COMMENT

A PRACTITIONER'S GUIDE TO FORUM SELECTION CLAUSES IN TEXAS*

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Over the past decade, there has been a significant expansion in trade activities among Texas businesses.[1] The healthy economy has helped established companies grow larger, and has supported the growth of new business start-ups.[2] The increase in trade and commerce has likewise resulted in an increase in contractual business arrangements. Generally, when parties

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1. *See generally* Lisa Pritchard Mayfield, *Texas Economic Development*, COM. REAL EST. S., Aug. 1997 (indicating that Texas cities such as San Antonio, Houston, Midland and Dallas have recently benefited from a growth of cross-border trade with Mexico).

2. *See generally id.* (noting that Houston has experienced an increase in corporate relocations to the area, while Dallas and Austin have each seen a growth of new businesses).

from one state engage in trade or commerce with business entities from another state, they would prefer to resolve any contractual disputes in the jurisdiction of their choice[3]—this is where a forum selection clause comes into play.[4]

Forum selection clauses may include contract provisions that select an exclusive court, law, or alternative procedure for resolving contractual disputes. A forum selection clause can be a valuable tool because it allows parties to select, up front, a specific jurisdiction for resolving future disputes, which can reduce litigation risks and costs.[5] Because of the benefits these provisions provide, contemporary business contracts frequently contain these types of agreements.[6] The treatment of forum selection clauses becomes crucial when a dispute arises, the clause is ignored, and the suit is filed in an alternate forum.

Historically, courts have emphasized various reasons for refusing to enforce forum selection clauses.[7] However, present day commercial realities have compelled the courts to abandon their age-old prejudice and hold parties to their agreements.[8]

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3. *See* James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 3 (1976) (claiming forum selection clauses "encourage trade by negating the fear of the vagaries of unfamiliar and fortuitous foreign courts").

4. Forum selection clause is a term that may describe choice-of-forum, choice-of-procedure, and choice-of-law agreements. *See* David H. Taylor, *The Forum-Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 784, 786–87 (1993); Phillip A. Buhler, *Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading*, 27 U. MIAMI INTER-AM. L. REV. 1, 3 (1995); Jon A. Jacobson, Comment, *Other International Issues: Your Place or Mine: The Enforceability of Choice-of-Law/Forum Clauses in International Securities Contracts*, 8 DUKE J. COMP. & INT'L L. 469, 469 (1998). Because of the lack of authorship regarding the disparate treatment between choice-of-forum and choice-of-law agreements in Texas, this article focuses mainly on these two aspects of forum selection clauses.

5. The main goal of any business is to maximize shareholder wealth. *See* JEFF MADURA, INTERNATIONAL FINANCIAL MANAGEMENT 5 (4th ed. 1995). Consequently, one reason for engaging in trade is that it allows businesses to enter into markets where there are fewer competitors. *See* RUTH STANAT, GLOBAL GOLD, PANNING FOR PROFITS IN FOREIGN MARKETS 7 (1998). However, competitive advantages can be quickly neutralized if a company has to incur excessive expenses fighting over jurisdiction and venue at the outset of the litigation. Forum selection clauses can be used to prevent these costly disputes from arising in hostile forums. *See* Taylor, *supra* note 4, at 785.

6. *See* Gilbert, *supra* note 3, at 2–3 (explaining that a choice-of-forum clause: (1) can "obviate a jurisdictional struggle between the courts of nations or states which in fact have personal jurisdiction by selecting a single forum to hear and determine all disputes under a given contract;" (2) "is a flexible device which allows parties to tailor the dispute resolution mechanism to their particular situation . . . [whether the forum is chosen] because of its neutrality, or because of its expertise in the particular subject matter of the contract;" and (3) "tend to encourage trade by negating the fear of the vagaries of unfamiliar and fortuitous foreign courts;" so, "[i]t is little wonder then that choice of forum provisions are quite routinely found in multinational or multistate contracts").

7. *See infra* Part I.

8. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8–9 (1972) (positing

Upholding these clauses allows contracting parties to make the economic result of their agreement more predictable.[9] Enforcement also allows the judicial system to function more economically and efficiently.[10] Similar to other courts, Texas courts had traditionally invalidated these clauses on grounds that they violated public policy.[11] After the federal courts began to move towards enforcement, Texas eventually fell in line and began to hold parties to their contractual agreements.[12]

This article is intended as a guideline for enforcement of forum selection clauses in Texas courtrooms. While the main focus of this article covers the development of Texas law, it also provides a brief overview of the applicable issues addressed in federal courts. Accordingly, Part I of this article provides an overview of the "ouster" doctrine and the historical treatment of forum selection clauses in federal courts, along with a comparison of the historical treatment in Texas courts. The developing conflict and the Supreme Court's landmark decision in *The Bremen v. Zapata Off-Shore Co.* are discussed in Part II.

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that "[f]or at least two decades [the courts] have witnessed an expansion of overseas commercial activities" by U.S. business enterprises; therefore, in this "era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans").

9. *See id.* at 13–15 (noting that parties eliminate contractual uncertainties with forum clauses, and that, in this case, "the forum clause was a vital part of the agreement, and . . . [that parties] conduct[ed] their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations"); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (concluding that the need of the international commercial system for predictability in the resolution of disputes requires enforcement of forum selection agreements); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516, 519–20 (1974) (holding that the agreement to arbitrate in the case was enforceable, that forum selection clauses are essential in achieving "orderliness and predictability" in an international business transaction, and that "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute"); Gilbert, *supra* note 3, at 2, noting the usefulness of forum provisions:

> . . . there are numerous inherent uncertainties for all involved when dealing and contracting across international, or even state, boundaries, and any device which tends to render multinational or multistate transactions less uncertain is sure to reduce the complexity, if not the incidence, of disputes and result in a greater feeling of security on behalf of the parties and more stability . . . .

10. *See, e.g.*, Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 51–52 (1992) (stating that forum selection clauses have many virtues, including "orderliness and predictability in contractual relationships" and "obviating a potentially costly struggle . . . over jurisdiction and venue"). *But see* Larry Lempert, *Companies Seeking Further Alternatives to Litigation Abroad*, LEGAL TIMES, Mar. 28, 1983, at 8, col. 2 (noting that international actions can be lengthier and more costly than litigation).

11. *See infra* Part I.

12. *See infra* Part III.

Part III analyzes the modern shift towards enforcement in the Texas courts. In Part IV, the First District Houston Court of Appeals' apparent shift from the general Texas rule is examined. Part V reviews the treatment of choice-of-law clauses, and the circumstances for applying differing rules. Part VI looks at the administrative and procedural mechanisms for trying to enforce a forum selection clause in Texas. The final section of this paper looks at the Supreme Court's decision in *Carnival Cruise Lines Inc. v. Shute*,[13] and the subsequent Texas case law regarding passenger form contracts.

I. A QUICK HISTORY LESSON IN FORUM SELECTION CLAUSES

Historically, American courts have not looked favorably upon forum selection clauses. These clauses were viewed as unlawful attempts to contractually "oust" a court of its jurisdiction.[14] The general rule, referred to as the "ouster doctrine," was that contracting parties could not prevent a court from taking jurisdiction of a case through contractual agreements.[15] The rationale was that a court's jurisdiction was established by law, and thus could not be altered by private agreement.[16] An often-cited example of the "ouster doctrine" comes from the Supreme Court's opinion in *Insurance Co. v. Morse*:[17]

> Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his . . . freedom, or his substantial rights . . . [and] agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.[18]

In addition to the ouster doctrine, the courts considered forum selection clauses to be a natural violation of public policy.[19]

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13. 499 U.S. 585 (1991).

14. *See* Gilbert, *supra* note 3, at 8.

15. *See id.*

16. *See id.*

17. 87 U.S. 445 (1874) (holding that a Wisconsin statute which requires companies to sign provisions agreeing not to remove cases from state court to federal court "ousts" the federal courts of their jurisdiction conferred by law, and thus, is unconstitutional and illegal).

18. *Id.* at 451.

19. *See* Francis M. Dougherty, Annotation, *Validity of Contractual Provision*

Other courts believed that forum selection clauses were related to the law of remedies, which could not be affected through private agreements.[20]

Critics have suggested that the reasons cited above do not truly explain the court's disfavor toward forum selection clauses.[21] Several alternative rationales have been presented which suggest there were additional reasons underlying the court's hostility. One suggestion is that the courts were not willing to force domestic parties to litigate their claims in a foreign forum.[22] Another is that judges used to be paid for the number of cases they heard, and forum selection clauses posed a threat to their livelihood.[23] The most convincing explanation, however, is that forum selection clauses are frequently found in adhesion contracts, and result from the disproportionate bargaining power between the contracting parties.[24]

The decisions handed down in Texas were no exception. In 1919, the Supreme Court of Texas conducted an examination of opinions issued from its sister states and the federal courts.[25] After completing its review, the court agreed that it was "utterly against public policy to permit bargaining" which would deprive courts of jurisdiction that was expressly conferred by statute.[26] In accordance with this rule, the court held that contract

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Limiting Place or Court in Which Action may be Brought, 31 A.L.R.4th 404 § 3 (1984) (compiling numerous cases from the federal courts and twenty states, including Texas, where forum selection clauses have been held invalid as contrary to public policy over the past century).

20. *See* Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1 U. ILL. L. REV. 133, 139 (1982) (citing Meacham v. Jamestown, F. & C.R.R., 211 N.Y. 346, 352, 105 N.E. 653, 655 (1914) (Cardozo, J., concurring), *overruled*, Siegel v. Lewis, 40 N.Y.2d 687, 389 N.Y.S.2d 800, 358 N.E.2d 484 (1976); Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 86, 66 N.E. 627, 628 (1903); Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856)).

21. *See, e.g.*, Kurt H. Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124, 127 (1973) (contending that "the true reasons for the negative attitude [toward forum selection clauses] were not necessarily in the written opinions"); Willis L. M. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187, 188 (1964) (arguing that "the reasons stated by the courts for denying effect to choice of forum clauses are unconvincing . . . [and] [c]learly . . . do not provide the true explanation of the manifest judicial hostility for choice of forum clauses"); ALBERT A. EHRENZWEIG, CONFLICT OF LAWS 148–53 (1962) (propounding that none of the reasons advanced by the courts for their opposition to prorogation agreements seem persuasive).

22. *See* Reese, *supra* note 21, at 188.

23. *See id.* at 189.

24. *See id.* at 188; Gilbert, *supra* note 3, at 9.

25. *See* International Travelers Ass'n v. Branum, 109 Tex. 543, 547–48, 212 S.W. 630, 631–32 (1919) (noting that previous legal precedent opposed parties changing, through contractual agreement, the forum in which a cause of action would be brought).

26. *See id.* at 548.

provisions for "exclusive venue" were unenforceable.[27] Following the Texas Supreme Court's lead, the lower courts began invalidating forum selection clauses on the ground that venue was fixed by law and could not be changed through private agreement.[28] In this manner, Texas became part of the crusade that would plague contracting parties for decades.

