable" (internal quotation marks omitted; brackets in original)). Relying on *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22 (1988), the Court of Appeals agreed with the District Court that §1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum when venue is otherwise proper in the district where the case was brought. See 701 F. 3d, at 739–741.[1] The court stated, however, that if a forum-selection clause points to a nonfederal forum, dismissal under Rule 12(b)(3) would be the correct mechanism to

[1] Venue was otherwise proper in the Western District of Texas because the subcontract at issue in the suit was entered into and was to be performed in that district. See *United States ex rel. J-Crew Management, Inc.* v. *Atlantic Marine Constr. Co.*, 2012 WL 8499879, *5 (WD Tex., Apr. 6, 2012) (citing 28 U. S. C. §1391(b)(2)).

enforce the clause because §1404(a) by its terms does not permit transfer to any tribunal other than another federal court. *Id.*, at 740. The Court of Appeals then concluded that the District Court had not clearly abused its discretion in refusing to transfer the case after conducting the balance-of-interests analysis required by §1404(a). *Id.*, at 741–743; see *Cheney*, *supra*, at 380 (permitting mandamus relief to correct "a clear abuse of discretion" (internal quotation marks omitted)). That was so even though there was no dispute that the forum-selection clause was valid. See 701 F. 3d, at 742; *id.*, at 744 (concurring opinion). We granted certiorari. 569 U. S. ___ (2013).

II

Atlantic Marine contends that a party may enforce a forum-selection clause by seeking dismissal of the suit under §1406(a) and Rule 12(b)(3). We disagree. Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is "wrong" or "improper." Whether venue is "wrong" or "improper" depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.

A

Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Rule 12(b)(3) states that a party may move to dismiss a case for "improper venue." These provisions therefore authorize dismissal only when venue is "wrong" or "improper" in the forum in which it was brought.

This question—whether venue is "wrong" or "improper"—is

generally governed by 28 U. S. C. §1391 (2006 ed., Supp. V).[2] That provision states that "[e]xcept as otherwise provided by *law* . . . this section *shall* govern the venue of *all civil actions* brought in district courts of the United States." §1391(a)(1) (emphasis added). It further provides that "[a] civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." §1391(b).[3] When venue is challenged, the court must determine whether the case falls within one of the three categories set out in §1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under §1406(a). Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in §1391(b). As a result, a case filed in a district that falls within §1391 may not be dismissed under §1406(a) or Rule 12(b)(3).

Petitioner's contrary view improperly conflates the special statutory term "venue" and the word "forum." It is certainly true that, in some contexts, the word "venue" is used synonymously with the term "forum," but §1391 makes clear that venue in "all civil actions" must be determined in accordance with the criteria outlined in that

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[2] Section 1391 governs "venue generally," that is, in cases where a more specific venue provision does not apply. Cf., *e.g.*, §1400 (identifying proper venue for copyright and patent suits).

[3] Other provisions of §1391 define the requirements for proper venue in particular circumstances.

section. That language cannot reasonably be read to allow judicial consideration of other, extrastatutory limitations on the forum in which a case may be brought.

The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum. In particular, the venue statutes reflect Congress' intent that venue should always lie in *some* federal court whenever federal courts have personal jurisdiction over the defendant. The first two paragraphs of §1391(b) define the preferred judicial districts for venue in a typical case, but the third paragraph provides a fallback option: If no other venue is proper, then venue will lie in "*any judicial district* in which any defendant is subject to the court's personal jurisdiction" (emphasis added). The statute thereby ensures that so long as a federal court has personal jurisdiction over the defendant, venue will always lie somewhere. As we have previously noted, "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." *Smith* v. *United States*, 507 U. S. 197, 203 (1993) (internal quotation marks omitted). Yet petitioner's approach would mean that in some number of cases—those in which the forum-selection clause points to a state or foreign court—venue would not lie in any federal district. That would not comport with the statute's design, which contemplates that venue will always exist in some federal court.

The conclusion that venue is proper so long as the requirements of §1391(b) are met, irrespective of any forum-selection clause, also follows from our prior decisions construing the federal venue statutes. In *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), we considered the meaning of §1404(a), which authorizes a district court to "transfer any civil action to any other district or division where it might have been brought." The question in *Van Dusen* was whether §1404(a) allows transfer to a district in which

venue is proper under §1391 but in which the case could not have been pursued in light of substantive state-law limitations on the suit. See *id.*, at 614–615. In holding that transfer is permissible in that context, we construed the phrase "where it might have been brought" to refer to "the federal laws delimiting the districts in which such an action 'may be brought,'" *id.*, at 624, noting that "the phrase 'may be brought' recurs at least 10 times" in §§1391–1406, *id.*, at 622. We perceived "no valid reason for reading the words 'where it might have been brought' to narrow the range of permissible federal forums beyond those permitted by federal venue statutes." *Id.*, at 623.

