Civil Procedure
Fall 2018
Professor Lonny Hoffman

Section 5

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*?

[585]CARNIVAL CRUISE LINES, INC., Petitioner

v.

Eulala SHUTE, et vir.

No. 89-1647.

Argued Jan. 15, 1991.

Decided April 17, 1991.

[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:

"SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3" App. 15.

The following appeared on "contract page 1" of each ticket:

"TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

. . . . .

"3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

. . . . .

"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.

The last quoted paragraph is the forum-selection clause at issue.

II

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] 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, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), where this Court held that forum-selection clauses, although not "historically ... favored," are "prima facie valid." *Id.*, at 9–10, 92 S.Ct., at 1913. 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.

We granted certiorari to address the question whether the Court of Appeals was correct in holding that the District Court should hear respondents' tort claim against petitioner. 498 U.S. 807–808, 111 S.Ct. 39, 112 L.Ed.2d 16 (1990). Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction. See *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("'It is not the habit of the Court to decide questions of a constitutional nature unless [590] absolutely necessary to a decision of the case,'" quoting *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482 (1905)).

* The Court of Appeals had filed an earlier opinion also reversing the District Court and ruling that the District Court had personal jurisdiction over the cruise line and that the forum-selection clause in the tickets was unreasonable and was not to be enforced. 863 F.2d 1437 (CA9 1988). That opinion, however, was withdrawn when the court certified to the Supreme Court of Washington the question whether the Washington long-arm statute, Wash.Rev.Code § 4.28.185 (1988), conferred personal jurisdiction over Carnival

Within this context, respondents urge that the forum clause should not be enforced because, contrary to this Court's teachings in *The Bremen*, the clause was not the product of negotiation, and enforcement effectively would deprive respondents of their day in court. Additionally, respondents contend that the clause violates the Limitation of Vessel Owner's Liability Act, 46 U.S.C.App. § 183c. We consider these arguments in turn.

IV

A

[2] Both petitioner and respondents argue vigorously that the Court's opinion in *The Bremen* governs this case, and each 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, 92 S.Ct. at 1914–1915 (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, 92 S.Ct., at 1916. 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 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, 92 S.Ct., 1915 (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, 92 S.Ct., at 1917. 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, 92 S.Ct., at 1915. These facts suggest that, even apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in *The* [598] *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, 109 S.Ct. 1633, 104 L.Ed.2d 149 (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, 92 S.Ct., at 1915, and n. 15; *Hodes*, 858 F.2d, at 913. Additionally, a clause establishing *ex ante* the forum for dispute resolution has 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, 108 S.Ct., at 2246 (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, 92 S.Ct., at 1917. 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 Washington than in Florida. In 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.

[3] 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.

TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

1. (a) Whenever the word "Carrier" is used in this Contract it shall mean and include, jointly and severally, the Vessel, its owners, operators, charterers and lenders. The term "Passenger" shall include, the plural where appropriate, and all persons engaging to and/or traveling under this Contract. The masculine includes the feminine.

   (b) The Master, Officers and Crew of the Vessel shall have the benefit of all of the terms and conditions of this contract.

2. This ticket is valid only for the person or persons named hereon as the passenger or passengers and cannot be transferred without the Carrier's consent written hereon. Passage money shall be deemed to be earned when paid and not refundable.

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

   (b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo. The Vessel may or may not carry a ship's physician at the election of the Carrier. The law includes full board, ordinary ship's food during the voyage, but no spirits, wine, beer or mineral waters

4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever howsoever arising and howsoever caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are or become from time to time its employees, servants or agents and all such persons shall to this extent be deemed to be parties to this Contract

5. The Carrier shall not be liable for losses of valuables unless stored in the Vessel's safety depository and then not exceeding $500 in any event.

6. If the Vessel carries a surgeon, physician, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the passenger and any such person in dealing with the passenger is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the Carrier and the Carrier shall not be liable for any act or omission of such person or those under his orders or assisting him with respect to treatment, advice or care of any kind given to any passenger.

   The surgeon, physician, masseuse, barber, hair-dresser or manicurist shall be entitled to make a proper charge for any service performed with respect to a passenger and the Carrier shall not be concerned in any way whatsoever in any such arrangement.

7. The Carrier shall not be liable for any claims whatsoever of the passenger unless full particulars thereof in writing be given to the Carrier or their agents within 185 days after the passenger shall be landed from the Vessel or in the case the voyage is abandoned within 185 days thereafter. Suit to recover any claim shall not be maintainable in any event unless commenced within one year after the date of the loss, injury or death

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

9. The Carrier in arranging for the service called for by all shore feature coupons or shore excursion tickets, acts only as agent for the holder thereof and assumes no responsibility and in no event shall be liable for any loss, damage, injury or delay to or of said person and/or baggage, property or effects in connection with said services, nor does Carrier guarantee the performance of any such service

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10 Each fully paid adult passenger will be allowed an unlimited amount of baggage free of charge Baggage means only trunks, valises, satchels, bags, hangers and bundles with their contents consisting of only such wearing apparel, toilet articles and similar personal effects as are necessary and appropriate for the station in life of the passenger and for the purpose of the journey

11 No tools of trade, household goods, presents and/or property of others jewelry, money documents, valuables of any description including but not limited to such articles as are described in Section 4281 Revised Statute of the U S A (46 USCA § 181) shall be carried except under and subject to the terms of a special written contract or Bill of Lading entered into with the Carrier prior to embarkation upon application of the passenger and the passenger hereby warrants that no such articles are contained in any receptacle or container presented by him as baggage hereunder, and if any such article or articles are shipped and the passenger's baggage in breach of this warranty no liability for negligence, gross or ordinary, shall attach to the Carrier for any loss or damage thereto

12. It is stipulated and agreed that the aggregate value of each passenger's property under the Adult ticket does not exceed $100 00 (half ticket $50.00) and any liability of the Carrier for any cause whatsoever with respect to said property shall not exceed such sum, unless the passenger shall in writing, delivered to the Carrier prior to embarkation, declare the true value thereof and pay to the Carrier prior to embarkation a sum (in U S Dollars) equal to 5% of the excess of such value, in which event the Carrier's liability shall be limited to the actual damages sustained to the property but not in excess of the declared value

13. The Vessel shall be entitled to leave and enter ports with or without pilots or tugs, to tow and assist other vessels in any circumstances to return to or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course, all such deviations being considered as forming part of and included in the proposed voyage

14 If the performance of the proposed voyage is hindered or prevented or in the opinion of the Carrier or the Master is likely to be hindered or prevented by war, hostilities blockade, ice, labor conflicts, strikes on board or ashore, restraint of Rulers or Princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever, or if the Carrier or the Master considers that for any reason whatsoever, proceeding to, attempting to enter, or entering or remaining at the port of passenger's destination may expose the Vessel to risk or loss or damage or be likely to delay her, the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call when the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed, or if the passenger has not embarked the Carrier may cancel the proposed voyage without liability to refund passage money or fares paid in advance.