II. A SHIFT IN COURSE—*The Bremen*

In the early part of the twentieth century, the hostility towards forum selection clauses permeated the American courts. But the marketplace continued to expand, forcing courts to reevaluate their views. In the mid-1900's, some courts began questioning the practicality of the traditional rule.[29] Finally, in 1972, the Supreme Court recognized the growing commercial importance of enforcing forum selection clauses in international trade and commerce.[30] The scope of American business enterprises had expanded significantly, and the strict traditional view toward forum clauses had become an impractical barrier to

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27. *See id.*

28. *See, e.g.*, General Motors Acceptance Corp. v. Hunsaker, 50 S.W.2d 367, 368 (Tex. Civ. App.—Amarillo 1932, writ dism'd) (holding that parties are prohibited from contractually fixing the venue of actions arising under their contract); Smith v. Watson, 44 S.W.2d 815, 817 (Tex. Civ. App.—Eastland 1931, no writ) (holding that attempts to fix venue by contract are illegal); Pfeifer v. E.J. Hermann Sales Co., 43 S.W.2d 484, 485 (Tex. Civ. App.—San Antonio 1931, no writ) (holding that although a contract provision only limited venue to 250 counties, the fact that the defendant was deprived of his right to be sued in the county of his domicile rendered the provision invalid); Smith v. Hartt & Cole, 13 S.W.2d 408, 409 (Tex. Civ. App.—Eastland 1929, no writ) (holding that venue contracts which effect a change in law are void); General Motors Acceptance Corp. v. Christian, 11 S.W.2d 620, 621 (Tex. Civ. App.—El Paso 1928, no writ) (holding that it is illegal to fix venue through contract); La Salle County Water Improvement Dist. No. 1 v. Arlitt, 297 S.W. 344, 345 (Tex. Civ. App.—Austin 1927, writ dism'd w.o.j.) (noting that venue cannot be the subject of contract); Ross-Carter Grain Co. v. H.H. Watson Co., 288 S.W. 239, 240 (Tex. Civ. App.—Austin 1926, no writ) (holding that a provision in a sales contract that attempted to fix venue exclusively in the county of the seller's residence was void); C. P. Ray & Co. v. La Rue & Barron Co., 237 S.W. 336, 338 (Tex. Civ. App.—Dallas 1922, no writ) (noting that the right to venue is "fixed by law," and cannot "be bartered away by contract").

29. *See, e.g.*, Krenger v. Pennsylvania R.R. Co., 174 F.2d 556, 561 (2d Cir. 1949) (Hand, L., concurring) (stating that "[w]hat remains of the [ouster] doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist"); William H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d Cir. 1955) (stating that if "the court finds that the agreement is not unreasonable in the setting of the particular case, [notwithstanding the ouster doctrine] it may properly decline jurisdiction and relegate a litigant to the forum to which he assented"); *see also* James T. Brittain Jr., Comment, *Foreign Forum-Selection Clauses in the Federal Courts: All in the Name of International Comity*, 23 HOUS. J. INT'L L. 305, 310–13 (2001) (discussing the shift in judicial attitude towards the ouster doctrine and the formation of the "reasonableness" rule in the federal courts for enforcing forum-selection clauses).

30. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-9 (1972).

trade.[31] Therefore, in *The Bremen*, the Supreme Court decided to change the rules used to evaluate forum selection clauses.[32]

The Bremen involved an action for limiting liability between Zapata, a Houston-based American corporation, and Unterweser, a German corporation.[33] Zapata had contracted Unterweser to tow an off-shore drilling rig from Louisiana to Italy.[34] The contract between the parties stated that all disputes had to be brought before the London Court of Justice. Although the contract had been reviewed and several changes were made, there were no alterations made to the forum selection clause.[35] While the tug and tow was in international waters, a severe storm formed and the rig was damaged. Zapata instructed the tug to head back to the nearest port, which was Tampa, Florida.[36]

After the vessels reached Florida, Zapata brought a suit in admiralty against Unterweser and the M/S Bremen in the U.S. District Court located in Tampa, Florida.[37] On the basis of the forum selection clause in the contract, Unterweser motioned the court to either dismiss the suit on lack of jurisdiction or *forum non conveniens* grounds, or alternatively to stay the action pending litigation in the London court.[38] Before the court had ruled on the motion, Unterweser decided to commence an action against Zapata for breach of contract in London. Zapata appeared before the London court to contest the court's jurisdiction, but the London court ruled that its jurisdiction was valid under the forum selection clause.[39]

Back in the United States, the six-month period for Unterweser to file an action to limit its liability was about to expire, and the district court had not yet ruled on Unterweser's motion.[40] Confronted with the possibility that its time might expire, Unterweser decided to file the action to limit its liability in the Tampa District Court.[41] Upon Unterweser's filing, the court entered an injunction against proceedings outside that court. Zapata then refiled its original claim in Unterweser's

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31. *See id.*

32. *See id.* at 15 (holding that "the forum clause should control absent a strong showing that it should be set aside").

33. *See id.* at 2, 5–6.

34. *See id.* at 2.

35. *See id.* at 3.

36. *See id.*

37. *See id.* at 3–4.

38. *See id.* at 4.

39. *See id.*

40. *See id.* at 5.

41. *See id.*

limitation action.[42] The district court denied Unterweser's motion to dismiss or stay Zapata's initial action, relying upon the "ouster doctrine" for support.[43] Unterweser's subsequent motion to stay the limitation action pending the resolution of the case in London was also denied.[44] The district court also granted Zapata's motion to restrain the parties from proceeding in any further litigation in the London court. Unterweser appealed the decisions to the Fifth Circuit, and it affirmed.[45] Resting its decision on prior case law, the appeals court stated that "enforcement of such clauses would be contrary to public policy."[46]

The Supreme Court granted certiorari to resolve the growing disparity among the lower courts in their treatment of forum selection clauses.[47] In beginning its analysis, the Court noted that forum selection clauses had historically been disfavored by American courts on grounds that they were contrary to public policy or proceeded to oust the jurisdiction of the courts.[48] The Court also noted that some courts, on the other hand, were beginning to adopt a more hospitable attitude towards forum selection clauses.[49] Rejecting the traditional view,[50] the Court held that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be

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42. *See id.*

43. *See id.* at 6 (noting the district court's reliance on *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958), which held that "'agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to 'public policy and will not be enforced'").

44. *See id.* at 6–7.

45. *See id.* at 7. (noting that the Fifth Circuit found that the "[d]istrict [c]ourt [had] not abuse[d] its discretion in refusing to decline jurisdiction on the basis of *forum non conveniens,*" but that the panel was divided with "six of the fourteen *en banc* judges dissenting").

46. *See id.* at 8 (citing Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963)).

47. *See id.* at 2.

48. *See id.* at 9 & n.10 (citing R.D. Hursh, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action may be Brought,* 56 A.L.R.2d 300, 306–320 (1957), *superceded by* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in which Action may be Brought*, 31 A.L.R.4th 404 § 3 (1984); Nute v. Hamilton Mutual Ins. Co., 72 Mass. (6 Gray) 174 (1856); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916); Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 66 N.E. 627 (1903)).

49. *Id.* at 9–10 (citing Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3d Cir. 1966); Anastasiadis v. S.S. Little John, 346 F.2d 281 (5th Cir. 1965); Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955); Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951); Central Contracting Co. v. C. E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (Pa. 1965)).

50. *See id.* at 12 (stating that "the argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction").

'unreasonable' under the circumstances."[51] The Court justified this holding on three grounds: (1) the traditional hostility toward forum selection clauses conflicted with the increased growth in international trade;[52] (2) its decision was a logical extension of its own precedent;[53] and (3) other common-law countries had already adopted substantially similar approaches in enforcing forum selection clauses.[54]

After determining that forum selection clauses were prima facie valid, the Court articulated four exceptions for when forum selection clauses should not be enforced: (1) if the resisting party could clearly show that "enforcement would be unreasonable and unjust;"[55] (2) if the clause was the result of fraud or overreaching;[56] (3) if enforcement would "contravene a strong public policy of the forum as declared by statute or judicial decision;"[57] and (4) if the forum was so inconvenient that the party would "for all practical purposes be deprived of his day in court."[58] The Court stated that these exceptions placed a heavy burden on the party opposing enforcement.[59] Unless an opposing party succeeds in making a strong showing that the forum selection should be set aside, then it will be enforced.

Applying the exceptions to the case, the Court held that the first exception had not been met because Zapata had accepted the foreseeable risk of increased litigation costs in the contracted forum.[60] Furthermore, the forum selection clause had been freely

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51. *Id.* at 10.

52. *See id.* at 9. The court stated:

> [I]n an era of expanding world trade and commerce, the absolute aspects of the [ouster doctrine] have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Id.

53. *See id.* at 10–11 (noting that upholding the validity of the forum selection clause "is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 318 (1964), which held that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction").

54. *See id.* at 11.

55. *Id.* at 15.

56. *See id.*

57. *Id.*

58. *Id.* at 18.

59. *See id.* at 19.

60. *See id.* at 17–18.

bargained for and was not a contract of adhesion.[61] Because the Court had already determined that the agreement was "unaffected by fraud, undue influence, or overweening bargaining power," it did not directly address the second exception in its analysis.[62]

In its analysis of the third exception, the Court noted that there was a federally created rule under admiralty law that prohibited forum selection clauses in towage contracts.[63] However, the rule was limited to towage in American waters, and in this case the incident occurred in international waters.[64] Therefore, the forum selection clause in this case did not violate the public policy of the forum, as proscribed under federal admiralty law.[65]

As to the fourth exception, the Court stated that the trial court had incorrectly placed the burden on Unterweser to show that the balance of convenience was strongly in favor of the contracted forum.[66] The Court held that the party opposing the clause has the burden of showing that the contracted forum is inconvenient.[67] Furthermore, a general claim of inconvenience would not be sufficient—the opposing party had to show that he would practically "be deprived of his day in court" if the clause was enforced.[68] Accordingly, the Court remanded the case to allow Zapata the opportunity to show whether enforcement of the clause would effectively deprive it of its day in court.[69]

Even though *The Bremen* was a suit in admiralty and appeared to be strictly limited to the facts of the case,[70] courts have declined to limit the ruling to cases in admiralty.[71] Thus,

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61. *See id.* at 17.

62. *See id.* at 12 n.14 (noting that the record refuted "any notion of overweening bargaining power" and that the Court of Appeals pointed out "'Zapata [had] neither presented evidence of nor alleged fraud or undue bargaining power in the agreement'").

63. *See id.* at 15–16; *see also* Bisso v. Inland Waterways Corp., 349 U.S. 85, 90 (1955) (holding that as a matter of public policy "contracts releasing towers from all liability for their negligence" were unlawful).

64. *See The Bremen*, 407 U.S. at 15–16.

65. *See id* at 15.

66. *See id.* at 18.

67. *See id.* at 18–19.

68. *See id.* at 18.

69. *See id.* at 19.

70. *See id.* at 10 (stating that the prima facie validity of forum selection clauses "is the correct doctrine to be followed by federal district courts *sitting in admiralty*") (emphasis added).