As we noted in *Van Dusen*, §1406(a) "shares the same statutory context" as §1404(a) and "contain[s] a similar phrase." *Id.*, at 621, n. 11. It instructs a court to transfer a case from the "wrong" district to a district "in which it could have been brought." The most reasonable interpretation of that provision is that a district cannot be "wrong" if it is one in which the case could have been brought under §1391. Under the construction of the venue laws we adopted in *Van Dusen*, a "wrong" district is therefore a district other than "those districts in which Congress has provided *by its venue statutes* that the action 'may be brought.'" *Id.*, at 618 (emphasis added). If the federal venue statutes establish that suit may be brought in a particular district, a contractual bar cannot render venue in that district "wrong."

Our holding also finds support in *Stewart*, 487 U. S. 22. As here, the parties in *Stewart* had included a forum-selection clause in the relevant contract, but the plaintiff filed suit in a different federal district. The defendant had initially moved to transfer the case or, in the alternative, to dismiss for improper venue under §1406(a), but by the time the case reached this Court, the defendant had abandoned its §1406(a) argument and sought only transfer under §1404(a). We rejected the plaintiff's argument that

state law governs a motion to transfer venue pursuant to a forum-selection clause, concluding instead that "federal law, specifically 28 U. S. C. §1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause." *Id.*, at 32. We went on to explain that a "motion to transfer under §1404(a) . . . calls on the district court to weigh in the balance a number of case-specific factors" and that the "presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus." *Id.*, at 29.

The question whether venue in the original court was "wrong" under §1406(a) was not before the Court, but we wrote in a footnote that "[t]he parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U. S. C. §1406(a) because respondent apparently does business in the Northern District of Alabama. See 28 U. S. C. §1391(c) (venue proper in judicial district in which corporation is doing business)." *Id.*, at 28, n. 8. In other words, because §1391 made venue proper, venue could not be "wrong" for purposes of §1406(a). Though *dictum*, the Court's observation supports the holding we reach today. A contrary view would all but drain *Stewart* of any significance. If a forum-selection clause rendered venue in all other federal courts "wrong," a defendant could always obtain automatic dismissal or transfer under §1406(a) and would not have any reason to resort to §1404(a). *Stewart*'s holding would be limited to the presumably rare case in which the defendant inexplicably fails to file a motion under §1406(a) or Rule 12(b)(3).

B

Although a forum-selection clause does not render venue in a court "wrong" or "improper" within the meaning of §1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under §1404(a). That provi-

sion states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." Unlike §1406(a), §1404(a) does not condition transfer on the initial forum's being "wrong." And it permits transfer to any district where venue is also proper (*i.e.*, "where [the case] might have been brought") or to any other district to which the parties have agreed by contract or stipulation.

Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district. And for the reasons we address in Part III, *infra*, a proper application of §1404(a) requires that a forum-selection clause be "given controlling weight in all but the most exceptional cases." *Stewart*, *supra*, at 33 (KENNEDY, J., concurring).

Atlantic Marine argues that §1404(a) is not a suitable mechanism to enforce forum-selection clauses because that provision cannot provide for transfer when a forum-selection clause specifies a state or foreign tribunal, see Brief for Petitioner 18–19, and we agree with Atlantic Marine that the Court of Appeals failed to provide a sound answer to this problem. The Court of Appeals opined that a forum-selection clause pointing to a nonfederal forum should be enforced through Rule 12(b)(3), which permits a party to move for dismissal of a case based on "improper venue." 701 F. 3d, at 740. As Atlantic Marine persuasively argues, however, that conclusion cannot be reconciled with our construction of the term "improper venue" in §1406 to refer only to a forum that does not satisfy federal venue laws. If venue is proper under federal venue rules, it does not matter for the purpose of Rule 12(b)(3) whether the forum-selection clause points to a federal or a nonfederal forum.

Instead, the appropriate way to enforce a forum-

selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer. See *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U. S. 422, 430 (2007) ("For the federal court system, Congress has codified the doctrine . . . "); see also notes following §1404 (Historical and Revision Notes) (Section 1404(a) "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper"). For the remaining set of cases calling for a nonfederal forum, §1404(a) has no application, but the residual doctrine of *forum non conveniens* "has continuing application in federal courts." *Sinochem*, 549 U. S., at 430 (internal quotation marks and brackets omitted); see also *ibid.* (noting that federal courts invoke *forum non conveniens* "in cases where the alternative forum is abroad, and perhaps in rare instances where a state or territorial court serves litigational convenience best" (internal quotation marks and citation omitted)). And because both §1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum. See *Stewart*, 487 U. S., at 37 (SCALIA, J., dissenting) (Section 1404(a) "did not change 'the relevant factors' which federal courts used to consider under the doctrine of *forum non conveniens*" (quoting *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32 (1955))).