15. The Carrier and the Master shall have liberty to comply with any orders, recommendations or directions whatsoever given by the Government of any nation or by any Department thereof or by any person acting or purporting to act with the authority of such Government or Department or by any Committee or person having under the terms of the War Risks Insurance on the Vessel the right to give such orders, recommendations or directions, and if by reason of and in compliance with any such orders, recommendations or directions anything is done or is not done the same shall not be deemed a deviation or a breach of this Contract. Disembarkation of any passenger or discharge of his baggage in accordance with such orders, recommendations or directions shall constitute due and proper fulfillment of the obligations of the Carrier under this Contract.

16. (a) The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger

(b) If for any reason whatsoever the passenger is refused permission to land at the port of disembarkation or such other ports as is provided for in Clauses 14 and 15 hereof the passenger and his baggage may be landed at any port or place at which the Vessel calls or be carried back to the port of embarkation and shall pay the Carrier full fare according to its tariff in use at such time for such further carriage, which shall be upon the terms herein contained

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17. The Carrier and the Vessel shall have a lien upon all baggage, money, motor cars and other property whatsoever accompanying the passenger and the right to sell the same by public auction or otherwise for all sums whatsoever due from the passenger under this contract and for the costs and expenses of enforcing such lien and of such sale.

18. The passenger or if a minor his parent or guardian shall be liable to the Carrier and to the Master for any fines or penalties imposed on the Carrier by the authorities for his failure to observe or comply with local requirements in respect of immigration, Customs and Excise or any other Government regulations whatsoever.

19. No passenger shall be allowed to bring on board the Vessel Weapons, Firearms, Ammunition, Explosives or other dangerous goods without written permission from the Carrier.

20. The Carrier shall have liberty without previous notice to cancel at the port of embarkation or at any port this Contract and shall thereupon return to the passenger, if the Contract is cancelled at the port of embarkation, his passage money, or, if the Contract is cancelled later, a proportionate part thereof.

21. The passenger warrants that he and those traveling with him are physically fit at the time of embarkation. The Carrier and Master each reserves the right to refuse passage to anyone whose health or welfare would be considered a risk to his own well-being or that of any other passenger

22. Should the Vessel deviate from its course due to passenger's negligence, said passenger or his estate shall be liable for any related costs incurred.

23. The Carrier reserves the right to increase published fares without prior notice in the event of an increase, the passenger has the option of accepting the increased fare or cancelling reservations without penalty.

24. In addition to all of the restrictions and exemptions from liability provided in this Contract the Carrier shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States of America (46 USCA Sections 182, 183, 183b, 184, 185 and 186); nothing in this Contract is intended to nor shall it operate to limit or deprive the Carrier of any such statutory limitation of or exoneration from liability.

25. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction or be so held by a Court of competent jurisdiction, such provision shall be deemed to be severed from the Contract and of no effect and all remaining provisions herein shall be in full force and effect and constitute the Contract of Carriage.

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The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law

Hannah L. Buxbaum*

Introduction

A forum selection clause is a form of contractual waiver. By this device, a contract party waives its rights to raise jurisdictional or venue objections if a lawsuit is initiated against it in the chosen court. (If the forum selection is *exclusive*, then that party also promises not to initiate litigation anywhere other than in the chosen forum.) The use of such a clause in a particular case may therefore raise a set of questions under contract law. Is the waiver valid? Was it procured by fraud, duress, or other unconscionable means? What is its scope? And so on.

Unlike most contractual waivers, however, a forum selection clause affects not only the private rights and obligations of the parties, but something of more public concern: the jurisdiction of a court to resolve a dispute. The enforcement of such a clause therefore raises an additional set of questions under procedural law. For instance, if the parties designate a court in a forum that is otherwise unconnected to the dispute, must (or should) that court hear a case initiated there? If one of the parties initiates litigation in a non-designated forum that is connected to the dispute, must (or should) that court decline to hear the case?

This report analyzes the approach to these questions in the United States.[1] Part I provides a brief background on the general attitude toward forum selection clauses. Part II surveys current state law on their use, in consumer as well as commercial contracts. Part III addresses the interpretation of forum selection clauses as either permissive or exclusive. Part IV analyzes the effect of permissive clauses in state and federal courts. Finally, Part V turns to choice of law problems, particularly as they arise in the course of litigation in federal courts.

I. Background

Historically, forum selection clauses were viewed as contrary to public policy and therefore invalid.[2] The most frequently invoked justification for this rule, relevant only in connection with exclusive clauses, was that parties should not be able to deprive a court of jurisdiction it would otherwise have over a dispute.[3] However, other explanations for the traditional approach—relevant in connection with permissive as well as exclusive clauses—

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[1] Outside the United States, permissive forum selection clauses are generally referred to as "optional choice of court agreements." The version of this report published here uses the U.S. terminology.

[2] *See generally* Arthur Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements,"* 15 RUTGERS L. REV. 414, 430-31 (1961); Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-39 (1982) (describing the traditional approach).

[3] *See* Home Ins. Co. v. Morse, 20 Wall. 445, 451 (1874); *see also* Lenhoff, *supra* note 2, at 431 (describing the "almost proverbial" status of the rule that parties cannot "oust" a court of jurisdiction).

appear in the case law as well. Some courts rejected forum selection clauses out of suspicion that the parties' intent in selecting a particular forum was to circumvent otherwise applicable substantive policies. Others worried that permitting parties to choose their forum would "bring the administration of justice into disrepute" by highlighting considerations such as the relative intelligence or impartiality of particular judges.[4] Overall, the sense was that "[t]he jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties."[5]

Over time, and given increasing recognition of the need for certainty and predictability in interstate and international commerce, adherence to the traditional view diminished. This shift manifested itself in the case law[6] and elsewhere. For example, in 1968, the National Conference of Commissioners on Uniform State Laws adopted a Model Choice of Forum Act[7] based on the Hague Conference's 1964 Convention on the Choice of Court. Although the model law gave courts considerably more discretion than the Convention did in enforcing forum selection clauses, its starting point was that the use of such clauses was desirable.[8] And the Restatement (Second) of Conflict of Laws, adopted in 1971, included a section stating that a forum selection clause will be given effect "unless it is unfair or unreasonable."[9]

The real turning point in U.S. doctrine was the Supreme Court's 1972 decision in *The Bremen v. Zapata Off-Shore Co.*[10] The case involved a forum selection clause included in a contract for towage negotiated by the U.S. owner of a drilling rig and a German towing company. The agreement designated the London Court of Justice as the exclusive forum for litigation; however, when its rig was damaged, the U.S. company brought suit in the United States District Court in Tampa, Florida. The defendant moved to dismiss or stay the action on the basis of the forum selection clause. Holding that such agreements were unenforceable, the court denied this motion, and its decision was upheld upon appeal. The U.S. Supreme Court then vacated and remanded, holding that the forum selection clause was entitled to a presumption of enforcement.

To make the discussion that follows as clear as possible, I want to separate strands of the Court's holding that have been frequently intertwined in subsequent cases and commentary.

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[4] *See* Nute v. Hamilton Mut. Ins. Co., 6 Gray 174, 184 (1856).
[5] Meacham v. Jamestown, F. & C.R. Co., 211 N.Y. 346, 352 (1914) (Cardozo, J., concurring). See also Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 648 (2015) (under the traditional approach, "it was for the sovereign to decide what the sovereign's courts could or could not do; it was not for the parties to make private agreements as to the availability of public remedies").
[6] *See, e.g.*, Krenger v. Pa. R.R., 174 F.2d 556, 561 (2d Cir. 1949) (Hand, J., concurring) (rejecting the notion of an "absolute taboo" against forum selection clauses, and stating that they are "invalid only when unreasonable" under the circumstances); Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d 806, 808 (2d. Cir. 1955) (summarizing the new rule as follows: "[T]he parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction ... the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented.").
[7] *See* Willis L.M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969).
[8] *Id.* at 292.
[9] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).
[10] The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972).