71. *See* Howard W. Schreiber, Note, *Appealability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument Against "Canceling Out" The Bremen*, 57 FORDHAM L. REV. 463, 468 & n.34 (1988) (citing numerous cases showing that the federal courts have refused to limit *The Bremen* holding to cases in admiralty)

The Bremen quickly became the "lodestar" for the widespread enforcement of forum selection clauses.[72]

III. THE TEXAS TRAIL TO ENFORCEMENT

Notwithstanding the Supreme Court's decision and the widespread movement towards enforcement, Texas was not yet prepared to disregard its prior case law. Seven years after *The Bremen*, the Eastland Court of Appeals refused to enforce a forum selection clause in *Dowling v. NADW Marketing, Inc.*[73] Dowling, who was a Texas resident, filed suit against NADW on grounds of deceptive trade practices and fraud.[74] NADW was a Louisiana corporation and was not registered to do business in Texas. NADW had filed a motion to dismiss on the basis of a forum selection clause in the parties' contract which stated that "[a]ny action brought . . . shall be brought in the District Court of the Parishes of Orleans or Jefferson, in the State of Louisiana."[75] The 162nd District Court in Eastland County decided to grant the Defendant's motion to dismiss for want of jurisdiction.[76]

On appeal, however, the Eastland Court of Appeals reversed the trial court's decision, using Texas precedent to support its decision to disregard the forum selection clause.[77] The appeals court attacked the choice-of-forum clause in the agreement by holding that contractual agreements to set venue "have been declared invalid in Texas."[78] The court cited decisions from prior cases for support.[79] Turning away from the choice-of-forum agreement, the appeals court determined that the trial court had both subject matter and personal jurisdiction over the parties.[80]

(citations omitted).

72. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 315 & n.99 (1988) (citing over thirty lower federal court cases that show *The Bremen* has become the "lodestar" for enforcing forum selection clauses in the lower courts).

73. 578 S.W.2d 475 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

74. *See id.* at 475.

75. *Id.*

76. *See id.*

77. *See id.* 475–76

78. *See id.* at 475.

79. *See id.* at 475–76. The appeals court noted that "'it is utterly against public policy to permit bargaining in this state about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses.'" *See id.* (quoting International Traveler's Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630 (1919)). The court also restated the rule that "'the fixing of venue by contract, except in such instances as permitted by Article 1995, [section] 5, is invalid and cannot be the subject of private contract.'" *See id.* at 476 (quoting Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535 (Tex. 1972)).

80. *See id.*

Accordingly, the appeals court held that the trial court erred in granting the motion to dismiss for want of jurisdiction, therefore the judgment was reversed and the case remanded.[81]

In *Dowling*, the appeals court was presented with an opportunity to reverse years of judicial hostility toward forum selection clauses. Surprisingly, the trial court chose to enforce the clause, but left itself open for reversal by granting the motion on the ground of want of jurisdiction. Unfortunately, even if the trial court had granted the motion to dismiss solely on the forum provision, the appeals court stated that the dismissal would still have been in error.[82] As this case shows, it appeared that the courts were not yet ready to turn away from its longstanding precedent.

One year after the *Dowling* decision, however, the Dallas Court of Appeals took the first step in enforcing forum selection clauses in Texas.[83] In *Monesson v. National Equipment Rental, Ltd.* a New York corporation had obtained a judgment in a New York court against Monesson, a Texas resident, for default as guarantor of a lease.[84] The lease agreement contained a forum selection provision which stated that "any and all actions or proceedings arising directly or indirectly from this guarantee shall be litigated in courts having a situs within the State of New York."[85] Monesson did not answer the action and failed to appear, so a default judgment was issued against her.[86] National Equipment then sought to have the judgment enforced in Texas. Monesson argued in the 134th District Court in Dallas County that the judgment should not be enforced because the New York court lacked personal jurisdiction over her. The district court disagreed, extended full faith and credit to the New York court's judgment, and granted National Equipment's motion for summary judgment.[87]

Monesson appealed the summary judgment to the Dallas Court of Appeals.[88] She claimed that the forum selection clause was invalid on the ground that it was unconscionable, and apart from the clause, there were insufficient minimum contacts for the

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81. *See id.*

82. *See id.* at 475.

83. *See* Monesson v. Nat'l Equip. Rental, Ltd., 594 S.W.2d 780, 781 (Tex. Civ. App. —Dallas 1980, writ ref'd n.r.e.) (upholding a judgment from a New York court on grounds that the party had contractually consented consented to jurisdiction in New York).

84. *See id.* at 780.

85. *Id.*

86. *See id.* at 781.

87. *See id.*

88. *See id.*

New York court to have personal jurisdiction over her.[89] Disregarding whether Monesson had sufficient minimum contacts with the forum, the court noted that jurisdiction could be established through a party's contractual consent. In this case, Monesson's consent in the contract was undisputed, so the issue of jurisdiction turned upon whether New York courts would enforce the parties' contractual forum clause in the first place.[90] Looking to prior case law, the appeals court determined that New York courts enforce these types of clauses, therefore personal jurisdiction did in fact exist. The court then noted that it could not consider her arguments that the clause was unconscionable or unreasonable because of lack of proof and a failure to raise these arguments in her pleadings.[91] Accordingly, the appeals court affirmed the summary judgment.[92]

Monesson represents the Texas courts' first step towards upholding forum selection clauses. The case is distinguishable from later cases because it centered on enforcing a judgment from a court in a different state.[93] Whether the clause was valid depended not on what Texas law held, but whether the other state would enforce the provision.[94] Later court cases, on the other hand, failed to address this distinction, and instead relied upon *Monesson* to support what would become the general rule in Texas.[95]

In the 1990's, almost two decades after *The Bremen* ruling, the treatment of forum selection clauses in Texas courts finally reversed direction. In 1991, two cases paved the way towards enforcement. The first case, *Sarieddine v. Moussa*,[96] involved an action between two Lebanese citizens.[97] Moussa had allegedly defaulted on a stock purchase agreement and owed Sarieddine approximately $1.5 million.[98] The agreement between the two parties contained a forum selection clause stating that "[a]ny action to enforce the terms of this agreement . . . may be brought in the court of any jurisdiction in which Moussa or any of his property or assets is located."[99] At the time Sarieddine filed suit,

89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.* at 782.
93. *See id.* at 780.
94. *See supra* notes 90–92 and accompanying text.
95. *See infra* notes 141–46 and accompanying text.
96. 820 S.W.2d 837 (Tex. App.—Dallas 1991, writ denied).
97. *See id.* at 838.
98. *See id.* at 839.
99. *Id.*

Moussa was available for service in Dallas, Texas. Accordingly, he filed the recovery suit in the 14th District Court in Dallas County, relying upon the forum clause to cure any jurisdictional defects.[100] After being personally served, Moussa motioned the court to dismiss the case under the doctrine of *forum non conveniens*.[101] The trial court granted the motion and dismissed the case.[102]

Sarieddine appealed, claiming that the forum selection clause in the parties' agreement precluded Moussa from claiming *forum non conveniens*.[103] In its analysis, the Dallas Court of Appeals first cited *Monesson* for the rule that "[a] forum selection clause is a valid means of asserting personal jurisdiction over a party."[104] However, noting that there was no Texas law on point, the court turned to federal case law.[105] The appeals court adopted part of a Third Circuit holding which stated that "[a] valid selection clause can also be treated as a waiver by the moving party of its right to assert its own convenience as a factor favoring transferring the case from the agreed forum."[106] The appeals court also adopted an exception to enforcement, which stated that the courts are "not bound by the forum selection clause agreement if the interests of the witness and of the public strongly favor transferring the case to another forum."[107] According to these rules, the appeals court held that even though a forum clause confers personal jurisdiction, it does not preclude considering a motion to dismiss based on *forum non conveniens*.[108] Instead, the forum clause was only a factor in the appeals court analysis as to whether the trial court erred when it dismissed the case.[109] The appeals court then engaged in a lengthy *forum non conveniens* analysis, concluding that Moussa had failed to establish that the balance of factors favored dismissal.[110] Accordingly, the appeals court reversed and remanded.[111]

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100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *Id.* (citing Monesson v. Nat' Equip. Rental, Ltd., 594 S.W.2d 780, 781 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.)).

105. *See id.*

106. *Id.* (citing Plum Tree v. Stockment, 488 F.2d 754, 758 n.7 (3rd Cir. 1973)).

107. *Id.* (citing *Plum Tree*, 488 F.2d at 758 n.7).

108. *See id.*

109. *See id.*

110. *See id.* at 839–44 (establishing that Texas still recognizes *forum non conveniens*, then determining whether an alternative forum exists, and finally weighing public and private factors to determine whether another forum is more appropriate).

111. *See id.* at 844.

Sardienne became the first recorded case in Texas that enforced a forum selection clause after the Supreme Court's decision in *The Bremen*. The appeals court noted the lack of case law enforcing the use of forum selection clauses in Texas.[112] The court overlooked the issue of whether forum selection clauses were even valid in Texas. Instead, it used *Monesson* as authority for enforcement, and turned to federal case law to carve out exceptions.[113]

The other case that led the way towards enforcement was *Barnette v. United Research Company*.[114] In this case, Barnette had entered into two employment agreements to serve as a management consultant for United Research—the first in 1987 and the second in 1989.[115] Both agreements contained a provision whereby any disputes between the parties would be resolved in either "'the United States District Court for the District of New Jersey or the Superior Court of New Jersey.'"[116] Shortly thereafter, United Research terminated Barnette's employment.[117] Barnette ignored the forum selection clause in the agreement and filed an action in the 193rd District Court in Dallas County, alleging wrongful termination as well as other additional claims. United Research filed a general denial and a motion to dismiss based upon the forum selection provision in the employment agreement.[118] The district court granted the motion to dismiss, stating in part "'that any lawsuit brought between Plaintiff and Defendant pertaining to Plaintiff's employment by Defendant must be instituted in a state or federal court in New Jersey.'"[119]

Dissatisfied with the trial court's ruling, Barnette appealed. Relying upon prior court decisions, he argued that the forum selection clause was unenforceable for public policy reasons.[120] The Dallas Court of Appeals did not accept this argument, and stated that the cases Barnette relied on were distinguishable

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112. *See id.* at 839 (noting that other than *Monesson v. National Equipment Rental, Ltd.*, 594 S.W.2d 780, 781 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) there was no Texas authority on point, so the court looked to federal law).

113. *See supra* notes 107–09 and accompanying text.

114. 823 S.W.2d 368 (Tex. App.—Dallas 1991, writ denied).

115. *See id.* at 369.

116. *Id.* (citation omitted).

117. *See id.*

118. *See id.*.

119. *Id.* (citation omitted).