C

An *amicus* before the Court argues that a defendant in a

breach-of-contract action should be able to obtain dismissal under Rule 12(b)(6) if the plaintiff files suit in a district other than the one specified in a valid forum-selection clause. See Brief for Stephen E. Sachs as *Amicus Curiae*. Petitioner, however, did not file a motion under Rule 12(b)(6), and the parties did not brief the Rule's application to this case at any stage of this litigation. We therefore will not consider it. Even if a defendant could use Rule 12(b)(6) to enforce a forum-selection clause, that would not change our conclusions that §1406(a) and Rule 12(b)(3) are not proper mechanisms to enforce a forum-selection clause and that §1404(a) and the *forum non conveniens* doctrine provide appropriate enforcement mechanisms.[4]

III

Although the Court of Appeals correctly identified §1404(a) as the appropriate provision to enforce the forum-selection clause in this case, the Court of Appeals erred in failing to make the adjustments required in a §1404(a) analysis when the transfer motion is premised on a forum-selection clause. When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.[5] Only under extraordinary circumstances unrelated to the convenience of the parties should a §1404(a) motion be denied. And no such exceptional factors appear to be present in this case.

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[4] We observe, moreover, that a motion under Rule 12(b)(6), unlike a motion under §1404(a) or the *forum non conveniens* doctrine, may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise. Even if Professor Sachs is ultimately correct, therefore, defendants would have sensible reasons to invoke §1404(a) or the *forum non conveniens* doctrine in addition to Rule 12(b)(6).

[5] Our analysis presupposes a contractually valid forum-selection clause.

A

In the typical case not involving a forum-selection clause, a district court considering a §1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations.[6] Ordinarily, the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice." §1404(a).

The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which "represents the parties' agreement as to the most proper forum." *Stewart*, 487 U. S., at 31. The "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Id.*, at 33 (KENNEDY, J., concurring). For that reason, and because the overarching consideration under §1404(a) is whether a transfer would promote "the interest of justice," "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Id.*, at 33 (same). The presence of a valid forum-selection clause requires district courts to adjust their usual §1404(a) analysis in three ways.

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[6] Factors relating to the parties' private interests 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." *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 241, n. 6 (1981) (internal quotation marks omitted). Public-interest factors may include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Ibid.* (internal quotation marks omitted). The Court must also give some weight to the plaintiffs' choice of forum. See *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32 (1955).

First, the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the "plaintiff's venue privilege." *Van Dusen*, 376 U. S., at 635.[7] But when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its "venue privilege" before a dispute arises. Only that initial choice deserves deference, and the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed.

Second, a court evaluating a defendant's §1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum. As we have explained in a different but "'instructive'" context, *Stewart*, *supra*, at 23, "[w]hatever 'inconvenience' [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 17–18 (1972); see also *Stewart*,

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[7] We note that this "privilege" exists within the confines of statutory limitations, and "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 183–184 (1979).

*supra*, at 33 (KENNEDY, J., concurring) (stating that *Bremen*'s "reasoning applies with much force to federal courts sitting in diversity").

As a consequence, a district court may consider arguments about public-interest factors only. See n. 6, *supra*. Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases. Although it is "conceivable in a particular case" that the district court "would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause," *Stewart*, *supra*, at 30–31, such cases will not be common.

Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a §1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations. See *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 241, n. 6 (1981) (listing a court's familiarity with the "law that must govern the action" as a potential factor). A federal court sitting in diversity ordinarily must follow the choice-of-law rules of the State in which it sits. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, 494–496 (1941). However, we previously identified an exception to that principle for §1404(a) transfers, requiring that the state law applicable in the original court also apply in the transferee court. See *Van Dusen*, 376 U. S., at 639. We deemed that exception necessary to prevent "defendants, properly subjected to suit in the transferor State," from "invok[ing] §1404(a) to gain the benefits of the laws of another jurisdiction . . . ." *Id.*, at 638; see *Ferens* v. *John Deere Co.*, 494 U. S. 516, 522 (1990) (extending the *Van Dusen* rule to §1404(a) motions by plaintiffs).

