

## Enforcing Outbound Forum Selection Clauses in State Court

JOHN F. COYLE\* & KATHERINE C. RICHARDSON\*\*

*Forum selection clauses are a staple of modern business law. Parties agree, ex ante, on where they can sue one another and then rely on the courts to enforce these agreements. Although the number of contracts containing forum selection clauses has skyrocketed in recent years, there is a dearth of empirical information about enforcement practice at the state level. Are there any states that refuse to enforce them? How frequently are they enforced? Under what circumstances, if any, will these clauses be deemed unenforceable? The existing literature provides few answers to these questions.*

*This Article aims to fill that gap. It surveys more than 200 state statutes and nearly 900 state cases involving outbound forum selection clauses to contribute to the scholarly discussion in two important ways. First, it provides a much needed, and heretofore missing, empirical account of when outbound forum selection clauses will be enforced in state courts. Second, the Article offers a rich descriptive account of why outbound forum selection clauses sometimes go unenforced. It shows that state courts generally refuse to enforce these clauses for one of two reasons: 1) they are contrary to public policy; or 2) they are unreasonable, a famously malleable term that encompasses a relatively stable subset of reasons.*

*The data presented in this Article offers important insights to actors who interact with outbound forum selection clauses on a regular basis—litigators, judges, and scholars. Armed with this information, litigators can take care to avoid pitfalls that may result in a clause being deemed unenforceable. Judges can gain a better sense for how their colleagues in other states address the myriad challenges posed by these clauses. And scholars can draw upon this data to evaluate whether there exists a difference between state and federal practice in this area and, if so, whether this difference presents a problem under the Supreme Court’s seminal decision in *Eric Railroad Co. v. Tompkins*.*

---

\* Reef C. Ivey II Distinguished Professor of Law, University of North Carolina at Chapel Hill.

\*\* Associate, McGuireWoods LLP; Law Clerk, United States Court of Appeals for the District of Columbia Circuit, 2021-22 Term. We would like to thank Pam Bookman, Kevin Clermont, Bill Dodge, Robin Efron, Maggie Gardner, Andy Hessick, Leigh Osofsky, Aaron Simowitz, Glenn West, and Chris Whytock for comments on an earlier draft of this Article. Thanks to Ryan Dovel and Carleigh Zeman for their excellent research assistance.

INTRODUCTION.....	1090
I. OUTBOUND AND INBOUND FORUM SELECTION CLAUSES .....	1094
II. A BRIEF HISTORY OF ENFORCEMENT FRAMEWORKS .....	1096
III. METHODOLOGY AND FINDINGS.....	1098
A. ENFORCEABLE CLAUSES .....	1100
B. UNENFORCEABLE CLAUSES .....	1103
IV. PUBLIC POLICY .....	1104
A. STATUTES EXPRESSLY INVALIDATING FORUM SELECTION CLAUSES ....	1105
1. GENERAL PROHIBITIONS .....	1105
2. PROHIBITIONS AFFECTING BUSINESS CONTRACTS .....	1108
3. PROHIBITIONS AFFECTING NONBUSINESS CONTRACTS.....	1110
B. ANTI-WAIVER STATUTES.....	1113
1. CONSTITUTIONAL RIGHTS .....	1115
2. STATUTORY RIGHTS .....	1117
3. COMMON LAW RIGHTS.....	1121
V. REASONABLENESS.....	1123
A. DUPLICATIVE LITIGATION.....	1125
B. PLAINTIFF CANNOT SECURE RELIEF IN THE CHOSEN FORUM .....	1128
1. TIMELINESS AND JURISDICTION.....	1128
2. SMALL CLAIMS AND CLASS ACTIONS .....	1129
3. SERIOUS INCONVENIENCE .....	1131
C. NO NOTICE OF THE CLAUSE .....	1135
1. CRUISE SHIPS .....	1136
2. ONLINE AGREEMENTS.....	1137
3. OTHER AGREEMENTS .....	1138
D. NO REASONABLE RELATIONSHIP TO THE PARTIES.....	1139
E. CONTRACTS OF ADHESION .....	1142
VI. FRAUD (AND OTHER CONTRACT DEFENSES).....	1144
VII. IMPLICATIONS.....	1147
CONCLUSION.....	1148
APPENDIX.....	1149

## INTRODUCTION

In the mid-nineteenth century, an unknown lawyer at an obscure Massachusetts insurance company had an idea with the potential to reshape the practice of litigation in the United States. What if, instead of waiting on a plaintiff to sue the insurance company wherever *he* wanted, the company took proactive steps to ensure that a suit was brought where *it* wanted? In the early 1850s, the Hamilton Mutual Insurance Company chose to act on this insight and became one of the first companies in the United States to write a forum selection clause into its contracts. The clause stated that any suit against the company had to be brought in Essex County, Massachusetts, the place where the company's headquarters were located. When a policyholder subsequently sued Hamilton in Suffolk County, the stage was set for a fateful decision. Would the Massachusetts court uphold the clause and require the plaintiff to refile in Essex County? Or would it void the clause and allow the suit to proceed in Suffolk County?

In 1856, the Massachusetts Supreme Judicial Court declared the clause invalid.<sup>1</sup> The court warned that such provisions, if given effect, might be used to divert litigation to a forum where the defendant's personal, social, or political standing could affect the outcome of the case.<sup>2</sup> That possibility, in the court's view, would "bring the administration of justice into disrepute."<sup>3</sup> The court also noted that "[t]he rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law" and that "to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience."<sup>4</sup> Accordingly, the court ruled that the forum selection clause in the insurance agreement was unenforceable.<sup>5</sup> If the plaintiff wanted to sue Hamilton in Suffolk County, he was free to do so.

This dim view of forum selection clauses was shared by many other courts in the nineteenth century. In 1874, the U.S. Supreme Court famously held that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."<sup>6</sup> This view persisted well into the twentieth century.<sup>7</sup> In the 1950s and 1960s, however, judicial attitudes began to shift. In 1972, the landmark U.S. Supreme Court case of *The Bremen v. Zapata Off-Shore Co.* ushered in a sea change in both state and federal treatment of outbound forum selection clauses.<sup>8</sup> In the wake of that case, a growing number of state courts came to embrace the notion that such clauses were presumptively enforceable.<sup>9</sup> By the late 1990s, most state courts in the United States had come around to the view that these clauses should be given effect in most cases.<sup>10</sup> After more than a century in the wilderness, the forum selection clause had at last arrived.

At this point in the story, something curious happens. Everything goes dark. The existing literature contains virtually no discussion about state practice with respect to forum selection clauses after the turn of the twenty-first century. As a consequence, scholars, judges, and practitioners lack the answers to basic empirical questions about such clauses. Are there any states that still refuse to enforce them? How frequently are they enforced? Under what circumstances, if any, will these

1. *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856).

2. *Id.*

3. *Id.*

4. *Id.*

5. An "outbound" forum selection clause, as that term is used in this Article, is a contractual provision stipulating that any litigation must occur in a court other than the one in which the suit has been filed. An "inbound" forum selection clause, by contrast, is a contractual provision stipulating that any litigation must occur in the court where the suit has been filed. Each of these terms is explained in greater detail in Part I.

6. *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

7. See Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-39 (1982) (collecting cases where courts refused to enforce forum selection clauses prior to 1972).

8. 407 U.S. 1 (1972).

9. See, e.g., *Smith, Valentino & Smith, Inc. v. Superior Ct. of L.A. Cty.*, 551 P.2d 1206, 1209 (Cal. 1976); *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 890 (Minn. 1982).

10. PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, *CONFLICT OF LAWS* 503 (6th ed. 2018).

clauses be deemed unenforceable? At best, the existing literature offers partial or inconclusive answers to these questions.<sup>11</sup> At worst, it offers answers that are outdated or affirmatively misleading.<sup>12</sup>

This state of affairs is particularly troubling because so many contracts now contain forum selection clauses. A recent study of more than 500,000 contracts filed with the Securities and Exchange Commission between 2000 and 2016 found that 30% of these agreements contained forum selection clauses.<sup>13</sup> Within certain types of agreements, the percentage is even higher.<sup>14</sup> As one scholar has observed, “[t]he forum selection clause . . . is among the most important and pervasive types of contract procedure.”<sup>15</sup> Nevertheless, we know remarkably little about how state courts today grapple with the issue of enforceability.

---

11. There are a few articles that discuss the enforceability of forum selection clauses in specific states. *See, e.g.*, J. Zak Ritchie, *A Tie That Binds: Forum Selection Clause Enforceability in West Virginia*, 113 W. VA. L. REV. 95 (2010) (West Virginia); Marty Gould, *The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got it Right in Jane Doe v. Match.com*, 90 CHI.-KENT L. REV. 671 (2015) (Illinois); Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265 (2009) (Colorado). There is an article that discusses state practice with respect to permissive forum selection clauses. Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMP. L. 127 (2018). And there is a recent book that provides a brief survey of U.S. state practice. ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 126–28 (2018). There are, however, frustratingly few articles that discuss in any detail the general practices of U.S. state courts when it comes to mandatory outbound clauses such as the ones at issue in *The Bremen* and *Carnival Cruise*.

12. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 664 (4th ed. 2020) (observing that “[t]he *The Bremen* holding has been uniformly followed in non-admiralty cases in federal and state courts” without acknowledging that some states follow the Model Choice of Forum Act); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 353–54 (6th ed. 2018) (suggesting that state courts in Florida have not “definitively resolved” whether outbound forum selection clauses are enforceable when there are at least forty-nine cases where Florida state courts have enforced these clauses); Jason Webb Yackee, *A Matter of Good Form: The (Downsized) Hague Judgements Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements*, 53 DUKE L.J. 1179, 1185–90 (2003) (offering partial survey of state practice that is now out of date).

13. Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT’L REV. L. & ECON. 6, 31 (2019). This same study found that 53% of loan agreements contained such clauses. *Id.*

14. *See* Matthew D. Cain & Steven M. Davidoff, *Delaware’s Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 94 (2012) (finding that 60% of the merger agreements in the sample contained forum selection clauses with Delaware as their choice of forum); *see also* Ya-Wei Li, Note, *Dispute Resolution Clauses in International Contracts: An Empirical Study*, 39 CORNELL INT’L L.J. 789, 797, 799 (2006) (finding that 67% of “merger, acquisition, stock exchange and share exchange, reorganization, and combination contracts filed with the [SEC] between January 1, 2002 and March 31, 2003 and involving at least one foreign party” contained a forum selection clause).

15. David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 975 (2008); *see also* David H.

This Article aspires to fill this gap in the literature. Drawing upon a dataset of 872 state cases, it offers a detailed analysis of when state courts will and will not enforce outbound forum selection clauses. It also examines more than 200 state statutes that specifically limit the enforceability of such clauses. Taken together, these two sources make it possible to take stock of what has changed—and what has not—with respect to state enforcement practice over the past several decades.<sup>16</sup>

Our most significant finding relates to the overall enforcement rate for outbound forum selection clauses in U.S. state courts. Our review of published and unpublished decisions suggests that these clauses are enforced in state courts roughly 77% of the time.<sup>17</sup> In cases where state courts decline to give effect to these clauses, they tend to do so because they conclude that (1) the clause is contrary to state public policy, or (2) the clause is unreasonable. While public policy and reasonableness are famously malleable concepts, we show that the courts have developed a surprisingly stable and predictable set of criteria that guide their decisions in this area.

These empirical findings set the stage for the resolution of an important scholarly question.<sup>18</sup> Scholars and courts have long debated whether there is a meaningful difference between state and federal practice when it comes to the enforcement of outbound forum selection clauses.<sup>19</sup> The prevailing scholarly view is that there is a difference and that this difference creates significant problems under the Supreme Court's seminal decision in *Erie*.<sup>20</sup> However, several courts have expressly stated

Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 793 n.38 (1993) (collecting sources).

16. This Article does not address the question of whether forum selection clauses may be enforced by and against individuals who never signed the contract containing the clause. For a detailed discussion of nonsignatories and forum selection clauses, see John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. (forthcoming 2021).

17. As discussed at greater length below, this almost certainly understates the true enforcement rate. See *infra* Section III.A. It is important to note that our dataset only includes cases where the defendant argued that a *forum selection clause* was unenforceable. We did not include cases where the defendant argued that a clause was unenforceable because the *entire contract* was invalid. See *infra* Part III.

18. See Robert A. de By, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068, 1079, 1084 (1989); Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913 (2009).

19. The potential for a difference between state and federal practice in this area can be traced to the Supreme Court's decision in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). In that case, the Court held that federal law should govern the inquiry as to whether a forum selection clause was enforceable in a § 1404(a) transfer motion when a diversity action was brought in federal district court. *Id.* at 32. If federal courts are applying federal law to assess whether a forum selection clause is enforceable, and if state courts are applying state law to assess whether a forum selection clause is enforceable, then there is the potential “for a serious problem” under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as Justice Scalia pointed out in his dissent in *Ricoh*. 487 U.S. at 33–41 (Scalia, J., dissenting).

20. 304 U.S. 64. For commentators that have argued that there is a difference between state and federal practice in this area and that this disparity generates an *Erie* problem, see generally Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521, 2558–60 (2014); Kelly Amanda Blair, *A*

that there is *not* a meaningful difference between state and federal practice in this area.<sup>21</sup> To date, scholars have lacked an empirical baseline of state practice against which to compare federal practice. In providing such a baseline, our paper paves the way for future scholars to draw informed conclusions based on fact—rather than anecdote and supposition—as to existence and extent of any *Erie* problem when it comes to state and federal practice relating to the enforcement of outbound forum selection clauses.

The Article proceeds in seven Parts. Part I defines the term “outbound forum selection clause.” Part II surveys the doctrinal frameworks that state courts now rely upon to evaluate whether an outbound forum selection clause is enforceable. Part III provides a detailed description of the methodology that we deployed to gather our data and provides a quantitative assessment of state practice. Part IV offers a detailed qualitative discussion of when state courts refuse to enforce clauses on public policy grounds. Part V surveys the rationales by which state courts refuse to enforce clauses on reasonableness grounds. Part VI briefly discusses the subset of cases where state courts refuse to enforce clauses because there is a valid defense under traditional contract law. Part VII discusses the implications of the foregoing as it relates to *Erie Railroad Co. v. Tompkins*.

#### I. OUTBOUND AND INBOUND FORUM SELECTION CLAUSES

Since there is relatively little in the existing academic literature that explains the distinction between an “inbound” and an “outbound” forum selection clause, we begin our discussion with a brief explanation of these terms.<sup>22</sup>

An outbound forum selection clause is a contractual provision stipulating that any litigation between the parties must occur in a forum other than the one in which the suit was filed. By way of example, imagine a scenario where the parties have agreed that any and all disputes relating to their contract must be litigated in California. This agreement notwithstanding, one party files a lawsuit against the other in Texas state court. The defendant asks the Texas court to enforce the forum selection clause and

---

*Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie a Second Chance*, 46 GA. L. REV. 799 (2012); Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625 (2011); Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663 (1997).

21. See *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 611 (7th Cir. 2006) (stating that “Illinois law concerning the validity of forum selection clauses is materially the same as federal law”); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 386 n.1 (1st Cir. 2001) (stating that the test under both Puerto Rico and federal law is the same); *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999) (stating that “Tennessee law is consistent with the rule of *Zapata*”); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997) (concluding that there were “no material discrepancies between Colorado law and federal common law”); *Lambert v. Kysar*, 983 F.2d 1110, 1116 (1st Cir. 1993) (stating that there is “no material discrepancy between Washington state law and federal law” with respect to the legal test for enforcing forum selection clauses).