- First, the holding rejected the notion that contractual provisions affecting matters of jurisdiction and venue were *invalid* as against public policy.[11] (The Court did suggest that the validity of a particular forum selection clause could be challenged on the basis of defects in contract formation, such as "fraud or overreaching," or lack of "free negotiation" by the parties.[12])

- Second, the holding introduced a rule of presumptive *enforceability* of exclusive (mandatory) forum selection clauses—meaning that, as a general matter, where the parties had agreed that any litigation would take place exclusively in the designated court, any other court should refuse to hear the case.[13]

- Third, the holding discussed two bases on which a court other than the designated court could refuse to enforce an otherwise valid and exclusive forum selection clause: (a) if enforcement would be "unreasonable" under the circumstances (by which the Court meant that the nominated forum would be so seriously inconvenient that the plaintiff would "for all practical purposes be deprived of his day in court"), or (b) if enforcement would violate a strong public policy of the forum in which suit was brought.[14]

The *Bremen* decision might have had limited effect for two reasons. To begin with, it involved an international contract. In justifying its adoption of a rule of presumptive enforceability, the Court referred repeatedly to the needs of international commerce; thus, the rule might have been limited to the international context. Moreover, the case involved the exercise of admiralty jurisdiction, and the decision was therefore binding neither on federal courts exercising different forms of jurisdiction nor on state courts.[15] Nevertheless, the *Bremen* rule quickly sprang these limits. Federal courts exercising jurisdiction in non-admiralty cases adopted the *Bremen* approach, applying it even in cases involving domestic contracts. State courts too began to apply the *Bremen* analysis, again in domestic as well as international cases.[16] In short, the decision has framed the modern U.S. approach to forum selection clauses.

The portions of the *Bremen* rule addressing the presumptive enforceability of forum selection clauses apply only to exclusive forum selection clauses, and so this report treats them only in passing. The first part of the Court's holding, though, relating to the general validity of private agreements as to forum choice, applies equally to permissive clauses. The following part addresses the treatment of such agreements under current law.

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[11] *Id.* at 10.
[12] *Id.* at 12, 15.
[13] *Id.* at 15.
[14] *Id.* at 16-18.
[15] Indeed, the Court more or less suggested that the rule it articulated was applicable only in the admiralty context. *Id.* at 10.
[16] In a two-part article published in the early 1990s, Walter Heiser provides an overview of the effect of the *Bremen* decision on analysis in both state courts and federal courts in the years following that case. *See* Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361, 369-71 (1993); Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553, 565 (1993).

II. The Validity of Permissive Forum Selection Clauses Under U.S. Law

A. In general

In the vast majority of U.S. states, forum selection clauses, both permissive and exclusive, are viewed with approval. A few states have enacted statutes governing the treatment of such agreements,[17] based on the Model Choice of Forum Act mentioned above.[18] In most states, however, the validity and enforceability of forum selection clauses are governed by common law. Often that law explicitly adopts the *Bremen* rule; sometimes, it integrates the reasoning of that case into rules that achieve the same result. In New York, for example, courts have adopted a four-step test that analyzes (1) whether the forum selection clause was reasonably communicated to the resisting party, (2) whether it should be classified as exclusive or permissive, (3) whether it covers the parties and the claims in question, and (4) whether the presumption in favor of enforcement has been rebutted by a showing that it is unreasonable under the circumstances or invalid for reasons such as fraud or overreaching.[19] Some states have also adopted specific legislation to permit (or attract) litigation involving high-value contracts. These statutes are discussed below.[20]

A handful of states maintain the traditional hostility to forum selection clauses. In one state, this position is reflected in the case law.[21] In three, legislation has been enacted that invalidates forum selection clauses.[22] Idaho's statute, for example, provides that "every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals ... is void as it is against the public policy of Idaho."[23] In some cases, however, courts have construed these statutes quite narrowly, reflecting recent movement toward the more liberal enforcement of forum selection clauses.[24] It is important to emphasize that—as the Idaho statute quoted above indicates—the focus of these general policies is on *exclusive* forum selection clauses that purport to deprive local courts of jurisdiction they would otherwise enjoy.

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[17] *See, e.g.*, Neb. Rev. Stat. §§ 25-414, -415; N.H. Rev. Stat. Ann. § 508-A; N.D. Cent. Code § 28-04.1.

[18] *See supra* note 8 and accompanying text. The Model Choice of Forum Act, approved in 1968 by the National Conference of Commissioners on Uniform State Laws, was loosely modeled on the 1964 Hague Convention on the Choice of Court. The Model Act was ultimately withdrawn in 1975.

[19] *See, e.g.*, Phillips v. Audio Active Ltd., 494 F.3d 378, 383-84 (2d Cir. 2007); *see also* APR Energy Ltd. v. Greenhill & Co., LLC, 220 F. Supp. 3d 427, 430-31 (S.D.N.Y. 2016); Moose Toys Pty, Ltd., v. Creative Kids Far East Inc., 195 F. Supp. 3d 599, 602-03 (S.D.N.Y. 2016).

[20] *See infra* note 79 and accompanying text.

[21] *See* Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982) ("[C]lauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa.").

[22] Mont. Code Ann. § 28-2-708 (Montana); Idaho Code § 29-110 (Idaho); N.C. Gen. Stat. § 22B-3 (North Carolina).

[23] Idaho Code § 29-110. *See also* Cerami-Kote, Inc. v. Energywave Corp., 773 P.2d 1143, 1147 (Idaho 1989) (applying this provision).

[24] *See, e.g.*, Frontline Processing Corp. v. Merrick Bank Corp., 2013 WL 12130638, at *4 (D. Mont. 2013) (enforcing a forum selection clause despite Montana's legislation); *see also* Shelter Mutual Insurance Co. v. Rimkus Consulting Group, 148 So. 3d 871, 881 (La. 2014) (holding that a rule of Louisiana procedure stating that venue objections could not be waived prior to litigation did not prohibit the use of forum selection clauses).

B. In particular business settings

In addition, many states have enacted legislation invalidating the use of forum selection clauses in certain types of contract where the risk of bargaining inequality is particularly significant.[25] For instance, a number of states, including New Jersey, Illinois, Minnesota, Wisconsin, and Washington, have adopted statutes designed to provide franchisees with a variety of substantive protections. Some include specific anti-waiver provisions relating to choice of court. Illinois's Franchise Disclosure Act, for instance, explicitly makes void "[a]ny provision in a franchise agreement that designates jurisdiction or venue in a [judicial] forum outside of this State."[26] Others include general anti-waiver language prohibiting any contractual provision that would operate as a waiver of the rights enjoyed by the franchisee under the law.[27] Provisions of the latter type require courts to analyze whether and to what extent a forum selection clause might operate as a waiver of any of the franchisee's rights.

