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Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in *Carnival Cruise Lines v. Shute*

During this century American courts increasingly have enforced forum selection clauses¹ in contracts.² Although traditionally rejected as ousting courts of their jurisdiction, forum selection clauses gained acceptance through an effort by courts to maintain parties' expectations.³ Nearly all cases upholding the clauses deal with commercial contracts between business entities.⁴ Recently, however, the United States Supreme Court examined the validity of such a provision on a cruise ticket that, if enforced, would bind the passenger to litigate more than 2500 miles from her home state.

In *Carnival Cruise Lines, Inc. v. Shute*⁵ the Court, sitting in admiralty,⁶ extended the acceptance of forum clauses to include such a clause on a cruise ticket. The majority held that enforcing forum selection clauses is consonant with previous holdings and that such clauses promote judicial and social economy,⁷ while two dissenting justices found

1. Forum selection clauses, also known as choice of forum clauses or forum clauses, are provisions in contracts which mandate that all suits arising under the contract be filed in a designated forum. See, e.g., Howard W. Schreiber, *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, 463 n.3 (1988).

2. See ALBERT A. EHRENZWEIG, CONFLICT OF LAWS § 41(a) (1959); James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 7-19 (1976); Ralph C. Oser, Recent Decision, 6 VAND. J. TRANSNAT'L L. 309, 311-12 (1972).

3. See, e.g., Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344-45 (3d Cir. 1966) ("[Forum selection clauses] should be respected as the responsible expression of the intention of the parties"); Hernandez v. Koninklijke Nederlandsche Stoomboot Maatschappij N.V., 252 F. Supp. 652, 654 (S.D.N.Y. 1965) ("[R]ecent case law clearly indicates that [forum selection clauses are] enforceable if reasonable."); Gilbert, *supra* note 2, at 16-19 (noting the trend toward judicial acceptance of forum selection clauses).

4. See, e.g., Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1288-89 (7th Cir. 1989) (lease of dairy equipment); Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 510-11 (9th Cir. 1988) (contract for international perfume dealership); Luce v. Edelstein, 802 F.2d 49, 51-52 (2d Cir. 1986) (sale of limited partnerships); Sun World Lines v. March Shipping Corp., 801 F.2d 1066, 1066 (8th Cir. 1986) (contract for cruise ship charter); Bryant Elec. Co. v. City of Fredricksburg, 762 F.2d 1192, 1192-93 (4th Cir. 1985) (governmental contract for construction of aqueduct).

5. 111 S. Ct. 1522 (1991).

6. The claim arose at sea and therefore is governed by admiralty law, which falls within the jurisdiction of the federal courts. See CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3671 (1985) (discussing scope of admiralty jurisdiction). The federal statute conferring admiralty jurisdiction on the federal courts reads: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (1988).

7. See *infra* notes 25-43 and accompanying text.

the clause unfair.⁸ This Note agrees with the dissenters, arguing that previous cases upholding forum selection clauses are distinguished from *Shute* in that they involved commercial contracts, typically between business entities.⁹ The application of such precedent in the consumer context of cruise contracts is thus suspect. Instead, this Note concludes, facts such as those posed in *Shute* require analysis under traditional contractual and constitutional principles governing the enforceability of forum selection clauses.¹⁰ Such an analysis reveals that by neglecting contract law dealing with adhesion and ignoring principles of due process, the *Shute* Court abandoned the consumer's rights in an age of form contracts and in a legal system that prefers the efficiency of justice rather than its equity.¹¹

Eulala Shute and her husband Russel, citizens of the State of Washington, purchased cruise tickets through a Washington travel agent.¹² The agent forwarded the Shutes' payment to Carnival Cruise Line's (Carnival) headquarters in Miami, Florida.¹³ Carnival then sent the Shutes their tickets, which contained a forum selection clause requiring that all suits relating to the cruise be litigated in Florida.¹⁴ The Shutes conceded notice of the forum selection clause.¹⁵ The Shutes boarded a Carnival ship in Los Angeles, sailed to Mexico, and returned to Los Angeles.¹⁶ While in international waters off Mexico, Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley.¹⁷

Mrs. Shute filed a negligence suit against Carnival in the United

8. Justice Stevens wrote a dissent in which Justice Marshall joined. *Shute*, 111 S. Ct. at 1529 (Stevens, J., dissenting); see *infra* notes 44-54 and accompanying text.

9. See *infra* notes 59-100 and accompanying text.

10. See *infra* notes 107-75 and accompanying text.

11. See *infra* notes 176-98 and accompanying text.

12. *Shute*, 111 S. Ct. at 1524.

13. *Id.*

14. *Id.* The clause read:

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

Id. (quoting from the contract, which Justice Stevens appended to the end of his dissenting opinion).

15. *Id.* at 1525. It is not clear whether the Shutes actually read the clause. If the Shutes had denied notice, the Court would have had to determine if the clause was reasonably noticeable. See *infra* note 196 and accompanying text.

16. *Shute*, 111 S. Ct. at 1524.

17. *Id.*

States District Court for the Western District of Washington.¹⁸ The basis for jurisdiction was admiralty.¹⁹ Carnival moved to dismiss for lack of personal jurisdiction and, in the alternative, to dismiss pursuant to the forum selection clause on the ticket.²⁰ The district court granted Carnival's motion to dismiss for lack of personal jurisdiction, finding that Carnival had insufficient contacts with the State of Washington.²¹ The United States Court of Appeals for the Ninth Circuit reversed, holding that Carnival did have sufficient contacts to establish personal jurisdiction.²² In addition, the court of appeals ruled on the forum selection clause, holding that since the clause "was not freely bargained for," it was invalid.²³ The appellate court also determined that the clause would excessively inconvenience the Shutes.²⁴ The Supreme Court granted certiorari to determine the validity of the forum selection clause,²⁵ and ultimately rejected the court of appeals' holding that a forum clause on a cruise ticket is per se unenforceable.²⁶ The Court emphasized the beneficial aspects of forum clauses and concluded that, absent fraud, bad faith, or overreaching, forum clauses will be upheld even in a consumer context.²⁷

The Court began by reviewing the reasoning of the court of appeals. The appellate court had determined that the clause was invalid since its inclusion was not negotiated.²⁸ The Court rejected this holding; finding

18. *Id.* The district court did not file an opinion.

19. *See supra* note 6.

20. *Shute*, 111 S. Ct. at 1524.

21. *Id.*

22. *Carnival Cruise Lines v. Shute*, 897 F.2d 377, 382-83 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). Washington's long-arm statute reads: "Any person, . . . who in person or through an agent does any of the [following] . . . submits . . . to the jurisdiction of the courts of this state . . . (a) [T]he transaction of any business within this state." WASH. REV. CODE § 4.28.185 (1988). Commentators considered personal jurisdiction to be the most significant issue in *Shute*. *See, e.g.*, Mary Lou Johnson, Note, *Personal Jurisdiction Over the Nonresident: Washington Contributes Shoe and Shute*, 26 GONZ. L. REV. 243, 255-56 (1991). At least one commentator has recognized the Court's decision to enforce the forum selection clause as a method of avoiding the difficult issue of personal jurisdiction. Linda S. Mullenix, *Forum-Shoppers Should Discover a Wider Market*, NAT'L L.J., Aug. 19, 1991, at S12 ("Playing chicken in the briar patch, [the Court] resolved the jurisdiction issue by deciding the narrow question of the scope and validity of the passenger ticket's forum-selection clause.").

23. *Carnival Cruise Lines v. Shute*, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991).

24. *Id.*

25. *Carnival Cruise Lines v. Shute*, 111 S. Ct. 39 (1990).

26. *Shute*, 111 S. Ct. at 1527.

27. *Id.* at 1528; *see infra* note 36 and accompanying text (discussing Court's fundamental fairness test).

28. The appellate court found that under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), only a freely negotiated forum selection clause should be enforced. *Carnival Cruise*

it unreasonable to assume that any cruise passenger would negotiate his contract, the Court held that negotiation is not an appropriate requirement of a cruise ticket.²⁹ The Court also rejected the court of appeals's determination that the clause was too inconvenient to be enforced.³⁰ The Court concluded that the plaintiff had not met the "heavy burden of proof" needed to invalidate a forum clause on the grounds of inconvenience.³¹

The Court then enumerated the benefits of forum selection clauses.³² First, it noted that since passengers on a cruise line are from many locales, without the forum clauses the cruise line could be subject to litigation in several different forums.³³ Second, the Court explained that forum clauses obviate confusion and litigation over which forum is correct.³⁴ Third, the Court stated that the clauses result in lower fares to passengers because of the resulting reduced legal costs to the cruise line.³⁵

The Court then stated that choice of forum clauses will be scruti-

Lines v. Shute, 897 F.2d 377, 388-89 (9th Cir. 1990) (citing *The Bremen*, 407 U.S. at 15), *rev'd*, 111 S. Ct. 1522 (1991). For a discussion of *The Bremen*, see *infra* notes 67-80 and accompanying text.

29. *Shute*, 111 S. Ct. at 1527.

30. The Court pointed to the court of appeals' reliance on standards set forth in *The Bremen*, which stated that a forum selection clause will be invalid if it is so inconvenient that it deprives a plaintiff of his day in court. *Id.* at 1527-28 (citing *Carnival Cruise Lines v. Shute*, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991), and *The Bremen*, 407 U.S. at 17). See *infra* note 79 and accompanying text for this discussion in *The Bremen*.