22. See *Salesforce.com, Inc. v. GEA, Inc.*, No. 19-cv-01710-JST, 2019 U.S. Dist. LEXIS 136745, at \*14 (N.D. Cal. Aug. 13, 2019) (invoking the distinction).

dismiss the case because it should have been brought in California. In this context, the forum selection clause functions as an outbound clause because it stipulates that litigation must occur in a forum (California) other than the one in which the suit was filed (Texas). The outbound clause does not oust the Texas court of its jurisdiction to hear the case.<sup>23</sup> It merely provides that court with a reason to decline to exercise that jurisdiction because the parties have agreed that the dispute must be resolved elsewhere.<sup>24</sup>

An inbound forum selection clause, by comparison, is a contractual provision stipulating that any litigation must occur in the court where the suit was filed.<sup>25</sup> By way of example, imagine a scenario where the parties have agreed that any disputes arising out of their contract must be litigated in the state courts of California. One party then files a lawsuit against the other in California state court. The defendant moves to dismiss the suit for lack of personal jurisdiction. In this context, the forum selection clause functions as an inbound clause because it stipulates that litigation must occur in a forum (California) where the suit has been filed (California). Among other things, an inbound clause can provide a basis for the court's assertion of personal jurisdiction over a defendant with no other connection to the chosen forum.<sup>26</sup>

It is important to note that the same contract provision can qualify as *either* an outbound clause *or* an inbound clause depending on where the suit is filed. If a clause selects the California courts and suit is filed in Texas, then it is treated as an outbound clause by the Texas courts. If the suit had been filed in California, however, then the exact same clause would be treated as an inbound clause by the California courts. It is impossible to know whether a particular contract provision is an outbound clause

23. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (“The argument that such clauses are improper because they tend to ‘oust’ a court of jurisdiction is hardly more than a vestigial legal fiction.”).

24. *See id.* at 15.

25. *See* John F. Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65 (2021) (discussing state practice with respect to inbound clauses); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 371 (1993) (same).

26. This outbound/inbound terminology is common in the United States. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMPAR. L. 1, 38–42 (2019) (utilizing the outbound/inbound distinction); Carolyn Dubay, *From Forum Non Conveniens to Open Forum: Implementing the Hague Convention on Choice of Court Agreements in the United States*, 3 GEO. MASON J. INT'L COM. L. 1, 27–28 (2011) (same). In Europe, scholars distinguish between “derogation clauses” and “prorogation clauses.” *See* ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 114–28 (2018); Taylor, *supra* note 15, at 791–92. We utilize the outbound/inbound language rather than the derogation/prorogation language for two reasons. First, it is more commonly used by U.S. courts. *See, e.g.*, *Burke v. Goodman*, 114 S.W.3d 276, 279 (Mo. Ct. App. 2003) (“An inbound forum selection clause provides for trial inside Missouri. An outbound forum selection clause provides for trial outside Missouri.”); *Ex parte Riverfront, LLC*, 129 So. 3d 1008, 1011 n.2 (Ala. 2013) (“An ‘outbound’ forum selection clause is one providing for trial outside of Alabama, while an ‘inbound’ clause provides for trial inside Alabama.”). Second, it maps neatly onto the actual operation of the clauses and makes it easier for the uninitiated to distinguish one from the other.

or an inbound clause merely by looking at the language in the clause.<sup>27</sup> The distinction only manifests after a lawsuit is filed.

In the outbound context, the court must decide whether to refrain from exercising its jurisdiction to hear a case because the parties have agreed to litigate their dispute in another forum. Outbound clauses are used defensively by defendants who want to redirect litigation to the chosen forum. In the outbound context, the clause functions as a shield. In the inbound context, the court must decide whether it has personal jurisdiction over the defendant. Inbound clauses are used offensively by plaintiffs to obtain jurisdiction over the defendant in the chosen forum. In the inbound context, the clause functions as a sword. Although the decision to dismiss a case on the basis of an outbound clause presents a different set of issues than the decision to assert personal jurisdiction on the basis of an inbound clause, courts routinely look to cases decided in the outbound context for guidance on how to resolve cases in the inbound context.<sup>28</sup>

In this Article, we are concerned exclusively with the enforceability of outbound clauses; we address the enforceability of inbound clauses in other work.<sup>29</sup> With this focus in mind, the next Part provides a brief historical account of the various enforcement frameworks that the courts have utilized over the years to determine whether outbound forum selection clauses should be given effect.

## II. A BRIEF HISTORY OF ENFORCEMENT FRAMEWORKS

Throughout the nineteenth century and for much of the twentieth, state courts refused to enforce outbound forum selection clauses.<sup>30</sup> In the 1950s and 1960s,

---

27. Courts and scholars often draw a distinction between “exclusive” or “mandatory” forum selection clauses and “nonexclusive” or “permissive” forum selection clauses. This distinction is one that is based on the language in the clause itself. An exclusive clause by its terms provides that litigation must proceed in the chosen forum and nowhere else. A nonexclusive clause by its terms provides that the parties consent to jurisdiction and/or venue in the chosen forum but does not preclude a suit from being brought elsewhere. The distinction between exclusive and nonexclusive clauses is relevant to the distinction between outbound and inbound clauses because *only* exclusive clauses qualify as outbound clauses. If a clause requires a suit to be brought elsewhere, then the court must evaluate whether to enforce the clause and decline to hear the case. If a clause is merely permissive, there is no reason why the court cannot hear the case so long as jurisdiction and venue are otherwise proper. The issue of whether an outbound clause is enforceable, in short, will only arise when the clause in question is exclusive. *See generally* John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1802 (2019) (discussing distinction between exclusive and nonexclusive clauses).

28. *See, e.g.*, *Desarrollo Inmobiliario Y Negocios Industriales De Alta Tecnologia De Hermosillo v. Kader Holdings Co.*, 276 P.3d 1, 6–7 (Ariz. Ct. App. 2012) (utilizing framework for whether to enforce outbound clauses to determine whether inbound clause is valid); *see also* Taylor, *supra* note 15, at 792 (observing that U.S. courts have “developed a standard for enforcement that only contemplates whether a clause should be enforced for the purpose of having the case heard elsewhere”); Coyle & Richardson, *supra* note 25, at 133–34 (discussing cases where courts failed to recognize the difference between inbound and outbound clauses).

29. *See* Coyle & Richardson, *supra* note 25.

30. *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY



however, state practice began to change. In 1968, the Model Choice of Forum Act (“Model Act”) was approved by the National Conference of Commissioners on Uniform State Laws.<sup>31</sup> With respect to outbound forum selection clauses, the Model Act provides that such clauses should generally be enforced unless one of the following conditions is met:

- (1) [T]he court is required by statute to entertain the action;
- (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
- (3) the other state would be a substantially less convenient place for the trial of the action than this state;
- (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
- (5) it would for some other reason be unfair or unreasonable to enforce the agreement.<sup>32</sup>

The Model Act was formally enacted by legislatures in four states—Michigan, Nebraska, New Hampshire, and North Dakota.<sup>33</sup> In 1983, the Tennessee Supreme Court adopted the test laid down in the Model Act as a matter of common law.<sup>34</sup>

In 1971, the American Law Institute published the Second Restatement of Conflict of Laws. The Second Restatement staked out a position on the enforceability of outbound forum selection clauses that was broadly similar to the one set forth in the Model Act. Section 80 of the Second Restatement states that such clauses are enforceable if they are “fair and reasonable.”<sup>35</sup> The section also stipulates, however, that such clauses are unenforceable if they are the result of “overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action.”<sup>36</sup>

While the publication of the Model Act and the Second Restatement represent important milestones in changing attitudes towards the enforcement of outbound forum selection clauses, the most consequential shift in practice was initiated by the U.S. Supreme Court. In 1972, that Court held in *The Bremen v. Zapata Off-Shore Co.* that an outbound forum selection clause selecting England as the forum in an international transportation contract to move an oil platform from the Gulf of Mexico to the Adriatic Sea was enforceable.<sup>37</sup> Although this decision was not binding on the states because it presented a question of federal admiralty law, it proved to be

L. REV. 507, 523–24 (2011).

31. Willis L. M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969).

32. MODEL CHOICE OF FORUM ACT § 3 (UNIF. L. COMM’N 1968). The Model Act lists a different set of criteria for determining when an inbound forum selection clause should be enforced. *See id.* at § 2.

33. *See* MICH. COMP. LAWS § 600.745 (2020); NEB. REV. STAT. § 25-415 (2020); N.H. REV. STAT. ANN. § 508-A:3 (2020); N.D. CENT. CODE § 28-04.1-03 (2020).

34. *See* Dyersburg Mach. Works, Inc. v. Rentenbach Eng’g Co., 650 S.W.2d 378, 380 (Tenn. 1983).

35. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. a (AM. L. INST. 1971).

36. *Id.*

37. 407 U.S. 1, 20 (1972).

enormously influential. In the decades that followed, virtually every state (save the five Model Act states discussed above) adopted some version of the test laid down in *The Bremen* to determine when forum selection clauses were enforceable as a matter of state common law.<sup>38</sup> It is useful, therefore, to consider what exactly that case has to say about the enforceability of forum selection clauses.

In *The Bremen*, the Supreme Court stated a general rule with three exceptions. The general rule is that forum selection clauses are prima facie valid and that the party resisting the enforcement of the clause has the burden of proving that it should not be enforced.<sup>39</sup> The first exception relates to public policy. When the enforcement of a clause would violate public policy, whether declared by statute or a judicial decision, then the clause is unenforceable.<sup>40</sup> The second exception focuses on the reasonableness of the clause. Reasonable clauses are enforceable; unreasonable clauses are not.<sup>41</sup> The third and final exception relates to contract defenses available at common law. The Court held that a clause was unenforceable when it was the result of “fraud, undue influence, or overweening bargaining power.”<sup>42</sup>

In the decades immediately after *The Bremen* was decided, state courts across the United States were repeatedly called upon to decide whether, as a matter of state common law, outbound forum selection clauses were enforceable. Some state courts quickly adopted the admiralty-law test laid down in *The Bremen* into their state common law. Others dragged their feet. Gradually, however, support for the traditional rule that forum selection clauses were per se unenforceable crumbled. By the turn of the twenty-first century, virtually every state had come around to the conclusion that outbound forum selection clauses were enforceable at least some of the time. To date, however, the scholarly literature has devoted surprisingly little attention to when, as an empirical matter, contemporary state courts in the United States will enforce outbound forum selection clauses.

### III. METHODOLOGY AND FINDINGS

To assess how state courts behave when asked to enforce outbound forum selection clauses, we set out to identify every state case where this issue had been litigated.<sup>43</sup> We began by conducting a search in Lexis Advance for the terms “forum

---

38. See *infra* Parts IV–V.

39. *The Bremen*, 407 U.S. at 10.

40. *Id.* at 15.

41. See *id.* at 16. In *The Bremen*, the Supreme Court offered only limited guidance as to what made a clause unreasonable. See *infra* notes 113–16 and accompanying text. The Court further elaborated on the reasonableness criteria in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591–94 (1991).

42. *The Bremen*, 407 U.S. at 12. These contract defenses have not typically been developed specifically in the context of forum selection clauses. They are rules of general application that apply to all contracts. Consequently, we devote comparatively little attention to them in this Article. See *infra* Part VI.

43. There are problems with relying on cases resulting in a published or unpublished decision as evidence of judicial behavior. Most significantly, published and unpublished cases are not representative of all cases. See William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 481 (2017) (observing that cases identified through

selection clause,” “choice of court clause,” and “choice of forum clause.” When we searched for these terms in “All State Courts” in late November 2019, we received roughly 4,000 hits.

We then narrowed the list of hits to cases decided after a particular state’s courts had had occasion to revisit the traditional rule of nonenforcement. In practice, this meant that we only looked at cases decided after (1) a particular state’s legislature had adopted the Model Act or (2) a particular state’s courts had adopted, modified, or rejected the doctrinal framework laid down by the Supreme Court in *The Bremen*.<sup>44</sup> The legislature in New Hampshire, for example, adopted the Model Act in 1969. Accordingly, we only looked at New Hampshire state cases decided after 1969. The Missouri Supreme Court, by comparison, did not adopt the framework from *The Bremen* until 1992. Accordingly, we only looked at Missouri state cases decided after 1992. In this manner, we sought to ensure that all of our cases were “modern” in the sense that they were decided after the legal developments of the 1960s and 1970s that ushered in a new framework for evaluating whether outbound clauses were enforceable.

We then used several additional criteria to further narrow the list of cases. First, we eliminated cases where the clause was permissive rather than mandatory.<sup>45</sup> Only

“databases of published judicial opinions” are “not representative of cases as a whole, both because published opinions are not a random sample of all judicial decisions, and because cases with judicial decisions are not a random sample of all cases”). A growing number of scholars have urged empiricists to look to court dockets—rather than judicial opinions—in order to get a more accurate measure of how judges behave. *See, e.g.,* David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 686–89 (2007). As even these “docketologists” acknowledge, however, looking to court dockets as a source of data is only possible when researching the behavior of the federal district courts. In most states, it is simply impossible for researchers to obtain reliable docket information for state trial courts. As a practical matter, therefore, empiricists seeking to obtain information about state court practice must continue to rely on judicial opinions. *See id.* at 729. While this is lamentable in many respects, there is an upside. While published and unpublished cases may not be “representative” in a statistical sense, they are “representative” in that they are for most scholars, judges, and lawyers the “full population . . . of the cases shaping perceptions of the legal system. Published opinions are all most of us ever work from.” Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1195 (1991).

44. There is no legislation authorizing the enforcement of outbound forum selection clauses at the state level other than the legislation based on the Model Act.

45. *See generally* Coyle, *supra* note 27 (discussing differences between “mandatory” and “permissive” forum selection clauses). A mandatory or exclusive forum selection clause requires that suit be brought in a particular forum and no other. A permissive or nonexclusive forum selection clause consents to jurisdiction or venue in a given court but does not state that suit cannot be brought elsewhere. *See id.* at 1793–94. The question of how to interpret a forum selection clause is an issue of contract law. As a general rule, a court should first interpret a clause to determine its scope and whether it purports to bind anyone other than the contract signatories. In interpreting the clause, the court should apply the contract law of the jurisdiction selected in any choice-of-law clause in the contract. *See* Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. 1119, 1152–60 (2018). After the task of contract interpretation is complete, the court should then determine whether the clause, as interpreted, should be enforced in accordance with the forum’s rules relating to the

a clause that *requires* a suit to be brought in a different place can compel a court to dismiss a suit that it otherwise has jurisdiction to hear. Second, we eliminated cases involving inbound forum selection clauses. Only a clause that requires a suit to be brought *in a different place* will trigger the application of one of the enforcement frameworks discussed above. Third, we eliminated cases relating primarily to the enforcement of arbitration clauses. Fourth, we eliminated cases in which neither party argued that the clause in question was unenforceable. Fifth, we eliminated cases where one party sought to transfer a case to a different county in the same state. These situations often involve state-specific venue statutes that make comparisons across states difficult. Sixth, we eliminated cases presenting issues of pure contract law. If a contract containing a forum selection clause was deemed invalid for lack of consideration, for example, it was not included in our dataset. Similarly, if the sole issue before the court was how the forum selection clause should be interpreted, it was omitted. Finally, we eliminated cases where the parties were seeking to enforce a judgment rendered by a court in a different jurisdiction. These additional screening procedures resulted in a dataset of 872 cases. This dataset consists of every modern published and unpublished case decided prior to December 1, 2019, in which a party challenged the enforceability of an outbound forum selection clause in state court.