Laws treating certain kinds of contracts are common. For example, New York's alcohol control law voids any contractual provision that operates as a waiver of any of the rights provided in the law.[28] A Virginia district court found the forum selection clause included in a distribution agreement to be unenforceable because it restricted the distributor's right to move for transfer, a right guaranteed by a local statute.[29] The Hawaii Motor Vehicle Industry Licensing Act generally prohibits any agreement that "requires that the dealer bring an action against the manufacturer or distributor in a venue outside of Hawaii."[30] And in Texas, forum selection clauses included in certain construction contracts are void.[31]

In the Reporter's view, these sorts of policies must be differentiated from a general policy of hostility toward forum selection clauses. Here, the target of regulation is not the power of private parties to affect matters of jurisdiction and venue. Rather, it is certain contractual relationships between parties of unequal bargaining power.[32] The effect of such policies on choice of court is incidental to the overall goal of protecting local residents from particular forms of unfair business practice.[33]

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[25] *See generally* Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. __ (2018 forthcoming), available at SSRN: https://ssrn.com/abstract=3014070 at 8 (noting the use of such legislation to address "consumer contracts, employment contracts, agency contracts, franchise contracts, and construction contracts").

[26] 815 Ill. Comp. Stat. Ann. 705/4.

[27] *E.g.*, Minn. Stat. Ann. § 80C.21.

[28] N.Y. A.B.C.L. § 55-c(11).

[29] Coors Brewing Co. v. Oak Beverage, Inc., 549 F. Supp. 2d 764, 771 (E.D. Va. 2008).

[30] Haw. Rev. Stat. Ann. § 437-52(1).

[31] Tex. Bus. & Com. Code Ann. 272.001.

[32] *See generally* Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOREIGN AFF. 43, 48-49 (2004) (discussing the effect of protective legislation of this kind on the freedom of parties to choose a forum in advance). This distinction becomes important in the choice of law context; *see infra* Part V.

[33] *See* Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141, 150 (Cal. Ct. App. 2015) (stating that both California's Franchise Investment Law and its Consumer Legal Remedies Act "share the common purpose of protecting California residents from unfair or deceptive business practices, and include a provision invalidating any waiver of the protections those laws provide," and at 154, stating that California's securities law "articulate[s] a strong public policy aimed at protecting the public from fraud and deception in securities transactions" and that a "cornerstone" of that law is an anti-waiver provision).

C. In contracts of adhesion

Like any clause in a contract, a forum selection clause can be challenged as invalid on the basis of formal defects (for instance, the absence of a required writing) or defects in the consent of one of the parties (for instance, that it was procured by duress, fraud, mistake, or the like). Formal validity is rarely an issue in practice, and allegations of duress and other similar practices are rare. However, parties frequently challenge the validity of forum selection clauses contained in adhesion contracts on the basis of unconscionability, arguing that it would be unconscionable to hold them to a clause that had not been freely negotiated.[34] *Bremen* itself recognized this potential limitation, focusing on the "freely negotiated" character of the clause at issue in that case.[35] And subsequent Supreme Court decisions did the same. In a 1985 case, for example, the Court echoed the position that where forum selection clauses "have been obtained through 'freely negotiated' agreements," their enforcement does not violate Constitutional norms.[36]

In 1991, however, in *Carnival Cruise Lines v. Shute*,[37] the Supreme Court undertook to "refine the analysis of *The Bremen* to account for the realities of form [maritime] passage contracts."[38] The case involved an exclusive forum selection clause included among the terms printed on a ticket for passage on a cruise ship. A federal court of appeals had concluded that the forum selection clause was "not freely bargained for," and on that basis declined to enforce it, permitting the plaintiffs to sue in a court other than the one nominated.[39] The Supreme Court reversed. The Court analyzed the forum selection clause the same way it would any clause in a contract offered on a "take it or leave it" basis: it scrutinized it for "reasonableness."[40] It concluded that both parties to the contract received benefit from an exclusive forum selection clause: the cruise line in the form of a limitation on the fora in which it could be sued by its passengers, and the passengers themselves "in the form of reduced fares" passing on the resulting cost savings.[41] Thus, the Court concluded, the clause was "reasonable" (i.e., not unconscionable). Although the clause was clearly not "freely negotiated," and although the parties had unequal bargaining power, the clause was therefore entitled to the *Bremen* presumption.

Like *Bremen*, *Carnival Cruise* was an admiralty case, and therefore binding on lower federal courts and state courts only in that setting. Like *Bremen*, however, the decision has had much broader impact, and is now followed in all types of contract litigation. It is true that some courts have pulled back somewhat on the breadth of its holding in a number of ways. For instance, some lower courts have refused to enforce forum selection clauses included in

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[34] *See, e.g.*, Tucker v. Cochran, 341 P.3d 673, 687 (Okla. 2014) (party argues "that the forum-selection clause was never negotiated, bargained for, or discussed by the parties, and ... there was no place for his initials to show agreement with the [clause]")

[35] 407 U.S. at 12, 16.

[36] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985).

[37] 499 U.S. 585 (1991).

[38] *Id.* at 593.

[39] Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1988).

[40] 499 U.S. at 593. The question here is not the reasonableness of the chosen forum, but rather the reasonableness of the "bargain" reflected in the contract provision.

[41] *Id.* at 593-94.

consumer contracts on the basis of insufficient notice. (In *Carnival Cruise*, the plaintiffs conceded that they had notice of the forum selection clause.[42]) This is clearly a minority position, however. Most courts conclude that parties receive adequate notice of forum selection clauses if the relevant clauses are in capital letters, bold type, or otherwise set apart from other provisions in the contract—even if the parties did not in fact read the contract.[43] Similarly, some courts, reviewing forum selection clauses contained in agreements between parties of disparate economic and bargaining power, have held them to be invalid for overreaching.[44] This too is clearly a minority position. Overall, the general rule that such agreements are presumptively valid in the consumer as well as the commercial context is by now well established.[45]

D. In asymmetrical agreements

Under U.S. law, as long as each party's obligation is supported by consideration, mutuality of obligation is not required for a contract to be enforceable. Thus, as a general matter, the fact that a forum selection clause binds only one party does not render it unenforceable. And, indeed, courts are willing to enforce clauses that waive objections to jurisdiction and venue by only one of the contract parties.[46] The same is true of clauses that make the choice of court permissive for one party and exclusive for the other.

E. Conclusion

Overall, throughout the United States, there is a strong policy in favor of enforcing forum selection clauses. As many courts put it, "a party opposing enforcement of a forum-selection clause 'bears a heavy burden of proof.'"[47]

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?

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1040

I. Summary of the Final Rule

On May 24, 2016, the Bureau of Consumer Financial Protection published a proposal to establish 12 CFR part 1040 to address certain aspects of consumer finance dispute resolution.[1] Following a public comment period and review of comments received, the Bureau is now issuing a final rule governing agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services.