120. *See id.* (noting that Barentte relied upon *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535 (Tex. 1972); *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S.W. 630 (1919); and *Dowling v. NADW Marketing, Inc.*, 578 S.W.2d 475 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.)).

because they held it was not permissible for contracts to contain venue agreements in contravention of venue statutes, which was not an issue in the present case.[121] Barnette then tried to argue that public policy in Texas prohibited parties from entering into forum selection agreements.[122] Again the appeals court disagreed. The court turned to the *Monesson* case for support, stating that "[w]hen a party contractually consents to the jurisdiction of a particular forum, jurisdiction necessarily depends on the validity of the contract."[123] Following the framework laid out in *Monesson*, the appeals court looked to New Jersey law and noted that New Jersey would enforce the forum selection provision in the present case.[124] The appeals court then determined that the trial court had acted properly when it decided to enforce the forum selection clause.[125]

In addition to the public policy argument, Barnette claimed that the trial court erred in dismissing the case because his claims against United Research were "outside the four corners of the employment contract."[126] In regards to this claim, the appeals court noted that "'[p]leading alternate non-contractual theories is not alone enough to avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate the contract's terms.'"[127] The appeals court determined that Barnette's claims arose from the employment relationship and implicated the terms of the employment contract.[128] Accordingly, the appeals court affirmed the trial court's judgment on this point.[129]

Barnette is the first recorded case after *The Bremen* that dismissed an action brought in a Texas court on the basis of a choice-of-forum provision. In enforcing the forum selection clause, the Dallas Court of Appeals summarily adopted *Monesson's* holding without distinguishing the context in which

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121. *See id.* (noting that all three cases rested on the rationale that it is "'utterly against public policy to permit bargaining in this state about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses'") (citing *Branum*, 212 S.W. at 632 (citation omitted)).

122. *See id.* at 370.

123. *Id.* (citing *Monesson*, 594 S.W.2d at 781).

124. *See id.* (citing Air Econ. Corp. v. Aero-Flow Dynamics, Inc., 300 A.2d 856, 857 (1973) (per curiam)).

125. *See id.*

126. *Id.*

127. *Id.* (quoting Crescent Int'l, Inc. v. Avatar Cmtys, Inc., 857 F.2d 943, 944 (3d Cir. 1988)).

128. *See id.*

129. *See id.*

the rule was originally used.[130] Because of the obvious lack of Texas authority in this area, the court in *Barnette* was forced to use parts of *Monesson* to support its decision—just like *Sarieddine*.

Shortly after *Sarieddine* and *Barnette*, the First District Houston Court of Appeals refined the rule for enforcing forum selection clauses in Texas. In *Greenwood v. Tillamook Country Smoker, Inc.*,[131] the lower court dismissed a suit between an Oregon manufacturer and its distributor, Greenwood, who was a Texas resident.[132] The distributorship agreement between the two parties contained a forum clause requiring any contractual disputes to be brought in "a court of competent jurisdiction in the State of Oregon."[133] The trial court dismissed the action because it wanted to enforce the forum selection clause contained in the parties' contract.[134]

On appeal, the court agreed with Tillamook's argument that forum selection clauses do not deprive a trial court of its ability to exercise personal jurisdiction.[135] Instead of depriving a court of its jurisdiction, forum selection clauses merely provide courts with the authority to refuse to exercise personal jurisdiction over the parties.[136] Citing the *Barnette* and *Monesson* cases, the appeals court refined the general rule for enforcing forum selection clauses in Texas: "[w]hen a party contractually consents to the jurisdiction of a particular state, that state has jurisdiction over that party if the state will enforce the type of forum selection clause signed by the party."[137] Relying on *Sardienne*, the appeals court also stated an exception to the general rule: "Texas courts are . . . [not] bound by forum selection clauses if the interests of the witnesses and of the public strongly favor jurisdiction in a forum other than the one consented to in the contract."[138] After noting that the clause was valid and

130. In essence, the rule used in *Monesson* to enforce a judgment from a New York court was adopted in *Barnette* to test the validity of forum selection clauses in Texas.

131. 857 S.W.2d 654 (Tex. App.—Houston [1st Dist.] 1993, no writ).

132. *See id.* at 655–56.

133. *Id.* at 655. Additionally, Greenwood had signed a guarantee that also gave the creditor the option of limiting jurisdiction and venue of any suit in the county of Tillamook, Oregon. *See id.*

134. *See id.* at 655–56.

135. *See id.* at 656.

136. *See id.*

137. *Id.* (citing Barnette v. United Research Co., 823 S.W.2d 368, 370 (Tex. App.—Dallas 1991, writ denied); Monesson v. National Equip. Rental, 594 S.W.2d 780, 781 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.)).

138. *Id.* at 656 (citing Sarieddine v. Moussa, 820 S.W.2d 837, 839 (Tex. App.—Dallas 1991, writ denied).

enforceable in Oregon, the court held that the trial court possessed sufficient authority to weigh the evidence and decide whether to enforce the forum selection clause.[139] Because the record supported the trial court's decision not to exercise its jurisdiction in this case, the appeals court affirmed the motion to dismiss.[140]

The decision in *Greenwood* quickly became the general rule in Texas.[141] The rule can be broken down into two parts: (1) whether the parties have contractually consented to submit to the exclusive jurisdiction of another forum; and (2) whether the contracted forum would enforce the agreement.[142] The drawback to this rule is that it requires the courts to conduct an analysis of the contracted forum's law. Both threshold criteria must be met before a court can conduct any further analysis.[143]

In addition to this general rule, the courts have carved out numerous exceptions and conditions which further complicates the analysis. Texas courts are not bound by forum selection clauses if the interests of the witnesses and the public strongly favor jurisdiction in a forum other than the one consented to in the contract.[144] The exception requires a subjective analysis weighing the witnesses' and the public's interest in litigating in the non-contractual forum against the interests for litigating in the contracted forum.[145] This exception is also limited—parties to a valid forum selection clause are considered to have waived the right to assert its own convenience as a factor favoring the transfer of the case from the agreed forum.[146]

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139. *See id.* at 656–67.

140. *See id.* at 657.

141. *See,* e.g., General Res. Org. v. Deadman, 907 S.W.2d 22, 27 (Tex. App.— San Antonio 1995, writ denied) (noting the change from traditional Texas law refusing to enforce forum selection clauses to the decisions in *Greenwood* and *Barnette*, which at the time controlled).

142. *See* Southwest Intelecom, Inc. v. Hotel Networks Corp., 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, no pet. h.).

143. *Compare id.* at 326 (holding that there was no need to further analyze the forum selection clause after finding that the clause did not provide for *exclusive jurisdiction* in the contracted forum) (emphasis added), *with* Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 70–71 (Tex.App.—Dallas 1996, no writ) (deciding to enforce the forum selection clause after initially finding that: (1) the parties contractually consented to limit jurisdiction in a San Mateo or San Francisco county court; and (2) California would enforce the clause as long as the clause was not unreasonable).

144. *See, e.g.*, *Accelerated Christian*, 925 S.W.2d at 71.

145. *See id.* (weighing the witnesses' interest to keep the litigation in Texas, as well as the public's interest in Texas to remedy civil injury against its citizens, and concluding that neither were strong enough in this case to void the forum selection clause).

146. *See id.*

Another exception involves fraud and misrepresentation in the making of the contract. A forum selection clause is not enforceable in a case where a party was induced by misrepresentations to enter into the contract.[147] Where the alleged "wrongs arise from misrepresentations inducing a party to execute the contract and not from breach of the contract, the remedies and limitations specified by the contract do not apply"—this includes forum selection provisions.[148] A typical example would be an action brought under the Deceptive Trade Practices Act or common law, where a party alleges that fraud or deceptive practices had been used to induce them into signing the agreement.[149]

A carryover remaining from the Pre-*Monesson* years is that parties are still prohibited from contracting in contravention of specific Texas venue statutes.[150] However, this exception is also limited in that it does not apply if the contracted forum is a foreign forum.[151] Where the case involves moving the suit out of state rather than transferring it to another county, then the exception is irrelevant because the specific venue statutes do not apply.[152]

Other conditions have been created through contract interpretation. Valid forum selection clauses govern all "transaction participants," regardless of whether the participants were actual signatories to the contract.[153] Like any other type of

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147. *See Southwest Intelecom*, 997 S.W.2d at 324 (noting that "Texas courts will not apply forum selection clauses to tort actions alleging fraud in the inducement"); Busse v. Pacific Cattle Feeding Fund #1, Ltd., 896 S.W.2d 807, 813 (Tex. App.—Texarkana 1994, writ denied) (stating that a forum selection clause "does not apply to a tort action alleging that the plaintiff was induced by misrepresentations to enter into the contract, where construction of the rights and liabilities of the parties under the contract is not involved"); Pozero v. Alfa Travel, Inc., 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ) (holding that forum selection clauses do not apply in actions brought under the Deceptive Trade Practices Act which allege misrepresentations in the making of the contract and do not attempt to enforce or challenge rights under the contract).

148. *Busse*, 896 S.W.2d at 813.

149. *See id.*

150. *See* Leonard v. Paxson, 654 S.W.2d 440, 441 (Tex. 1983) (holding in a suit affecting a parent/child relationship that the fixing of venue by contract is invalid because the Family Code removed such suits from the general venue statute and the fixing of venue by contract is only permissible if allowed under the general venue statute).

151. Foreign forum is defined in this instance as a forum located outside the State and is not limited to forums located in other countries. *See* BLACK'S LAW DICTIONARY 358 (7th ed. 1999) (defining a foreign court as "the court of a foreign nation" as well as "the court of another state").

152. *See* Accelerated Christian Education, Inc. v. Oracle Corp., 925 S.W.2d 66, 73 (Tex. App.—Dallas 1996, no writ) (holding that *Leonard* does not control in cases where the case involves moving the suit out-of-state).

153. *See id.* at 75.

contract right, a forum selection clause can be waived by the parties.[154] Furthermore, pleading alternate noncontractual theories will not alone avoid a forum selection clause if the alternate claims arise out of the contractual relations and implicate the contract's terms.[155]

In enforcing forum selection clauses in Texas, it should be noted that most of the courts have consistently declined to apply any of *The Bremen* standards, and instead have relied upon *Monesson*, *Barnette*, and *Greenwood* for authority.[156] In this manner, Texas courts have been able to develop distinct guidelines to govern the validity and application of forum selection clauses.

IV. CURRENT STATE OF AFFAIRS IN TEXAS CASE LAW

A. *A Split Among the Texas Courts—Greenwood or The Bremen?*

As shown above, the guidelines pieced together in *Greenwood* were relied upon and expanded throughout the 1990's.[157] In 1999, however, the First District Houston Court of Appeals delivered two opinions that have left practitioners questioning which rules the courts will use when dealing with forum selection clauses in the future.

The first case, *Abacan Technical Services v. Global Marine International Services Corp.*,[158] involved a settlement dispute

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154. *See, e.g.*, Dart v. Balaam, 953 S.W.2d 478, 482 (Tex. App.—Fort Worth 1997, no writ) (citing Purvis Oil Corp. v. Hillin, 890 S.W.2d 931, 937 (Tex. App.—El Paso 1994, no writ)). The Purvis court stated that "any contractual right can be waived" so long as "there [is] proof of an intent to relinquish [such] right." *Purvis Oil Corp.*, 890 S.W.2d at 937.