The policies motivating our exception to the *Klaxon* rule for §1404(a) transfers, however, do not support an extension to cases where a defendant's motion is premised on

enforcement of a valid forum-selection clause. See *Ferens, supra*, at 523. To the contrary, those considerations lead us to reject the rule that the law of the court in which the plaintiff inappropriately filed suit should follow the case to the forum contractually selected by the parties. In *Van Dusen*, we were concerned that, through a §1404(a) transfer, a defendant could "defeat the state-law advantages that might accrue from the exercise of [the plaintiff's] venue privilege." 376 U. S., at 635. But as discussed above, a plaintiff who files suit in violation of a forum-selection clause enjoys no such "privilege" with respect to its choice of forum, and therefore it is entitled to no concomitant "state-law advantages." Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship. Because "§1404(a) should not create or multiply opportunities for forum shopping." *Ferens, supra*, at 523, we will not apply the *Van Dusen* rule when a transfer stems from enforcement of a forum-selection clause: The court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right.[8]

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[8] For the reasons detailed above, see Part II–B, *supra*, the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums. We have noted in contexts unrelated to forum-selection clauses that a defendant "invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Co.*, 549 U. S. 422, 430 (2007). That is because of the "hars[h] result" of that doctrine: Unlike a §1404(a) motion, a successful motion under *forum non conveniens* requires dismissal of the case. *Norwood*, 349 U. S., at 32. That inconveniences plaintiffs in several respects and even "makes it possible for [plaintiffs] to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate." *Id.*, at 31 (internal quotation marks omitted). Such caution is not warranted, however, when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

B

The District Court's application of §1404(a) in this case did not comport with these principles. The District Court improperly placed the burden on Atlantic Marine to prove that transfer to the parties' contractually preselected forum was appropriate. As the party acting in violation of the forum-selection clause, J-Crew must bear the burden of showing that public-interest factors overwhelmingly disfavor a transfer.

The District Court also erred in giving weight to arguments about the parties' private interests, given that all private interests, as expressed in the forum-selection clause, weigh in favor of the transfer. The District Court stated that the private-interest factors "militat[e] against a transfer to Virginia" because "compulsory process will not be available for the majority of J-Crew's witnesses" and there will be "significant expense for those willing witnesses." 2012 WL 8499879, *6–*7; see 701 F. 3d, at 743 (noting District Court's "concer[n] with J-Crew's ability to secure witnesses for trial"). But when J-Crew entered into a contract to litigate all disputes in Virginia, it knew that a distant forum might hinder its ability to call certain witnesses and might impose other burdens on

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clause. In such a case, dismissal would work no injustice on the plaintiff.

its litigation efforts. It nevertheless promised to resolve its disputes in Virginia, and the District Court should not have given any weight to J-Crew's current claims of inconvenience.

The District Court also held that the public-interest factors weighed in favor of keeping the case in Texas because Texas contract law is more familiar to federal judges in Texas than to their federal colleagues in Virginia. That ruling, however, rested in part on the District Court's belief that the federal court sitting in Virginia would have been required to apply Texas' choice-of-law rules, which in this case pointed to Texas contract law. See 2012 WL 8499879, *8 (citing *Van Dusen*, *supra*, at 639). But for the reasons we have explained, the transferee court would apply Virginia choice-of-law rules. It is true that even these Virginia rules may point to the contract law of Texas, as the State in which the contract was formed. But at minimum, the fact that the Virginia court will not be required to apply Texas choice-of-law rules reduces whatever weight the District Court might have given to the public-interest factor that looks to the familiarity of the transferee court with the applicable law. And, in any event, federal judges routinely apply the law of a State other than the State in which they sit. We are not aware of any exceptionally arcane features of Texas contract law that are likely to defy comprehension by a federal judge sitting in Virginia.

* * *

We reverse the judgment of the Court of Appeals for the Fifth Circuit. Although no public-interest factors that might support the denial of Atlantic Marine's motion to transfer are apparent on the record before us, we remand the case for the courts below to decide that question.

*It is so ordered.*

Piper Questions

1. Follow the procedural history of the case. Where did it begin? Where did it end?

2. The United States District Court for the Middle District of Pennsylvania, as well as the Court of Appeal for the Third Circuit, found that different substantive law would govern the claims against Piper and Hartzell. See if you can follow the reasoning.

3. What is the formal federal forum non conveniens test?

4. What presumptions, if any, apply (according to the S Ct) when the plaintiff is not a US citizen. What if they are not a US citizen but a resident of the US? Does that change anything? What difference does it make if they are a US citizen? Why?

5. What is the source of the authority by which a federal court may decline to exercise the jurisdiction which it otherwise possesses?

6. Compare the federal doctrine of forum non conveniens with the "fair play and substantial justice" factors of the Shoe test. What similarities/differences can you see?

7. In 1945, the Court announces Shoe. In 1947, it decides Gilbert. In 1980, the Court decides WWV (but also a number of other cases that appeared to expand the constitutional amenability of nonresidents to suit. In 1981, it decides Piper. Although each of these cert grants were separate, it is valuable to compare the evolution in personal jurisdiction doctrine and the forum non conveniens doctrine. What overlaps can you see in terms of how the two doctrines developed over time?