We then reviewed each of these 872 cases in an attempt to answer two questions. First, we sought to determine how frequently state courts enforce outbound forum selection clauses. Second, when a court refused to enforce a clause, we sought to determine why, precisely, it had concluded that the clause was unenforceable.

#### A. Enforceable Clauses

The cases in our dataset suggest that the overall enforcement rate for outbound clauses in state courts where one party challenges the enforceability of a clause is 77%.<sup>46</sup> This rate was remarkably consistent across major U.S. commercial jurisdictions.<sup>47</sup> In California, the enforcement rate was 80%. In Texas, it was 79%. In New York, it was 79%. In Florida, it was 78%. In Ohio, it was 78%. In Illinois, it

---

enforcement of outbound forum selection clauses. *See id.*

46. We identified 668 cases in which the clause was enforced as compared to 204 cases in which the clause was unenforced. This ratio generates an overall enforcement rate of 77%. This estimate very likely understates the true enforcement rate for two reasons. First, our screening criteria excluded a number of cases where neither party challenged the enforceability of the clause even though the clause was ultimately enforced. Second, there is almost certainly a publication bias in favor of nonenforcement cases. Our data show that the general practice among modern courts is to enforce forum selection clauses. Accordingly, a court is more likely to write a decision explaining its reasoning in a case where it elects *not* to enforce such a clause. In limiting our review to decisions accessible through online databases, we did not—and could not—review the many cases where the courts enforced an outbound forum selection clause without producing any formal opinion.

47. The enforcement rate in virtually every state is higher than that predicted by the Priest-Klein hypothesis, which posits that the success rate for plaintiffs at trial will be close to 50%. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 18–19 (1984). While there is no way to know for certain why this disparity exists, one possibility is that it is relatively inexpensive for lawyers to add a challenge to the clause in their jurisdictional briefing and that they do so even when the likelihood of success is low.

was 74%. These findings suggest that state courts enforce outbound forum selection clauses at roughly similar rates notwithstanding differences in political leanings and judicial culture.

Some states enforce outbound forum selection clauses at a rate significantly higher than the national average. In Delaware, for example, the enforcement rate was 89%. This finding is consistent with the prevailing view that the courts in Delaware enforce contracts as written.<sup>48</sup> The enforcement rate in Alabama (84%) is also among the highest in the nation. This finding is noteworthy because Alabama was one of the last states to cast aside the traditional rule that outbound forum selection clauses are per se unenforceable.<sup>49</sup> In the years since it abandoned the traditional rule in 1997, the Alabama Supreme Court has enforced such clauses in virtually every case that has come before it.<sup>50</sup>

The enforcement rate in other states was significantly below the national average. In New Jersey, for example, the enforcement rate was 63%. In Pennsylvania, it was 59%. The low enforcement rate in New Jersey is likely attributable to a New Jersey Supreme Court decision in 1996 that took an exceptionally broad view of a state statute directing the state's courts not to enforce outbound forum selection clauses in particular types of contracts.<sup>51</sup> The low enforcement rate in Pennsylvania is more difficult to explain. It is possible that the rate is attributable to the fact that the Supreme Court of Pennsylvania decided a case revisiting the traditional rule in 1965, several years before the Model Act or Section 80 of the Second Restatement or *The Bremen*.<sup>52</sup> The relative novelty of this decision may have nudged the Pennsylvania courts onto a doctrinal path that was marginally less friendly to outbound forum selection clauses than the one followed by most other states.

The enforcement rate in each U.S. state with at least fifteen published or unpublished cases addressing enforceability in the modern era appears in Table 1.

48. When Delaware refuses to enforce a forum selection clause, it is almost always because such enforcement will result in duplicative litigation in more than one jurisdiction. See *infra* Section IV.A (discussing cases where clauses went unenforced on this basis).

49. See *Prof'l Ins. v. Sutherland*, 700 So. 2d 347, 351 (Ala. 1997) (abandoning the traditional rule of nonenforcement).

50. Since 1997, the Alabama courts have twice declined to enforce a clause because it would result in duplicative litigation and once declined to enforce because a state statute specifically directed them not to enforce the clause. See *Ex parte Terex USA, LLC*, 260 So. 3d 813, 822 (Ala. 2018) (statute); *F.L. Crane & Sons, Inc. v. Malouf Constr. Corp.*, 953 So. 2d 366, 373 (Ala. 2006) (duplicative litigation); *Ex parte Leasecomm Corp.*, 886 So. 2d 58, 67 (Ala. 2003) (duplicative litigation). In the other eighteen cases that have come before them, they have enforced the clause at issue. See, e.g., *Caterpillar Fin. Servs. Corp. v. JRD Contracting, Inc.*, 263 So. 3d 1035, 1041 (Ala. 2018).

51. See *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 626 (N.J. 1996); see also Benjamin A. Levin & Richard S. Morrison, *Kubis and the Changing Landscape of Forum Selection Clauses*, 16 *FRANCHISE L.J.* 97, 97 (1997) (“In [*Kubis*], the New Jersey court held that forum selection clauses in franchise agreements are presumptively invalid.”); Victoria A. Cundiff, *The Franchise Trademark Handbook: Developing and Protecting Your Trademarks and Service Marks*, 16 *FRANCHISE L.J.* 111, 118 (1997) (“*Kubis* does not level the playing field; it changes the rules of the game entirely.”).

52. *Cent. Contracting Co. v. C. E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965).

<b>Table 1: Enforcement Rate of Outbound Forum Selection Clauses, by State (min. 15 cases)</b>	
<b>State (total cases)</b>	<b>Enforcement Rate</b>
Delaware (28)	89%
Alabama (19)	84%
California (69)	80%
Texas (97)	79%
Tennessee (19)	79%
New York (146)	79%
Ohio (32)	78%
Florida (63)	78%
Louisiana (27)	78%
Michigan (18)	78%
<b>All States (872)</b>	<b>77%</b>
North Carolina (17)	76%
Illinois (23)	74%
Connecticut (42)	71%
Massachusetts (36)	69%
Georgia (21)	67%
New Jersey (27)	63%
Pennsylvania (27)	59%

In each of the states listed above, we were able to identify a significant number of cases involving outbound forum selection clauses. In other states, by contrast, this particular issue arises only rarely. The state courts of Hawaii, for example, appear never to have decided a case in which they were asked to determine whether an outbound forum selection clause was enforceable. Likewise, the enforceability of such clauses appears to have arisen only once in the state courts of Vermont and New Mexico.

Among the five states that have adopted the Model Act for outbound clauses—Michigan, Nebraska, New Hampshire, North Dakota, and Tennessee—the enforcement rate for cases in our dataset is 80%. The pool of cases from Model Act states is dominated by Michigan (18) and Tennessee (19). Courts in the other three states have decided only seven cases between them addressing the enforceability of outbound forum selection clauses.

Our data indicate that the overall enforcement rate for outbound forum selection clauses has not changed appreciably over time. The enforcement rate in cases decided

prior to 2010 is 76%. The enforcement rate in cases decided in or after 2010 is 79%. This finding suggests that state courts today are not appreciably more or less hostile to forum selection clauses than they were earlier in the modern era.

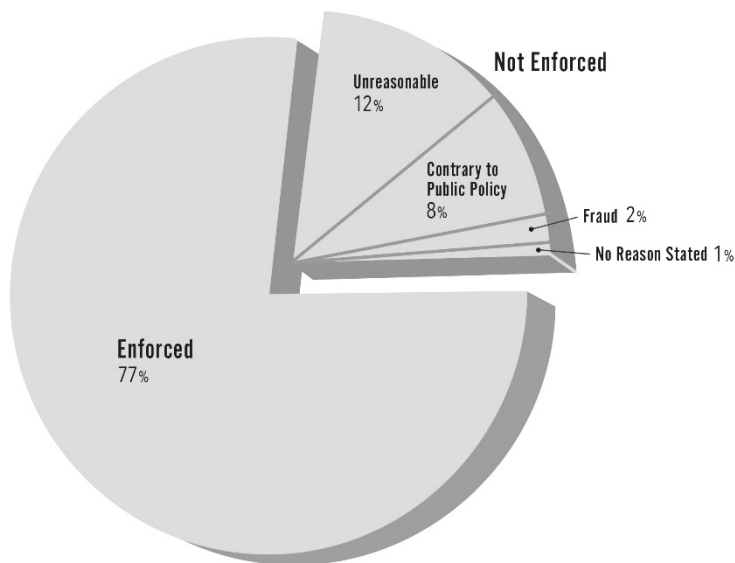
In other work, we deployed a similar methodological approach to learn more about the enforcement rate for inbound forum selection clauses in state court.<sup>53</sup> In that paper, we found that the overall enforcement rate for inbound clauses was 80%.<sup>54</sup> The overall enforcement rate for outbound clauses using the same screening criteria, as noted above, is 77%.

### B. Unenforceable Clauses

When a court declines to enforce a forum selection clause, it usually cites as its justification one of the three categories laid down by the Supreme Court in *The Bremen*—public policy, a lack of reasonableness, or fraud. The courts cited reasonableness as a basis for refusing to enforce the clause in 12% of cases, as compared to 8% for public policy and 2% for fraud, as shown in Figure 1.

FIGURE 1

#### Outcomes in State Cases Addressing Enforcement of Forum Selection Clauses



Our review of the cases in each of these categories revealed some important differences in practice across the states. We found, for example, that state courts in California are more likely to strike down a forum selection clause on public policy grounds than on the basis of reasonableness. The state courts in New York, by

53. See Coyle & Richardson, *supra* note 25.

54. *Id.*

comparison, rely almost exclusively on reasonableness as a basis for invalidating a forum selection clause. The basis for this disparity lies in the fact that the California legislature routinely writes so-called “anti-waiver” provisions into its statutes.<sup>55</sup> The California courts then rely upon these anti-waiver provisions to strike down clauses on public policy grounds. The New York legislature, by comparison, rarely writes anti-waiver provisions into its statutes, and, consequently, the New York courts seldom have occasion to cite such statutes as evidence of the state’s public policy. This difference in practice notwithstanding, the overall enforcement rate across the two states in the dataset cases was virtually identical—80% in California as compared to 79% in New York.

These differences in state practice generate several important questions. What factors, exactly, do the courts consider when invalidating a clause on public policy grounds? Conversely, what factors do the courts consider when invalidating a clause on the grounds that it is unreasonable? Our review of the cases in our dataset suggests that the answers to these questions are surprisingly complex. Indeed, the answers are sufficiently complex that we are reluctant to state there *is* a definitive answer to either of these questions. After reviewing more than 200 cases where state courts refused to enforce outbound forum selection clauses, however, we are uniquely positioned to shed light on this question.

In an attempt to capture some of the nuance and detail undergirding these decisions, the next three Parts of this Article offer a detailed account of situations where state judges refuse to enforce outbound forum selection clauses. We first discuss the case law as it relates to the nonenforcement of such clauses on public policy grounds. We then offer a similar account of the case law as it relates to reasonableness. Finally, we conclude with a brief discussion of fraud and other contract defenses.

#### IV. PUBLIC POLICY

There are, broadly speaking, two scenarios in which state courts will refuse to enforce an outbound forum selection clause on public policy grounds.<sup>56</sup> First, a court may refuse to enforce a clause because there is a state statute that specifically directs the court to disregard the clause. A complete list of such statutes can be found in the Appendix. Second, a court may refuse to give effect to a clause because its

---

55. See *infra* Section IV.B (discussing relationship between anti-waiver provisions and the enforcement of outbound forum selection clauses).

56. This rule was most famously expressed by the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore Co.*: “A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.” 407 U.S. 1, 15 (1972); see also Kojo Yelapaala, *Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California*, 2 *TRANSNAT’L LAW* 379, 387–99 (1989) (surveying definitions of public policy in U.S. conflict of laws); Michael Mousa Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 *DUQ. L. REV.* 1009 (1996) (discussing role of public policy in enforcement of forum selection clauses).



enforcement would result in the waiver of a right that cannot be waived under state law.<sup>57</sup> Each of these scenarios is discussed at length below.

### *A. Statutes Expressly Invalidating Forum Selection Clauses*

State residents, as a rule, generally prefer to sue out-of-state defendants in local courts. When a contract contains an outbound forum selection clause, however, state residents may be obliged to bring suit in a different state or in a foreign country. In order to avoid this outcome, residents sometimes band together to lobby their elected representatives to enact laws to invalidate outbound forum selection clauses that would require them to bring suit anywhere except the courts in their home state. To date, every state in the United States has enacted at least one such statute. This legislation may be usefully sorted into three categories: (1) statutes directing courts not to enforce outbound clauses as a general rule; (2) statutes directing courts not to enforce such clauses in certain types of business contracts; and (3) statutes directing courts not to enforce such clauses in certain types of nonbusiness contracts.

#### 1. General Prohibitions

If a state legislature wants to protect its residents against the possibility of having to litigate disputes with out-of-state actors in another state or a foreign country, the simplest way to achieve this goal is to enact a statute that directs its courts to disregard any and all outbound forum selection clauses. Such statutes ensure that local residents are able to litigate at home even when the contract giving rise to the suit contains a contractual provision requiring suit to be brought somewhere else.

To date, state legislatures in Montana, Idaho, Louisiana, Oklahoma, South Carolina, and South Dakota have all enacted statutes that—at least on their face—prohibit their courts from enforcing outbound forum selection clauses.<sup>58</sup> In addition, the legislature in North Carolina has enacted a statute that directs its courts to refuse to enforce such clauses whenever the contract containing the clause was “made” in North Carolina.<sup>59</sup> The legislature in each of these states has made clear, in short, that

---

57. The distinction between these two rationales—one focused on the identity of the foreign forum, the other focused on the content of the foreign law—is significant because it speaks to two very different concepts of public policy. Protecting state residents from having to litigate disputes in potentially unfriendly forums is, for lack of a better phrase, aggressively parochial. Such statutes seek to ensure that state residents will have a home court advantage in any dispute relating to the contract. Conferring a home court advantage is different, however, from protecting state residents from having to litigate under an unfavorable foreign law. When a state has announced that its residents are entitled to certain rights, and where the enforcement of a forum selection clause seems likely to deprive its residents of those rights, then courts may decline to enforce the forum selection clause. In such cases, the nonenforcement of the clause is not driven by concerns about the fairness of the chosen forum. Instead, the motivation underlying this public policy exception derives from concerns about the content of the law in the chosen jurisdiction.

58. MONT. CODE ANN. § 28-2-708 (2019); IDAHO CODE § 29-110(1) (2020); LA. CODE CIV. PROC. ANN. art. 44 (2020); OKLA. STAT. tit. 15, § 216 (2020); S.C. CODE ANN. § 15-7-120 (2020); S.D. CODIFIED LAWS § 53-9-6 (2020).