155. *See Accelerated Christian*, 925 S.W.2d at 72 (noting that the forum selection clause was not invalid although the petition asserted causes of action for breach of contract, negligent misrepresentation, violations of the DTPA, fraud, and gross negligence); Barnette v. United Research Co., 823 S.W.2d 368, 369–70 (Tex. App.—Dallas 1991, writ denied) (enforcing the forum selection clause despite Barnette's allegations of wrongful termination, unlawful age discrimination, intentional infliction of severe emotional distress, fraudulent inducement to accept employment, and detrimental reliance).

156. *See, e.g.*, *Southwest Intelecom*, 997 S.W.2d at 324 (citing *Greenwood* in its analysis); *Accelerated Christian*, 925 S.W.2d at 70–71, 73 (citing *The Bremen*, but using *Greenwood* and *Barnette* in its analysis); *Busse*, 896 S.W.2d at 812–13 (following *Greenwood*); *see also infra*, Part IV.A. (discussing the shift in the First District Houston Court of Appeals applying *The Bremen* instead of using *Greenwood*).

157. *See supra* notes 141–52 and accompanying text (stating the general rule and main exception to enforcing forum selection clauses and listing additional exceptions that the courts have applied to their forum selection clause analysis).

158. 994 S.W.2d 839 (Tex. App.— Houston [1st Dist.] 1999, no pet.).

between two nonresident corporations.[159] Both parties had been organized under Bahamian law and had offices located in Houston, Texas.[160] Abacan had entered into a contract to lease an offshore drilling rig from Global Marine.[161] Abacan later defaulted on the payments, and the parties entered into a settlement agreement requiring Abacan to make payments totaling over $2 million.[162] In the case of another default, the settlement agreement contained a clause which provided that Global Marine was entitled to bring an action in either a Texas state court or in the U.S. District Court in Houston, Texas.[163]

Abacan again defaulted, and Global Marine filed suit in the 125th District Court in Harris County.[164] Abacan requested a special appearance to contest jurisdiction, "interject[ing] traditional due-process challenges to [the] exercise of long-arm jurisdiction over a nonresident" but virtually ignoring the forum selection clause.[165] After reviewing the documents and the forum selection agreement, the trial court denied Abacan's special appearance. Abacan then requested an interlocutory appeal, arguing that the trial court erred in denying the special appearance because the forum selection clause was unreasonable as a matter of law.[166]

In reviewing the validity of the forum selection clause, the First District Houston Court of Appeals completely disregarded *Greenwood* and its successors. In its place, the appeals court embraced the Supreme Court's factors in *The Bremen* to determine the enforceability of the settlement agreement's forum clause.[167] The court stated that unless Abacan could defeat the forum selection clause by demonstrating one or more of *The Bremen* factors, then enforcing the clause would not violate due process.[168] Upon review, the appeals court held that Abacan failed to meet this heavy burden, and affirmed the trial court's order denying the special appearance.[169]

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159. *See id.* at 840.

160. *See id.* at 840–41.

161. *See id.* at 841.

162. *See id.*

163. *See id.* at 841–42.

164. *See id.*

165. *Id.* at 842.

166. *See id.* at 842–43.

167. *See id.* at 844–45 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), and listing the factors that would prevent enforcement of a forum-selection clause). For a discussion of *The Bremen* factors and exceptions, *see supra* notes 50–59 and accompanying text.

168. *See Abacan,* 994 S.W.2d at 844–45.

169. *See id.*

The First District Houston Court of Appeals' analysis in *Abacan* is surprising, considering that it was the same court that had delivered the opinion in *Greenwood* six years earlier.[170] One possible explanation for the court's embrace of *The Bremen* factors lies in the facts of the case. Both *Abacan* and *The Bremen* were cases involving admiralty, and both involved international agreements.[171] The appeals court may have decided to relegate *Greenwood* to domestic cases, and use *The Bremen* when confronted with international cases.

An answer to this question possibly lies in a subsequent unpublished opinion that the First District Houston Court of Appeals delivered seven months later in *General Mortgage Acceptance Corp. v. Inter-Tel Leasing, Inc.*[172] This case involved a lease dispute between Inter-Tel, a lease finance company operating out of Texas, and GMAC, a California corporation.[173] Inter-Tel had filed suit to recover money damages from GMAC in the 11th District Court of Harris County pursuant to the parties' lease provision which required all disputes to be resolved in Harris County.[174] Similar to Abacan, GMAC requested a special appearance to object to the court's jurisdiction on grounds that it was a violation of federal and state due process requirements.[175] The trial court denied the special appearance, and GMAC subsequently filed an interlocutory appeal.[176] On appeal, the court again resorted to using *The Bremen* factors in its analysis.[177] After determining that none of the factors were met,[178] the appeals court affirmed the trial court's decision.[179]

The *Inter-Tel* decision reveals that there has been a definite change in the case law relied upon to judge the validity of forum

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170. *See* Greenwood v. Tillamook Country Smoker, Inc., 857 S.W.2d 654 (Tex. App.—Houston [1st Dist.] 1993, no writ).

171. *See Abacan*, 994 S.W.2d at 840–41; *see also The Bremen*, 407 U.S. at 2.

172. *See* No. 01-99-00809-CV, 1999 WL 1240936 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.) (not recommended for publication).

173. *See id.* at *1.

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.* (stating that "[i]n general, a court will find it unreasonable to enforce a forum-selection clause that is 1) the product of fraud or overreaching, 2) violates public policy, or 3) effectively deprives a party of his day in court").

178. *See id.* (finding that it was reasonable to hold the parties to the forum selection provisions in the lease, due to the facts of the case). The appeals court stated that the forum selection provisions were included in the lease in capital letters; GMAC had not shown that defending the claims in Texas would be so inconvenient as to deprive GMAC of its day in court; and there was nothing to suggest that the clause was fundamentally unfair or obtained in bad faith. *See id.* at *1–*2.

179. *See id.* at *2.

selection clauses in Texas. *Inter-Tel* involved a domestic forum selection clause between two domestic entities,[180] a fact scenario where *Greenwood* had historically been employed. Although the case has not yet been designated for publication, and the opinion cannot be cited as authority, it appears that the First District Houston Court of Appeals has decided to ignore *Greenwood* and use *The Bremen* factors when analyzing later forum selection clause cases.

B. *A Comparison Between the Two Rules*

The First District's apparent decision to adopt *The Bremen* begs the question whether other Texas courts will follow suit or continue to rely upon *Greenwood* and its successors. This is a crucial question because a court's decision to enforce or invalidate a forum selection clause can be significantly affected by the analysis it applies. Although there are some similarities between the U.S. Supreme Court's analysis in *The Bremen* and the Texas general rule, applying one instead of the other may produce opposite results on the same facts.

For example, most of *The Bremen* exceptions have been incorporated into the Texas rule.[181] However, the most important exception is missing—whether enforcement would be unreasonable or unjust.[182] By not including this exception among the others, the Texas rule severely limits a complaining party's ability to argue that the clause should not be enforced. In essence, the complaining party's ability to argue that

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180. *See id.* at *1.

181. *The Bremen's* second exception is whether the clause was the result of fraud or overreaching. *See supra* note 56 and accompanying text. The exception to the Texas rule is whether a party was induced by fraud or misrepresentation to enter into the agreement. *See supra* notes 147–49 and accompanying text. There is really no substantive difference between these two exceptions.

The third and fourth *Bremen* exceptions are: whether enforcement would contravene a strong public policy of the forum as declared by statute or judicial decision, and if the forum was so inconvenient that the party would be "deprived of his day in court." *See supra* notes 57–58 and accompanying text. In Texas, the courts are not bound to enforce a clause if the interests of the witnesses and of the public strongly favor jurisdiction in the non-contracted forum. *See Greenwood*, 857 S.W.2d at 656–67. Furthermore, parties are prohibited from contracting in contravention of specific Texas venue statutes, so the only gap is that this exception is limited to *specific venue statutes* and does not reach all statutory law. *See* Leonard v. Paxson, 654 S.W.2d 440, 441 (Tex. 1983) (emphasis added). However, if enforcement in Texas would contravene some other Texas statute or case law, then the court would have more than adequate grounds for looking to the other exception to hold that the interests of the public strongly favor voiding the clause. Likewise if enforcement would result in depriving the party of his day in court. Similar to the above paragraph, there is really no substantive difference in these exceptions either.

182. *See The Bremen*, 407 U.S. at 15.

enforcement would be fundamentally unfair is restricted to the scope of the other exceptions.

A second disadvantage of the Texas rule is that it preconditions enforcement of the clause, which essentially places the initial burden of proof on the party seeking enforcement.[183] Under the Texas rule, the courts will not consider a forum selection clause to be valid unless it determines that both parties have contractually consented to the exclusive jurisdiction of another forum and that the contracted forum will enforce the forum selection agreement.[184] This rule effectively burdens the party seeking enforcement to provide the court with enough evidence to satisfy the threshold requirements—a result that is in direct conflict with the Supreme Court's analysis.

In *The Bremen*, the Court explicitly ruled that forum selection clauses are to be considered prima facie valid,[185] which means that the clauses are presumed valid unless disproved by evidence to the contrary.[186] There are no preconditions to enforcement. Furthermore, the burden of proof is placed on the complaining party to show why the clause should not be enforced, not on the party seeking enforcement to show that the clause is valid.[187]

Compared to the general rule followed in Texas, *The Bremen* clearly provides greater benefits. Courts applying *The Bremen* would no longer have to second-guess whether the contracted forum would enforce the clause. Likewise, the party seeking to enforce the clause would no longer have to worry about presenting the court with enough evidence to satisfy the threshold requirements. The complaining party also benefits because the exceptions articulated in *The Bremen* are not as restrictive as the exceptions to the general rule.[188]

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183. *See, e.g.*, Southwest Intelecom, Inc. v. Hotel Networks Corp., 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, no pet. h.).

184. *See id.*

185. *See The Bremen*, 407 U.S. at 10.

186. *See id.* at 15.

187. *See supra* note 51 and accompanying text.

188. As previously stated, the Texas rule does not explicitly focus on whether the forum selection clause is unreasonable or unjust when determining whether to enforce the clause. *See supra* notes 181–82 and accompanying text. This could pose significant problems for challengers trying to argue, for example, that: the clause was not freely bargained for; the contract was not entered into at arm's length; the challengers were unaware of their potential liability in the contracted forum; or the challengers were not experienced or savvy business persons. When contesting the validity of a forum selection clause under these circumstances, challengers restricted by *Greenwood* could find themselves in the unpleasant position of having to craft public policy arguments against enforcement. *See, e.g.*, *supra* notes 120–23, 126–29 and accompanying text (illustrating the unsuccessful attempts of the challenger in *Barnette* to avoid the forum selection clause

Because of the disadvantages of the Texas general rule, other Texas courts would be well advised to follow the First District's lead and adopt *The Bremen* analysis when evaluating forum selection clauses in future cases. Unfortunately, whether the other courts will follow suit or continue to rely upon *Greenwood* and its successors remains an open question. There is a strong possibility that until the Texas Supreme Court addresses this issue there will continue to be two separate and distinct rules used for enforcing forum selection clauses in Texas.