**PIPER AIRCRAFT COMPANY, Petitioner,**

v.

Gaynell REYNO, Personal Representative of the Estate of William Fehilly, et al. HARTZELL PROPELLER, INC., Petitioner, v. Gaynell REYNO, Personal Representative of the Estate of William Fehilly, et al.

**Nos. 80-848, 80-883.**

Argued Oct. 14, 1981.

Decided Dec. 8, 1981.

Justice MARSHALL delivered the opinion of the Court.

These cases arise out of an air crash that took place in Scotland. Respondent, acting as representative of the estates of several Scottish citizens killed in the accident, brought wrongful-death actions against petitioners that were ultimately transferred to the United States District Court for the Middle District of Pennsylvania. Petitioners moved to dismiss on the ground of *forum non conveniens*. After noting that an alternative forum existed in Scotland, the District Court granted their motions. 479 F.Supp. 727 (1979) . The United States Court of Appeals for the Third Circuit reversed. 630 F.2d 149 (1980) . The Court of Appeals based its decision, at least in part, on the ground that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff. Because we conclude that the possibility of an unfavorable change in law should not, by itself, bar dismissal, and because we conclude that the District Court did not otherwise abuse its discretion, we reverse.

I

A.

In July 1976, a small commercial aircraft crashed in the Scottish highlands during the course of a charter flight from



Blackpool to Perth. The pilot and five passengers were killed instantly. The decedents were all Scottish subjects and residents, as are their heirs and next of kin. There were no eyewitnesses to the accident. At the time of the crash the plane was subject to Scottish air traffic control.

The aircraft, a twin-engine Piper Aztec, was manufactured in Pennsylvania by petitioner Piper Aircraft Co. (Piper). The propellers were manufactured in Ohio by petitioner Hartzell Propeller, Inc. (Hartzell). At the time of the crash the aircraft was registered in Great Britain and was owned and maintained by Air Navigation and Trading Co., Ltd. (Air Navigation). It was operated by McDonald Aviation, Ltd. (McDonald), a Scottish air taxi service. Both Air Navigation and McDonald were organized in the United Kingdom. The wreckage of the plane is now in a hangar in Farnsborough, England.

The British Department of Trade investigated the accident shortly after it occurred. A preliminary report found that the plane crashed after developing a spin, and suggested that mechanical failure in the plane or the propeller was responsible. At Hartzell's request, this report was reviewed by a three-member Review Board, which held a 9-day adversary hearing attended by all interested parties. The Review Board found no evidence of defective equipment and indicated that pilot error may have contributed to the accident. The pilot, who had obtained his commercial pilot's license only three months earlier, was flying over high ground at an altitude considerably lower than the minimum height required by his company's operations manual.

In July 1977, a California probate court appointed respondent Gaynell Reyno administratrix of the estates of the five passengers. Reyno is not related to and does not know any of the decedents or their survivors; she was a legal secretary to the attorney who filed this lawsuit. Several days after her appointment, Reyno commenced separate wrongful-

death actions against Piper and Hartzell in the Superior Court of California, claiming negligence and strict liability. [1] Air Navigation, McDonald, and the estate of the pilot are not parties to this litigation. The survivors of the five passengers whose estates are represented by Reyno filed a separate action in the United Kingdom against Air Navigation, McDonald, and the pilot's estate. [2] Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort. Moreover, it permits wrongful-death actions only when brought by a decedent's relatives. The relatives may sue only for "loss of support and society." [3]

On petitioners' motion, the suit was removed to the United States District Court for the Central District of California. Piper then moved for transfer to the United States District Court for the Middle District of Pennsylvania, pursuant to 28 U.S.C. § 1404(a). [4] Hartzell moved to dismiss for lack of personal jurisdiction, or in the alternative, to transfer. [5] In December 1977, the District Court quashed service on

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Hartzell and transferred the case to the Middle District of Pennsylvania. Respondent then properly served process on Hartzell.

B

In May 1978, after the suit had been transferred, both Hartzell and Piper moved to dismiss the action on the ground of *forum non conveniens*. The District Court granted these motions in October 1979. It relied on the balancing test set forth by this Court in *Gulf Oil Corp. v. Gilbert*, **330 U.S. 501**, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*, **330 U.S. 518**, 67 S.Ct. 828, 91 L.Ed. 1067 (1947). In those decisions, the Court stated that a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. *Koster, supra*, at 524, 67 S.Ct., at 831-832. To guide trial court discretion, the Court provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum. *Gilbert, supra*, **330 U.S. 508**-509, 67 S.Ct., at 843. [6]

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After describing our decisions in *Gilbert* and *Koster*, the District Court analyzed the facts of these cases. It began by observing that an alternative forum existed in Scotland; Piper and Hartzell had agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitations defense that might be available. It then stated that plaintiff's choice of forum was entitled to little weight. The court recognized that a plaintiff's choice ordinarily deserves substantial deference. It noted, however, that Reyno "is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." 479 F.Supp., at 731.