31. *Shute*, 111 S. Ct. at 1528. The appellate court had determined that the Shutes "are physically and financially incapable of pursuing this litigation in Florida." *Id.* at 1527 (citing *Carnival Cruise Lines v. Shute*, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991)). The Supreme Court stated that the district court reported no findings on this matter. *Id.* at 1528. The Court also stated that in *The Bremen* references to convenience were made in a hypothetical case involving two Americans contracting to litigate in a "remote alien forum." *Id.* (quoting *The Bremen*, 407 U.S. at 17). The Court implicitly retained the defense of inconvenience to invalidate forum selection clauses, but did not articulate clearly the level of inconvenience required. Additionally, the Court did not explain whether the source of the inconvenience argument was contractual, see *infra* notes 115-40 (discussing the claim that forum clauses are adhesive), or constitutional, see *infra* notes 141-75 (discussing the claim that forum clauses violate due process).

32. *Shute*, 111 S. Ct. at 1527.

33. *Id.*; see *infra* notes 181-84 and accompanying text.

34. *Shute*, 111 S. Ct. at 1527; see *infra* notes 185-89 and accompanying text.

35. *Shute*, 111 S. Ct. at 1527; see *infra* notes 136-38 and accompanying text. The Court did not indicate how the clauses would save legal costs, but presumably it meant savings of travel and the costs arising from distant litigation. As a practical matter, though, the forum clauses also could serve as a deterrent to suit, thereby lowering amount of damage claims paid. See, e.g., *Yoder v. Heinhold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986); see also *infra* note 198 (noting that forum clauses deter suits and discussing the *Yoder* court's view on this issue).

nized only for fundamental fairness.³⁶ The majority asserted that Carnival had not inserted the clause with the intent to discourage suits.³⁷ Additionally, the Court dismissed any possibility of fraud or overreaching, finding no evidence to support such claims.³⁸ The Court added that since Mrs. Shute had notice of the clause, she presumably could have "reject[ed] the contract with impunity."³⁹

Finally, the majority addressed Shute's argument that the forum selection clause violates the Limitation of Vessel Owner's Liability Act.⁴⁰ The Court stated that a plain language reading indicates that the Act was intended only to prevent ship owners from limiting liability for negligence and from forcing passengers to submit to arbitration.⁴¹ The majority found no authority indicating that the Act was passed "to avoid having a plaintiff travel to a distant forum."⁴² Noting that the clause does not deny a plaintiff a judicial forum and that the clause does not purport to limit liability for negligence, the Court concluded that the clause does not violate the Act.⁴³

Justice Stevens wrote a dissent in which he asserted that a forum selection clause on a cruise ticket is unenforceable under principles of admiralty law.⁴⁴ Justice Stevens further explained that forum selection clauses in passenger tickets "involve the intersection of two strands of

36. *Shute*, 111 S. Ct. at 1528. Aside from giving examples of what does not constitute fundamental fairness, the Court failed to clarify what is meant by fundamental fairness. The Court also did not indicate whether the fundamental fairness scrutiny is a result of contractual principles, see *infra* notes 115-40 (discussing adhesion), or constitutional principles, see *infra* notes 141-75 (discussing due process).

37. *Shute*, 111 S. Ct. at 1528. In support of its determination, the Court pointed to the facts that Carnival's principal place of business was in Florida, and that its cruises departed from and returned to Florida ports. *Id.*

38. *Id.*

39. *Id.* Justice Stevens disagreed with this conclusion. *Id.* at 1529 (Stevens, J., dissenting); see *infra* text accompanying note 131.

40. 46 U.S.C. app. § 183c (1988). The Limitation of Vessel Owner's Liability Act makes it "unlawful for [an] owner of any vessel . . . [to] purport[] . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction." *Id.* The Act generally protects passengers from the predatory practices of ship owners. See *infra* notes 107-112 and accompanying text.

41. *Shute*, 111 S. Ct. at 1529.

42. *Id.*

43. *Id.*

44. *Id.* (Stevens, J., dissenting). Justice Stevens began by noting that exculpatory clauses in passenger tickets have been void since the turn of the century as contrary to public policy. *Id.* at 1530 (Stevens, J., dissenting). He analogized forum selection clauses to other clauses that are recognized as void: clauses limiting liability, clauses requiring notice to be filed within a short period of time, and clauses mandating a choice of law that is favorable to the defendant in negligence cases. *Id.* (Stevens, J., dissenting) (citing 46 U.S.C. app. §§ 183b(a), 183c (1988) and *The Kensington*, 183 U.S. 263, 269 (1902)).

traditional contract law that qualify the general rule that courts will enforce" contract terms.⁴⁵ First, Justice Stevens pointed out that courts generally disfavor contracts in which there is little bargaining power and no meaningful choice.⁴⁶ Second, he restated the traditional principle that forum selection clauses deprive the courts of their jurisdiction.⁴⁷ Even in light of *The Bremen v. Zapata Off-Shore Co.*,⁴⁸ he wrote, forum clauses are not enforceable if they are not bargained for freely, if they create additional expense for one party, or if they deny one party a remedy.⁴⁹

Justice Stevens also maintained that the clause is void under the Limitation of Vessel Owner's Liability Act.⁵⁰ Justice Stevens asserted that enforcement of the clause lessens or weakens plaintiff's ability to recover, thereby rendering the clause void under the Act.⁵¹ He supported this interpretation of the Act by referring to the House Report,⁵² which enunciated that the legislative intent was to disallow limitation of liability and to "put a stop to all such practices."⁵³ Justice Stevens concluded that even absent the Act, such a clause on a passenger ticket should be void.⁵⁴

Shute represents an extension of the modern cases that condone forum selection clauses.⁵⁵ Historically, courts have viewed provisions limiting their authority, especially forum selection and arbitration clauses, as attempts to oust courts of their jurisdiction; consequently, courts have treated such provisions with animosity.⁵⁶ Under the widely criticized

45. *Id.* (Stevens, J., dissenting).

46. *Id.* at 1530-31 (Stevens, J., dissenting); see *infra* notes 115-40 (discussing adhesion).

47. *Shute*, 111 S. Ct. at 1531 (Stevens, J., dissenting). This argument has been abandoned by courts and commentators. See *infra* note 57. Justice Stevens distinguished *The Bremen* on the grounds that it had involved two international corporations entering an agreement which had been the product of free negotiation. *Shute*, 111 S. Ct. at 1531 (Stevens, J., dissenting).

48. 407 U.S. 1 (1972). For a discussion of *The Bremen*, see *infra* notes 67-80 and accompanying text.

49. *Shute*, 111 S. Ct. at 1531 (Stevens, J., dissenting). Justice Stevens's conclusion is too broad and is not supported by case law. While some courts have refused to enforce forum clauses, most forum clauses are enforced. See *infra* notes 103-06 and accompanying text. Because it is difficult to imagine a situation where litigating away from one's home forum would entail no extra cost, Justice Stevens's conclusion would invalidate nearly all forum selection clauses.

50. *Shute*, 111 S. Ct. at 1532 (Stevens, J., dissenting).

51. *Id.* (Stevens, J., dissenting); see 46 U.S.C. § 183c (1988). For the relevant language of the Act, see *supra* note 40.

52. H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6-7 (1936).

53. *Shute*, 111 S. Ct. at 1532 (Stevens, J., dissenting) (quoting H.R. REP. NO. 2517).

54. *Id.* at 1533 (Stevens, J., dissenting).

55. See *infra* notes 59-106 and accompanying text.

56. See, e.g., *French v. LaFayette Ins. Co.*, 9 F. Cas. 788, 789 (C.C.D. Ind. 1853) (No. 5102) ("Why has a condition or an agreement in a policy, providing that all disputes arising

justification of public policy, courts refused to enforce clauses that restricted judicial activity.⁵⁷ The gradual acceptance of clauses limiting judicial authority was evidenced in the field of arbitration by the passage of the Federal Arbitration Act in 1947,⁵⁸ soon thereafter, courts began to follow suit in the area of forum selection clauses.

The first significant case to uphold a contract clause waiving personal jurisdiction was *National Equipment Rental, Ltd. v. Szukhent*.⁵⁹ National Equipment, whose principal place of business was in New York, entered into a farm equipment lease with Szukhent, a resident of Michigan.⁶⁰ The contract included a clause assigning Szukhent an agent for service of process in New York,⁶¹ the purpose of which was to confer personal jurisdiction over Szukhent, thereby assuring that any litigation under the contract would be conducted in New York.⁶² The Court upheld the clause over due process objections,⁶³ stating that "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."⁶⁴ Justice Black, dissenting, argued that the clause was a sham and that the manifest unequal bargaining power should render the clause unenforceable.⁶⁵ Three other justices, in a second dissenting opinion, asserted that Szukhent's signature on the form

under it shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the court."), *aff'd*, 59 U.S. (18 How.) 404 (1856).

57. See, e.g., 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1431, at 381-82 (1962) ("How can two individuals by private agreement limit or otherwise alter the 'jurisdiction' of the great courts of state or nation!"); EHRENZWEIG, *supra* note 2, § 41(a), at 145-47 (stating that the ouster theory is not rational); Gilbert, *supra* note 2, at 9 (stating that ouster theory has no basis and suggesting a more likely reason judges retained jurisdiction was that their pay was based on the number of cases they heard).

58. Federal Arbitration Act, ch. 392, § 1, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1-16 (1988 & Supp. II 1990)). The Act states, "A written provision in any . . . contract [agreeing] to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988). This wholesale endorsement of arbitration agreements represents a marked departure from the previous hostility courts held toward such agreements. See *infra* notes 81-88 and accompanying text (dealing with acceptance of arbitration).

59. 375 U.S. 311 (1964).

60. *Id.* at 312-13.

61. *Id.* at 312.

62. *Id.* at 315.

63. *Id.* at 329-33 (Black, J., dissenting) (arguing that forcing the defendants to litigate in New York, by means of a clause in fine print on a contract, raises questions of due process in the Fifth and Fourteenth Amendments).

64. *Id.* at 316.

65. *Id.* at 323, 326 (Black, J., dissenting).

did not justify a waiver of personal jurisdiction.⁶⁶ Although *Szukhent* dealt with waiver of personal jurisdiction, and not with exclusivity of venue, the case reflected the Court's willingness to uphold clauses limiting judicial authority.