59. N.C. GEN. STAT. § 22B-3 (2020).

the enforcement of outbound forum selection clauses is contrary to state public policy.<sup>60</sup>

These legislative enactments notwithstanding, judges in five of the seven states routinely enforce outbound forum selection clauses. In Montana, the legislature has enacted a statute which provides that “[e]very stipulation or condition in a contract by which any party to the contract is restricted from enforcing the party’s rights under the contract by the usual proceedings in the ordinary tribunals . . . is void.”<sup>61</sup> On its face, this statute would appear to state that outbound clauses are contrary to Montana public policy and hence unenforceable.<sup>62</sup> The Montana Supreme Court has, however, held that the parties are free to contract around this statute by writing a choice-of-law clause into their agreement. If the contract is governed by California law, the court has reasoned, the Montana statute does not apply and an outbound forum selection clause selecting the California courts may be enforced.<sup>63</sup> Since most contracts with outbound forum selection clauses also contain choice-of-law clauses selecting the law of a different state, the Montana statute disapproving of outbound forum selection clauses is largely toothless.

The Louisiana legislature has also passed a law that is facially hostile to outbound clauses.<sup>64</sup> That law provides that “an objection to the venue may not be waived prior to the institution of the action.”<sup>65</sup> The Louisiana Supreme Court has nevertheless held that outbound forum selection clauses are presumptively enforceable in Louisiana.<sup>66</sup> In so holding, the court dismissed as irrelevant the law referenced above as well as a different law stating that it shall “be[] against the public policy of the state of

---

60. North Dakota has enacted a statute with similar language to the general prohibitions put in place by other states. *See* N.D. CENT. CODE § 9-08-05 (2020). The North Dakota statute specifically provides, however, that it shall apply “except as otherwise specifically permitted by the laws of this state.” *Id.* Since North Dakota has enacted the Model Act, outbound clauses are enforceable in North Dakota when they comport with the Model Act.

61. MONT. CODE ANN. § 28-2-708 (2019).

62. *State ex rel. Polaris Indus., Inc. v. Dist. Court of the Thirteenth Judicial. Dist.*, 695 P.2d 471, 472 (Mont. 1985).

63. *See San Diego Gas & Elec. Co. v. Gilbert*, 329 P.3d 1264, 1272 (Mont. 2014) (applying California law); *Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 476, 482 (Mont. 2008) (applying Washington law). This approach has attracted criticism from scholars who argue that courts should always apply the law of the forum—not the law selected in a choice-of-law clause—to determine whether a forum selection clause is enforceable. *See* Symeonides, *supra* note 45, at 1152–60.

64. Several courts and commentators have argued that this statute serves to invalidate such clauses contained in contracts executed before a lawsuit is filed. *See* FRANK L. MARAIST, 1 LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE § 3:7 (2d ed. 2008); Eric Michael Liddick, *Give Me Freedom of Contract or Give Me Death: The Obscurity of Article 44(A) of the Louisiana Code of Civil Procedure*, 54 LOY. L. REV. 602, 613–14 (2008); *Thompson Tree & Spraying Serv., Inc. v. White-Spinner Constr., Inc.*, 68 So. 3d 1142, 1144 (La. Ct. App. 2011), *abrogated by Shelter Mut. Ins. Co. v. Rimkus Consulting Grp., Inc.*, 148 So. 3d 871 (La. 2014); Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235 (2020). As discussed below, however, the Louisiana Supreme Court has rejected these arguments. *See infra* note 67.

65. LA. CODE CIV. PROC. ANN. art. 44 (2020).

66. *Shelter*, 148 So. 3d at 878.

Louisiana to allow a contractual selection of venue or jurisdiction contrary to the provisions of the Louisiana Code of Civil Procedure.”<sup>67</sup>

Oklahoma, South Carolina, and South Dakota have also enacted statutes that facially prohibit the enforcement of outbound forum selection clauses.<sup>68</sup> In the past, the courts in two of these states have either held or strongly suggested that these statutes invalidate outbound clauses.<sup>69</sup> More recently, however, courts in all three states have upheld outbound clauses without making any reference to the state statutes that would seem to prohibit their enforcement.<sup>70</sup>

The only two states where general statutory prohibitions are routinely enforced are Idaho and North Carolina. The Idaho statute provides that any contract provision that limits the ability of a party to “enforc[e] his rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho.”<sup>71</sup> The Idaho Supreme Court has repeatedly held that this statute invalidates outbound forum selection clauses in all cases brought in Idaho state court.<sup>72</sup> The North Carolina statute, for its part, provides that “any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.”<sup>73</sup>

67. *Id.* at 880–81 (citing LA. STAT. ANN. § 51:1407 (2020)). This is not the only case where the Louisiana Supreme Court has strained to construe a state statute narrowly to allow for the enforcement of an outbound forum selection clause. *See, e.g.*, *Creekstone Juban I, L.L.C. v. XL Ins. Am.*, 282 So. 3d 1042, 1045 (La. 2019) (interpreting statute invalidating contract clauses that deprive “the courts of this state of the jurisdiction of action against the insurer” to permit enforcement of forum selection clause selecting New York). This latter decision prompted a strong dissent from two members of that court. *See id.* at 1055 (Hughes, J., dissenting) (“As best I can understand, it works like this: Even though the contract does not contain the word venue, but rather says ‘jurisdiction’, this court has determined that *what the parties really meant* was venue, and because jurisdiction and venue are different concepts, and the statute does not refer to venue, it does not apply to this contract. Really.”).

68. OKLA. STAT. tit. 15, § 216 (2020) (“Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals . . . is void.”); S.C. CODE ANN. § 15-7-120 (2020) (“Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title . . . the cause of action alternatively may be brought in the manner provided in this title . . .”), *preempted by* *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 540 S.E.2d 864 (S.C. Ct. App. 2000); S.D. CODIFIED LAWS § 53-9-6 (2020) (“Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals . . . is void.”).

69. *See Johnson v. Paraplane Corp.*, 460 S.E.2d 398, 400 (S.C. Ct. App. 1995), *vacated*, 468 S.E.2d 620 (S.C. 1996); *Green v. Clinic Masters, Inc.*, 272 N.W.2d 813, 816 (S.D. 1978).

70. *See Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010) (collecting South Carolina cases where outbound forum selection clauses were enforced); *Rawdon v. Starwood Capital Grp.*, 453 P.3d 516, 524 (Okla. Civ. App. 2019); *Senior Ride Connection v. Itnamerica*, No. 2016-CP-10-1629, 2016 S.C. C.P. LEXIS 1, at \*9 (Dec. 28, 2016); *Klenz v. AVI Int’l*, 647 N.W.2d 734, 740 (S.D. 2002).

71. IDAHO CODE § 29-110(1) (2020).

72. *See T3 Enters. v. Safeguard Bus. Sys.*, 435 P.3d 518, 531 (Idaho 2019); *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1147 (Idaho 1989).

73. N.C. GEN. STAT. § 22B-3 (2020). By its terms, the statute does not apply to

This provision only applies to contracts that were “made” in North Carolina. When a North Carolina resident enters into a contract in another state, the statute is inapplicable.<sup>74</sup> When a contract is made in North Carolina, however, that state’s courts have consistently cited the statute in refusing to give effect to outbound forum selection clauses.<sup>75</sup>

The foregoing account suggests two important insights. First, it highlights the gravitational pull exerted by *The Bremen*. In a world where outbound forum selection clauses are presumptively enforceable in most states, it is difficult for courts to resist the pressure to fall in line even when there is a state statute on the books that would seemingly require a different outcome. Second, it raises interesting questions about the relationship between judges and legislatures. On the one hand, it is easy to admonish judges in Montana, Louisiana, Oklahoma, South Carolina, and South Dakota for ignoring the hierarchy between legislation and common law rules. Whatever their policy views about the virtues of forum selection clauses, so this argument goes, judges are required to follow the law enacted by the legislature.<sup>76</sup> On the other hand, it is possible that these judges view themselves as well-intentioned reformers.<sup>77</sup> They believe that forum selection clauses *should* be enforceable at least some of the time and that the statutes directing them to ignore such clauses are outdated. On this telling of the story, these judges are to be commended for dragging their respective states into the modern era. We take no position on the validity of these competing narratives other than to note that their persuasive force will likely vary depending on one’s attitude towards the utility of forum selection clauses more generally.

## 2. Prohibitions Affecting Business Contracts

While a few states have enacted general prohibitions on the enforcement of forum selection clauses, most have not. These other states have instead passed laws that direct their courts to refuse to enforce forum selection clauses when they are written into certain *types* of contracts. When a local business enters into a contract with a large company from another state, the latter will frequently insist that the contract contain a forum selection clause requiring any lawsuit to be brought in the courts of

---

nonconsumer loan transactions. *Id.*

74. *Bryant v. AP Indus.*, 749 S.E.2d 112, 112 (N.C. Ct. App. 2013) (“If Plaintiff was the last party to sign the 2010 Agreement and he signed the agreement in North Carolina, then the contract was entered into in North Carolina and N.C. Gen. Stat. § 22B-3 applies; if, on the other hand, Carl Benjamin (on behalf of AP) was the last party to sign *and* he signed the agreement in Quebec, then the contract was entered into in Quebec, and N.C. Gen. Stat. § 22B-3 does not apply.”).

75. *See Schwarz v. St. Jude Med., Inc.*, 802 S.E.2d 783, 785 (N.C. Ct. App. 2017); *SED Holding, LLC v. 3 Star Props., LLC*, 784 S.E.2d 627, 632 (N.C. Ct. App. 2016).

76. *See Michels Corp. v. Rockies Express Pipeline, L.L.C.*, 34 N.E.3d 160, 167–68 (Ohio Ct. App. 2015) (“Here, our state’s public policy was explicitly identified by the legislature and placed into a statutory prohibition . . . Appellee’s suggestion that a different public policy is more rational is an argument for the legislature, not the court, who must apply the law as written.”).

77. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

its home state. In an attempt to protect local businesses against having to litigate claims in another state or a foreign country, state legislatures in many states have passed laws that invalidate these outbound clauses. A survey of state statutes suggests that these laws most frequently target forum selection clauses in two types of agreements: (1) construction contracts, and (2) franchise agreements. In contrast to the general prohibitions discussed above, state courts in all fifty states routinely enforce these more specific invalidating statutes.

With respect to construction contracts, twenty-eight states have enacted statutes directing their courts not to enforce outbound forum selection clauses in agreements where the building work was performed within the borders of that state.<sup>78</sup> The purpose of these statutes is simple—to ensure that local carpenters, electricians, plumbers, and other tradespeople are able to bring claims against out-of-state construction companies at home.<sup>79</sup> The widespread enactment of these statutes is attributable to the political influence of the local construction industry.<sup>80</sup> The various players in this industry are well-resourced and capable of banding together to lobby for the enactment of laws that favor their interests—including laws that invalidate outbound forum selection clauses in construction contracts.

With respect to franchise agreements, twenty-six states have enacted statutes that declare forum selection clauses contained in certain types of franchise agreements to be unenforceable.<sup>81</sup> Some of these statutes apply to all franchise agreements.<sup>82</sup> Others apply exclusively to motor vehicle franchise agreements.<sup>83</sup> Still others only apply to franchise agreements in specific industries, such as beer distributors or equipment manufacturers.<sup>84</sup> These laws work to ensure that local franchisees that have ongoing

78. See *infra* Table 2.

79. See *Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.*, 192 Cal. Rptr. 3d 838, 847 (Ct. App. 2015) (citing legislative history stating that “large out-of-state general contractors have an unfair bargaining advantage when negotiating with California subcontractors” and that this advantage “is evident when the subcontractors are forced to sign contract provisions that waive their right to have disputes resolved in California or lose the contract”); *Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719, 726 (Utah 2005) (“The primary purpose of [the Utah statute directing courts not to enforce outbound clauses in construction contracts] is to prohibit out-of-state contractors, construction managers, or suppliers from haling a Utah resident into a foreign state’s court when the work by the Utah resident is performed within the State of Utah. The statute furthers Utah’s policy interest in providing its residents with a forum in which they can pursue their legal claims.”).

80. See Deborah J. Mackay & Jason A. Greves, *Foreign Forum Selection Clauses in Construction Contracts and State Attempts to Limit Their Enforcement*, CONSTR. BRIEFINGS, July 2004, at 5; Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court’s Pending Review of Atlantic Marine*, 33 CONSTR. LAW. 27, 30 (2013); V. Frederic Lyon & Douglas W. Ackerman, *Controlling Disputes by Controlling the Forum: Forum Selection Clauses in Construction Contracts*, 22 CONSTR. LAW. 15, 21 (2002).

81. See *infra* Table 2; see also Maral Kilejian & Christianne Edlund, *Enforceability of Choice of Forum and Choice of Law Provisions*, 32 FRANCHISE L.J. 81, 82 (2012) (discussing role of forum selection provisions in franchise agreements).

82. See, e.g., 815 ILL. COMP. STAT. 705/4 (2020).

83. See, e.g., TENN. CODE ANN. § 47-25-1913(b) (2021).

84. See, e.g., ALA. CODE § 8-20-4(3)(m) (2021) (heavy equipment); CAL. BUS. & PROF.

business relationships with out-of-state franchisors have the opportunity to litigate any disputes arising out of these relationships at home.<sup>85</sup> The widespread enactment of these statutes is attributable to the political influence of franchisees.<sup>86</sup> Franchisees do not want to travel to litigate claims against out-of-state franchisors; they want to bring these suits in the courthouse just down the street. In order to realize this goal, the franchisees have successfully lobbied the legislatures in many states to pass laws invalidating forum selection clauses that would require them to litigate in a different state.<sup>87</sup>

### 3. Prohibitions Affecting Nonbusiness Contracts

States have also passed laws directing courts not to enforce outbound forum selection clauses in some nonbusiness contracts.<sup>88</sup> Every state has enacted a statute that invalidates forum selection clauses in consumer leases. These leases are the subject of Article 2A of the Uniform Commercial Code, which was first promulgated by the Uniform Law Commission in 1987. Section 2A-106 provides that “[i]f the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.”<sup>89</sup> The official comments to this provision make clear that its purpose is to ensure that consumer lessees can bring claims in a convenient local forum:

There is a real danger that a lessor may induce a consumer lessee to agree that . . . the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these . . . forum clauses, except where . . . the forum chosen is one that otherwise would have jurisdiction over the lessee.<sup>90</sup>

---

CODE § 25000.6 (West 2021) (beer).

85. See *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 628 (N.J. 1996) (“[O]ur concern is not focused only on the likelihood that the court in the designated forum would properly interpret and apply the Franchise Act, but rather on the denial of a franchisee’s right to obtain injunctive and other relief from a New Jersey court. The added expense, inconvenience, and unfamiliarity of litigating claims under the Act in a distant forum could, for some marginally financed franchisees, result in the abandonment of meritorious claims that could have been successfully litigated in a New Jersey court.”).

86. See *id.* at 627; Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 578–79 (2016); Douglas C. Berry, David M. Byers & Daniel J. Oates, *State Regulation of Franchising: The Washington Experience Revisited*, 32 SEATTLE U. L. REV. 811, 819 (2009).

87. See Kilejian & Edlund, *supra* note 81, at 84.

88. See Cara Reichard, Note, *Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum*, 129 YALE L.J. 866 (2020) (advocating for expanded use of state statutes invalidating outbound clauses to protect individuals).