The District Court next examined several factors relating to the private interests of the litigants, and determined that these factors strongly pointed towards Scotland as the appropriate forum. Although evidence concerning the design, manufacture, and testing of the plane and propeller is located in the United States, the connections with Scotland are otherwise

"overwhelming." *Id.* , at 732. The real parties in interest are citizens of Scotland, as were all the decedents. Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident—all essential to the defense—are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.

The District Court reasoned that because crucial witnesses and evidence were beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants, it would be "unfair to make Piper and Hartzell proceed to trial in this forum." *Id.* ,

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at 733. The survivors had brought separate actions in Scotland against the pilot, McDonald, and Air Navigation. "[I]t would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." *Ibid.* Although the court recognized that if trial were held in the United States, Piper and Hartzell could file indemnity or contribution actions against the Scottish defendants, it believed that there was a significant risk of inconsistent verdicts. [7]

The District Court concluded that the relevant public interests also pointed strongly towards dismissal. The court determined that Pennsylvania law would apply to Piper and Scottish law to Hartzell if the case were tried in the Middle District of Pennsylvania. [8] As a result, "trial in this forum would be hopelessly complex and confusing for a jury." *Id.* , at 734. In addition, the court noted that it was unfamiliar with Scottish law and thus would have to rely upon experts from that country. The court also found that the trial would be enormously costly and time-consuming; that it would be unfair to burden citizens with jury duty when the Middle Dis-

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trict of Pennsylvania has little connection with the controversy; and that Scotland has a substantial interest in the outcome of the litigation.

In opposing the motions to dismiss, respondent contended that dismissal would be unfair because Scottish law was less favorable. The District Court explicitly rejected this claim. It reasoned that the possibility that dismissal might lead to an unfavorable change in the law did not deserve significant weight; any deficiency in the foreign law was a "matter to be dealt with in the foreign forum." *Id.* , at 738.

C

On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded for trial. The decision to reverse appears to be based on two alternative grounds. First, the Court held that the District Court abused its discretion in conducting the *Gilbert* analysis. Second, the Court held that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

The Court of Appeals began its review of the District Court's *Gilbert* analysis by noting that the plaintiff's choice of forum deserved substantial weight, even though the real parties in interest are nonresidents. It then rejected the District Court's balancing of the private interests. It found that Piper and Hartzell had failed adequately to support their claim that key witnesses would be unavailable if trial were held in the United States: they had never specified the witnesses they would call and the testimony these witnesses would provide. The Court of Appeals gave little weight to the fact that Piper and Hartzell would not be able to implead potential Scottish third-party defendants, reasoning that this difficulty would be "burdensome" but not "unfair," 639 F.2d, at 162. [9] Finally, the court stated that resolution of the suit

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would not be significantly aided by familiarity with Scottish topography, or by viewing the wreckage.

The Court of Appeals also rejected the District Court's analysis of the public interest factors. It found that the District Court gave undue emphasis to the application of Scottish law: " 'the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court.' " *Id.* , at 163 (quoting *Hoffman v. Goberman* , 420 F.2d 427 (CA3 1970) ). In any event, it believed that Scottish law need not be applied. After conducting its own choice-of-law analysis, the Court of Appeals determined that American law would govern the actions against both Piper and Hartzell. [10] The same choice-of-law analysis apparently led it to conclude that Pennsylvania and Ohio, rather than Scotland, are the jurisdictions with the greatest policy interests in the dispute, and that all other public interest factors favored trial in the United States. [11]

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In any event, it appears that the Court of Appeals would have reversed even if the District Court had properly balanced the public and private interests. The court stated:

"[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.' Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified." 630 F.2d, at 163-164 (footnote omitted) (quoting *DeMateos v. Texaco, Inc.* , 562 F.2d 895 , 899 (CA3 1977), cert. denied, **435 U.S. 904** , 98 S.Ct. 1449 , 55 L.Ed.2d 494 (1978) ).

In other words, the court decided that dismissal is automatically barred if it would lead to a change in the applicable law unfavorable to the plaintiff.