Having dispelled any notion that it would refuse to enforce a waiver of personal jurisdiction, in 1972 the Court squarely addressed the aspect of forum selection clauses dealing with exclusivity of venue in *The Bremen v. Zapata Off-Shore Co.*⁶⁷ Unterweser, a German corporation, agreed to tow a drilling rig to Italy for Zapata, a Houston-based corporation.⁶⁸ The contract included a forum selection clause stating that any dispute arising from the contract would be litigated in England.⁶⁹ When Zapata filed suit in Florida for damages incurred during a storm, Unterweser moved to dismiss pursuant to the clause.⁷⁰ Reversing an eight-to-six en banc decision from the United States Court of Appeals for the Fifth Circuit,⁷¹ the Court found that the forum selection clause should be upheld.⁷²

The Court reasoned that invalidating such clauses would impair the ability of American corporations to trade in world markets.⁷³ Additionally, the Court stated that the contract was between "experienced and sophisticated businessmen" and accented the principle of freedom to contract.⁷⁴ The Court explicitly rejected the theory that such clauses oust a

66. *Id.* at 333 (Brennan, J., dissenting). Joining Justice Brennan in his dissent were Chief Justice Warren and Justice Goldberg. Justice Brennan wrote:

[S]ince the corporate plaintiff prepared the printed form contract, I would not hold the individual purchaser bound by the appointment without proof, in addition to his mere signature on the form, that the individual understandingly consented to be sued in a State not that of his residence. . . . The sales pitch aims solely at getting the signature on the form and wastes no time explaining or even mentioning the print.

Id. at 333-34 (Brennan, J., dissenting).

67. 407 U.S. 1 (1972).

68. *Id.* at 2. The Bremen was the name of the towing vessel owned by Unterweser. *Id.* at 3.

69. *Id.* at 2. Unterweser sent a proposed contract containing the forum clause to Zapata, whereupon Zapata made some changes but left the forum clause intact. *Id.* at 2-3.

70. *Id.* at 3-4.

71. *Zapata Off-Shore Co. v. The Bremen (In re Unterweser Reederei, GmbH)*, 428 F.2d 888 (5th Cir. 1970), *vacated*, 407 U.S. 1 (1972).

72. *The Bremen*, 407 U.S. at 8.

73. *Id.* at 9. The Court asserted that by accepting forum selection clauses, thereby harmonizing American law with that of foreign nations, international trade would be encouraged through greater predictability and uniformity. *Id.*; see *infra* note 192.

74. *The Bremen*, 407 U.S. at 11-12. The Court explained that "[t]here is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.* at 14. In defense of enforcing the clause, the Court stated, for example, "The choice of that forum was

court of jurisdiction, explaining that courts upholding such clauses are simply exercising their power to give effect to the legitimate expectations of the parties.⁷⁵ The Court also noted that in an international agreement, there is a heightened possibility that one might be exposed to suit in a foreign forum, a concern that further justifies using a predetermined forum to eliminate uncertainties.⁷⁶ The Court held that forum selection clauses are "prima facie valid,"⁷⁷ and that they should be enforced unless it is clear "that enforcement would be unreasonable and unjust, or [unless] the clause [is] invalid for such reasons as fraud or overreaching."⁷⁸ The Court later stated that a party wishing to invalidate a clause on grounds of inconvenience must show that he will for all practical purposes be deprived of his day in court.⁷⁹ *The Bremen* signified the changing tide in attitudes toward restrictions on judicial authority and served as a jurisprudential lighthouse to lower courts faced with forum selection clause dilemmas.⁸⁰

In 1974 the Court reaffirmed its commitment to enforcing contractual agreements limiting jurisdiction in *Scherk v. Alberto-Culver Co.*⁸¹ Alberto-Culver, incorporated in Delaware, filed suit in Illinois against Scherk, a German citizen, alleging violations of the Securities and Ex-

made in an arm's-length negotiation by experienced and sophisticated businessmen . . . and . . . it should be honored by the parties and enforced by the courts." *Id.* at 12.

75. *Id.* ("The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction.")

76. *Id.* at 13.

77. *Id.* at 10.

78. *Id.* at 15. This language resembles the "fundamental fairness" scrutiny mentioned in *Shute*. See *supra* note 36 and accompanying text. In *The Bremen*, as in *Shute*, the foundation for the fairness requirement is not explicit, but its derivations probably lie either in contract law dealing with adhesion, see *infra* notes 115-40 and accompanying text, or in constitutional law concerning due process, see *infra* notes 141-75 and accompanying text.

79. *The Bremen*, 407 U.S. at 18. The requisite level of inconvenience was found by the appellate court in *Shute*, but the Supreme Court rejected this determination. *Shute*, 111 S. Ct. at 1528; see *supra* note 31 and accompanying text. *Shute* implicitly retains the requirement of reasonableness, but since the Court held that forcing the Shutes to sue in Florida was not unreasonable, it is clear that the Court demanded an elevated degree of unreasonableness to invalidate such clauses. This reluctance to find forum clauses unreasonably inconvenient is rife throughout lower opinions. See *infra* notes 104-05 (citing cases upholding forum clauses). Only under extreme circumstances have courts found the requisite inconvenience. See, e.g., *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 343-44 (8th Cir.) (holding that Iran would not provide Americans a fair forum and, additionally, that Iran's war with Iraq made litigation there dangerous), *cert. denied*, 474 U.S. 948 (1985).

80. See, e.g., *Republic Int'l Corp. v. Amco Eng'g, Inc.*, 516 F.2d 161, 168 (9th Cir. 1975); *Gaskin v. Stumm Handel, GmbH*, 390 F. Supp. 361, 363-64 (S.D.N.Y. 1975); see also Stephen R. Buckingham, Comment, *Stewart Organization v. Ricoh Corporation: Judicial Discretion in Forum Selection*, 41 RUTGERS L. REV. 1379, 1385 (1989) ("The impact of the Court's decision in [*The Bremen*] on the enforceability of forum selection clauses has been great.")

81. 417 U.S. 506 (1974).

change Act of 1934 and Securities and Exchange Commission rule 10b-5.⁸² Scherk moved to dismiss under a contract clause providing that all claims arising from the agreement were to be arbitrated in Paris.⁸³ In addition to relying on authority from the Federal Arbitration Act,⁸⁴ the Court, using the principles espoused in *The Bremen*, reasoned that in an international agreement there are heightened needs for certainty and that, therefore, arbitration clauses will be enforced.⁸⁵ Four dissenting justices stated that the clause was inconsistent with the Securities Act and therefore void.⁸⁶ Although *Scherk* deals with arbitration, an arbitration clause is a form of forum selection clause.⁸⁷ *Scherk* is significant in that it reflected the Court's commitment to enforcing agreements limiting judicial authority. In subsequent decisions concerning arbitration

82. *Id.* at 508-09.

83. *Id.*

84. 9 U.S.C. §§ 1-16 (1988 & Supp. II 1990); see *supra* note 58 and accompanying text.

85. *Scherk*, 417 U.S. at 518-20. But see *Wilko v. Swan*, 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (invalidating an arbitration agreement). In *Wilko* a securities consumer alleged that his broker misrepresented the future value of certain stocks, and the broker moved to stay the proceedings pursuant to an arbitration agreement. *Wilko*, 346 U.S. at 428-29. The Court ruled that in actions arising under § 12(2) of the Securities Act of 1933, which provides that any court can enforce suits arising under that section, arbitration clauses are void since "the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Acts." *Id.* at 434-35. While the *Wilko* Court acknowledged that the Federal Arbitration Act encourages arbitration, the Court also stressed that the Securities Act was designed to afford buyers special protections, such as reviewability, and that arbitration would usurp these safeguards. *Id.* at 435-37.

The *Scherk* Court took great lengths to distinguish its case from *Wilko*. The Court in *Scherk* first noted that *Wilko* involved § 12(2) of the Securities Act of 1933, which has an express private remedy, whereas *Scherk* involved the 1934 Act and rule 10b-5, which have only implicit private remedies. *Scherk*, 417 U.S. at 513-14. The Court's principal argument, though, was that *Scherk* involved an international contract, and that therefore the policies in *Scherk* differed from those in *Wilko*. *Id.* at 515-16. Their reasoning for upholding arbitration agreements was similar to that employed in *The Bremen*, see *supra* notes 73-74, finding that enforcement of such clauses will lead to predictability and therefore increased international transactions. *Scherk*, 417 U.S. at 516. The Court, in a subsequent case, stated that "*Scherk* supports [the] understanding that *Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue." *Shearson/American Express v. McMahon*, 482 U.S. 220, 229 (1987). The Court also stressed that since *Wilko* relied heavily on doubts concerning arbitration, "*Wilko* . . . is difficult to square with the assessment of arbitration that has prevailed since that time." *Id.* at 233; see Leslie W. More, Comment, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.: Is Arbitration Finally Above Suspicion?*, 78 Ky. L.J. 839, 864 (1990) (suggesting that arbitration is fair).

86. *Scherk*, 417 U.S. at 522, 527 (Douglas, J., dissenting, with Justices Brennan, Marshall, and White joining) ("Section 29 of the 1934 Act, which renders arbitration clauses void and inoperative, recognizes no exception for fraudulent dealings which incidentally have some international factors.").