Congress directed the Bureau to study these pre-dispute arbitration agreements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or Dodd-Frank Act).[2] In 2015, the Bureau published and delivered to Congress a study of arbitration (Study).[3] In the Dodd-Frank Act, Congress also authorized the Bureau, after completing the Study, to issue regulations restricting or prohibiting the use of arbitration agreements if the Bureau found that

[1] Arbitration Agreements, 81 FR 32830 (May 24, 2016).
[2] Public Law 111-203, 124 Stat. 1376 (2010), section 1028(a).
[3] Bureau of Consumer Fin. Prot., "Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)," (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. Specific portions of the Study are cited in this final rule where relevant, and the entire Study will be included in the docket for this rulemaking at www.regulations.gov.

such rules would be in the public interest and for the protection of consumers.[4] Congress also required that the findings in any such rule be consistent with the Bureau's Study.[5] In accordance with this authority, the final rule issued today imposes two sets of limitations on the use of pre-dispute arbitration agreements by covered providers of consumer financial products and services. First, the final rule prohibits providers from using a pre-dispute arbitration agreement to block consumer class actions in court and requires most providers to insert language into their arbitration agreements reflecting this limitation. This final rule is based on the Bureau's findings – which are consistent with the Study – that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.

Second, the final rule requires providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral and court proceedings to the Bureau. The Bureau will use the information it collects to continue monitoring arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action. The Bureau is also finalizing provisions that will require it to publish the materials it collects on its website with appropriate redactions as warranted, to provide greater transparency into the arbitration of consumer disputes.

C. Arbitration and Arbitration Agreements

As described above at the beginning of Part II, arbitration is a dispute resolution process in which the parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.[74] The typical arbitration agreement provides that the parties shall submit any disputes that may arise between them to arbitration. Arbitration agreements generally give each party to the contract two distinct rights. First, either side can file claims against the other in arbitration and obtain a decision from the arbitrator.[75] Second, with some exceptions, either side can use the arbitration agreement to require that a dispute that has been filed in court instead proceed in arbitration.[76] The typical agreement also specifies an organization called an arbitration administrator. Administrators, which may be for-profit or nonprofit organizations, facilitate the selection of an arbitrator to decide the dispute, provide for basic rules of procedure and operations support, and generally administer the arbitration.[77] Parties usually have very limited rights to appeal from a decision in arbitration to a court.[78] Most arbitration also provides

for limited or streamlined discovery procedures as compared to those in many court proceedings.[79]

History of Arbitration

The use of arbitration to resolve disputes between parties is not new.[80] In England, the historical roots of arbitration date to the medieval period, when merchants adopted specialized rules to resolve disputes between them.[81] English merchants began utilizing arbitration in large numbers during the nineteenth century.[82] However, English courts were hostile towards arbitration, limiting its use through doctrines that rendered certain types of arbitration agreements unenforceable.[83] Arbitration in the United States in the eighteenth and nineteenth centuries reflected both traditions: it was used primarily by merchants, and courts were hostile toward it.[84] Through the early 1920s, United States courts often refused to enforce arbitration agreements and awards.[85]

In 1920, New York enacted the first modern arbitration statute in the United States, which strictly limited courts' power to undermine arbitration decisions and arbitration agreements.[86] Under that law, if one party to an arbitration agreement refused to proceed to arbitration, the statute permitted the other party to seek a remedy in State court to enforce the

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[79] *See* Study, *supra* note 3, section 4 at 16-17.
[80] The use of arbitration appears to date back at least as far as the Roman Empire. *See, e.g.*, Amy J. Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis," 37 Ga. L. Rev. 123, at 134-36 (2002); Derek Roebuck, "Roman Arbitration" (Holo. Books 2004).
[81] *See, e.g.*, Jeffrey W. Stempel, "Pitfalls of Public Policy: The Case of Arbitration Agreements," 22 St. Mary's L. J. 259, at 269-70 (1990).
[82] *Id.*
[83] *See, e.g.*, Schmitz, *supra* note 80, at 137-39.
[84] *See, e.g.*, Stempel, *supra* note 81, at 273-74.
[85] David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63(1) Bus. L. 55, at 58 and n.11 (2007) (*citing, inter alia, Haskell* v. *McClintic-Marshall Co.*, 289 F. 405, 409 (9th Cir. 1923) (refusing to enforce an arbitration agreement because of a "settled rule of the common law that a general agreement to submit to arbitration did not oust the courts of jurisdiction, and that rule has been consistently adhered to by the Federal courts"); *Dickson Manufacturing Co.* v. *Am. Locomotive Co.*, 119 F. 488, 490 (C.C.M.D. Pa. 1902) (refusing to enforce an arbitration agreement where plaintiff revoked its consent to arbitration).
[86] 43 N.Y. Stat. 833 (1925).

arbitration agreement.[87] In 1925, Congress passed the United States Arbitration Act, which was based on the New York arbitration law and later became known as the Federal Arbitration Act (FAA).[88] The FAA remains in force today. Among other things, the 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."[89]

Expansion of Consumer Arbitration and Arbitration Agreements

From the passage of the FAA through the 1970s, arbitration continued to be used in commercial disputes between companies.[90] Beginning in the 1980s, however, companies began to use arbitration agreements in form contracts with consumers, investors, employees, and franchisees that were not the result of individually negotiated terms.[91] By the 1990s, this trend began to spread more broadly within the consumer financial services industry.[92]

One notable feature of these agreements is that they could be used to block class action litigation and often class arbitration as well.[93] The agreements could block class actions filed in

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[87] *Id.*

[88] 9 U.S.C. 1, *et seq*. The FAA was codified in 1947. Public Law 282, 61 Stat. 669 (July 30, 1947). James E. Berger & Charlene Sun, "The Evolution of Judicial Review Under the Federal Arbitration Act," 5 N.Y.U. J. L. & Bus. 745, at 754 n.45 (2009).

[89] 9 U.S.C. 2.

[90] *See, e.g.*, Soia Mentschikoff, "Commercial Arbitration," 61 Colum. L. Rev. 846, at 850 (1961) (noting that, as of 1950, nearly one-third of trade associations used a mechanism like the American Arbitration Association as a means of dispute resolution between trade association members, and that over one-third of other trade associations saw members make their own individual arrangements for arbitrations); *see also id.* at 858 (noting that AAA heard about 240 commercial arbitrations a year from 1947 to 1950, comparable to the volume of like cases before the U.S. District Court of the Southern District of New York in the same time period). Arbitration was also used in the labor context where unions had bargained with employers to create specialized dispute resolution mechanisms pursuant to the Labor Management Relations Act. 29 U.S.C. 401-531.

[91] Stephen J. Ware, "Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights," 67 L. & Contemp. Probs. 179 (2004).

[92] *See* Sallie Hofmeister, "Bank of America is Upheld on Consumer Arbitration," N.Y. Times, Aug. 20, 1994 ("'The class action cases is where the real money will be saved [by arbitration agreements],' Peter Magnani, a spokesman for the bank, said."); John P. Roberts, "Mandatory Arbitration by Financial Institutions," 50 Consumer Fin. L. Q. Rep. 365, at 367 (1996) (identifying an anonymous bank "ABC" as having adopted arbitration provisions in its contracts for consumer credit cards, deposit accounts, and safety deposit boxes); Hossam M. Fahmy, "Arbitration: Wiping Out Consumers Rights?," 64 Tex. Bus. J. 917, at 917 (2001) (citing Barry Meier, "In Fine Print, Customers Lose Ability to Sue," N.Y. Times, Mar. 10, 1997, at A1 (noting in 2001 that "[t]he use of consumer arbitration expanded eight years ago when Bank of America initiated its current policy," when "notices of the new arbitration requirements were sent along with monthly statements to 12 million customers, encouraging thousands of other companies to follow the same policy").