89. U.C.C. § 2A-106(2) (AM. L. INST. & UNIF. L. COMM’N 2012). A consumer lease is a lease made by a “lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose.” *Id.* § 2A-103(1)(e).

90. *Id.* § 2A-106 cmt.

To date, forty-nine states have written Article 2A into their respective commercial codes. The fiftieth state—Louisiana—has enacted a stand-alone statute that invalidates outbound clauses in leases for all movable property.<sup>91</sup> Consequently, outbound clauses are generally unenforceable when written into consumer leases.

Other states have passed legislation that invalidates forum selection clauses in nonbusiness loan agreements. Sixteen states have enacted statutes that invalidate forum selection clauses in consumer credit agreements.<sup>92</sup> Six states have enacted statutes that invalidate these clauses in certain types of home loans.<sup>93</sup> Six states have enacted statutes that void such clauses in foreclosure consulting agreements.<sup>94</sup> And five states have passed laws that invalidate forum selection clauses when they appear in student debt contracts.<sup>95</sup> This combination of statutes means that consumers, home buyers, and students may sometimes file suits against out-of-state lenders at home regardless of any forum selection clauses in their loan documents.

Other few states have taken additional steps to protect consumers outside of the lending context. Eleven states have passed laws directing courts not to enforce forum selection clauses in certain types of insurance contracts.<sup>96</sup> California, Oregon, Nevada, and Wisconsin have enacted statutes invalidating forum selection clauses in all consumer contracts.<sup>97</sup> Louisiana refuses to enforce such clauses in contracts concluded between state residents and out-of-state telephone solicitors.<sup>98</sup> And Tennessee will not give effect to forum selection clauses when the claims asserted arise under that state’s consumer protection act.<sup>99</sup>

91. LA. STAT. ANN. § 9:3303(F)(2) (2020).

92. See UNIF. CONSUMER CREDIT CODE § 1-201(8)(d) (UNIF. L. COMM’N 1974); *infra* Table 2. A consumer credit agreement is one in which a natural person is granted credit in order to purchase goods, services, or an interest in land primarily for a personal, family, household, or agricultural purpose by a seller who regularly engages as a seller in credit transactions of the same kind. See § 1.301(12)–(15).

93. See, e.g., ME. STAT. tit. 9-A, § 8-506(6)(I) (2020) (“[A]ny provision of a residential mortgage loan agreement that allows a person to require a borrower to assert any claim or defense in a forum that is less convenient, more costly or more dilatory for the resolution of a dispute than a judicial forum established in this State where the borrower may otherwise properly bring a claim or defense or that limits in any way any claim or defense the borrower may have is unconscionable and void as a matter of law.”).

94. See COLO. REV. STAT. § 6-1-1106(1)(b) (2020); DEL. CODE ANN. tit. 6, § 2424B (2020); MD. CODE ANN., REAL PROP. § 7-310(b) (West 2020); NEB. REV. STAT. § 76-2715(2) (2020); N.M. STAT. ANN. § 47-15-5(G)(2) (2020); OR. REV. STAT. § 646A.710(2) (2019).

95. See NEB. REV. STAT. § 85-1645 (2020); TENN. CODE ANN. § 49-7-2015 (2021); WASH. REV. CODE § 28B.85.140 (2021).

96. See HAW. REV. STAT. § 431:10-221(a)(2) (“No insurance contract delivered or issued for delivery in this State and covering subjects located, resident or to be performed in this State, shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this State of the jurisdiction of action against the insurer”).

97. See CAL. CIV. PROC. CODE § 116.225 (West 2021); OR. REV. STAT. § 81.150 (2020); NEV. REV. STAT. § 97B.100 (2020); WIS. STAT. § 421.201(10)(c) (2020).

98. LA. STAT. ANN. § 51:1407(A) (2020).

99. TENN. CODE ANN. § 47-18-113(b) (2021).

Some states also refuse to enforce forum selection clauses in employment agreements relating to work performed within the state. California, for example, recently passed the following statute:

An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would . . . [r]equire the employee to adjudicate outside of California a claim arising in California . . . . Any provision of a contract that violates [this rule] is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California.<sup>100</sup>

Louisiana has enacted a similar statute.<sup>101</sup> New Mexico recently passed a law invalidating forum selection clauses in employment contracts for clinical health care services to be rendered within the state of New Mexico.<sup>102</sup> Other states have enacted statutes that ban the enforcement of forum selection clauses in contracts for child support, time shares, and seller-assisted marketing plans, among other types of agreements.<sup>103</sup>

It is no coincidence that the most widely enacted consumer protection provisions relating to forum selection clauses are contained, first, in Article 2A of the Uniform Commercial Code, and second, in the Uniform Consumer Credit Code, both of which were promulgated by the Uniform Law Commission. When that organization is involved in the legislative process, statutes that protect local residents against outbound forum selection clauses are far more likely to find their way into law.<sup>104</sup> When that organization is not involved in the legislative process, history suggests that such statutes prohibiting the enforcement of such clauses in nonbusiness contracts are less likely to be enacted. A complete list of state statutes that expressly invalidate forum selection clauses appears in the Appendix. Table 2 presents a summary.

---

100. CAL. LAB. CODE § 925(a)-(b) (West 2021).

101. See LA. STAT. ANN. § 23:921(A)(2) (2020).

102. N.M. STAT. ANN. § 24-11-2(B) (2020).

103. See CAL. FAM. CODE § 5614(b)(7) (child support) (West 2021); MONT. CODE ANN. § 37-53-306(3) (2019) (time shares); OHIO REV. CODE ANN. § 1334.06 (West 2020) (seller-assisted marketing plans).

104. Interestingly, state courts have proven unwilling to give retroactive effect to statutes declaring outbound forum selection unenforceable on public policy grounds regardless of the type of contract. See *Ryze Claim Sols., LLC v. Superior Ct.*, 245 Cal. Rptr. 3d 575, 579 (Ct. App. 2019) (declining to apply California statute invalidating forum selection clauses in employment agreements to an agreement concluded before the statutory enactment); *Hammer v. AB Staffing Sols., LLC*, No. A-1-CA-37813, 2019 WL 6173548, at \*2-3 (N.M. Ct. App. Oct. 2, 2019) (same result in New Mexico statute invalidating clauses in certain employment agreements); *Foster Wheeler Energy Corp. v. LSP Equip., LLC*, 805 N.E.2d 688, 695 (Ill. App. Ct. 2004) (same result in Illinois statute invalidating clauses in construction agreements).



TABLE 2 States Statutes Directing Courts Not To Enforce Outbound Forum Selection Clauses, by Contract Type

	General Prohibition	Construction	Franchise	Motor Vehicle Franchise	Other Franchise	Consumer Lease	Consumer Loan	Consumer Contract	High Cost Home Loan	Insurance	Student Loan	Foreclosure	Other
Alabama				•	•	•							
Alaska						•					•		
Arizona		•			•	•							•
Arkansas		•		•	•	•							•
California		•	•		•	•	•	•					•
Colorado				•		•	•					•	
Connecticut		•	•			•							
Delaware						•						•	•
Florida		•		•		•							•
Georgia				•		•			•				•
Hawaii				•		•	•			•			
Idaho	•					•	•						
Illinois		•	•			•							
Indiana		•	•			•	•						
Iowa		•		•		•							•
Kansas		•	•		•	•	•						•
Kentucky						•							
Louisiana	•	•		•		•	•	•		•			•
Maine						•	•		•				
Maryland						•				•		•	
Massachusetts						•			•	•			
Michigan			•			•							
Minnesota		•		•		•	•						
Mississippi		•	•	•	•	•							
Missouri						•							•
Montana	•	•				•							•
Nebraska		•				•						•	
Nevada		•				•	•	•			•		
New Hampshire				•		•							•
New Jersey			•	•		•			•				
New Mexico		•				•			•			•	•
New York		•				•			•				
North Carolina	•	•				•				•			
North Dakota						•							
Ohio		•	•			•							
Oklahoma	•	•				•	•						•
Oregon		•	•	•		•		•				•	
Pennsylvania		•				•							
Rhode Island		•	•			•			•	•			
South Carolina	•					•	•						
South Dakota	•		•	•		•				•			
Tennessee		•	•	•		•	•	•			•		•
Texas		•				•							•
Utah		•				•				•			
Vermont				•		•							•
Virginia		•				•				•			
Washington				•		•				•	•		•
West Virginia						•							
Wisconsin		•				•	•	•		•			
Wyoming						•	•						
TOTALS	7	28	15	17	6	50	16	6	6	11	5	6	18

B. Anti-Waiver Statutes

Choice of forum and choice of law are separate concepts. The mere fact that the parties have agreed to litigate their dispute exclusively in the courts of New York does not necessarily mean that those courts will apply New York law. State courts will, however, sometimes cite concerns about the law chosen by the parties as a basis for refusing to give effect to the parties' chosen forum. In order to understand why, it is necessary to begin with a discussion of anti-waiver statutes.

An anti-waiver statute is a statute which states that the rights conferred by a given law cannot be waived. Consider a state's wage and hour law. This law operates to confer certain benefits upon employees who work in that state. One can imagine a scenario where an employer, as a condition of employment, requires all of its employees to sign a contract that waives any and all protections afforded by this act. If the wage and hour law contains an anti-waiver provision, this contractual waiver is unenforceable. In such cases, the legislatures have made it clear that the protections afforded by the law cannot be waived by contract.

In lieu of an express contractual waiver, the employer may try to accomplish the same goal indirectly by means of a choice-of-law clause. The contract may, for example, select the law of a state that has not enacted any wage and hour law. If the choice-of-law clause is enforced, then the employee will be deprived of her statutory rights just as surely as if the contract had contained an express waiver. When the enforcement of a choice-of-law clause will result in the waiver of a nonwaivable right, therefore, the courts will generally invoke the anti-waiver provision, disregard the choice-of-law clause, and apply the wage and hour law of the forum.

The logic of anti-waiver may be extended to invalidate outbound forum selection clauses.<sup>105</sup> If the contracting parties have agreed to litigate their dispute exclusively in another state, and if the court believes that the courts in this other state will apply the law of a state that lacks a comparable law, then the court may refuse to give effect to the forum selection clause.<sup>106</sup> The forum selection clause is invalid, on this account, because its enforcement will ultimately lead to waiver of nonwaivable rights.<sup>107</sup> The enforcement of the forum selection clause will lead to the enforcement of the choice-of-law clause. The enforcement of the choice-of-law clause will lead to the waiver of a nonwaivable right. In order to respect the legislative intent underlying the enactment of the anti-waiver statute, the court must refuse to give effect to the forum selection clause because this represents the first step in a chain of

---

105. See John F. Coyle, *Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses*, 75 U. MIAMI L. REV. (forthcoming 2021) (discussing the logic of anti-waiver as applied to federal statute regulating contracts between cruise companies and their passengers).

106. The courts in New Jersey are unique in that they have consistently refused to enforce forum selection clauses by citing the dangers posed by unfriendly foreign forums with unfavorable foreign law. See *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 628 (N.J. 1996) (“That comprehensive legislative design for the protection of New Jersey franchisees would be severely undermined if forum-selection clauses in franchise agreements were to be generally enforced and ultimately were to become commonplace in franchise agreements. In such event, the inevitable result would be to limit severely the availability of New Jersey courts as a forum for the enforcement of franchisees’ claims under the Act, a result that the Legislature assuredly would find intolerable.”); *Param Petroleum Corp. v. Commerce & Indus. Ins. Co.*, 686 A.2d 377, 381 (N.J. Super. Ct. App. Div. 1997) (“[A]t least when dealing with risks located wholly within this State, we are of the view that the parties to the insurance contract should not be permitted to negotiate away the protection of our courts, protection which is intended for the insured, the insurance company, and for those who may suffer damages as a result of an insured risk.”).

107. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (“[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”).

events that will ultimately result in an impermissible waiver of non-waivable rights.<sup>108</sup>

In the five decades since *The Bremen* was decided, only a few state courts have opted to traverse this rather complicated piece of doctrinal terrain. Those that have gone down this path, however, have developed an important and distinctive public policy basis for refusing to enforce outbound forum selection clauses.<sup>109</sup> In the discussion below, we examine three situations where this issue arises: (1) the waiver of nonwaivable constitutional rights, (2) the waiver of nonwaivable statutory rights, and (3) the waiver of nonwaivable common law rights.

### 1. Constitutional Rights

The courts have long held that certain constitutional rights are impliedly nonwaivable.<sup>110</sup> In recent years, however, a number of states have enacted statutes specifically stating that certain constitutional rights cannot be waived and, moreover, that state courts are forbidden from enforcing outbound forum selection clauses that may ultimately lead to the deprivation of one of these rights.<sup>111</sup>

To understand the logic of these statutes, let us begin with choice of law. Twelve states direct their courts not to give effect to choice-of-law clauses selecting the law of a non-U.S. jurisdiction when the application of that law would operate to deprive a U.S. person of the right to due process, the right to equal protection, freedom of religion, freedom of the press, or certain other constitutional rights. While it may seem farfetched that a U.S. court would ever give effect to a choice-of-law clause selecting the law of a non-U.S. jurisdiction under these circumstances, there are now statutes on the books in many states formally banning this practice.

108. *See id.*

109. The state courts of Florida, in particular, have struggled to develop a consistent position on this question. *Compare* *Am. Online, Inc. v. Pasiaka*, 870 So. 2d 170, 172 (Fla. Dist. Ct. App. 2004) (refusing to enforce a forum selection clause when claims arose out of the Florida Deceptive and Unfair Trade Practices Act), *and* *Mgmt. Comput. Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 632 (Fla. Dist. Ct. App. 1999) (same), *with* *Farmers Grp., Inc. v. Madio & Co.*, 869 So. 2d 581, 583 (Fla. Dist. Ct. App. 2004) (enforcing forum selection clause even when claims arose out of the Florida Deceptive and Unfair Trade Practices Act), *and* *Celmins v. Am. On Line*, 748 So. 2d 1041, 1041 (Fla. Dist. Ct. App. 1999) (same). *See generally* *Fairbanks Contracting & Remodeling, Inc. v. Hopcroft*, 169 So. 3d 282, 283 (Fla. Dist. Ct. App. 2015) (“Whether a forum selection provision in a contract applies to an FDUTPA claim depends on the circumstances.”).

110. The Supreme Court has consistently held, for example, that one cannot bargain away one’s rights under the First Amendment. Jason Mazzone, *The Waiver Paradox*, 97 *Nw. U. L. Rev.* 801, 801 (2003).

111. *See* ARK. CODE ANN. § 1-1-103 (2020); ARIZ. REV. STAT. ANN. § 12-3103 (2021); FLA. STAT. § 61.0401 (2020); KAN. STAT. ANN. § 60-5103 (2021); LA. STAT. ANN. § 9:6001 (2020); MISS. CODE ANN. § 11-63-1 (2021); N.C. GEN. STAT. § 1-87.13 (2020); OKLA. STAT. tit. 12, § 20 (2021); S.D. CODIFIED LAWS § 19-8-7 (2021); TENN. CODE ANN. § 20-15-102 (2021); TEX. GOV’T CODE ANN. § 22.0041 (West 2019); *see also* ALA. CONST. art. I, § 13.50(h) (constitutional provision); *cf.* GA. CODE ANN. § 1-3-9 (2020) (“The laws of other states and foreign nations shall have no force and effect of themselves within this state further than is provided by the Constitution of the United States and is recognized by the comity of states.”).