87. *Id.* at 519 ("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.").

agreements, the Court maintained the bearing, set forth in *The Bremen*, authorizing jurisdictional limitations.⁸⁸

The next case addressing the validity of the forum selection clause was *Stewart Organization, Inc. v. Ricoh Corp.*⁸⁹ Stewart, an Alabama corporation, agreed to distribute copier products manufactured by Ricoh, a New Jersey corporation.⁹⁰ The contract contained a forum selection clause stating that any action would be brought in New York City.⁹¹ Stewart filed suit in Alabama claiming breach of contract, breach of warranty, fraud, and antitrust violations.⁹² Ricoh moved to transfer the case to New York pursuant to the federal venue-transfer statute,⁹³ relying on the forum selection clause.⁹⁴ While the principal issue in *Stewart* was whether federal courts should defer to state policy regarding forum clauses in section 1404(a) transfers, the Court, in holding that federal law governs,⁹⁵ also addressed the standard for transfer.⁹⁶ The Court,

88. In 1985 in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court, over the dissent of Justices Stevens, Brennan, and Marshall, held that an arbitration clause in an international agreement encompasses claims under the Sherman Act, 15 U.S.C. §§ 1-7 (1988). *Mitsubishi Motors Corp.*, 473 U.S. at 629. The Court, emphasizing the international aspect of the agreement, stated, "[I]nternational comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Id.* Two years later in *McMahon* the Court faced arbitration of securities and RICO claims in a domestic context. *McMahon*, 482 U.S. at 223. The Court held that arbitration offers a fair forum for these claims and that Congress had expressed no aversion toward arbitration of such claims. *Id.* at 233, 238, 242. Justice Blackmun, with whom Justices Brennan and Marshall joined, wrote a dissenting opinion in which he argued that the Securities Exchange Act of 1934 constitutes an exception to the Arbitration Act. *Id.* at 254-55 (Blackmun, J., dissenting) (finding that the *Wilko* holding, discussed *supra* note 85, dictates invalidation of the arbitration clause, and that *Scherk* upheld an arbitration clause only because it was an international agreement). Justice Blackmun also indicated distrust of the arbitration process: "Despite improvements in the process of arbitration and changes in the judicial attitude towards it, several aspects of arbitration that were seen by the *Wilko* court to be inimical to the policy of investor protection still remain." *Id.* at 257 (Blackmun, J., dissenting). Justice Stevens wrote a dissent in which he agreed with Justice Blackmun that the rule in *Wilko* should control. *Id.* at 268-69 (Stevens, J., dissenting).

89. 487 U.S. 22 (1988).

90. *Id.* at 24.

91. *Id.*

92. *Id.*

93. 28 U.S.C. § 1404(a) (1988). Section 1404(a) reads: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

94. *Stewart*, 487 U.S. at 24.

95. *Id.* at 32. Justice Scalia dissented, arguing that there is no conflict between § 1404(a) and Alabama law disfavoring such clauses, and that federal judges should defer to state law when possible. *Id.* at 38-39 (Scalia, J., dissenting).

96. *Id.* at 31.

instead of focusing on the validity of forum selection clauses, focused on section 1404(a).⁹⁷ The Court held that section 1404(a) envisions a balancing of interests, including convenience and fairness in light of both the clause and the parties' relative bargaining power.⁹⁸ Justices Kennedy and O'Connor concurred in an opinion which added that the principles developed in *The Bremen* also were applicable in a diversity case such as *Stewart*.⁹⁹ Justice Kennedy stated that "a valid forum selection clause is given controlling weight in all but the most exceptional cases."¹⁰⁰

While *Stewart* set forth a balancing test with respect to forum selection clauses, its holding applies only to section 1404(a) transfers,¹⁰¹ and even then many courts continue to apply *The Bremen* standard.¹⁰²

97. *Id.* at 30-31. Commentators viewed the Court's decision based on section 1404(a) as a means of sidestepping the issue of forum selection clauses. See, e.g., Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 336 (1988).

98. *Stewart*, 487 U.S. at 29-30 ("The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences."). The Court held that forum clauses are one factor to consider when a federal court decides a transfer motion: "The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)." *Id.* at 31.

99. *Id.* at 33 (Kennedy, J., concurring). Diversity cases, as compared to cases involving only federal issues, involve consideration of state laws, which gives rise to conflicts between federal and state laws. Federal law is not necessarily dispositive on such conflicts, and therefore a federal holding does not bind federal courts in future diversity cases. See, e.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641-42 (1981).

100. *Stewart*, 487 U.S. at 30 (Kennedy, J., concurring). Justice Kennedy's concurrence more accurately represents the treatment of forum clauses in ensuing cases than does the majority opinion. See, e.g., *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 912 (3d Cir. 1988) (referring to Justice Kennedy's concurrence in *Stewart*), *cert. denied*, 490 U.S. 1001 (1989). See *infra* notes 104-05 and accompanying text (referring to strict judicial adherence to forum clauses).

101. See, e.g., *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990) (holding that *Stewart* applies only to a § 1404(a) transfer which considers convenience and not to a dismissal which involves the waiver of personal jurisdiction); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (holding that *Stewart*'s balancing approach to forum selection clauses does not apply when dismissing actions and remanding to state courts). The *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1952), unlike *Stewart*, does not balance interests, but rather enforces forum clauses unless they are unreasonably unfair or exceedingly inconvenient. *Id.* at 15, 18. For a discussion of this aspect of *The Bremen*, see *supra* notes 78-79 and accompanying text.

102. See, e.g., *Seward v. Devine*, 888 F.2d 957, 962 (2d Cir. 1989) (applying *The Bremen* standard to § 1404(a) transfer); *First Interstate Leasing Serv. v. Sagge*, 697 F. Supp. 744, 746 (S.D.N.Y. 1988) (relying on *The Bremen* and *Stewart* in § 1404(a) transfer). There is discord within the federal circuits as to whether federal or state law should govern motions to dismiss on the basis of a forum selection clause. See, e.g., *Sun World Lines v. March Shipping Co.*, 801 F.2d 1066, 1069 (8th Cir. 1986) (using federal law); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986) (relying on state law); see also Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 *COLUM. L. REV.* 1068, 1071 (1989) (noting that most courts use federal law); Julia L. Erick-

While a few federal courts have set aside forum selection clauses,¹⁰³ the majority of cases have consistently enforced them.¹⁰⁴ In the most extreme applications, the acceptance of forum selection clauses has forced individuals to file suit in foreign countries,¹⁰⁵ prompting some courts to express discomfort in applying the doctrine.¹⁰⁶ Much of the controversy and confusion surrounding forum selection clauses, however, is derived from the conflicting areas of law that underlie the issue. *Shute* implicates admiralty law, contract principles, and constitutional doctrine; to understand thoroughly the forum selection clause in *Shute*, it is necessary to analyze how these underlying legal issues affect such clauses.

A cruise ticket is subject to admiralty law;¹⁰⁷ as such, it must com-

son, Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 71 MINN. L. REV. 1090, 1096-97 (1988) ("[O]nly the Third and Eighth Circuits have held that when federal and state law conflict, state law determines the enforceability of forum selection clauses in diversity suits.").

103. *Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302, 1309-10 (7th Cir. 1988) (striking down forum selection clause on three grounds: (1) unmet condition precedent, (2) unequal bargaining power, and (3) duress); *Farmland Indus. v. Frazier-Parrott Commodities*, 806 F.2d 848, 851-52 (8th Cir. 1986) (holding that where a defrauder owed the defrauded a fiduciary duty, a forum selection clause was vitiated); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759-60 (E.D. Va. 1986) (finding clause against individual unfair); *ECC Computer Ctrs. v. Entre Computer Ctrs.*, 597 F. Supp. 1182, 1185-86 (N.D. Ill. 1984) (finding clause against Illinois public policy).

104. See, e.g., *Moses v. Business Card Express*, 929 F.2d 1131, 1136-37 (6th Cir.) (holding that in a § 1404(a) transfer the forum clause "figures centrally"), *cert. denied*, 112 S. Ct. 81 (1991); *Karl Koch Erection Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659-60 (2d Cir. 1988) (upholding forum clause in breach of contract case); *Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik, GmbH*, 718 F. Supp. 886, 892 (M.D. Ala. 1989) (upholding forum clause written in German); *Sagge*, 697 F. Supp. at 747-48 (upholding forum clause in lease for vending equipment). For a discussion on the enforceability of forum selection clauses generally, see Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4TH 404, 415-42 (1984).

105. *Spradlin v. Lear Siegler Management Servs.*, 926 F.2d 865, 869 (9th Cir. 1991) (employee who had worked for American corporation in Saudi Arabia forced to sue in Saudi Arabia); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 912-16 (3d Cir. 1988) (American passenger on Italian cruise ship departing from and returning to Italy forced to sue in Italy), *cert. denied*, 490 U.S. 1001 (1989); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563, 566 (S.D.N.Y. 1987) (American passenger on cruise departing from Greece forced to sue in Greece). It should be noted that in these cases, in addition to entering into contracts containing forum selection clauses, the plaintiffs entered the foreign forums in connection with the contracts. Since the foreign forum had a genuine interest in the matter and since the plaintiffs had subjected themselves to a foreign jurisdiction by entering it, it was less offensive to force them to litigate there than it would have been for someone who had never entered the jurisdiction. The *Hodes* court acknowledged, "We note this is not a case in which a consumer contracted to have a service rendered or buy a product in his/her home jurisdiction only to later learn of the existence of a forum selection clause." *Hodes*, 858 F.2d at 913.

106. *Spradlin*, 926 F.2d at 869 (court acknowledged it was "troubled" with forcing American citizen to sue in Saudi Arabia).

107. *Shute*, 111 S. Ct. at 1525.

ply with the Limitation of Vessel Owner's Liability Act.¹⁰⁸ Section 183c of the Act provides that a vessel owner may not contract to lessen or weaken the right of a party to sue in negligence for bodily injury.¹⁰⁹ A plaintiff's case clearly is weakened when witnesses will be unavailable in the distant forum.¹¹⁰ It is not as clear, however, that forcing litigation in a distant forum lessens a plaintiff's right to recover. While there is some evidence that the Act supports a liberal interpretation,¹¹¹ the *Shute* majority discounted the Act on the grounds that there is no authority that the Act was intended to "avoid having a plaintiff travel to a distant forum."¹¹² Since the Act is silent as to forum selection clauses, the better reading is that the Act does not apply to forum selection clauses.