V. CHOICE-OF-LAW PROVISIONS

Forum selection agreements frequently contain a choice-of-law provision, which specifies that the law of the contractually selected forum will apply to any disputes.[189] The issue of whether a choice-of-law provision is separate and distinct from a forum selection clause is an unclear issue in Texas.[190] To complicate matters further, it appears that the Texas courts have developed separate rules for analyzing choice-of-law provisions, depending on whether there is only a choice-of-law clause, or whether a choice-of-law agreement is accompanied by a choice-of-forum agreement.[191]

The problem is that the Texas Supreme Court has addressed only one of these issues. In *DeSantis v. Wackenhut Corp.*,[192] the Texas Supreme Court was faced with determining

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by relying on alternate theories and public policy arguments).

189. *See* William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 139 (1995) (stating that forum selection clauses "[f]requently . . . operate in tandem with a choice-of-law clause, providing that the contract will be interpreted according to the substantive rules of the dominant party's own legal system").

190. *Compare* Greenwood v. Tillamook Country Smoker, Inc., 857 S.W.2d 654, 655 (Tex. App.—Houston [1st Dist.] 1993, no writ) (describing a choice-of-law provision and a choice-of-forum provision in a distributorship agreement as forum selection clauses); Hi Fashion Wigs Profit Sharing Trust v. Hamilton Invest. Trust, 579 S.W.2d 300, 301–02 (Tex. Civ. App.—Eastland 1979, no writ) (classifying a choice-of-law provision in a loan agreement as a forum selection clause) *with* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677–81 (Tex. 1990) (analyzing a choice-of-law provision in a noncompetition agreement under its own distinct set of rules); Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 73 (Tex. App.—Dallas 1996, no writ) (indicating that contracts that contain a choice-of-law clause do not necessarily contain a forum selection clause).

191. *See DeSantis*, 793 S.W.2d at 678 (holding that section 187 of the Restatement (Second) of Conflict of Laws should be used to determine the validity of a choice-of-law provision in a noncompetition agreement); *Accelerated Christian,* 925 S.W.2d at 72–73 (distinguishing between the analysis used to evaluate choice-of-law provisions that act in conjunction with a forum selection clause and provisions that only contain a choice-of-law clause); Barnette v. United Research Co., 823 S.W.2d 368, 370 (Tex. App.—Dallas 1991, writ denied) (holding that once a court determines whether the forum selection clause is enforceable, it is up to the forum court to decide which law will govern the interpretation of the contract).

192. 793 S.W.2d 670 (Tex. 1990).

the validity of a noncompetition agreement in an employee contract.[193] In addition to the covenant not to compete, the contract contained a choice-of-law clause which provided that Florida law would govern any questions regarding the contract's interpretation or enforcement.[194] There was no choice-of-forum clause in the contract.

The Texas Supreme Court began its analysis by stating that they had to first consider what law was to be applied in order to determine whether the noncompetition agreement was enforceable.[195] This case was the first instance where the court had to decide what effect should be given to contractual choice-of-law agreements. The court noted that the party autonomy rule had been recognized by the legislature with the adoption of Uniform Commercial Code:[196]

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.[197]

Notwithstanding this statutory rule, the court believed that the best rule for analyzing choice-of-law agreements was formulated in section 187 of the Restatement (Second) of Conflict of Laws.[198] Although the Restatement contained, in

193. *See id.* at 674.
194. *See id.* at 675.
195. *See id.* at 677.
196. *See id.*
197. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon Supp. 2000).
198. Section 187 states:

> Law of the State Chosen by the Parties
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
> (a) the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice, or
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the

essence, the same rule found in the Uniform Commercial Code, it expands on the conditions and limitations regarding the enforcement of choice-of-law provisions.[199]

After deciding to adopt the Restatement, the court began a lengthy analysis on whether the choice-of law clause should be enforced.[200] Modeling their analysis after the Restatement, the court stated that section 187(1) was not applicable because the enforceability of the covenant not to compete was not "'one the parties could have resolved by an explicit provision in the agreement.'"[201] Section 187(2), however, was relevant in this case and it appeared that Florida law would apply unless one of the exceptions in section 187(2) was met.[202] Looking at section 187(2)(a), the court determined that Florida did have a substantial relationship to the parties and the transaction—Wackenhut's corporate offices were located in Florida and part of the negotiations occurred there.[203] This left the exceptions listed in section 187(2)(b).

Under section 187(2)(b), the court stated that it had to make three determinations: (1) whether a noncontracted state had a more significant relationship with the parties and the transaction than the state that was chosen;[204] (2) whether that state has a materially greater interest than the chosen state in deciding whether the contract should be enforced;[205] and (3) whether that state's fundamental policy would be contravened by the application of the law of the chosen state.[206] After

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applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1969) (quoted in *DeSantis*, 793 S.W.2d at 677–78).

199. *See DeSantis*, 793 S.W.2d at 677–78.

200. *See id.* at 678–84.

201. *Id.* at 678 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1969)).

202. *See id.*

203. *See id.*

204. *See id.* at 678. The Court had to determine whether Texas had a more significant relationship with the parties and the transaction than Florida. *See id.* at 678–79. The court created this factor from section 188, referenced in section 187(2)(b). *See id.* at 678. Section 188 provides that a contract is to be governed by the law of the state that "'has the most significant relationship to the transaction of the parties', taking into account various contacts in light of the basic conflict of laws principles of section 6 of the Restatement." *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969)).

205. *See id.* The court had to determine whether Texas had a materially greater interest than Florida in deciding the enforceability of the covenant not to compete. *See id.* at 678–79.

206. *See id.* at 678. The court had to determine whether the application of Florida

reviewing the facts of the case, the court decided that the choice-of-law provision in the employment agreement was unenforceable,[207] and that the case must be decided under Texas law.[208]

Although the Texas Supreme Court declined to enforce the choice-of-law provision in this case, they did provide an extensive critique of how choice-of-law provisions should be analyzed in Texas. Instead of analyzing these clauses as a forum selection clause, they are to be decided by applying section 187 of the Restatement (Second) of Conflict of Laws.[209] Subsequent court cases dealing solely with choice-of-law agreements have followed the *DeSantis* analysis.[210]

The *DeSantis* analysis, however, does not apply when a choice-of-law provision is accompanied by a choice-of-forum provision. The *Barnette v. United Research Co.*[211] decision, previously discussed in Part IV,[212] was delivered after the Texas Supreme Court's decision in *DeSantis*.[213] *Barnette* is similar to *DeSantis* in that it involved an employment contract containing a choice-of-law provision.[214] The difference between the two cases is that the contract in *Barnette* also contained a choice-of-forum provision.[215] The employment contract provided that any disputes would be settled in a court located in New Jersey and under New Jersey law.[216]

The appeals court in *Barnette* never relied upon *DeSantis* in its analysis. Instead, the court considered both provisions to be part of the contract's forum selection clause, and relied

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law would be contrary to the fundamental policy of Texas. *See id.* at 679–81.

207. *See id.* at 681. The court found that Texas had a more significant relationship to the transaction and the parties than Florida. *See id.* at 679. Texas also had a materially greater interest in determining whether the noncompetition agreement was enforceable. *See id.* Finally, the Court concluded that the law governing the enforcement of covenants not to compete was fundamental policy in Texas, and that to apply the laws of Florida in this case would be contrary to that policy. *See id.* at 681.

208. *See id.*

209. *See id.* at 677–78.

210. *See, e.g.*, Lemmon v. United Waste Systems, Inc., 958 S.W.2d 493, 498–99 (Tex. App.—Fort Worth 1997, pet. denied) (applying section 187 and enforcing the choice of law provision); Salazar v. Coastal Corp., 928 S.W.2d 162, 166–67 (Tex. App.—Houston [14th Dist.] 1996, no writ) (same); Chase Manhattan Bank v. Greenbriar North Section II, 835 S.W.2d 720, 723 (Tex. App.—Houston [1st Dist.] 1992, no writ) (same).

211. 833 S.W.2d 368 (Tex. App.—Dallas 1991, writ denied).

212. *See supra* notes 114–29 and accompanying text.

213. *See DeSantis*, 793 S.W.2d at 670.

214. *See Barnette*, 823 S.W.2d at 369.

215. *See id.*

216. *See id.*

upon *Monesson v. National Equipment Rental*[217] to validate the clause.[218] After the forum clause was upheld, the appeals court stated that it was up to the New Jersey courts, and not the Texas court, to determine which law would govern the interpretation of the contract.[219] Thus, the first issue was whether the forum selection clause was valid, and if so, then it was up to the contracted forum to engage in a choice-of-law analysis to determine which law should apply.[220]

A similar holding was made in *Accelerated Christian Education, Inc. v. Oracle Corp.*[221] The dispute in that case concerned the validity of a forum selection clause in separate licensing and support agreements.[222] The forum selection clause contained both a choice-of-forum and choice-of-law agreement, requiring any disputes between the parties to be brought in a state or federal court in California and governed under California law.[223] In enforcing the forum selection clause, the Dallas Court of Appeals did not engage in any choice-of-law analysis. Instead, the court engaged in a traditional forum selection clause analysis, relying upon *Barnette* and the general rule that was later refined in *Greenwood* to enforce the clause in that case.[224]

As shown by the above case law, there remain two distinct analyses for dealing with choice-of-law provisions. In the case where a contract contains only a choice-of-law provision, then a *DeSantis* analysis should be undertaken to determine the validity of the agreement.[225] On the other hand, if the contract contains both a choice-of-forum provision as well as a choice-of-law provision, then the clause will be analyzed as a typical forum selection clause, which could be conducted using either

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217. 594 S.W.2d 780 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

218. *See supra* notes 122–25 and accompanying text.

219. *See Barnette*, 823 S.W.2d at 370 (holding that because the court "found that the forum selection clause is enforceable, it is up to the New Jersey courts to rule upon which law governs the interpretation of the contract").

220. *See id.*

221. 925 S.W.2d 66, 71 (Tex. App.—Dallas 1996, no writ) (affirming the trial court's rejection of Accelerated's claim that Texas was a more proper forum than California, the forum chosen by the parties in their contract).

222. *See id.* at 69.

223. *See id.* (noting that the forum selection clause stipulated that Accelerated consented to state or federal jurisdiction in San Fransisco or San Mateo County, California, but that Oracle could "institute legal action in any appropriate jurisdiction").

224. *See id.* at 70–72.

225. *See supra* notes 192–210 and accompanying text.

the Texas General Rule, or the standards derived from *The Bremen*.[226]

VI. THE PROCEDURAL HOOPS

A. *Special Appearances*

In Texas, a special appearance is a specific procedural mechanism, and is used to litigate one issue.[227] Rule 120a of the Texas Rules of Civil Procedure provides that parties may make a special appearance "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of [Texas]."[228] This rule applies only when a defendant claims that it is not amenable to process in this state—for example, when "the Texas court cannot validly obtain jurisdiction under the federal and state constitutions and the applicable state statutes."[229]

When an action is brought in a forum other than the one provided for in the forum selection clause, the complaining party does not have to enter a special appearance to maintain the right to object to the improper forum.[230] Special appearances address jurisdiction, not contractual forum selection clauses.[231] Therefore, a special appearance is not necessary, and complainants do not waive their right to complain about the improper forum by failing to enter a special appearance to contest the court's jurisdiction based on the forum selection clause.