Legislatures in seven states have gone even further. These states have enacted provisions that direct their courts not to enforce forum selection clauses when (a) the clause calls for the dispute to be resolved in a non-U.S. forum, and (b) there is reason to believe that that forum will apply a body of law that would violate constitutional rights vouchsafed to natural persons by state and federal constitutions.<sup>112</sup> The list of states that have enacted a law directing state courts not to enforce foreign forum selection clauses under these circumstances includes Alabama, Arkansas, Kansas, Louisiana, North Carolina, Oklahoma, and Tennessee. While the precise language used in each state statute is different, the Arkansas statute is broadly representative:

A contract or contractual provision, if severable, that provides for a jurisdiction for purposes of granting the courts . . . personal jurisdiction over the parties to adjudicate any disputes between parties arising from the contract mutually agreed upon violates the public policy of Arkansas and is void and unenforceable if the jurisdiction chosen includes any foreign law, legal code, or system, as applied to the dispute at issue, that does not grant the parties . . . fundamental rights, liberties, and privileges granted under the Arkansas Constitution or the United States Constitution . . .<sup>113</sup>

On the one hand, this statute is entirely unobjectionable in that it codifies an implied anti-waiver rule with respect to many constitutional rights long followed by the courts. On the other hand, the timing of its enactment is curious. Why have so many states recently rushed to pass laws stating that constitutional rights are nonwaivable?

The answer to this question, it would seem, lies in the anti-foreign-law movement that has recently gained traction in the United States.<sup>114</sup> A review of contemporary accounts suggests that the enactment of the Arkansas statute and others like it was specifically motivated by a concern that the enforcement of outbound forum selection clauses might lead to the application of Islamic law (Sharia).<sup>115</sup> The basis

---

112. See ALA. CONST. art. I, § 13.50(e); ARK. CODE ANN. § 1-1-103(d)(1) (2020); KAN. STAT. ANN. § 60-5105 (2020); LA. STAT. ANN. § 9:6001 (2020); N.C. GEN. STAT. § 1-87.17 (2020); OKLA. STAT. tit. 12, § 20 (2020); TENN. CODE ANN. § 20-15-104 (2020). In each of these states, the statutory prohibition on the enforcement of forum selection applies only to natural persons. It does not apply to artificial persons such as corporations. See ALA. CONST. art. I, § 13.50(h); ARK. CODE ANN. § 1-1-103(e) (2020); KAN. STAT. ANN. § 60-5108 (2020); LA. STAT. ANN. § 9:6001(G) (2020); N.C. GEN. STAT. § 1-87.17 (2020); OKLA. STAT. tit. 12, § 20(E) (2020); TENN. CODE ANN. § 20-15-105 (2020). In theory, the parties' choice of forum should not affect the law applied to resolve their dispute. In practice, this is not always the case. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992). But see Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009).

113. ARK. CODE ANN. § 1-1-103(d)(1) (2020).

114. See Cyra Akila Choudhury, *Shari'ah Law as National Security Threat?*, 46 AKRON L. REV. 49, 52–65 (2013).

115. See FAIZA PATEL, MATTHEW DUSS & AMOS TOH, CTR. FOR AM. PROGRESS & BRENNAN CTR. FOR JUST., FOREIGN LAW BANS LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/05/ForeignLawBans-1.pdf> [<https://perma.cc/8YXQ-KYWS>].

for this concern is unclear. In the course of reviewing thousands of state cases involving forum selection clauses, we did not find a single case where the possibility that the enforcement of an outbound clause might lead to the application of Sharia was even discussed. This fact notwithstanding, seven states have now enacted legislation stating that forum selection clauses selecting a non-U.S. forum shall not be enforced in circumstances where the end result would be a deprivation of certain fundamental constitutional rights under U.S. law.

The anti-waiver sentiment underlying these statutes has at times been applied to domestic cases involving state constitutions. In *Handoush v. Lease Finance Group, LLC*, for example, the California Court of Appeal was called upon to decide whether a forum selection clause selecting New York should be enforced when the practical effect would be to validate a jury waiver clause that was unenforceable under the California Constitution.<sup>116</sup> The court began by observing that while California generally favors the enforcement of forum selection clauses, its courts “will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy.”<sup>117</sup> The court then stated that the party seeking to enforce the forum selection clause “bears the burden to show litigating the claims in the contractually designated forum ‘will not diminish in any way the substantive rights afforded . . . under California law.’”<sup>118</sup> The California court then expressed the view that a New York court was likely to enforce the jury waiver provision. Since this provision was invalid under the California Constitution, the court deemed the forum selection clause requiring the dispute to be heard in New York unenforceable.<sup>119</sup>

## 2. Statutory Rights

Statutory rights, as a rule, are more easily waived than constitutional rights. In some states, however, the legislature has made clear that certain statutory rights are nonwaivable. The Illinois legislature, for example, has passed a law invalidating any contract provision purporting to waive any of the provisions of the state’s Sales Representative Act.<sup>120</sup> When a statute contains such language, the courts will generally refuse to enforce forum selection clauses if they believe that enforcement will ultimately result in the waiver of rights conferred by this statute.

Courts have utilized this reasoning to invalidate forum selection clauses in other contexts.<sup>121</sup> In *Hall v. Superior Court*, the California Court of Appeal refused to

116. 254 Cal. Rptr. 3d 461, 463–64 (Ct. App. 2019). Although the right to a trial by jury is a constitutional right in California, the anti-waiver rule relating to this right is set forth in a statute. See CAL. CIV. PROC. CODE § 631(a) (West 2021).

117. *Handoush*, 254 Cal. Rptr. at 463–64.

118. *Id.* at 464 (quoting *Verdugo v. Alliantgroup, L.P.*, 187 Cal. Rptr. 3d 613, 618 (Ct. App. 2015)).

119. *Id.* at 469 (observing that enforcing the forum selection clause would be “contrary to California’s fundamental public policy protecting the jury trial right and prohibiting courts from enforcing predispute jury trial waivers”).

120. 820 ILL. COMP. STAT. 120/2 (2020).

121. See, e.g., *Moon v. CSA—Credit Sols. of Am., Inc.*, 696 S.E.2d 486, 488 (Ga. Ct. App. 2010) (“[I]f enforced, the contract’s forum selection and choice of law provisions requiring the

enforce an outbound forum selection clause because it would result in the waiver of rights conferred by the state securities laws of California.<sup>122</sup> In *Morris v. Towers Finance Corp.*, the Colorado Court of Appeals held that an anti-waiver provision in the Colorado Wage Claim Act precluded the enforcement of a forum selection clause selecting New York as the exclusive forum.<sup>123</sup> In *Rrapo v. Coffee Meets Bagel*, an

---

Moons to bring their action before a Texas court applying Texas law would operate in tandem to deprive them of specific statutory protections . . . . Because this would violate Georgia's public policy established in OCGA § 18-5-1 et seq. relating to debt adjustment agreements and encourage debt adjustment practices in Georgia contrary to that policy, the forum selection and choice of law provisions in the contract are invalid and unenforceable.”); *Acharya v. Microsoft Corp.*, 354 P.3d 908, 914 (Wash. Ct. App. 2015) (“Under Washington law, the right to be free from discrimination is nonnegotiable and cannot be waived in contract. But, under the forum selection clause and the choice of law provision, Acharya's [Washington Law Against Discrimination] claim would not be cognizable. Preventing a Washington plaintiff from enforcing Washington law is contrary to public policy.”); *see also* *Pepe v. GNC Franchising, Inc.*, 750 A.2d 1167, 1168–69 (Conn. Super. Ct. 2000) (anti-waiver provision in Connecticut Franchise Law precluded enforcement of forum selection clause); *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 685–86 (Md. Ct. Spec. App. 2011) (anti-waiver provision in Maryland Workers Compensation Law precluded enforcement of forum selection clause); *Watson v. Prestige Delivery Sys., Inc.*, 27 Pa. D. & C.5th 449, 455 (2013) (anti-waiver provision in Pennsylvania Wage Payment and Collection Law precluded enforcement of forum selection clause).

122. 197 Cal. Rptr. 757, 762 (Ct. App. 1983) (“California's policy to protect securities investors, without more, would probably justify denial of enforcement of the choice of forum provision, although a failure to do so might not constitute an abuse of discretion; but section 25701, which renders void any provision purporting to waive or evade the Corporate Securities Law, removes that discretion and compels denial of enforcement.”); *see also* *Verdugo v. Alliantgroup, L.P.*, 187 Cal. Rptr. 3d 613, 616 (Ct. App. 2015) (“[A] defendant seeking to enforce a mandatory forum selection clause bears the burden to show enforcement will not in any way diminish the plaintiff's unwaivable statutory rights. By definition, this showing requires the defendant to compare the plaintiff's rights if the clause is not enforced and the plaintiff's rights if the clause is enforced. Indeed, a defendant can meet its burden only by showing the foreign forum provides the same or greater rights than California, or the foreign forum will apply California law on the claims at issue.”); *Am. Online, Inc. v. Superior Ct.*, 108 Cal. Rptr. 2d 699, 702 (Ct. App. 2001) (“Enforcement of the contractual forum selection and choice of law clauses would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law.”); *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 38 Cal. Rptr. 2d 612, 618 (Ct. App. 1995) (“Given California's inability to guarantee application of its Franchise Investment Law in the contract forum, its courts must necessarily do the next best thing. In determining the ‘validity and enforceability’ of forum selection provisions in franchise agreements, its courts must put the burden on the franchisor to show that litigation in the contract forum will not diminish in any way the substantive rights afforded California franchisees under California law.”). *But see* *Campbell v. Marriott Ownership Resorts Inc.*, No. E064139, 2016 Cal. App. LEXIS 1603, at \*11–12 (Mar. 2, 2016) (concluding that California legislation relating to time shares did not contain nonwaivable rights and therefore did not bar the enforcement of the clause).

123. 916 P.2d 678, 679 (Colo. App. 1996); *see also* *Kan. City Grill Cleaners, LLC v. BBQ Cleaner, LLC*, 454 P.3d 608, 615 (Kan. Ct. App. 2019) (“The potential likelihood that an agreed-to forum would apply an accompanying choice-of-law provision favoring its law and

Illinois court held that an anti-waiver provision in the Illinois Dating Referral Services Act precluded the enforcement of a forum selection clause selecting Delaware as the exclusive forum.<sup>124</sup>

In each of the foregoing cases, courts refused to enforce the forum selection clauses because they believed that the chosen forum would not apply the statute conferring the nonwaivable right. When the courts believe that the chosen forum will apply the statute conferring the nonwaivable right, however, then they will enforce the clause. In *Melia v. Zenhire, Inc.*, for example, the Massachusetts Supreme Judicial Court upheld a forum selection clause designating New York as the forum to hear the plaintiff's nonwaivable statutory claims under the Massachusetts Wage and Hour Act.<sup>125</sup> In justifying this decision, the court noted that it was "persuaded that a New York court, applying New York's choice-of-law rules, would apply Massachusetts law."<sup>126</sup> The court believed, in other words, that the chosen forum would give effect to the rights conferred by Massachusetts law. In light of this conclusion, there was no reason for the court not to enforce the New York forum selection clause.<sup>127</sup>

disfavoring the protections in the KCPA bolsters our conclusion that the forum-selection clause is unenforceable in this case.").

124. No. 18 CH 13834, 2019 Ill. Cir. LEXIS 1026, at \*17–18 (Ill. Cir. Ct. July 30, 2019) ("Because the choice of forum clause furthers a prohibited waiver of the [Dating Referral Services Act], it is unenforceable."); *see also* *Maher & Assocs., Inc. v. Quality Cabinets*, 640 N.E.2d 1000, 1005 (Ill. App. Ct. 1994) ("The only reasonable interpretation of section 2 of the [Illinois Sales Representative Act] is that the legislature was announcing fundamental public policy when it decided that any contract purporting to waive any provisions of the Act is void. Therefore, we void the forum-selection clause of the agreement in this matter.").

125. 967 N.E.2d 580 (Mass. 2012).

126. *Id.* at 590; *see also id.* at 595 (recognizing a "presumption that forum selection clauses are enforceable with respect to Wage Act claims" and stating that a "party seeking to rebut this presumption must produce some evidence indicating that (1) the Wage Act applies; (2) the selected forum's choice-of-law rules would select a law other than that of Massachusetts; and (3) application of the selected law would deprive the employee of a substantive right guaranteed by the Wage Act.").

127. There are many cases in which the courts reached a similar result. *See* *Charney v. Standard Gen. L.P.*, No. B269631, 2017 Cal. App. LEXIS 5751, at \*16 (Aug. 22, 2017) (concluding that Delaware was likely to apply California law and enforcing forum selection clause in favor of Delaware); *Camino Real Collision Ctr. v. Boltek Int'l*, No. B187270, 2007 Cal. App. LEXIS 7700, at \*5–8 (Sep. 25, 2007) (concluding that Pennsylvania was likely to apply California law and enforcing forum selection clause in favor of Pennsylvania); *Olinick v. BMG Entm't*, 42 Cal. Rptr. 3d 268, 281–82 (Ct. App. 2006) (concluding that New York law provided similar remedies against age discrimination as California and enforcing forum selection clause selecting New York); *see also* *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs.*, 789 S.E.2d 310, 316 (Ga. Ct. App. 2016) ("Tesoro has failed to carry its burden to show that Virginia law is materially different from, much less in conflict with, that of Georgia on the legal points raised by Tesoro's complaint. Tesoro, therefore, has wholly failed to make a strong case . . . that enforcement of the parties' forum selection clauses that Tesoro drafted are likely to produce a result that violates a public policy of Georgia because the same or similar remedies are not available in Virginia."); *Crump Ins. Servs. v. All Risks, Ltd.*, 727 S.E.2d 131, 134 (Ga. Ct. App. 2012) ("The appellants here have not shown that . . . proceedings in a Maryland court would likely produce a result that offends the public policy of Georgia. Absent

There are also cases where courts have concluded that statutory rights are nonwaivable by implication. In *High Life Sales Co. v. Brown-Forman Corp.*, for example, the Missouri Supreme Court refused to enforce a forum selection clause requiring litigation relating to a liquor distribution agreement to proceed in Kentucky.<sup>128</sup> Although the relevant statute lacked an express anti-waiver provision, the court observed that (1) Missouri had enacted a comprehensive law regulating wholesale liquor franchises, (2) Kentucky had no comparable law, and (3) there was no guarantee that Kentucky would faithfully apply Missouri law were the case to be litigated in Kentucky.<sup>129</sup> Accordingly, the court concluded that the contract provision requiring litigation to proceed in Kentucky was contrary to Missouri public policy and refused to enforce it.<sup>130</sup>

Not all state courts have accepted the logic of the cases above. These other states reject the notion that anti-waiver provisions relating to a particular legal rule—whether express or implied—should ever serve to invalidate an otherwise enforceable forum selection clause.<sup>131</sup> In *Boss v. American Express Financial*

---

such a showing, no compelling reason appears to avoid the forum-selection clause.”); *Holeman v. Nat’l Bus. Inst.*, 94 S.W.3d 91, 99 (Tex. App. 2002) (“Because Holeman has made no effort to show that a Georgia court would not apply Texas law, Holeman has failed to demonstrate how enforcement of the forum selection clause would subvert Texas public policy.”), *abrogated by* *Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355 S.W.3d 842 (Tex. Ct. App. 2011).