While most forum clauses do not involve admiralty law, all forum clauses involve the intersection of jurisdiction and contract law.¹¹³ It is evident that such clauses are treated differently from other contract terms since they affect jurisdiction, which is grounded in due process.¹¹⁴ Since forum selection clauses involve the application of contract law to jurisdiction, it is necessary to consider both areas of law.

108. 46 U.S.C. app. §§ 181-96 (1988).

109. *Id.* § 183c. For the text of § 183c, see *supra* note 40.

110. *Shute*, 111 S. Ct. at 1532 (Stevens, J., dissenting).

111. Section 183c, passed in 1936, Act of June 5, 1936, ch. 521, § 2, 49 Stat. 1480 (codified at 46 U.S.C. app. § 183c), was enacted at a time when forum selection clauses were predominately rejected, and there would have been no reason to insert a provision for forum clauses. *Shute*, 111 S. Ct. at 1532 (Stevens, J., dissenting). Even though the Act does not expressly forbid forum selection clauses, Stevens maintained that there are indications that it was Congress's intent to prohibit such provisions. *Id.* (Stevens, J., dissenting). In addition, it is clear that the gist of § 183c is to protect claimants against vessel owners, an end that the rejection of the forum clauses furthers. Justice Stevens cited to the House Report, which stated, referring to an amendment pertaining to arbitration clauses, "The amendment . . . is intended to . . . put a stop to all such practices and practices of a like character." *Id.* (Stevens, J., dissenting) (quoting H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6-7 (1936)) (emphasis omitted). A liberal interpretation of the Act is further supported by similar cases arising under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1988), which hold that forum selection clauses are limitations on liability. See, e.g., *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840, 842 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

112. *Shute*, 111 S. Ct. at 1529.

113. See *Mullenix*, *supra* note 97, at 296 ("Although [forum selection clauses] affect basic procedural rights, their interpretation is nonetheless irretrievably based in contract law.").

114. *The Bremen* Court, for example, held that forum clauses are to be enforced "unless . . . 'unreasonable' under the circumstances." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1971); see *supra* note 78. *Stewart* held that such clauses are merely to be analyzed with respect to convenience and fairness to the parties. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 27, 29 (1988); see *supra* note 98 and accompanying text. These are unusual requirements of contract terms. Convenience is generally irrelevant in contract law unless the inconvenience rises to the level of impossibility, see, e.g., *CORBIN*, *supra* note 57, § 1320; similarly, contract law does not require reasonableness unless the unreasonableness rises to the level of unconscionability, see, e.g., *id.* § 128.

While contract law generally enforces the terms of agreements, exceptions are sometimes made for unconscionable contracts.¹¹⁵ One such contract is an adhesion contract, in which a disparity in bargaining power precludes one party from having a meaningful choice and therefore deprives her of the ability to negotiate contract terms meaningfully.¹¹⁶ Disparity of bargaining power alone, however, will not invalidate a contract.¹¹⁷ Invalidation of contract terms on grounds of adhesion generally requires unfairness in two areas regarding the contract: the procedure by which the contract was entered and the substance of the contract.¹¹⁸ The procedural strand usually refers to some form of surprise, often fine print,¹¹⁹ while the substantive strand requires that the terms be unfair.¹²⁰ Generally, courts are less likely to invalidate

115. The Uniform Commercial Code, which applies to the sale of goods, states:

The basic test [for unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

U.C.C. § 2-302 cmt. (1978) (citation omitted). This language embodies the common-law treatment of adhesion. *Id.* (citing cases illustrating the basis for § 2-302 and adhesion).

116. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (setting forth the standard for unconscionability as "includ[ing] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 404, 161 A.2d 69, 95 (1960) (invalidating a contract clause which would exculpate auto manufacturer from liability to purchaser); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1245-48 (1983) (questioning the validity of adhesion contracts); Mark J. Kelson, Comment, *Choice-of-Law, Venue, and Consent-to-Jurisdiction Provisions in California Commercial Lending Agreements: Can Good Draftsmanship Overcome Bad Choice-of-Law Doctrine?*, 23 LOY. L.A. L. REV. 1337, 1371 (1990) (referring to setting aside forum clauses on grounds of unconscionability).

117. *E.g., Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984); *Preston v. Kruezer*, 641 F. Supp. 1163, 1172-73 (N.D. Ill. 1986).

118. *See, e.g., Premier Wine & Spirits, Inc. v. E. & J. Gallo Winery*, 644 F. Supp. 1431, 1440 (E.D. Cal. 1986) (referring to procedural and substantive elements of an unconscionability claim), *aff'd*, 846 F.2d 537 (9th Cir. 1988). Other courts hold that such contracts are only invalid if unreasonably unfair, but this usually involves the procedural and substantive elements. *E.g., Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535, 543-44 (D. Neb. 1976) (holding that, in general, boilerplate clauses are valid if not unreasonably unfair to the weaker party), *aff'd*, 571 F.2d 437, 439 (8th Cir. 1978) (per curiam).

119. *See, e.g., Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) ("The evidence disclosed . . . that there was in fact no bargaining on the clause in question. It was contained in a form contract in fine print at the bottom of a page. . . . [T]his sort of take-it-or-leave-it clause will be disregarded."); *Computerized Radiological Servs., Inc. v. Syntex Corp.*, 595 F. Supp. 1495, 1509 (E.D.N.Y. 1984) (holding a disclaimer of warranty clause ineffective because written in small letters and buried in a paragraph), *aff'd in part, rev'd in part on other grounds*, 786 F.2d 72, 76 (2d Cir. 1986).

120. *See, e.g., Kolentus v. Avco Corp.*, 798 F.2d 949, 959-60 (7th Cir. 1986) (upholding

a contract on grounds of adhesion when the contract is commercial or when the parties are business entities, because in those circumstances courts expect the parties to be knowledgeable.¹²¹ Before *Shute*, dealing with forum selection clauses had involved only commercial contracts; the Court had never addressed directly the issue of adhesion. In *Shute*, which involved an individual plaintiff, the Court, therefore, should have scrutinized the clause under an adhesion analysis.

While the majority makes no mention of adhesion anywhere in the opinion, the scrutiny for "fundamental fairness" may have incorporated principles of adhesion. If this is so, however, it is difficult to see how the Court could so readily enforce the clause.¹²² The absence of an adhesion analysis in the opinion may indicate that the Court disfavors, or rejects, adhesion as a defense to a forum clause; the Court, however, neglects to justify this judicial coup, which overthrows a fundamental contract principle.

Ironically, the Court in *Shute* noted the disparity of bargaining power and used that finding to enforce the clause.¹²³ *The Bremen* emphasized the importance of negotiation in order to ensure that the parties have entered willingly and knowingly into an agreement limiting the forum.¹²⁴ The Court in *Shute* reasoned that since *The Bremen* involved international shipping, it was reasonable to expect negotiation in that context; but that since a cruise ship passenger normally would not negotiate his contract, it is unreasonable to read *The Bremen* as requiring that a forum selection clause in such a contract be negotiated.¹²⁵ The Court seems simply to do away with a requirement that cannot be met by stating that in precedent cases it was reasonable to expect the requirement to be met.¹²⁶ This circular reasoning disarms a principal bastion defending

termination clause, stating that "[t]he basic test . . . is whether . . . the clauses at issue are so one-sided as to be oppressive and unfair"), *cert. denied*, 479 U.S. 1032 (1987).

121. See, e.g., *York v. Georgia-Pacific Corp.*, 585 F. Supp. 1265, 1278 (N.D. Miss. 1984) (referring to plaintiff's knowledge and sophistication as evidence that he consented to forum clause and, consequently, that no procedural unconscionability was present).

122. See *infra* notes 128-40 and accompanying text (arguing that the facts in *Shute* support a finding of adhesion).

123. *Shute*, 111 S. Ct. at 1527.

124. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12 (1972); *supra* note 74 (discussing *The Bremen*).

125. *Shute*, 111 S. Ct. at 1526-27.

126. This form of logic leads to bizarre results. To illustrate: In a case in which a passenger purchased his ticket after just having exhibited erratic behavior and after having displayed signs of psychological infirmity, the Court presumably would deny the defense of lack of capacity since one with severe mental problems would never have capacity. Or in a case in which the passenger was illiterate or did not speak English, this reasoning would seemingly do away with any requirement of notice since it would be unreasonable to expect such a person to have

personal jurisdiction set forth in *The Bremen*.¹²⁷ Since this leaves one of the protections provided for in *The Bremen* only to those most capable of negotiating, it is an illogical interpretation of *The Bremen*. Not only does the individual lack bargaining power in the formation of the contract, she also has this disparity used against her in its enforcement. Instead of squarely addressing the adhesion issue, the Court employed questionable reasoning to circumvent the element of negotiation, integral to *The Bremen*, that would have called into question the validity of the clause; clearly, the issue deserves more consideration.

One requisite of adhesion is procedural unfairness.¹²⁸ Justice Stevens pointed out that Mrs. Shute did not receive her tickets until after they had been purchased.¹²⁹ She, therefore, had no opportunity to see the clause until after she had paid her fare. In addition, the contract stated that the tickets could not be refunded.¹³⁰ Justice Stevens argued that "the average passenger," not knowing whether or not that provision is legally enforceable, "would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute."¹³¹ This reasoning is persuasive. The unanticipated clause, in a contract viewable only after payment, that presents itself as nonrefundable, constitutes as much a surprise to the consumer as unreasonably fine print or other deceptive practices, thereby meeting the procedural requirement for a finding of adhesion.¹³²

notice of a provision written in English. This form of logic can cripple any precedent and effectively rewrite any area of law.