B. *Motions to Transfer Venue*

Motions to transfer venue are governed by the rules of civil procedure, and are mechanisms used to transfer cases between Texas counties.[232] In order for a party to preserve an objection to improper venue, the party must file a motion to transfer venue before or with any other pleading or motion.[233] The only

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226. *See supra* discussion in Part IV.

227. *See, e.g.*, Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 69 (Tex. App.—Dallas 1996, no writ).

228. TEX. R. CIV. P. 120a (Vernon 2000).

229. Abacan Technical Servs. Ltd., v. Global Marine Int'l Servs. Corp., 994 S.W.2d 839, 843 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (citations omitted).

230. *See Accerlated Christian,* 925 S.W.2d at 70 (concluding that "appellees could not waive their complaint by failing to enter a special appearance").

231. *See id.*

232. Rule 86, Motion to Transfer Venue provides in pertinent part:

> 3. Requisites of Motion. The motion, and any amendments to it, shall

exception to this rule is the motion for special appearance under Rule 120a.[234]

This is a limited rule, and Texas courts have held that they do not have the power to transfer a case to another state's court, notwithstanding the presence of a forum selection clause.[235] Accordingly, if the contracted forum is located in another state, then a motion to transfer venue will be denied.[236]

A similar result will probably be reached even if the contracted forum is located in another county. Parties who attempt to contract venue risk running afoul of the Texas exception that prevents parties from contracting venue in contravention of specific Texas venue statutes.[237] Furthermore, recent case law suggests that, under current Texas statutory law, it would be very difficult for a party to successfully contract venue to a specific Texas county.[238]

C. *Motions to Dismiss*

In cases where the contracted forum is located in another state, the courts have held that the proper mechanism to enforce

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> state that the action should be transferred to another specified county of proper venue because:
>
> (a) The county where the action is pending is not a proper county; or
>
> (b) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated.
>
> The motion shall state the legal and factual basis for the transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87.

TEX. R. CIV. P. 86 (Vernon 2000).

233. *See, e.g.*, *Accelerated Christian*, 925 S.W.2d at 70.

234. *See id.*

235. *See id.* (noting that the law is contrary to the proposition that a Texas state court has the power to transfer a case to another state's court).

236. *See id.*

237. *See supra* note 150 and accompanying text.

238. *See, e.g.*, Wallpapers To Go, Inc. v. Brennan, 1999 WL 771286 (Tex. App.—Hous. [14th Dist.] 1999, no pet h.) (not designated for publication). This unpublished opinion states that "rule 86 applies to those cases in which a defendant claims, based on the venue chapter, Chapter 15 of the Civil Practice and Remedies Code, that it should be sued in a county other than the one chosen by the plaintiff." *Id.* Furthermore, "[t]he provisions of Chapter 15 are based on legislative decisions regarding where Texas will require or allow a defendant to respond to suit . . . [and contain] a number of legislatively mandated forum selection clauses," but there are no provisions governing contractual forum selection clauses. *Id.* Therefore, because of the reach of Chapter 15, it is unlikely that a complaining party will be able to move for a transfer of venue based on a contracted forum clause.

the forum selection clause is a motion to dismiss.[239] A motion to dismiss is a request that the complaint be dismissed because it is legally insufficient.[240] Therefore, in cases where an action is brought in a Texas court and the contracted court is located in another state, the complaining party should file a motion to dismiss on the ground that the contract's forum selection clause precluded the other party from filing suit in the noncontracted forum. Furthermore, the motion must appear in a proper form, which is usually determined by local court rules.[241]

VII. FORUM SELECTION CLAUSES IN PASSENGER FORM CONTRACTS

The final portion of this article addresses the U.S. Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*,[242] and the subsequent Texas cruise line cases. In *Carnival Cruise*, the Shutes brought a damages suit against the cruise line for injuries that Mrs. Shute suffered when she slipped on a deck mat.[243] The Shutes filed the action in a Washington federal district court, in contravention to the forum selection clause that was located on the back of her passenger ticket.[244] The clause specified that any disputes shall be litigated in a court located in the State of Florida, to the exclusion of the courts of any other state or country.[245] Carnival Cruise moved for summary judgement, contending that the forum selection clause required the Shutes to bring their action in a court located in Florida.[246] The district court granted the motion, but was reversed by the Ninth Circuit.[247]

The Supreme Court granted certiorari to address the question of whether the forum selection clause should be enforced.[248] The Court determined that the enforceability of the clause depended on three issues: (1) whether the Shutes had notice of the clause;[249] (2) whether the clause satisfied *The*

239. *See, e.g.*, *Accelerated Christian*, 925 S.W.2d at 70.

240. *See* BLACK'S LAW DICTIONARY 1034 (7th ed. 1999).

241. *See, e.g.*, RULE 3.3.1, LOCAL RULES OF THE HARRIS COUNTY CIVIL COURTS AT LAW, *available at* http://www.co.harris.tx.us/cclerk/local.html.

242. 499 U.S. 585 (1991).

243. *See id.* at 588.

244. *See id.*

245. *See id.* at 587–88.

246. *See id.* at 588.

247. *See id.*

248. *See id.* at 589.

249. *See id.* at 590.

Bremen standards;[250] and (3) whether "the forum-selection clause at issue violate[d] [the Limitation of Vessel Owner's Liability Act,] 46 U.S.C.App. § 183c."[251] The Court quickly disposed of the first issue, noting that the Shutes had essentially conceded this point in their brief.[252] The Court then turned to *The Bremen* standards. The majority rejected the idea that *The Bremen* applied only in cases dealing with sophisticated parties and where the contract terms are the subject of actual negotiation.[253] The majority reasoned that limiting *The Bremen* in this manner would exclude routine business transactions that occurred frequently and were not the subject of actual negotiation.[254] Furthermore, the Court stated that "[c]ommon sense" dictated that the terms in this kind of contract would not be subject to negotiation, nor would the individual purchasing the ticket have equal bargaining power with the cruise line.[255] Therefore, the majority decided that *The Bremen* analysis needed to be refined to account for the realities of form contracts in routine commerce.[256]

In evaluating whether the forum clause satisfied *The Bremen's* reasonableness requirement, the Court focused on three factors: (1) the cruise line's "special interest in limiting the fora in which it potentially could be subject to suit;"[257] (2) the "salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions . . . and conserving judicial resources that otherwise would be devoted to deciding these motions;"[258] and (3) the consumer's benefit by limiting litigation to one forum, which would be realized in the form of reduced fares.[259] After reviewing these factors, the Court concluded that the clause was reasonable[260] and shifted its analysis to the other exceptions from *The Bremen*.

In reviewing the inconvenience exception, the majority refuted the argument that the clause was unenforceable because

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250. *See id.* at 591–92. *The Bremen* standards were established in *Bremen v Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *see also supra* Part II.

251. *See Carnival Cruise,* 499 U.S. at 595.

252. *See id.* at 590.

253. *See id.* at 592.

254. *See id.* at 593.

255. *Id.*

256. *See id.*

257. *Id.*

258. *Id.* at 593–94.

259. *See id.* at 594.

260. *See id.* at 594–95.

the Shutes claimed they were physically and financially incapable of litigating the case in Florida.[261] The Court noted that the accident had occurred in international waters, and Florida was not a "'remote alien forum.'"[262] Under these circumstances, the Court held that the Shutes' "heavy burden of proof" for showing inconvenience had not been met.[263]

The Court then decided to modify *The Bremen's* fraud or overreaching exception. In a move to expand the reach of the exception, the Court stated that "forum-selection clauses in form passage contracts are subject to judicial scrutiny for fundamental fairness."[264] The Court then looked for a bad-faith motive for inserting the forum-selection clause in the form contract.[265] After reviewing the evidence in the case, the Court stated that there was no evidence to suggest that the clause did not pass judicial scrutiny.[266]

The final issue, whether there was a statutory conflict, can be considered the court's analysis of *The Bremen's* public policy exception.[267] The Shutes contended that the forum selection clause violated the anti-waiver provisions of The Limitation of Vessel Owner's Liability Act.[268] After analyzing the Act's statutory language, the Court determined that the provisions in the Act prohibited only formal limitations on access to a "court of competent jurisdiction."[269] In this case, the forum selection clause merely limited the dispute to a court in Florida—*it did not prohibit suit in all courts*.[270] Furthermore, the clause did not act to limit Carnival's liability for negligence.[271] Because none of *The Bremen*

261. *See id.* at 594.

262. *See id.* (quoting *The Bremen*, 407 U.S. at 17).

263. *See id.* at 594–95.

264. *Id.* at 595.

265. *See id.*

266. *See id.* The majority noted that: (1) Petitioner's principal place of business is in Florida; (2) the cruise ships depart and return to Florida; (3) there was no indication that the selected forum had been chosen to discourage purchasers from pursuing claims; (4) there was no evidence of fraud or overreaching; and (5) there was adequate notice of the clause. *See id.*

267. *See id.* (addressing the public policy issue as stated in the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. Section 183(c) (1936)).

268. *See id.* at 595.

269. *See id.* at 596.

270. *See id.* (stating that "the forum-selection clause before us does not take away respondent's right to 'a trial by [a] court of competent jurisdiction' . . . [i]nstead, the clause states specifically that actions arising out of the passage contract shall be brought 'if at all,' in a court 'located in the state of Florida' . . .").

271. *See id.* at 597.

exceptions had been met, the Court enforced the forum selection clause.[272]

The *Carnival Cruise* case received a lot of attention, and many commentators were surprised and disappointed by the Court's decision.[273] Observers believed that the Court would waste little time in voiding what was essentially an adhesive consumer contract provision.[274] There was a growing concern that adhesion contracts, which had traditionally been looked upon with disfavor, would now be enforced out of hand.[275] In any event, the Court's ruling seemed to put an end to the question whether forum selection clauses in cruise line tickets should be enforceable. Not all Texas courts, however, have been as willing as the Supreme Court to enforce these types of forum selection clauses.

Pozero v. Alfa Travel, Inc.[276] is one of the two cruise line cases that have been published in Texas. In *Pozero*, the plaintiffs ("Pozeros") had purchased Hawaii cruise tickets from Alfa Travel, as well as cancellation insurance that they presumed entitled them to a full refund in the event they had to cancel their trip.[277] The tickets that were mailed to the Pozeros contained a forum selection clause stating that any lawsuit arising from the contract must be brought before a court located in San Francisco, California.[278] Three days before departure, the Pozeros cancelled their trip and requested a refund under the cancellation

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272. *See id.*

273. *See, e.g.*, Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 Nw. U. L. REV. 700, 741 (1992) (concluding that "neither normative judgments about consumers' responsibility for their conduct nor enlightened economic reasoning" can support the Supreme Court's decision in *Carnival Cruise*); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 339 (1992) (noting that the Supreme Court's opinion in *Carnival Cruise* caught many observers "off-guard"); Julie Hofherr Bruch, Comment, *Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum*, 23 LOY. U. CHI. L.J. 329, 353–54 (1992) (criticizing the *Carnival Cruise* decision for placing business efficiency above any concerns the courts should have for consumer protection); John McKinley Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888, 903 (1992) (arguing that the Court should have scrutinized the clause under a stricter adhesion analysis); Jeffrey A. Liesemer, Note, *Carnival's Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine after Carnival Cruise Lines, Inc. v. Shute*, 53 U. PITT. L. REV. 1025, 1045–49 (1992) (arguing that the forum clause in *Carnival Cruise* was substantively unconscionable).