128. 823 S.W.2d 493, 498 (Mo. 1992) (en banc).

129. *Id.*

130. *Id.* at 499–500. In *Osborne v. Brown & Saenger, Inc.*, the North Dakota Supreme Court reached a similar conclusion about the enforceability of a forum selection clause in an employment agreement naming South Dakota as the exclusive forum. 904 N.W.2d 34, 38–39 (N.D. 2017). Although the North Dakota statute banning noncompetes lacked an express anti-waiver provision, the Court observed that (1) North Dakota had a strong public policy against noncompete agreements, (2) South Dakota lacked such a policy, and (3) there was no guarantee that South Dakota would faithfully apply North Dakota law were the case to be litigated in South Dakota. *Id.* at 37–38. Accordingly, the court concluded that the forum selection clause naming South Dakota was unenforceable as against North Dakota public policy even though there was no express anti-waiver provision in the North Dakota statute. *Id.* at 38; *see also* *Beilfuss v. Huffey Corp.*, 685 N.W.2d 373, 378 (Wis. Ct. App. 2004) (“[I]t is unreasonable to enforce the forum selection clause because it violates Wisconsin’s strong public policy governing covenants not to compete.”). In other cases, however, state courts have concluded that the rights at issue are, in fact, waivable and proceeded to enforce the forum selection clause. *See* *Furda v. Superior Ct.*, 207 Cal. Rptr. 646, 651 (Ct. App. 1984); *Fog Motorsports #3, Inc. v. Arctic Cat Sales, Inc.*, 982 A.2d 963, 965 (N.H. 2009); *Health v. Campbell All. Grp., No. Civ. 537205*, 2016 Cal. Super. LEXIS 12737, at \*9 (Sept. 1, 2016).

131. In some cases, the courts accept the logic but disagree as to whether the specific language in a particular anti-waiver provision justifies the nonenforcement of a forum selection clause. *See, e.g., Adams Reload Co. v. Int’l Profit Assocs.*, 143 P.3d 1056, 1059 (Colo. App. 2005) (rejecting argument that anti-waiver provision in Colorado Consumer Protection Act mandated the nonenforcement of forum selection clause). *Compare* *Cagle v. Mathers Fam. Tr.*, 295 P.3d 460, 468 (Colo. 2013) (interpreting anti-waiver language to permit enforcement of outbound forum selection clause), *with* *Collins v. Nadw Mktg., Inc.*, 8 Pa. D. & C.3d 214, 216 (1978) (interpreting similar anti-waiver language to bar enforcement of clause).



*Advisors*, for example, the New York Court of Appeals was called upon to determine the enforceability of a clause selecting the state courts of Minnesota in a suit alleging violations of New York labor law.<sup>132</sup> The plaintiffs argued that the defendant's practices with respect to wage deductions contravened the statute and that the forum selection clause should be invalidated on public policy grounds because the Minnesota courts were unlikely to apply New York law. The New York Court of Appeals disagreed. It stated:

Plaintiff's argument . . . is misdirected. The issue they raise is really one of choice of law, not choice of forum; it is the choice of *law* clause that, according to plaintiffs, may not be enforced. They say, in substance, that, since plaintiffs worked in New York, New York law must govern the deductions from their wages, even though the contract contains a Minnesota choice of law clause. We express no opinion on the merits of plaintiffs' argument. It could and should have been made to a court in Minnesota—the forum the parties chose by contract. If New York's interest in applying its own law to this transaction is as powerful as plaintiffs contend, we cannot assume that Minnesota courts would ignore it, any more than we would ignore the interests or policies of the State of Minnesota where they were implicated. *In short, objections to a choice of law clause are not a warrant for failure to enforce a choice of forum clause.*<sup>133</sup>

The courts of Texas have invoked similar reasoning to uphold forum selection clauses against challenges that their enforcement will necessarily result in the waiver of nonwaivable rights conferred by Texas's securities laws.<sup>134</sup>

### 3. Common Law Rights

Constitutions and statutes are not the only source of rights in the U.S. legal system. Courts also have the power to make law and to confer rights as a matter of common law. Once these rights are conferred, the courts must decide whether they are nonwaivable. If the rights are deemed to be nonwaivable, then the courts must consider whether enforcing a forum selection clause in a particular case would operate as an impermissible waiver of these rights. In a few cases, they have reached precisely this conclusion.

The Georgia courts have long held that, as a matter of common law, public policy forbids the courts from rewriting—or blue penciling—an otherwise invalid covenant

132. 844 N.E.2d 1142, 1143–44 (N.Y. 2006).

133. *Id.* at 1144 (second emphasis added); *see also* *Erie Ins. Co. of N.Y. v. AE Design, Inc.*, 961 N.Y.S.2d 710, 712 (App. Div. 2013); *USA-India Exp.-Imp., Inc. v. Coca-Cola Refreshments USA, Inc.*, 9 N.Y.S.3d 596, 596 (Sup. Ct. 2015).

134. *Young v. Valt.X Holdings, Inc.*, 336 S.W.3d 258, 266 (Tex. App. 2010) (“We consequently hold that the antiwaiver provisions of federal and Texas securities laws do not bar enforcement of the forum-selection cause in this case.”). *But see* *AutoNation, Inc. v. Hatfield*, 186 S.W.3d 576, 579–80 (Tex. App. 2005) (issuing anti-suit injunction enjoining litigation in Florida on grounds that a Florida court would apply Florida law to enforce a noncompete in contravention of Texas public policy that such agreements are unenforceable).

not to compete contained in an employment agreement.<sup>135</sup> When an employment agreement contains an overbroad covenant not to compete *and* a forum selection clause, the Georgia courts have traditionally inquired as to whether the state named in the forum selection clause would rewrite the covenant to save it.<sup>136</sup> If they conclude that it would, then the Georgia courts will refuse to enforce the forum selection clause on the theory that it would produce an outcome—the blue penciling of an otherwise invalid covenant not to compete—that is contrary to Georgia’s public policy as expressed in the state’s common law.<sup>137</sup>

Minnesota has taken a similar approach with respect to the common law doctrine of champerty. Champerty refers to “[a]n agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant[’s] claims as consideration for receiving part of any judgment proceeds.”<sup>138</sup> Minnesota, like many states, traditionally refused to enforce contracts for champerty.<sup>139</sup> Other states, including New York, have taken a more relaxed approach to this issue.<sup>140</sup> In 2014, a litigation funding company entered into an agreement with a Minnesota resident with a personal injury claim. In exchange for an immediate payment of \$6000, the resident promised to repay that sum—plus \$1425 and 60% annual interest—if she ultimately obtained a successful recovery in the action.<sup>141</sup>

That resident subsequently brought an action to invalidate the contract in Minnesota state court on the grounds that it was champertous.<sup>142</sup> The defendant

---

135. See, e.g., *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746, 748–49 (Ga. 1983).

136. *Carson v. Obor Holding Co.*, 734 S.E.2d 477, 485 (Ga. Ct. App. 2012) (“[I]t is likely that a Florida court would enforce the forum selection clause at issue. And were Carson required to challenge the restrictive covenants at issue in a Florida court, applying Florida law, the covenants would almost certainly be upheld, despite the fact that they violate applicable Georgia law. Thus, enforcement of the forum selection clause would likely result in a violation of Georgia’s then-existing public policy against certain agreements in partial restraint of trade.”).

137. See *Lapolla Indus., Inc. v. Hess*, 750 S.E.2d 467, 476 (Ga. Ct. App. 2013) (“In support of their contention that the trial court should refuse to enforce the forum selection and choice of law clauses, Premium and Hess made the necessary showing that a Texas court would likely apply Texas law to enforce the covenants in a manner contrary to applicable Georgia public policy.” (citing *Carson*, 734 S.E.2d at 484)); *Bunker Hill Int’l, Ltd. v. Nationsbuilder Ins. Servs.*, 710 S.E.2d 662, 667 (Ga. Ct. App. 2011) (“It follows that the agreement’s forum-selection provision is void because its application would likely result in the enforcement by an Illinois court of at least one covenant in violation of Georgia public policy.”). Whether the Georgia courts will continue to follow this line of cases in the future is open to question. In 2011, the Georgia legislature passed a statute that permits but does not require the courts of that state to blue pencil a covenant not to compete. See GA. CODE ANN. § 13-8-53(d) (2021); *Fortress Inv. Grp. v. Holsinger*, 841 S.E.2d 55, 62 (Ga. Ct. App. 2020).

138. *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 763 (Minn. Ct. App. 2017). The Minnesota Supreme Court subsequently abolished the state’s common-law prohibition against champerty. See *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 241 (Minn. 2020).

139. *Maslowski*, 890 N.W.2d at 763.

140. See *id.* at 766.

141. *Id.* at 759.

142. *Id.* at 760.

responded by invoking the forum selection clause in the contract requiring all disputes between the parties to be resolved in New York. The Minnesota court held that the clause was unenforceable because it doubted that the New York court would apply Minnesota champerty law. As the Minnesota court explained: “Given the choice-of-law provision in this case—and Prospect’s intent to enforce it—enforcement of the forum-selection clause could be the first step in thwarting Minnesota’s policy against champerty.”<sup>143</sup> Accordingly, the Minnesota court held that the forum selection clause was unenforceable on public policy grounds.<sup>144</sup>

\* \* \*

State courts in the United States sometimes hold that a forum selection clause is unenforceable because it is contrary to public policy. However, public policy is not the only—or even the most common—basis for refusing to enforce a forum selection clause. There were actually more cases in our dataset in which state courts concluded that such provisions were unenforceable because they were unreasonable. This line of cases is discussed in the next Part.

#### V. REASONABLENESS

The U.S. Supreme Court famously held in *The Bremen* that forum selection clauses should not be enforced when the resisting party can show that the clause is “unreasonable” under the circumstances.<sup>145</sup> In *The Bremen*, the Court offered three general guidelines as to when a clause might be unreasonable.<sup>146</sup> First, it noted that a clause was unreasonable if “trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.”<sup>147</sup> Second, it observed that a clause might be unreasonable if it

143. *Id.* at 767.

144. *Id.*; see also Robert Glenn, *The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts*, 41 CARDOZO L. REV. 2243, 2260–61 (2020) (situating this case within the broader context of third-party litigation funding).

145. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). The Model Choice of Forum Act also provides that an outbound forum selection clause is not enforceable if it is “unfair or unreasonable.” MODEL CHOICE OF FORUM ACT § 2 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1977). And Section 80 of the Second Restatement of Conflict of Laws states that such clauses are only enforceable when they are “fair and reasonable.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. a (AM. L. INST. 1977).

146. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591–92 (“The [*The Bremen*] Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that made it reasonable to enforce the clause at issue in *The Bremen* and that, presumably, would be pertinent in any determination whether to enforce a similar clause.”).

147. *The Bremen*, 407 U.S. at 18. In this respect, the Court’s approach to enforceability was stricter than the one laid down in the Model Act, which stated that a clause was unenforceable when “the other state would be a substantially less convenient place for the trial of the action than this state.” MODEL CHOICE OF FORUM ACT § 3(3) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1977).

designated a “seriously inconvenient”<sup>148</sup> or “remote alien”<sup>149</sup> forum. Third, the Court intimated that a clause might be also unreasonable if it was procured by “overweening bargaining power.”<sup>150</sup>

The Supreme Court had occasion to apply these criteria in 1991 in the context of its most controversial forum selection clause case—*Carnival Cruise Lines, Inc. v. Shute*.<sup>151</sup> In that case, a woman who lived in Washington fell and injured herself on the deck of a cruise ship.<sup>152</sup> A forum selection clause, buried on the back of the passenger ticket,<sup>153</sup> designated Florida as the exclusive forum for all litigation.<sup>154</sup> When the woman tried to bring a claim against the cruise ship company in Washington, the company sought to enforce the clause and dismiss the case. Whether the clause was enforceable ultimately came before the Supreme Court in the exercise of its federal admiralty jurisdiction.<sup>155</sup>

In considering whether the clause was reasonable, the Court acknowledged that the facts of *Carnival Cruise* differed significantly from those in *The Bremen*.<sup>156</sup> First, the plaintiffs could not and did not negotiate the terms of the form contract on the back of their passenger tickets.<sup>157</sup> Second, the parties in *Carnival Cruise* represented a significant shift in bargaining parity from sophisticated commercial entities, such as those in *The Bremen*, to the less sophisticated plaintiffs, who did not even receive notice of the forum selection clause until it was too late to cancel their vacation for a refund.<sup>158</sup> Finally, the Court also acknowledged that Florida represented a “distant forum” for the Washington-based plaintiff.<sup>159</sup> Nevertheless, the Court ultimately held that the clause was enforceable.<sup>160</sup> In so doing, it recognized that forum selection clauses set forth in nonnegotiated contracts of adhesion requiring an individual to travel thousands of miles to bring a claim could be “reasonable” under a refined version of the analysis it had previously laid down in *The Bremen*.<sup>161</sup>

After *Carnival Cruise*, the quest to identify an “unreasonable” forum selection clause presented clear challenges. After all, if a forum selection clause buried in a

---

148. *The Bremen*, 407 U.S. at 16 (emphasis omitted).

149. *Id.* at 17.

150. *Id.* at 12. On the facts presented by *The Bremen*, the issue of overweening bargaining power was not really presented. There was not any disparity in power between the two sophisticated contracting parties in that case and the Court was unsympathetic to claims of serious inconvenience, as any inconvenience would have been apparent and foreseeable to the parties at the time of contracting.

151. 499 U.S. 585 (1991); see also Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 92 (1992) (surveying the nature of the reasonableness inquiry after *Carnival Cruise*).

152. *Carnival Cruise Lines*, 499 U.S. at 588.

153. The impassioned dissent from Justice Stevens points out that the clause was contained in paragraph eight of twenty-five paragraphs. See *id.* at 597 (Stevens, J., dissenting).

154. *Id.* at 587–88.

155. *Id.* at 585.

156. *Id.* at 590.

157. *Id.* at 592–93.

158. See *id.* at 597 (Stevens, J., dissenting).

159. *Id.* at 596.

160. *Id.* at 599.

161. *Id.* at 593–94.

consumer contract of adhesion, requiring a couple to travel thousands of miles to litigate their claims against a huge corporation, was not unreasonable, then perhaps no clause was. It is important to remember, however, that *Carnival Cruise* is not binding on the states outside of cases presenting questions of admiralty law. Just as those states are free to accept or reject the framework laid down in *The Bremen*, so too are they free to accept or reject the cramped interpretation of reasonableness laid down in *Carnival Cruise* in cases not involving cruise ships.

Over the past few decades, state courts have worked to develop a body of common law that marks the contours of what constitutes an “unreasonable” forum selection clause. Most states continue to follow the talismanic *Bremen* guideline that forum selection clauses are presumptively reasonable, with a heavy burden of proof on the party seeking to resist them.<sup>162</sup> Our review of the case law suggests that state courts conclude that such clauses are reasonable in the vast majority of cases. In this Part, we survey the exceptions to this general rule and seek to determine what may render a forum selection clause *unreasonable* to a modern state court asked to decide whether a clause is enforceable.