127. *The Bremen's* references to negotiation and arm's length dealing reflect that the Court in *The Bremen* did not envision a disparity in bargaining power depriving a citizen of her jurisdictional rights. *The Bremen*, 407 U.S. 1, 13 (1972) ("There are compelling reasons why a freely negotiated private international agreement, unaffected by . . . overweening bargaining power . . . should be given full effect." (footnote omitted)). Other protections afforded by *The Bremen* were that forum clauses should be neither unreasonable nor unjust. *Id.* at 15; see *supra* note 78 and accompanying text.

128. See *supra* notes 118-20 and accompanying text.

129. *Shute*, 111 S. Ct. at 1529 (Stevens, J., dissenting). The majority was content that Mrs. Shute had notice of the clause and ignored any further discussion of adhesion. *Id.* at 1528. Mere notice of a term, however, is not dispositive on the issue of adhesion. See, e.g., *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 399-403, 161 A.2d 69, 92-95 (1960) (focusing on the lack of bargaining power and the likelihood that the consumer will not understand the terms).

130. *Shute*, 111 S. Ct. at 1529. (Stevens, J., dissenting) ("[T]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger." (quoting the contract)).

131. *Id.* (Stevens, J., dissenting).

132. Justice Stevens felt that the contract itself so eloquently illustrated the argument for invalidating the contract that he appended a copy of the relevant ticket provisions to the opinion. *Id.* (Stevens, J., dissenting).

The clause must also be examined for substantive unfairness.¹³³ Under the terms of the contract, Mrs. Shute must litigate her claims in the opposite corner of the country, thereby giving the cruise line an advantage.¹³⁴ Mrs. Shute must work long-distance with attorneys she may never see, and she may have to travel to Florida in pursuit of her claim. In some cases, the added costs and burdens of distant litigation would deter suits.¹³⁵ Considering the size of the parties, it is relatively more burdensome for Mrs. Shute to litigate cross-country than it would be for Carnival. Furthermore, the cruise line could easily account for litigation costs in the fare, instead of placing all of the costs on those passengers filing suit. The majority defended the substance of the clause on the grounds that "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."¹³⁶ While it is clear that Carnival incurs lower legal costs due to such clauses, it is most likely that only some of the savings, if any, are relayed to the passengers.¹³⁷ Even assuming that all the savings are passed on when the cruise's legal costs are lowered, passengers who are risk averse are better off without the clause.¹³⁸ Therefore, considering the relatively high burden of having an individual conduct litigation across the country, there are sufficient grounds in *Shute* to find substan-

133. See *supra* notes 118, 120 and accompanying text.

134. *Shute*, 111 S. Ct. at 1532 (Stevens, J., dissenting) ("[Litigating in Florida] certainly lessens or weakens [the Shutes'] ability to recover for the slip and fall incident that occurred off the west coast of Mexico during the cruise that originated and terminated in Los Angeles, California."); see also *Burger King v. Rudzewicz*, 471 U.S. 462, 488 (1985) (Stevens, J., dissenting) ("[Enforcement of a forum clause] creates a potential for unfairness not only in negotiations between franchisors and their franchisees but, more significantly, in the resolution of the disputes [that follow.]").

135. See *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986); *infra* note 198 (quoting the *Yoder* court on this issue). As Justice Stevens noted, contracts limiting liability for negligence are generally void as against public policy. *Shute*, 111 S. Ct. at 1530 (Stevens, J., dissenting).

136. *Shute*, 111 S. Ct. at 1527.

137. See, e.g., *Mullenix*, *supra* note 22, at S12 ("Apart from the justices, are there any consumers naive enough to buy this reduced-fare theory?").

138. When such clauses are used, passengers save a relatively small amount of money and are forced to bear the risk of litigating away from home. The Court implies that individuals prefer to save small amounts of money rather than to avert great risks. See *Shute*, 111 S. Ct. at 1527. This premise is not well founded; American society is fraught with examples of risk aversion and risk spreading. The insurance industry, among others, is founded upon the principle of risk aversion and risk spreading. In addition, strict liability is based on similar principles. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 93-94 (1973) (describing theory that strict liability rests on risk spreading). For an explanation of risk aversion, see ROBIN M. HOGARTH, *JUDGMENT AND CHOICE* 86-98 (2d ed. 1987).

tive unfairness.¹³⁹

Thus, in *Shute* there is sufficient evidence of both procedural and substantive unfairness.¹⁴⁰ On contract principles alone, therefore, the clause is unenforceable; however, the clause is also in conflict with tenets of due process. It is necessary first to analyze the plaintiff's procedural rights, and then to determine what is required to waive those rights.

Forum selection clauses involve two aspects of jurisdiction: first, a forum selection clause operates as a waiver of personal jurisdiction in the specified forum; second, it limits venue to a particular forum.¹⁴¹ The requirement of personal jurisdiction, founded in the Due Process Clause,¹⁴² serves to protect parties from judgments entered by forums with which the party has no substantial contact.¹⁴³ Distant litigation exposes a party to added burdens and costs;¹⁴⁴ as a result, forcing an individual to litigate a claim in a distant forum represents too great a burden upon him to comply with due process.¹⁴⁵ Cases dealing with personal jurisdiction typically concern the fairness to the defendant of litigating in

139. This does not necessarily mean that all forum clauses entered by consumers fail a test for substantive unfairness. When considering the substantive unfairness that forum clauses pose to consumers, the most significant factor, encompassing both legal costs and inconvenience, is distance. As such, the court must determine in every case whether the unfairness of forcing the plaintiff to sue in a distant forum rises to the level needed to invalidate the clause. Had Mrs. Shute lived in Georgia, for example, the unfairness of the clause might not be great enough to render it unenforceable, but somewhere between Florida and the state of Washington the clause inflicts a measure of injustice that surpasses tolerable dimensions. *Shute* provides no guidance for this line drawing since it inexplicably ignores the element of adhesion in the contract.

140. In *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1963), Justice Black disfavored a clause waiving personal jurisdiction on similar grounds, stating, "Where one party, . . . drawing upon expert legal advice, drafts a form contract, complete with waivers of rights and privileges by the other, it seems to me to defy common sense . . . to treat this as an agreement coolly negotiated and hammered out by equals." *Id.* at 326 (1963) (Black, J., dissenting).

141. See, e.g., *Mullenix*, *supra* note 97, at 294 (stating that "it is unclear whether forum-selection clauses are matters of jurisdiction or venue"). Under the civil-law system, analogous waivers are called derogation (excluding specified courts thereby limiting venue) and prorogation (consenting to jurisdiction) agreements. See, e.g., *Oser*, *supra* note 2, at 311-12.

142. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of . . . property, without due process of law . . .").

143. See, e.g., *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293-94 (1980).

144. In reference to war, William Shakespeare wrote, "'Tis better that the enemy seek us;/ So shall he waste his means, weary his soldiers,/ Doing himself offence, whilst we, lying still,/ Are full of rest, defence, and nimbleness." WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 4, sc. 2, lines 249-52 (The New Cambridge ed., Cambridge Univ. Press 1988). This passage applies equally to lawsuits in which the litigants prefer the luxury of defending at home while their adversaries are frustrated and burdened with long-distance litigation.

145. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) ("To require the [defendant] to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the [defendant] to comport with due process.").

the plaintiff's chosen forum.¹⁴⁶ If the individual resisting enforcement of a forum selection clause is the defendant, she can rely on case law dealing with a defendant's waiver of personal jurisdiction.¹⁴⁷ If, however, the individual challenging a forum clause is the plaintiff, she must first establish that she has a right to sue in a forum with which she has substantial contacts.

Fairness to the plaintiff generally is not in issue, since the plaintiff chose the forum in which to bring suit, and therefore case law is scant on the issue of a plaintiff's rights. There is, however, evidence that a plaintiff is entitled to due process considerations similar to those that protect the defendant. The Due Process Clause, applying to "persons," intimates no intention to exclude plaintiffs;¹⁴⁸ accordingly, the Court has recognized that the borders of this protective language extend beyond the rights of defendants.¹⁴⁹ Similarly, the Court has embraced an expansive interpretation of "property" that goes beyond "real estate, chattels, or money,"¹⁵⁰ and includes legal claims.¹⁵¹ A plaintiff's legal claim, therefore, qualifies as an "interest in property" that deserves the protections afforded by the Constitution. Additionally, the degree of protection should be identical to that afforded the defendant in *International Shoe Co. v. Washington*¹⁵² since the considerations are essentially the same.

International Shoe was concerned with having a defendant travel to a distant forum or suffer a default judgment.¹⁵³ Forcing distant litigation on the plaintiff, however, presents comparable considerations. Both plaintiff and defendant, facing distant litigation, can travel and pursue the claim, in which case the burdens, in terms of added costs, are equal. If they forgo the suit, the difference is only a conceptual one: a defendant

146. See, e.g., *Kulko v. California Super. Ct.*, 436 U.S. 84, 91 (1978) ("The due process clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants.").

147. See *infra* notes 161-66 and accompanying text (defining requisites for waiver of personal jurisdiction).

148. U.S. CONST. amend. XIV, § 1; see *supra* note 142 (quoting the relevant text of this constitutional provision).

149. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) ("The Fourteenth Amendment does protect 'persons,' not 'defendants' . . .").

150. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), *overruled in part by* *Paul v. Davis*, 424 U.S. 693 (1976).

151. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (cause of action is protected under the Due Process Clause); see also *Roth*, 408 U.S. at 577 ("To have a property interest . . . [an individual must] have a legitimate claim of entitlement to it."); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that welfare benefits are a property right).

152. 326 U.S. 310 (1945).

153. *Id.* at 317.

suffers a judgment whereas a plaintiff bears the loss of a claim. What is relevant is that the parties are forced to have their property rights determined in a forum with which they have no substantial contacts. It was precisely this consideration that led to the minimum contacts requirement of *International Shoe*; the plaintiff, therefore, should be afforded the same protection courts give the defendant under similar considerations, and she should not be forced to litigate in a forum with which she has no substantial contacts.