We granted certiorari in these cases to consider the questions they raise concerning the proper application of the doctrine of *forum non conveniens.* **450 U.S. 909** , 101 S.Ct. 1346 , 67 L.Ed.2d 333 (1981) . [12]

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II

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

We expressly rejected the position adopted by the Court of Appeals in our decision in *Canada Malting Co. v. Paterson Steamships, Ltd.* , **285 U.S. 413** , 52 S.Ct. 413 , 76 L.Ed. 837 (1932) . That case arose out of a collision between two vessels in American waters. The Canadian owners of cargo lost in the accident sued the Canadian owners of one of the vessels in Federal District Court. The cargo owners chose an American court in large part because the relevant American liability rules were more favorable than the Canadian rules. The District Court dismissed on grounds of *forum non conveniens.* The plaintiffs argued that dismissal was inappropriate because Canadian laws were less favorable to them. This Court nonetheless affirmed:

"We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion

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that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy. . . . '[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' " *Id.* , at 419-420, 52 S.Ct., at 414 , quoting *Charter Shipping Co. v. Bowring, Jones & Tidy* , 281 U.S. 515 , 517, 50 S.Ct. 400 , 414, 74 L.Ed. 1008 (1930) .

The Court further stated that "[t]here was no basis for the contention that the District Court abused its discretion." 285 U.S., at 423 , 52 S.Ct., at 415-16 .

It is true that *Canada Malting* was decided before *Gilbert* , and that the doctrine of *forum non conveniens* was not fully crystallized until our decision in that case. [13] However, *Gilbert* in no way affects the validity of *Canada Malting*. In-

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deed, by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law. [14] Under *Gilbert* , dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. [15] If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient.

The Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility. In *Gilbert* , the Court refused to identify specific circumstances "which will justify or require either grant or denial of remedy." 330 U.S., at 508 , 67 S.Ct., at 843 . Similarly, in *Koster* , the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate. "That is one, but only one, factor which may show convenience." 330 U.S., at 527 , 67 S.Ct., at 833 . And in *Williams v. Green Bay & Western R. Co.* **326 U.S. 549** , 557, 66 S.Ct. 284 , 288, 90 L.Ed. 311 (1946) , we stated that we would not lay down a rigid rule to govern discretion, and that "[e]ach case turns on its facts." If central emphasis were

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placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.

Except for the court below, every Federal Court of Appeals that has considered this question after *Gilbert* has held that dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery. See, *e. g.*, *Pain v. United Technologies Corp.* , 205 U.S.App.D.C. 229 , 248-249, 637 F.2d 775 , 794-795 (1980); *Fitzgerald v. Texaco, Inc.* , 521 F.2d 448 , 453 (CA2 1975), cert. denied, **423 U.S. 1052** , 96 S.Ct. 781 , 46 L.Ed.2d 641 (1976) ; *Anastasiadis v. S.S. Little*

John , 346 F.2d 281 , 283 (CA5 1965), cert. denied, **384 U.S. 920** , 86 S.Ct. 1368 , 16 L.Ed.2d 440 (1966) . [16] Several courts have relied expressly on *Canada Malting* to hold that the possibility of an unfavorable change of law should not, by itself, bar dismissal. See *Fitz-*

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gerald v. Texaco, Inc., supra; Anglo-American Grain Co. v. The S/T Mina D'Amico , 169 F.Supp. 908 (ED Va.1959) .

The Court of Appeals' approach is not only inconsistent with the purpose of the *forum non conveniens* doctrine, but also poses substantial practical problems. If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum. The doctrine of *forum non conveniens* , however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert* , the public interest factors point towards dismissal where the court would be required to "untangle problems in conflict of laws, and in law foreign to itself." 330 U.S., at 509 , 67 S.Ct., at 843 .

Upholding the decision of the Court of Appeals would result in other practical problems. At least where the foreign plaintiff named an American manufacturer as defendant, [17] a court could not dismiss the case on grounds of *forum non*

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conveniens where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs, [18] would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts. [19]

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The Court of Appeals based its decision, at least in part, on an analogy between dismissals on grounds of *forum non conveniens* and transfers between federal courts pursuant to § 1404(a). In *Van Dusen v. Barrack* ,**376 U.S. 612** , 84 S.Ct. 805 , 11 L.Ed.2d 945 (1964) , this Court ruled that a § 1404(a) transfer should not result in a change in the applicable law. Relying on dictum in an earlier Third Circuit opinion interpreting *Van Dusen*, the court below held that that principle is also applicable to a dismissal on *forum non conveniens* grounds. 630 F.2d, at 164, and n. 51 (citing *DeMateos v. Texaco, Inc.*, 562 F.2d, at 899). However, § 1404(a) transfers are different than dismissals on the ground of *forum non conveniens* .