[93] *See, e.g.*, Alan S. Kaplinsky & Mark J. Levin, "Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense," 7 Bus. L. Today 24 (1998) ("Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place."); *see also* Bennet S. Koren, "Our Mini Theme: Class Actions," 7 Bus. L. Today 18 (1998) (industry attorney recommends adopting

court because when sued in a class action, companies could use the arbitration agreement to dismiss or stay the class action in favor of arbitration. Yet the agreements often prohibited class arbitration as well, rendering plaintiffs unable to pursue class claims in either litigation or arbitration.[94] More recently, some consumer financial providers themselves have disclosed in their filings with the SEC that they rely on arbitration agreements for the express purpose of shielding themselves from class action liability.[95]

Since the early 1990s, the use of arbitration agreements in consumer financial contracts has become widespread, as shown by Section 2 of the Study (which is discussed in detail in Part III.D below). By the early 2000s, a few consumer financial companies had become heavy users of arbitration proceedings to obtain debt collection judgments against consumers. For example, in 2006 alone, the National Arbitration Forum (NAF) administered 214,000 arbitrations, most of which were consumer debt collection proceedings brought by companies.[96]

Before 2011, courts were divided on whether arbitration agreements that bar class proceedings were unenforceable because they violated a particular State's laws. Then, in 2011, the Supreme Court held in *AT&T Mobility* v. *Concepcion* that the FAA preempted application of California's unconscionability doctrine to the extent it would have precluded enforcement of a consumer arbitration agreement with a provision prohibiting the filing of arbitration on a class basis. The Court concluded that any State law – even one that serves as a general contract law defense – that "[r]equir[es] the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[109] The Court reasoned that class arbitration eliminates the principal advantage of arbitration – its informality – and increases risks to defendants (due to the high stakes of mass resolution combined with the absence of multilayered review).[110] As a result of the Court's holding, parties to litigation could no longer prevent the use of an arbitration agreement to block a class action in court on the ground that a prohibition on class arbitration in the agreement was unconscionable under the relevant State law.[111] The Court further held, in a 2013 decision, that a court may not use the "effective vindication" doctrine – under which a court may invalidate an arbitration agreement that operates to waive a party's right to pursue statutory remedies – to invalidate a class arbitration waiver on the grounds that the plaintiff's cost of individually arbitrating the claim exceeds the potential recovery.[112]

The analysis of the agreements that the Bureau collected found that tens of millions of consumers use consumer financial products or services that are subject to arbitration agreements, and that, in some markets such as checking accounts and credit cards, large providers are more likely to have the agreements than small providers.[166] In the credit card market, the Study found that small bank issuers were less likely to include arbitration agreements than large bank issuers.[167] Likewise, only 3.3 percent of credit unions in the credit card sample used arbitration agreements.[168] As a result, while 15.8 percent of credit card issuers included such agreements in their contracts, 53 percent of credit card loans outstanding were subject to such agreements.[169] In the checking account market, the Study again found that larger banks tended to include arbitration agreements in their consumer checking contracts (45.6 percent of the largest 103 banks, representing 58.8 percent of insured deposits).[170] In contrast, only 7.1 percent of small- and mid-sized banks and 8.2 percent of credit unions used arbitration agreements.[171] In the GPR prepaid card and payday loan markets, the Study found that the substantial majority of contracts – 92.3 percent of GPR prepaid card contracts and 83.7 percent of the storefront payday loan contracts – included such agreements.[172] In the private student loan and mobile wireless markets, the Study found that most of the large companies – 85.7 percent of the private student loan contracts and 87.5 percent of the mobile wireless contracts – used arbitration agreements.[173]

The Bureau's analysis also found, among other things, that nearly all the arbitration agreements studied included provisions stating that arbitration may not proceed on a class basis. Across each product market, 85 percent to 100 percent of the contracts with arbitration agreements – covering over 99 percent of market share subject to arbitration in the six product markets studied – included such no-class-arbitration provisions.[178] Most of the arbitration agreements that included such provisions also contained an "anti-severability" provision stating that, if the no-class-arbitration provision were to be held unenforceable, the entire arbitration agreement would become unenforceable as a result.[179]

The Study found that most of the arbitration agreements contained a small claims court "carve-out," permitting either the consumer or both parties to file suit in small claims court.[180] The Study similarly explored the number of arbitration provisions that allowed consumers to "opt out" or otherwise reject an arbitration agreement. To exercise the opt-out right, consumers must follow stated procedures, which usually requires all authorized users on an account to physically mail a signed written document to the issuer (electronic submission is permitted only rarely), within a stated time limit. With the exception of storefront payday loans and private student loans, the substantial majority of arbitration agreements in each market studied generally did not include opt-out provisions.[181]

The Study analyzed three different types of cost provisions: provisions addressing the initial payment of arbitration fees; provisions that addressed the reallocation of arbitration fees in an award; and provisions addressing the award of attorney's fees.[182] Most arbitration agreements reviewed in the Study contained provisions that had the effect of capping consumers' upfront arbitration costs at or below the AAA's maximum consumer fee thresholds. These same arbitration agreements took noticeably different approaches to the reallocation of arbitration fees in the arbitrator's award, with approximately one-fifth of the arbitration agreements in credit card, checking account, and storefront payday loan markets permitting shifting company fees to consumers.[183] The Study also found that only a small number of agreements representing negligible shares of the relevant markets directed or permitted arbitrators to award attorney's fees to prevailing companies.[184] A significant share of arbitration agreements across almost all markets did not address attorney's fees.[185]

Aside from costs more generally, the Study found that many arbitration agreements permit the arbitrator to reallocate arbitration fees from one party to the other. About one-third of credit card arbitration agreements, one-fourth of checking account arbitration agreements, and half of payday loan arbitration agreements expressly permitted the arbitrator to shift attorney's fees to the consumer.[186] However, as the Study pointed out, the AAA's consumer arbitration fee schedule, which became effective March 1, 2013, restricts such reallocation.[187] With respect to another type of provision that affects consumers' costs in arbitration – where the arbitration must

[182] *Id.* section 2 at 58. Many contracts – particularly checking account contracts – included general provisions about the allocation of costs and expenses arising out of disputes that were *not* specific to arbitration costs. Indeed, such provisions were commonly included in contracts without arbitration agreements as well. While such provisions could be relevant to the allocation of expenses in an arbitration proceeding, the Study did not address such provisions because they were not specific to arbitration agreements.
[183] *Id.* section 2 at 62-66.
[184] *Id.* section 2 at 67.
[185] *Id.* section 2 at 66-76. As described *supra* when the arbitration agreement did not address the issue, the arbitrator is able to award attorney's fees when permitted elsewhere in the agreement or by applicable law.
[186] *Id.* section 2 at 62-66.
[187] *Id.* section 2 at 61-62.

take place – the Study noted that most, although not all, arbitration agreements contained provisions requiring or permitting hearings to take place in locations close to the consumer's place of residence.[188]

Further, most of the arbitration agreements the Bureau studied contained disclosures describing the differences between arbitration and litigation in court. Most agreements disclosed expressly that the consumer would not have a right to a jury trial, and most disclosed expressly that the consumer could not be a party to a class action in court.[189] Depending on the product market, between one-quarter and two-thirds of the agreements disclosed four key differences between arbitration and litigation in court: no jury trial is available in arbitration; parties cannot participate in class actions in court; discovery is typically more limited in arbitration; and appeal rights are more limited in arbitration.[190] The Study found that this language was often capitalized or in boldfaced type.[191]

The Study also examined whether arbitration agreements limited recovery of damages – including punitive or consequential damages – or specified the time period in which a claim had to be brought. The Study determined that most agreements in the credit card, payday loan, and private student loan markets did not include damages limitations. However, the opposite was true of agreements in checking account contracts, where more than three-fourths of the market included damages limitations; GPR prepaid card contracts, almost all of which included such limitations; and mobile wireless contracts, all of which included such limitations. A review of consumer agreements *without* arbitration agreements revealed a similar pattern, albeit with damages limitations being somewhat less common.[192]

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[188] *Id.* section 2 at 53.
[189] *Id.* section 2 at 72.
[190] *Id.* section 2 at 72-79.
[191] *Id.* section 2 at 72 and n.144.