Additionally, other holdings of the Court provide a strong inference that plaintiffs have rights to due process. Much of the Court's language concerning due process does not limit its application to the defendant,¹⁵⁴ and many cases that decide the propriety of asserting personal jurisdiction over the defendant emphasize the importance of convenience to the plaintiff.¹⁵⁵ Furthermore, the Court has, in contexts other than considering personal jurisdiction, afforded the plaintiff essential fairness considerations concerning the forum.¹⁵⁶ The Court has, therefore, implicitly recognized that plaintiffs as well as defendants have due process rights.

These principles, although never embodied in a rule expressing a plaintiff's right to due process, are incorporated in the general rule that a plaintiff's chosen forum will seldom be disturbed; this is often referred to as the *Gilbert* doctrine because it was first developed in *Gulf Oil Corp. v. Gilbert*.¹⁵⁷ As Justice Jackson stated, "[T]here is good reason why [the dispute] should be tried in the plaintiff's home forum He should not

154. See, e.g., *Burger King v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts'" (quoting *International Shoe*, 326 U.S. at 319) (emphasis added)); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

155. See, e.g., *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987) ("We have previously explained that . . . the reasonableness . . . of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." (emphasis added)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) ("[The defendant's burden of challenging personal jurisdiction] will in an appropriate case be considered in light of other relevant factors, including . . . the plaintiff's interest in obtaining convenient and effective relief . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum" (emphasis added) (citing *Kulko v. California Super. Ct.*, 436 U.S. 84, 92 (1978) and *Schaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977))).

156. See, e.g., *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960) (holding that the defendant cannot transfer venue to a jurisdiction where the plaintiff could not have sued initially, since allowing him to do so would be unfair to the plaintiff).

157. 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); see also *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 325 (1964) (Black, J., dissenting) ("The right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum is as ancient as the Magna Charta." (citation omitted)). But see Peter G. McAllen,

be deprived of the presumed advantages of his home jurisdiction. . . ."¹⁵⁸ This sentiment resounds throughout lower court opinions that require an enormous finding of inconvenience to the defendant, the court, and the witnesses to support a transfer.¹⁵⁹ Disturbing this deference to the plaintiff's forum would remove the keystone from the framework of traditional American procedure that maintains the balance between the parties, and thereby would expose the plaintiff to vexatious litigation.¹⁶⁰

This right is, of course, subject to waiver,¹⁶¹ but the Court has announced reservations toward waiver, such as limiting enforcement to negotiated contracts¹⁶² and directing courts to consider the relative bargaining power.¹⁶³ Contract provisions pertaining to personal jurisdiction, a constitutional right,¹⁶⁴ are inherently unlike other contract provisions such as price or terms of delivery.¹⁶⁵ Considering the gravity of

Deference to the Plaintiff in Forum Non Conveniens, 13 S. ILL. U. L.J. 191, 208 (1989) (criticizing the interpretation of *Gilbert* as giving deference to the plaintiff's forum).

158. *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947).

159. *Norwood v. Kirkpatrick*, 349 U.S. 29, 41 (1955) (Clark, J., dissenting) ("Apparently [only] one jurisdiction stands squarely behind the proposition that a court may decline to hear a personal injury suit, brought by a *bona fide* resident, in order to spare the defendant inconvenience and expense."); see, e.g., *Erbamont, Inc. v. Cetus Corp.*, 720 F. Supp. 387, 396-97 (D. Del. 1989); *Entenmann's, Inc. v. King Bees Distrib. Co.*, 692 F. Supp. 157, 159-60 (E.D.N.Y. 1988).

160. "Thus, [*Shute*] throws out of kilter the federal court's long-standing, traditional deference to a plaintiff's choice of forum." Mullenix, *supra* note 22, at S12.

161. See, e.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982) (waiver of personal jurisdiction can be voluntary or involuntary); *Szukhent*, 375 U.S. at 316. For a discussion of *Szukhent*, see *supra* notes 59-66 and accompanying text.

162. See, e.g., *Burger King v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("Where . . . forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' . . . their enforcement does not offend due process.") (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

163. *Id.* at 486 ("[J]urisdiction may not be grounded on a contract whose terms have been obtained through . . . 'overweening bargaining power' and whose application would render litigation 'so gravely difficult and inconvenient [as to deprive the plaintiff] of his day in court.'") (quoting *The Bremen*, 407 U.S. at 12, 18)); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (holding that district court must consider convenience "and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power"); see *supra* notes 89-101 (discussing *Stewart*).

164. See *supra* notes 148-60 and accompanying text.

165. Nearly one hundred years before *The Bremen*, the Court stated, "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 life or his freedom, or his substantial rights." *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874). Although reflective of rejected notions that forum clauses are per se invalid, *French v. LaFayette Ins. Co.*, 9 F. Cas. 788, 789 (C.C.D. Ind. 1853) (No. 5102), *aff'd*, 59 U.S. (18 How.) 404 (1856) (discussed *supra* note 56 and accompanying text), this language reflects the value traditionally placed on jurisdictional rights, which exists to a lesser degree in modern times, see *supra* notes 161-63 and accompanying text.

this right, courts have an added interest in making sure that its waiver is truly the party's intention.¹⁶⁶ The notion that waivers of constitutional rights merit more consideration by the parties than do other contractual waivers is not confined to the relinquishment of personal jurisdiction.

The Court has previously struck down a waiver of the rights to receive notice and to have a hearing in a civil proceeding when the relevant provision was printed in small type on a form contract.¹⁶⁷ In a criminal context the Court has announced that a waiver of constitutional rights must be done "voluntarily, intelligently, and knowingly."¹⁶⁸ Similarly, when waiving the right to counsel, the Court has required that the defendant do so "competent[ly] and intelligent[ly]."¹⁶⁹ Regarding waivers of constitutional rights, the Court has stated that "'courts indulge every reasonable presumption against waiver' of fundamental Constitutional rights and that [courts] 'do not presume acquiescence in the loss of fundamental rights.'"¹⁷⁰ For an individual to yield a fundamental right provided by the Constitution, therefore, the Court has consistently held that the individual must intelligently and competently renounce her right.

The right of the plaintiff to obtain judicial relief in a forum where he is subject to personal jurisdiction is an implicit constitutional principle that is well established in legal doctrine;¹⁷¹ its surrender, therefore, requires meaningful consent from the parties.¹⁷² In *Shute*, since payment for the cruise tickets occurred before reading the contract was possible, it is absurd to consider payment to be a meaningful consent. The only action arguably demonstrating consent was that of the Shutes boarding the cruise ship once they had received their tickets. Even this conduct, though, does not rise to the level of meaningful consent since the Court can not "presume acquiescence in the loss of fundamental rights."¹⁷³ In a similar setting, the Court has held invalid a waiver of rights to due

166. See, e.g., *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332 (1964) (Black, J., dissenting) (stating that a form contract is insufficient to override the constitutional right to be sued at home).

167. *Fuentes v. Shevin*, 407 U.S. 67, 94-97 (1972).

168. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972).

169. *United States v. Morgan*, 346 U.S. 502, 512 (1954); *Glasser v. U.S.*, 315 U.S. 60, 70-71 (1942). The rule discussed was set forth in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

170. *Johnson*, 304 U.S. at 464 (footnotes omitted) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937)).

171. See *supra* notes 148-60 and accompanying text.

172. See *supra* notes 161-70.

173. See *Johnson*, 305 U.S. at 464; *supra* text accompanying note 170. A finding of meaningful consent in *Shute* requires a mountain of presumptions. The Court first must have presumed that the Shutes understood the legal consequences of a forum selection clause. Next the

process that was printed in small type on a form contract.¹⁷⁴ The Court in *Shute* failed to recognize that forum selection clauses represent a threat to due process, and that, as such, their use should require the parties' meaningful consent. Thus, the Court replaced what had been an iron fortress protecting individuals from distant litigation with a thatched hut, the walls of which are easily penetrated by fine print and shrewd business practices.¹⁷⁵

Instead of addressing the contractual and constitutional principles underlying forum selection clauses, the Court emphasized policy reasons supporting forum clauses. Forum selection clauses admittedly provide many benefits to the parties and to the courts.¹⁷⁶ The Court in *The Bremen* emphasized that in international contracts there may be contact with myriad forums, thus exposing the parties to uncertainty and inconvenience.¹⁷⁷ This predictability assured by forum clauses encourages international trade,¹⁷⁸ thereby promoting American indus-

Court must have presumed that the Shutes knew of its enforceability. Finally, the Court must have presumed that the Shutes agreed to its contents.

174. See *Fuentes v. Shevin*, 407 U.S. 67, 94-97 (1972); *supra* text accompanying note 167.

175. See, e.g., *Mullenix*, *supra* note 97, at 296 ("Contract principles now effectively usurp long-standing jurisdictional . . . rules, but courts and commentators have devoted scant attention to the deleterious effects of this quiet revolution."). The Court's opinion invites the wholesale use of forum selection clauses by corporations against consumers. See *infra* notes 194-98 and accompanying text. The Court's holding essentially allows contract clauses to undermine the plaintiff's due process rights without the plaintiff's meaningful consent. Addressing the waiver of due process, Justice Black wrote,

Where one party, at its leisure and drawing upon expert legal advice, drafts a form contract, complete with waivers of rights and privileges by the other, it seems to me to defy common sense for this Court to formulate a federal rule designed to treat this as an agreement coolly negotiated and hammered out by equals.

. . . .

. . . [I]t exhausts credulity to think that [the plaintiffs] or any other laymen reading these legalistic words would have known or even suspected that they amounted to an agreement [to be sued away from home.] This Court should not permit valuable constitutional rights to be destroyed by any such sharp contractual practices.

National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 326, 332-33 (1964) (Black, J., dissenting).