Congress enacted § 1404(a) to permit change of venue between federal courts. Although the statute was drafted in accordance with the doctrine of *forum non conveniens* , see Revisor's Note, H.R.Rep. No. 308, 80th Cong., 1st Sess., A132 (1947); H.R.Rep. No. 2646, 79th Cong., 2d Sess., A127 (1946), it was intended to be a revision rather than a codification of the common law. *Norwood v. Kirkpatrick* ,**349 U.S. 29** , 75 S.Ct. 544 , 99 L.Ed. 789 (1955) . District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens. Id.* , at 31-32, 75 S.Ct., at 546 .

The reasoning employed in *Van Dusen v. Barrack* is simply inapplicable to dismissals on grounds of *forum non conveniens* . That case did not discuss the common-law doctrine. Rather, it focused on "the construction and application" of § 1404(a). 376 U.S., at 613 , 84 S.Ct., at 807-08 .

[20] Emphasizing the re-

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medial purpose of the statute, *Barrack* concluded that Congress could not have intended a transfer to be accompanied by a change in law. *Id.* , at 622, 84 S.Ct., at 812 . The statute was designed as a "federal housekeeping measure," allowing easy change of venue within a unified federal system. *Id.* , at 613, 84 S.Ct., at 807-08 . The Court feared that if a change in venue were accompanied by a change in law, forum-shopping parties would take unfair advantage of the relaxed standards for transfer. The rule was necessary to ensure the just and efficient operation of the statute. [21]

We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice. [22] In these cases, however, the remedies that

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would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

III

The Court of Appeals also erred in rejecting the District Court's *Gilbert* analysis. The Court of Appeals stated that more weight should have been given to the plaintiff's choice of forum, and criticized the District Court's analysis of the private and public interests. However, the District Court's decision regarding the deference due plaintiff's choice of forum was appropriate. Furthermore, we do not believe that the District Court abused its discretion in weighing the private and public interests.

A.

The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign.

The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster* , the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. 330 U.S., at 524 , 67 S.Ct., at 831-832 . [23] When the home forum has

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been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. [24]

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B

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. *Gilbert*, 330 U.S., at 511-512, 67 S.Ct., at 844-845; *Koster*, 330 U.S., at 531, 67 S.Ct., at 835. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

(1)

In analyzing the private interest factors, the District Court stated that the connections with Scotland are "overwhelming." 479 F.Supp., at 732. This characterization may be somewhat exaggerated. Particularly with respect to the question of relative ease of access to sources of proof, the private interests point in both directions. As respondent emphasizes, records concerning the design, manufacture, and testing of the propeller and plane are located in the United States. She would have greater access to sources of proof relevant to her strict liability and negligence theories if trial were held here. [25] However, the District Court did not act

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unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain.

The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. [26] Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests. Our examination of the record convinces us that sufficient in-

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formation was provided here. Both Piper and Hartzell submitted affidavits describing the evidentiary problems they would face if the trial were held in the United States. [27]

The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of the pilot's estate, Air Navigation, and McDonald is crucial to the presentation of petitioners' defense. If Piper and Hartzell can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if Hartzell and Piper were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial. The Court of Appeals rejected this argument. Forcing petitioners to rely on actions for indemnity or contributions would be "burdensome" but not "unfair." 630 F.2d, at 162. Finding that trial in the plaintiff's chosen forum would be burdensome, however, is sufficient to support dismissal on grounds of *forum non conveniens*. [28]

(2)

The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its

choice-of-law analysis, it concluded that if the case were tried in the Middle District of Pennsylvania, Pennsylvania law would apply to Piper and Scottish law to Hartzell. It stated that a trial involving two sets of laws would be confusing to the jury. It also noted its own lack of familiarity with Scottish law. Consideration of these problems was clearly appropriate under *Gilbert* ; in that case we explicitly held that the need to apply foreign law pointed towards dismissal. [29] The Court of Appeals found that the District Court's choice-of-law analysis was incorrect, and that American law would apply to both Hartzell and Piper. Thus, lack of familiarity with foreign law would not be a problem. Even if the Court of Appeals' conclusion is correct, however, all other public interest factors favored trial in Scotland.

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert* , there is "a local interest in having localized controversies decided at home." 330 U.S., at 509 , 67 S.Ct., at 843 . Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in an



American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

IV

The Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens* . It also erred in rejecting the District Court's *Gilbert* analysis. The District Court properly decided that the presumption in favor of the respondent's forum choice applied with less than maximum force because the real parties in interest are foreign. It did not act unreasonably in deciding that the private interests pointed towards trial in Scotland. Nor did it act unreasonably in deciding that the public interests favored trial in Scotland. Thus, the judgment of the Court of Appeals is

*Reversed.*

Justice POWELL took no part in the decision of these cases.

Justice O'CONNOR took no part in the consideration or decision of these cases.