274. *See* Goldman, *supra* note 273, at 707; Mullenix, *supra* note 273, at 354.

275. *See* Goldman, *supra* note 273, at 707, 711; Mullenix, *supra* note 273, at 356–58; Kirby, *supra* note 273, at 902–03, 914–15.

276. 856 S.W.2d 243 (Tex. App.—San Antonio 1993, no writ).

277. *See id.* at 244.

278. *See id.*

insurance policy. The refund was denied on grounds that the Pozeros had failed to notify Alfa Travel at least four business days prior to departure.[279]

Instead of filing the action in California, the Pozeros filed suit in the Bexar County Court at Law No. 2 in San Antonio.[280] The Pozeros claimed violations of the DTPA and unconscionability.[281] The trial court summarily dismissed the action on the grounds of lack of jurisdiction and improper venue.[282]

On appeal, the Pozeros argued that the forum selection clause was not applicable because they were suing on account of misrepresentations made by the local travel agent when they procured the cancellation insurance, and not to enforce any right secured by the cruise ticket contract.[283] The San Antonio Court of Appeals agreed, finding that the Pozeros did not mention the ticket contract in their pleading, nor did they attempt to enforce or challenge any rights stemming from the contract.[284] The appeals court disregarded *Carnival Cruise* because the action was based on alleged misrepresentations inducing the Pozeros to enter the contract, which did not involve any rights and liabilities arising out of the contract itself.[285] Furthermore, because the claim was based on a cause of action solely derived from a Texas statute, they should be entitled to have that cause of action litigated in a Texas court.[286] The appeals court accordingly reversed and remanded the case for trial.[287]

The second published opinion is *Stobaugh v. Norwegian Cruise Line Ltd.*[288] In *Stobaugh*, the plaintiffs purchased a seven-day cruise aboard the M/S Dreamward.[289] The tickets were mailed to the plaintiffs, and contained a forum clause designating Florida as the forum for any disputes between the parties.[290] Before departure, the plaintiffs learned that there were several tropical storms in the Atlantic, as well as a possible

279. *See id.*
280. *See id.* at 243.
281. *See id.* at 244.
282. *See id.*
283. *See id.* at 245.
284. *See id.*
285. *See id.* at 244–45.
286. *See id.* at 245.
287. *See id.*
288. 5 S.W.3d 232 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)
289. *See id.* at 233.
290. *See id.* at 233–34.

hurricane.[291] The plaintiffs voiced their concerns to Norwegian Cruise, and inquired into the possibility of a refund. Norwegian informed them that a refund was not possible, and that they should proceed with the trip and trust the captain's judgment. While underway, the ship sailed into Hurricane Eduardo, which allegedly caused physical and emotional injury to the plaintiffs.[292]

Upon returning to Texas, the plaintiffs filed a class action suit against Norwegian Cruise in the 270th District Court in Harris County.[293] After engaging in stall tactics for eleven months, Norwegian filed a motion to dismiss on the ground of the forum selection clause in the ticket contract.[294] The trial court granted the motion to dismiss.[295] The plaintiffs then appealed, arguing that the forum selection clause was unenforceable because it was not properly part of the contract, and alternatively, because the clause was fundamentally unfair.[296]

In its analysis, the Fourteenth District Houston Court of Appeals reviewed the *Carnival Cruise* decision, noting that the Court's analysis included several factors for scrutinizing fundamental fairness.[297] These factors included: (1) whether the forum appeared to be selected to discourage legitimate claims; (2) whether the forum clause was obtained by fraud or overreaching; (3) whether the purchasers had adequate notice of the clause; and (4) whether the purchasers had the option of rejecting the contract after receiving notice of the clause.[298] After reviewing the record, the appeals court held that the forum selection clause in this case failed judicial scrutiny for fundamental fairness because of how and when Norwegian Cruise attempted to impose the clause[299]—i.e., the purchasers had no option to reject the tickets upon receipt without incurring a penalty. [300] The court held that such a result fails the fundamental fairness requirement described in *Carnival Cruise*, and violates Texas'

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291. *See id.* at 234.

292. *See id.*

293. *See id.*

294. *See id.* (noting that Norwegian filed the motion to dismiss one month prior to the tolling of the statute of limitations).

295. *See id.* at 233.

296. *See id.* at 234.

297. *See id.* at 235.

298. *See id.*

299. *See id.*

300. *See id.* at 236 (noting that at the time the purchasers received the ticket, and thus received notice of the forum selection clause, they would have been subject to $400 cancellation penalty because the tickets had been sent after the full refund date had passed).

public policy.[301] The court then stated that "[p]arties who intend to deprive Texas citizens of the right to use their courts by way of a forum selection clause must give notice of that intention in an effective manner, and at a time that affords an opportunity to reject such a term without penalty."[302] Because Norwegian Cruise did not provide such an opportunity, the court reversed and remanded the case for trial.[303]

The appeals court was able to reach a different result than the Supreme Court's decision in *Carnival Cruise* because, unlike the Shutes', the purchasers in *Stobaugh* were not given the option of rejecting the ticket contract without incurring monetary harm.[304] However, this result appears to be reaching. There was no evidence that the purchasers were dissatisfied with the tickets containing the forum selection clause when they received them. In fact, the opinion shows that the first time the purchasers considered asking for a refund was only a few days before the ship was scheduled to depart.[305] The Court of Appeals' decision therefore places a strict duty on the seller because it mandates that there be an opportunity for the buyer to refuse the clause without incurring any penalty.[306] According to the *Stobaugh* decision, the failure to provide this opportunity results in automatically voiding the forum selection clause on grounds of fundamental fairness and public policy, notwithstanding whether the objection is made weeks after receipt.[307]

Although both published opinions reached opposite results than the one in *Carnival Cruise*, this does not mean that all courts in Texas have refused to enforce forum selection clauses found in cruise line tickets. For example, one newspaper article has reported a case where a suit filed against Norwegian Cruise Lines has been dismissed from a Texas court on the basis of the ticket's forum selection clause.[308] Unfortunately, articles of this

301. *See id.*

302. *Id.*

303. *See id.*

304. In *Carnival Cruise*, the Supreme Court noted that the respondents had "presumably retained the option of rejecting the contract with impunity." *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

305. *See Stobaugh*, 5 S.W.3d at 234.

306. *See id.* at 236.

307. *See id.* As a side note, there was additional evidence in the opinion suggesting that the appeals court was not pleased that Norwegian waited until there was only one month left before the lawsuit would be barred to file its motion to dismiss. *See id.* at 234. The appeals court's apparent displeasure with Norwegian's conduct was probably a contributing factor in the court's strained efforts to find a way to void the forum selection clause.

308. *See* T.J. Milling, *Judge Dismisses Suit Over Norwegian Star; Class Action Must be Refiled in Florida*, HOUS. CHRON., Jan. 27, 1998, at 13, *available at* 1998 WL 3556909

type are not published opinions, so the exact number of cases voiding or enforcing these clauses is not easily ascertainable. Therefore, unless the suit involves either inducement from misrepresentation or the inability to reject the tickets upon receipt without penalty, there remains a good chance that a forum selection clause in a cruise line ticket will be enforced.

VIII. CONCLUSION

Forum selection clauses provide many benefits to contracting parties.[309] For example, forum selection clauses allow disputes to be managed more efficiently. They also make the economic result of the contracting relationship more predictable. By determining the conditions for resolving disputes up front, costly struggles at the outset of a case over jurisdiction and venue can be avoided. However, these benefits can quickly be negated if a struggle emerges over the enforceability of the clause at hand. Therefore, it is imperative that Texas practitioners understand the rules and case law governing these contract provisions.

A division in Texas has recently occurred in the rules that are used to judge the enforceability of forum selection clauses. From the published opinions that are available, it appears that the majority of courts continue to rely upon *Greenwood v. Tillamook Country Smoker, Inc.*[310] and its successors to determine the validity of forum selection clauses. The First District Houston Court of Appeals, on the other hand, has currently decided to adopt the factors laid out in *The Bremen* as its guide for determining enforceability.[311] Although *The Bremen* clearly provides greater benefits and flexibility than the Texas general rule, whether other courts will adopt it in the future remains an unanswered question.[312] Therefore, practitioners should become familiar with both sets of rules.

The treatment of choice-of-law provisions is another issue that requires careful analysis. If the contract contains only a choice-of-law provision, then the courts will examine the clause using section 187 of the Restatement (Second) of Conflict of Laws.[313] However, if the choice-of-law provision is accompanied

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(reporting that a class-action lawsuit filed against Norwegian Cruise Line was dismissed because of a forum selection clause printed on cruise tickets which required any legal action to be filed in Miami).

309. *See supra* notes 5–6, 9–10 and accompanying text.

310. 857 S.W.2d 654 (Tex. App.—Houston [1st Dist.] 1993, no writ).

311. *See supra* notes 158–71 and accompanying text.

312. *See supra* Part IV.B.

313. *See supra* notes 192–209 and accompanying text.

by a choice-of-forum provision, then the courts will examine the choice-of-forum provision first.[314] Depending on the jurisdiction, either the *Greenwood* rule or *The Bremen* factors will be used to determine the validity of the clause. If the clause is enforced, then it becomes the contracted forum's responsibility to decide whether the choice-of-law provision should be enforced.

The procedural rules regarding forum selection clauses are relatively straightforward.[315] If an action has been started in a Texas court in contradiction to a forum selection clause, then the objecting party does not have to enter a special appearance to maintain the right to object to the improper forum. If the contracted forum is located in another state or country, then a motion to transfer venue is inappropriate. In this case, a motion to dismiss is the proper method to use. On the other hand, if the contracted forum is located within another county, then a motion to transfer venue has to be made.[316] However, the party has to be careful that the forum selection clause does not contravene a specific venue statute, or the courts will deny the motion.

Finally, if the forum selection clause is in a contract similar to those contained in form passage contracts, then a slightly different analysis will be used. In these situations, the courts have looked to the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*.[317] Although the rules regarding these clauses place a heavy burden on the opposing party, the courts are not averse to rejecting the provisions. Therefore, the contracting party has to be careful to avoid making any misrepresentations during the contracting process. Also, the contracting party has to ensure that the other party has an opportunity to reject the clause without incurring a penalty, or risk having the clause voided. Whether Texas courts will use *Carnival Cruise* to evaluate forum selection clauses in other types of adhesion contracts remains to be seen, but practitioners should not discount the possibility.

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314. *See supra* notes 225–26 and accompanying text.
315. *See supra* Part VI.
316. *See supra* Part VI.B.
317. 499 U.S. 585 (1991). *See supra* Part VIII.