176. See, e.g., Leandra Lederman, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 424 (1991) ("[T]he enforcement of reasonable forum-selection clauses protects the expectations of contracting parties, preserves the equities of the agreement, respects freedom of contract, encourages trade, and conserves judicial resources by limiting pretrial struggles over where to litigate." (footnotes omitted)).

177. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972); see *supra* note 76 and accompanying text.

178. *The Bremen*, 407 U.S. at 9. This furtherance of international trade was also raised in *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 515-20 (1974), see *supra* note 85; and in *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 229 (1987), see *supra* note 88.

try.¹⁷⁹ Such clauses also conserve judicial resources and spare "litigants the time and expense of pretrial motions to determine the correct forum."¹⁸⁰ These themes had been sounded previously by the Court, but never in the context of binding an individual in a noncommercial contract. It is therefore necessary to reanalyze the merits of forum selection clauses in the context of a cruise contract.

Shute, echoing *The Bremen*,¹⁸¹ stated that refusing to enforce the forum clause would expose a cruise line to suit in several forums since its passengers are from varied locales.¹⁸² Contrasted with *The Bremen*, which involved only one contract, the cruise line entered into as many contracts as there were passengers, thereby voluntarily subjecting itself to several forums. In addition to lacking support on fairness grounds, the Court's reasoning also lacks support on the basis of efficiency. Two situations must be distinguished here: a mass disaster at sea involving several plaintiffs with similar claims,¹⁸³ and an isolated incident involving only one plaintiff. In the former scenario, a forum selection clause assists in consolidating the litigation and potentially conserves resources;¹⁸⁴ in the latter setting, however, the clause does not produce efficiency in litigation. Invalidating the forum selection clause will subject the cruise line to suit in several forums, but forcing the passengers to litigate in the chosen forum only shifts the burden from the cruise line to the passengers. While this burden-shifting is permissible in a freely negotiated agreement, it is questionable when done through an adhesion contract affecting constitutional rights.

The *Shute* Court bolstered its affirmation of forum selection clauses by claiming that such clauses promote judicial economy;¹⁸⁵ this, however, is a questionable assumption. Under the Court's holding plaintiffs still can argue against such clauses on grounds of "fundamental fair-

179. See *McMahon*, 482 U.S. at 229; *Scherk*, 417 U.S. at 515-20; *The Bremen*, 407 U.S. at 9; see POSNER, *supra* note 138, at 41-44 (discussing economic benefits of contracts); see also ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-9 (1979) (broadly addressing the economics of contract law).

180. *Shute*, 111 S. Ct. at 1527.

181. *The Bremen* envisioned a suit between two parties that might be filed in one of several forums since many forums may be affected in an international shipping agreement. See *The Bremen*, 407 U.S. at 13.

182. *Shute*, 111 S. Ct. at 1527.

183. See, e.g., *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 906-07 (3d Cir. 1988) (terrorists hijacked a cruise ship), *cert. denied*, 490 U.S. 1001 (1989).

184. See, e.g., *Ballard Medical Prods., Inc. v. Concord Labs, Inc.*, 700 F. Supp. 796, 801 (D. Del. 1988) (stating that it is efficient to litigate all claims "in one place, before one court").

185. *Shute*, 111 S. Ct. at 1527. *The Bremen* did not mention judicial efficiency in enforcing forum clauses, but it may have been an underlying factor in its decision.

ness,"¹⁸⁶ and since such clauses may conflict with common-law principles of adhesion contracts, they are likely to be disfavored.¹⁸⁷ The Court's holding may have done little more than shift the focus of the litigation. In addition, contrasted with a commercial case involving businesses, the judicial resources used in determining the forum in an individual's noncommercial case are less burdened since the issue is less complex.¹⁸⁸ If the Court wanted to promote judicial efficiency, it could have done so more equitably by invalidating forum selection clauses in noncommercial contracts, including cruise contracts, and invoking the *Gilbert* doctrine,¹⁸⁹ which favors the plaintiff's chosen forum absent compelling reasons to dismiss or transfer the case.

While *Shute* employed some of the considerations found in *The Bremen*, no mention was made of the promotion of commerce and American industry that was integral to *The Bremen* and subsequent cases.¹⁹⁰ This economic argument does not apply as forcefully in cases like *Shute*. First, it is arguable that cruise contracts, being primarily recreational, are not the type of transaction deserving judicial encouragement envisioned by previous cases.¹⁹¹ Second, it is not likely that cruise lines will trade elsewhere or that Americans will be denied cruises if American courts reject their forum clauses.¹⁹² To think that invalidating forum selection clauses would induce Carnival to redirect its marketing to Mexico or

186. *Id.* at 1528.

187. See *supra* notes 115-39 and accompanying text.

188. A business or corporation may conduct substantial business in several locales, thereby being subject to suit in several forums. Additionally, since commercial contracts often affect many states, several forums may have an interest in the matter. Commercial contracts, therefore, are likely to have several plausible forums since the contracts and the parties contact many states. If a cruise line faces a consolidation of suits arising from a similar incident, forum selection clauses eliminate substantial litigation since there are many potential forums. In an isolated suit, however, litigation concerning a cruise is less likely to have several suitable forums since the plaintiff will generally favor only her home forum and since only a limited number of jurisdictions will have an interest in the matter.

189. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (favoring plaintiff's forum); see *supra* notes 157-60 and accompanying text.

190. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("[A] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

191. For example, *The Bremen* Court stated, "Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control . . ." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

192. *The Bremen* stressed that if American courts deny forum selection clauses, Americans will be impaired in international trading. *Id.* at 9. The Court argued that "the expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . [Invalidating forum clauses] would be a heavy hand indeed on the future development of international commercial dealings by Americans." *Id.*

Canada, for example, is unreasonable. Additionally, there was no evidence that other countries would enforce such a clause on a cruise contract.¹⁹³

The contract in *Shute*, therefore, differed greatly from the contract in *The Bremen* and subsequent cases. The previous cases concerned commercial contracts and their reasoning supporting forum clauses does not apply correspondingly in an individual's noncommercial contract. Not only did the Court effectively condone the extirpation of fundamental rights rooted deeply in the American legal landscape, it did so on inapplicable precedent and diluted arguments.

In addition to distorting precedent and abandoning established principles, the Court failed to realize the implications of its holding. *Shute* is an admiralty case and, therefore, has no binding effect on diversity cases,¹⁹⁴ however, there is reason to believe that its holding will apply to diversity cases as well. *The Bremen*, too, was an admiralty case, but the tentacles of its holding soon became firmly attached to diversity cases as well as admiralty cases.¹⁹⁵ *Shute*, therefore, is likely to affect diversity cases, potentially exposing all individuals to the hazards of litigating in distant forums.

Guided by *Shute*, manufacturers of products and providers of services are encouraged to affix in every contract a clause designating that all suits be brought in their home forums. While lack of notice is still a defense under *Shute*, courts are amenable to findings of constructive notice or of a duty to discover the provision.¹⁹⁶ Thus a patron who slips and falls in a movie theater may be required to litigate her claim, if at all, in the home forum of the corporation due to a clause on her ticket. A consumer injured by a defective automobile could be limited to filing suit in the remote forum of the manufacturer due to a forum clause on the sales form, while the dealer that sold the automobile might be protected

193. *The Bremen* stressed that other countries enforce forum clauses in international agreements, which furthered the need for American courts to enforce them, too. *Id.* at 11 ("[Favoring forum clauses] is substantially . . . followed in other common-law countries including England."). For a discussion of other countries' treatment of forum clauses, see Gilbert, *supra* note 2, at 20-24.

194. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28-29 (1988) (stating that although *The Bremen* is "instructive" it does not control diversity cases).

195. See *supra* notes 101-06 and accompanying text.

196. See, e.g., *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 909-10 (3d Cir. 1988) (referring to whether or not there was sufficient warning and to the nature of the forum clause itself; requiring that "ticket provisions . . . meet a practical 'standard of reasonable communicativeness'" (quoting *Marek v. Marpan Two, Inc.*, 817 F.2d 242, 245 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987))), *cert. denied*, 490 U.S. 1001 (1989); see also John D. Calamari, *Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341, 341-42 (1947) (stating the traditional rule that parties have a duty to read).

from suit in the purchaser's forum by notice on the doors that entering the premises signifies acceptance of a specified forum for all claims. The gains that *International Shoe*¹⁹⁷ and its progeny made toward allowing plaintiffs to sue in their home jurisdictions will be largely recaptured by corporations in a frenzy to lower legal costs.¹⁹⁸

The decision in *Shute* stands on a precarious foundation of flawed reasoning and the Court's inability to recognize the ramifications of its holding. *Shute* was an ideal case for arresting the progress of the forum selection clause. As Judge Posner stated, "If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary."¹⁹⁹ Instead, the Court deprived the plaintiff of her traditional rights based on a contract in which her only participation was payment and boarding ship.²⁰⁰ Regarding a similar waiver, Justice Black stated, "This printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home."²⁰¹ Ignoring contract principles as well as fundamental rights to due process, the Court stripped the individual of his jurisdictional shield and sheathed his sword of venue preference, thus exposing the individual consumer to aggressive corporate practices and the perils of distant litigation.

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197. 326 U.S. 310 (1945).

198. One court has stated concerning these dangers:

The Court is wary of forum selection clauses that appear in form contracts between individuals and large corporations. Routine enforcement of these clauses would undercut the broad reach of a court's personal jurisdiction over corporations that do business in many states. As in the case at hand, where the clause requires the filing of a suit in a distant state it can serve as a large deterrent to the filing of suits by consumers against large corporations.

Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 759 (E.D. Va. 1986).

199. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (referring to the appellate decision in *Shute*).

200. See *Shute*, 111 S. Ct. at 1529.

201. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 328 (1964) (Black, J., dissenting). Although *Szukhent* concerned only waiver of personal jurisdiction, Justice Black's commentary applies equally to forum selection clauses since their effect, like the effect in *Shute*, is that the plaintiff must forsake her home forum.