CFPB Arbitration Rulemaking--and Potential FSOC Veto

posted by Adam Levitin

Today the CFPB finalized the most important rulemaking it has undertaken to date. This rulemaking substantially restricts consumer financial service providers' ability to prevent consumer class actions by forcing consumers into individual arbitrations. I believe this is by far the most important rulemaking undertaken by the CFPB because it affects practices across the consumer finance space (other than mortgages, where arbitration clauses are already prohibited by statute).

Let's be clear--the issue has never really been about arbitration vs. judicial adjudication. It's always been about whether consumers could bring class actions. I don't want to rehash the merits of that here other than to say that the prevention of class actions is effectively a license for businesses with sticky consumer relationships to steal small amounts from a large number of people. For example, am I really going to change my banking relationship (and its direct deposit and automatic bill payment arrangements and convenient branch) over an illegal $15 overcharge? Rationally, no, I'll lump it, not least because I have no easy way of determining if another bank will do the same thing to me. In a world of profit-maximizing firms, we know what will happen next: I'll get hit with overcharges right up to my tolerance limit. Given that consumer finance is largely a business of lots of relatively small dollar transactions, it is tailor made for this problem. Class actions are imperfect procedurally, but they at least reduce the incentive for firms to treat their customers unfairly.

The financial services industry seems to be circling the wagons for a last ditch defense of arbitration. There appear to be three prongs to the defense strategy. First, there will be intense lobbying to get Congress to overturn the rulemaking under the Congressional Review Act. There's a limited window in which that can happen, however, and it will be an uncomfortable vote for members of Congress, particularly with the 2018 election looming. This one will be an albatross for them. Second, there's an effort afoot to have the Financial Stability Oversight Council veto the rulemaking. And finally, if the rule isn't quashed by Congress or the FSOC, there will assuredly be a litigation challenge to the rulemaking.

I want to focus on the FSOC veto strategy, which has just popped up in the news.

The FSOC veto strategy is really a legal hail Mary. The FSOC is an eleven member body that includes the heads of all of the federal financial regulatory agencies and an insurance representative. It's chaired by the Treasury Secretary. For the FSOC to veto a CFPB rulemaking, an FSOC member agency must file a petition with the FSOC within 10 days of the publication of the rule in the Federal Register. The Treasury Secretary may then stay the rule for 90 days, and the FSOC must decide whether to veto before the expiry of the stay. That means there are 100 days after the publication of the rule in the Federal Register for the FSOC to potentially veto the rule.
In order to veto the rulemaking, there must be a 2/3 vote of the FSOC, so it will take 8 of 11 votes. At present 4 of the FSOC members are still Democratic appointees, plus the insurance representative. If one more seat flips within 100 days, then the override would require only votes of GOP appointees. That's quite possible given the end of terms for the FDIC and CFPB Director Cordray's own uncertain plans. So the votes may well be there for an FSOC veto.

But here's the thing. The FSOC veto is subject to some legal procedures and judicial review, and I don't think it has a chance in hell of surviving such review, although it would buy the industry some time (and the affect of an overturned veto on the Congressional Review Act timeline is currently unclear to me). Here are the most immediate problems I see for an FSOC veto. First, the petitioning agency must have "in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system of the United States." Presumably the OCC

would be the petitioning agency, but I could see the NCUA also joining the petition given its current leadership.

I don't think either agency can show that it has "in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system of the United States". The arbitration rulemaking was proposed in 2016. The CFPB is required to consult with the prudential regulators during the rulemaking process. Have either the OCC or the NCUA in that time weighed in with concerns to the CFPB? Apparently the Acting Comptroller recently wrote to the CFPB to raise "safety and soundness" concerns he had with the rule; I'm not sure that such an 11th hour letter is a good faith attempt. Moreover, just saying the words "safety and soundness" concerns doesn't mean that they are actually good faith concerns. It's hard to claim with a straight face that limiting class actions jeopardizes "the safety and soundness of the United States banking system or the stability of the financial system of the United States". To make that claim is to admit that the US financial system would be unsound or destabilized without the ability to rip off consumers via small dollar malfeasance.

Now I'm sure that the argument can get gussied up with some story about how the plaintiffs' bar will extort good institutions right and left, but class action waivers are (1) relatively new, and the world operated just fine before them and (2) the US mortgage market hasn't been crippled without them and (3) a number of card issuers had dropped their class action waivers as part of a settlement and don't seem to have gone belly up as a result. I'm skeptical that the rule will result in higher costs for consumers, but even if it does, that's not in and of itself a threat to safety and soundness or financial stability. Critically, I believe that the CFPB (or potentially intervenors) could sue to block the FSOC from voting on the grounds that the petition was not in good faith.

But even if that good faith showing about the petition can be made, however, there is still the matter of the FSOC's vote itself. The FSOC doesn't just vote. Each member must first be authorized to vote. That requires the member to have "considered any relevant information provided by the agency submitting the petition and by the Bureau" and to have "made an official determination, at a public meeting where applicable, that the regulation which is the subject of the petition would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." That "official determination" is another point that could be vulnerable to challenge, and separately for each agency, based on both the procedure for making the determination and the substantive support for the determination. (And if those determinations look suspiciously similar or if FOIA reveals a trail of arm-twisting from Treasury, etc....)

Finally, if there are enough FSOC members authorized to vote and the requisite majority of members serving (not members voting) vote to veto the rulemaking, the FSOC has to publish a decision "with an explanation of the reasons for the decision." I assume that among other things, that FSOC decision has to include factually supported findings that the petition was filed in good faith. In any case, any and all of the FSOC decision can itself be challenged under the Administrative Procedures Act, and you'd better believe that it would be. Given that there really is no connection between class action waivers and "safety and soundness" or "financial stability," I cannot see how an FSOC veto could possibly survive judicial review.

These are only the first level vulnerabilities I see with the FSOC veto strategy, but there's also a more general problem: no one really knows how the mechanics of an FSOC veto process work. The FSOC was supposed to adopt rules implementing the veto procedure, but it hasn't. That opens the door to lots of potential litigation challenges to the FSOC's procedure, and those challenges might well run the clock on the 100-day limit; there's certainly nothing in the statute that provides for an extension of the stay beyond that 100 days.

Bottom line is that the financial services industry is grasping for ways to stave off the arbitration rulemaking, but the FSOC route is unlikely to succeed and could result in a lot of egg on the face of Secretary Mnuchin if he wants to push ahead with it.

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 (1996).

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 "harsh[] 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?

454 U.S. 235 (1981)

PIPER AIRCRAFT CO.

v.

REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.

No. 80-848.

Supreme Court of United States.

Argued October 14, 1981

Decided December 8, 1981[*]

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

237 *237 *James M. Fitzsimons* argued the cause for petitioner in No. 80-848. With him on the brief were *Charles J.*
238 *McKelvey, Ann S. Pepperman,* and *Keith A. Jones. Warner W. Gardner* argued the cause for petitioner in *238 No. 80-883. With him on the briefs were *Nancy J. Bregstein* and *Ronald C. Scott.*

Daniel C. Cathcart argued the cause and filed a brief for respondent in both cases.[†]

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

239 In July 1976, a small commercial aircraft crashed in the Scottish highlands during the course of a charter flight from *239 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
240 wrongful-death *240 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
241 December 1977, the District Court quashed service on *241 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 (1947), and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*, 330 U. S. 518 (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. 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*, at 508-509.[6]

242 *242 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
243 be "unfair to make Piper and Hartzell proceed to trial in this forum." *Id.*, *243 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
244 to burden citizens with jury duty when the Middle District *244 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," 630 F. 2d, at 162.[9] Finally, the court stated that resolution of the
245 suit *245 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 423, 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]

246 *246 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 won 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 (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 case to consider the questions they raise concerning the proper application of the doctrine of *forum non conveniens.* 450 U. S. 909 (1981).[12]

247 *247 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 (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 rights of the parties are governed, as we are of the
248 opinion *248 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 (quoting Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U. S. 515, 517 (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.

It is true that *Canada Malting* was decided before *Gilbert,* and that the doctrine of *forum non conveniens* was not fully
249 crystallized until our decision in that case.[13] However, *Gilbert* in no way affects the validity of *Canada Malting.* Indeed, *249 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. 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. And in *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549, 557 (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
250 emphasis were *250 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 (1976); *Anastasiadis* v. *S.S. Little John*, 346 F. 2d 281, 283 (CA5 1965), cert. denied, 384 U. S. 920 (1966).[16] Several Courts have relied expressly on *Canada Malting* to hold that the possibility of an unfavorable
251 change of law should not, by itself, bar dismissal. See *Fitzgerald* *251 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.

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*
252 *non* *252 *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]

253 *253 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 (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 (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.

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
254 application" of § 1404(a). 376 U. S., at 613.[20] Emphasizing the remedial *254 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. The statute was designed as a "federal housekeeping measure," allowing easy change of venue within a unified federal system. *Id.,* at 613. 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
255 that *255 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
256 forum. 330 U. S., at 524.[23] When the home forum has *256 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]

257 *257 **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; Koster, 330 U. S., at 531. 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
258 negligence theories if trial were held here.[25] However, the District Court did not act *258 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
259 information *259 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)

260 The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its *260 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. 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
261 deterrence that would be gained if this trial were held in an *261 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.

JUSTICE WHITE, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. However, like JUSTICE BRENNAN and JUSTICE STEVENS, I would not proceed to deal with the issues addressed in Part III. To that extent, I am in dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

In No. 80-848, only one question is presented for review to this Court:

> "Whether, in an action in federal district court brought by foreign plaintiffs against American defendants,
> 262 the plaintiffs may defeat a motion to dismiss on the ground of *262 *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation." Pet. for Cert. in No. 80-848, p. i.

In No. 80-883, the Court limited its grant of certiorari, see 450 U. S. 909, to the same question:

> "Must a motion to dismiss on grounds of *forum non conveniens* be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court?" Pet. for Cert. in No. 80-883, p. i.

I agree that this question should be answered in the negative. Having decided that question, I would simply remand the case to the Court of Appeals for further consideration of the question whether the District Court correctly decided that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.

[*] Together with No. 80-883, *Hartzell Propeller, Inc.* v. **Reyno**, *Personal Representative of the Estates of Fehilly et al.,* also on certiorari to the same court.

[†] *John D. Dillow, Samuel F. Pearce, John J. Hennelly, Jr.,* and *Thomas C. Walsh* filed a brief for Boeing Co. et al. as *amici curiae* urging reversal.

Memorandum

To: Associate
From: Partner
Re: *Abel, et al. v. Tex-a-Pharm*, in U.S. District Court for Northern District of Texas

Our client, Tex-a-Pharm, is a Texas company with its principal place of business in Dallas. The company developed and used a new antibiotic to fight an epidemic of bacterial meningitis in Kano, Nigeria. In February 2002, the media reported an outbreak of bacterial meningitis in Kano. Tex-a-Pharm had been working on a new antibiotic, Trovan, which could be used to treat meningitis, but it had not received FDA approval by February 2002. In April 2002, Tex-a-Pharm sought and received FDA authorization to export Trovan to Nigeria. In that same month, Tex-a-Pharm researchers departed from the U.S. in a chartered DC-9 bound for Kano, Nigeria. Tex-a-Pharm's research team spent approximately a month in Nigeria; it provided no follow up care to the children. By the end of May, all Tex-a-Pharm employees had returned home.

Many children were severely injured or died from the epidemic in total. All plaintiffs in this case are Nigerian and live in Nigeria. They have brought suit under the Torture Victim Prevention Act (TVPA), which both provides for original jurisdiction in the federal courts and for a private right of action by United States citizens and aliens who allege torture by a defendant acting allegedly "under color of law" of a foreign nation ("under color of law" is typically interpreted to mean acting with the support or backing of the foreign nation's government). The TVPA was enacted in 1991. Some plaintiffs are the surviving family members of these children; other plaintiffs are Nigerian children who took the drug and survived with disabilities.

The survival rate for the children who received Trovan was higher than it was for those who did not receive it, but the fatality rate was still extraordinarily high. Moreover, a high percentage of those who survived have sustained permanent physical and mental disabilities which plaintiffs allege is the result not of the epidemic but of having taken Trovan. The strongest evidence plaintiffs can cite in support of this allegation is that of all of the surviving children, only those treated with Trovan seem to have these disabilities.

The Nigerian government provided Tex-a-Pharm with a letter necessary to secure the FDA's approval for the export of Trovan. The Nigerian government also facilitated Tex-a-Pharm's efforts to conduct the Kano Trovan Test by arranging for Tex-a-Pharm's accommodations in Kano, and providing access to two of the hospital's wards to conduct the Kano Trovan Test, as well arranging for Tex-a-Pharm's use of the services of hospital's nurses and physicians.

All research on the drug was performed in Dallas. The drug was manufactured in Dallas. Also, in various places throughout the United States the company gathered data from clinical trials used to further research and development efforts of the drug. Plaintiffs have alleged that Tex-a-Pharm intended to use the experiments in Nigeria to aid its efforts to obtain FDA regulatory approval of the drug in America. Such FDA approval of the new antibiotic would, in turn, pave the way for sale of Trovan in the U.S., according to plaintiffs. To date, however, no Trovan has been sold in this country.

I want you to consider whether we should file a forum non conveniens motion. As always, I want you to consider not only the strength of the arguments for dismissal but also the force of the argument that plaintiffs will make against dismissal, so we can make a fully informed decision about what to do.