Despite the inherent malleability of a “reasonableness” standard, state courts have adhered to a surprisingly stable and predictable set of principles when striking down forum selection clauses on the basis of unreasonableness. While *The Bremen* suggested some of these categories, others seem to have evolved organically from state practice. In the sections that follow, we identify those situations where state courts may find a forum selection unreasonable.

#### *A. Duplicative Litigation*

Duplicative litigation is by far the most common reason for state courts to strike down a forum selection clause on unreasonableness grounds.<sup>163</sup> The risk of fractured litigation most often occurs when the forum selection clause covers certain claims but not others.<sup>164</sup> State courts have repeatedly recognized that it is simply not reasonable to enforce a forum selection clause when to do so would result in two parties litigating a dispute arising out of a common nucleus of fact in two different forums. As one Massachusetts court put it:

In this case, to require a co-defendant in a Massachusetts case to go to California to bring an indemnity claim against a defendant who is a co-defendant in the Massachusetts case would be more than unreasonable or unfair. It would require two separate actions and two separate sets of attorneys for the parties in a simple, straightforward case. This would be ludicrous.<sup>165</sup>

---

162. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972).

163. See generally Brian C. Newberry, *Duplicative Litigation*, R.I. BAR J., May/June 2004, at 9 (explaining how multiple lawsuits can arise).

164. See, e.g., *Brandywine Balloons, Inc. v. Custom Comput. Serv., Inc.*, No. 87C-JL-208, 1989 Del. Super. LEXIS 247, at \*9–10 (Del. Super. Ct. June 13, 1989).

165. *Peabody & Arnold v. Luxury Media Corp.*, 01-5718, 2002 Mass. Super. LEXIS 108, at \*4-5 (Mass. Super. Ct. April 23, 2002). The state of Massachusetts offers a number of both

State courts have offered several justifications in support of this principle. First, litigating the same dispute simultaneously in two places runs the risk of inconsistent rulings. In one California case, for example, a purchase agreement for the leasehold interests of the *northern* part of a resort property contained a forum selection clause designating Mexico as the site for any future litigation.<sup>166</sup> However, the purchase agreement selling the *southern* interests contained no such provision and instead permitted litigants to sue in California.<sup>167</sup> When purchasers of both northern and southern interests brought suit in California instead of the contractually selected Mexico, a California Court of Appeal found the clause unreasonable on duplicative litigation grounds.<sup>168</sup> The court reasoned that “[i]t would be unreasonable and illogical to have an individual involved in simultaneous litigation in two separate forums, over the same issue, because of nothing more than the location of the leasehold interest within the same resort area. This simultaneous litigation could result in conflicting rulings.”<sup>169</sup>

Second, duplicative litigation constitutes a waste of judicial resources. The California court in the resort property case above further noted that conducting litigation in two separate forums simultaneously would “violate[] principles of judicial economy.”<sup>170</sup> Other courts have produced similar decisions while citing the danger of “inconsistent adjudications,”<sup>171</sup> “duplication of effort,”<sup>172</sup> “inconsistent judgments,”<sup>173</sup> “waste [of] judicial resources,”<sup>174</sup> “inconsistent outcomes,”<sup>175</sup> “conflicting results,”<sup>176</sup> and an effort to reduce “judicial labor.”<sup>177</sup>

---

pre-*The Bremen* and post-*The Bremen* cases striking down forum selection clauses. See, e.g., *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 182–83 (1856); *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 16 (1916) (“Attempts to place limitations by contract of the parties upon the powers of courts as to actions growing out of the particular contract, or to oust appropriate courts of their jurisdiction, have been regarded with disfavor and commonly have been held invalid.”). The state did not reject *Nute* fully until the 1995 case of *Jacobson v. Mailboxes Etc. U.S.A.*, 419 Mass. 572, 574–75 (1995) (“We accept the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so.”).

166. *Bancomer, S. A. v. Superior Court*, 52 Cal. Rptr. 2d 435, 443 (Ct. App. 1996).

167. *Id.*

168. *Id.* at 443.

169. *Id.*

170. *Id.*

171. *Scott v. Tutor Time Child Care Sys., Inc.*, 33 S.W.3d 679, 683 (Mo. Ct. App. 2000).

172. *Id.*

173. *WRG Servs., Inc. v. Eilers*, No. 2008-L-057, 2008 WL 4876868, at \*9 (Ohio Ct. App. Nov. 7, 2008).

174. *Id.*; see also *Collins v. Nadw Mktg., Inc.*, 8 Pa. D. & C.3d 214, 216 (Ct. Com. Pl. 1978) (“Dividing jurisdiction in this manner would be unduly cumbersome and wasteful of judicial resources.”).

175. *Phillipsburg Bridge & Constr. Co. v. Whiting-Turner Contr. Co.*, No. 2004-C-2239, 2005 Pa. Dist. & Cnty. Dec. LEXIS 684, \*9–10 (Ct. Com. Pl. Jan. 21, 2005).

176. *Miller & Solomon Gen. Contractors, Inc. v. Brennan's Glass Co.*, 837 So. 2d 1182, 1184 (Fla. Dist. Ct. App. 2003); see also *Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*, 522 So. 2d 111, 112 (Fla. Dist. Ct. App. 1988) (“conflicting results”).

177. *Mason v. Homes by Whitaker, Inc.*, 971 So. 2d 1029, 1030 (Fla. Dist. Ct. App. 2008).

Third, and finally, some states cite inconvenience and financial burden for litigants as an additional rationale for refusing to enforce forum selection clauses that will result in duplicative litigation.<sup>178</sup> In one recent case, the Minnesota Court of Appeals found that “[e]nforcement of the forum selection clause in this matter would result in two lawsuits involving the same or similar issues creating *serious inconvenience*.”<sup>179</sup> The Utah Supreme Court has recognized that “requiring [the plaintiff] to litigate against [one defendant] in New York and [another defendant] in Utah would twice impose on him [an] *onerous burden* . . . and for all practical purposes denies him his day in court.”<sup>180</sup> The Alabama Supreme Court, for its part, has held that “a ‘serious inconvenience’ arises if enforcement of the forum-selection clause ‘would result in two lawsuits involving similar claims or issues being tried in separate courts.’”<sup>181</sup>

This is not to say that state courts always refuse to enforce outbound clauses when to do so would result in duplicative litigation. Courts in both Massachusetts<sup>182</sup> and Texas<sup>183</sup> have held that requiring litigants “‘to litigate in multiple forums’ . . . ‘is not sufficient to invalidate’ the parties’ forum selection clauses.”<sup>184</sup> State courts in New York and Ohio have come to similar conclusions.<sup>185</sup> And while some Florida courts have struck down forum selection clauses on these grounds,<sup>186</sup> others have steadfastly refused to do so.<sup>187</sup>

178. See *infra* Section V.B.3.

179. Personalized Mktg. Serv., Inc. v. Stotler & Co., 447 N.W.2d 447, 452 (Minn. Ct. App. 1989) (emphasis added).

180. Prows v. Pinpoint Retail Sys. 868 P.2d 809, 813 (Utah 1993) (emphasis added).

181. F.L. Crane & Sons, Inc. v. Malouf Constr. Corp., 953 So. 2d 366, 373 (Ala. 2006) (quoting *Ex parte* Leasecomm Corp., 886 So. 2d 58, 63 (Ala. 2003)).

182. See, e.g., C. White Marine, Inc. v. S&R Corp., No. MICV2012-04436, 2013 Mass. Super. LEXIS 16, at \*10 (Mass. Super. Ct. Feb. 27, 2013).

183. See, e.g., In re FC Stone, LLC, 348 S.W.3d 548, 552 (Tex. App. 2011) (“[The plaintiff] also claims that some of the defendants might not be subject to the jurisdiction of the Illinois courts, forcing him to maintain two independent lawsuits. Again, this argument presents an insufficient basis upon which to avoid enforcement of the clause.”).

184. *C. White Marine, Inc.*, 2013 Mass. Super. LEXIS 16, at \*10 (quoting Superior Care Pharmacy Inc. v. Medicine Shoppe Int’l, Inc., No. 2:10-cv-207, 2011 U.S. Dist. LEXIS 13013, at \*5 (S.D. Ohio 2011)).

185. See, e.g., N.Y. State Workers’ Comp. Bd. v. Episcopal Church Home & Affiliates, Inc., 98 N.Y.S.3d 726, 736–37 (Sup. Ct. 2019) (refusing to enforce even in the face of evidence that enforcement would result in duplicative litigation and would result in the application of precedent that was flatly inconsistent with that of the district); see also Keehan Tenn. Inv., LLC v. Praetorium Secured Fund I, L.P., 71 N.E.3d 325, 335–36 (Ohio Ct. App.) (enforcing forum selection clause even in the face of evidence that there would be duplicative litigation).

186. See, e.g., Miller & Solomon Gen. Contractors, Inc. v. Brennan’s Glass Co., 837 So. 2d 1182, 1184 (Fla. Dist. Ct. App. 2003); see also Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp., 522 So. 2d 111, 112 (Fla. Dist. Ct. App. 1988); Mason v. Homes by Whitaker, Inc., 971 So. 2d 1029, 1030 (Fla. Dist. Ct. App. 2008).

187. See, e.g., Ware Else, Inc. v. Ofstein, 856 So. 2d 1079, 1083 (Fla. Dist. Ct. App. 2003) (“Finally, we note that in the present case the trial court reason for refusing to enforce the forum selection clause was only that splitting the causes of action would cause the parties to litigate in two different courts. That determination, however practical, is not a finding that meets any of the requirements of *Manrique*, *Maritime*, or *Zapata*.”).

Notwithstanding these decisions, many state courts have recognized that duplicative litigation constitutes a valid basis for refusing to enforce a forum selection clause. In support of this conclusion, these courts typically voice concerns about (1) inconsistent judicial rulings, (2) scarce judicial resources, and (3) inconvenience or financial burden for the litigants.

### *B. Plaintiff Cannot Secure Relief in the Chosen Forum*

Another reason why state courts strike down forum selection clauses as unreasonable is rooted in a sense that the plaintiff cannot secure effective relief in the chosen forum. These reasons may be sorted into three categories: (1) timeliness or jurisdictional problems in the chosen forum; (2) the claims are too small to make it economical to pursue them in the chosen forum; and (3) it would be seriously inconvenient to require the plaintiff to litigate in the chosen forum.

#### 1. Timeliness and Jurisdiction

State courts have refused to uphold forum selection clauses when it is unclear whether the chosen state will actually adjudicate the merits of the case. The Massachusetts Court of Appeals, for example, has held that the expiration of the chosen state's statute of limitations on the issue precluded enforcement of the forum selection clause.<sup>188</sup> A Louisiana Court of Appeals similarly refused to enforce a forum selection clause designating the Philippines in a seaman's employment contract because the statute of limitations had run on his claim under that country's laws.<sup>189</sup> By contrast, some courts—most notably the states following the Model Choice of Forum Act—do not recognize untimeliness as a valid reason for concluding that a clause is unreasonable.<sup>190</sup>

State courts also sometimes invalidate outbound forum selection clauses because the chosen court lacks subject-matter jurisdiction to hear the case. These cases typically concern either land disputes or child custody battles. A recent New York opinion, for example, explained that it could not enforce a Florida forum selection clause because “Florida courts do not have subject matter jurisdiction over a mortgage foreclosure action involving real property located in New York.”<sup>191</sup>

---

188. *Ernest & Norman Hart Bros., Inc. v. Town Contractors, Inc.*, 463 N.E.2d 355, 359 (Mass. App. Ct. 1984) (“Given the probability that the Connecticut statute of limitations concerning contracts will bar relief in that State, considerations of justice support allowing [Plaintiff] to recover, as soon as possible, its fairly earned compensation, already unduly delayed.”).

189. *Cabahug v. Text Shipping Co.*, 760 So. 2d 1243, 1248 (La. Ct. App. 2000).

190. These states are Michigan, Nebraska, New Hampshire, North Dakota, and Tennessee. *See supra* notes 32–33. The Model Act provides that forum selection clauses should generally be enforced unless one of several conditions is met, including that “the plaintiff cannot secure effective relief in the other state, *for reasons other than delay in bringing the action.*” MODEL CHOICE OF FORUM ACT § 3 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1977) (emphasis added).

191. *Nagel v. Simeonidou*, No. 1344/14, 2014 N.Y. Misc. LEXIS 5944, at \*11 (N.Y. Sup. Ct. Dec. 19, 2014).



Likewise, state courts in New York, Pennsylvania, and Washington have refused to enforce forum selection clauses when they purport to dictate a forum in which to resolve child custody disputes.<sup>192</sup> In support of these decisions, the courts in both states have held that these clauses may fail because the parties cannot contractually agree to confer subject-matter jurisdiction on a court that otherwise lacks such jurisdiction.<sup>193</sup>

The refusal to uphold forum selection clauses in these situations is relatively uncontroversial. In each instance, enforcing the clause would mean that the plaintiff will be left without any forum in which to bring his or her claim, an outcome that is clearly unreasonable under the framework laid down in *The Bremen*.<sup>194</sup>

## 2. Small Claims and Class Actions

As a general rule, the smallness of a claim is not enough to defeat a valid forum selection clause.<sup>195</sup> However, on a few occasions, state courts have shown themselves to be sympathetic to claims that the amount of money at stake is too small to make it economical for the plaintiff to bring a claim in the chosen forum.

State courts in New York and California are especially sensitive to forcing plaintiffs with small claims to expend large sums of money traveling to the chosen forum. The California Courts of Appeal, for example, has held that “a forum selection clause that requires a consumer to travel 2,000 miles to recover a small sum is not reasonable . . . . To expect [plaintiffs with losses of \$40 to \$50] to travel to Georgia in order to obtain redress . . . is unreasonable as a matter of law.”<sup>196</sup> Likewise, a New York state court deemed a forum selection clause unreasonable in

192. See *In re Eldad LL. v. Dannai MM.*, 65 N.Y.S.3d 284, 287 (App. Div. 2017); S.K.C. v. J.L.C., 94 A.3d 402, 409 (Pa. Super. Ct. 2013); *In re Parentage of Ruff*, 275 P.3d 1175, 1176 (Wash. Ct. App. 2012). We found one case dealing with a federal court lacking subject matter jurisdiction over not land or child custody but confirmation of an arbitration award. See *Rough Bros., Inc. v. Bischel*, No. C-100373, 2011 Ohio App. LEXIS 1716, at \*13–14 (Ohio Ct. App. April 27, 2011) (“In this case, the district court lacked subject-matter jurisdiction over Rough Brothers’ action, and the parties’ designated forum was therefore effectively unavailable. Consequently, if we were to hold that the trial court erred in failing to dismiss Rough Brothers’ action and in not enforcing the forum-selection clause, Rough Brothers would have been deprived of any forum for its action. We refuse to enforce a forum-selection clause to reach such an unjust result.”).

193. See *supra* notes 192.

194. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).

195. See, e.g., *Bennett v. Appaloosa Horse Club*, 35 P.3d 426, 431 (Ariz. Ct. App. 2001) (“The party claiming oppression or unfairness must meet a heavy burden of proof, even when the designated forum is in a geographically remote location. Mere physical inconvenience and increased costs are not enough to defeat a forum selection clause.” (citation omitted)); see also *Smith, Valentino & Smith, Inc. v. Superior Court of L.A. Cty.*, 551 P.2d 1206, 1209 (Cal. 1976) (“Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things.” (quoting *Cent. Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965)); *Parson v. Oasis Legal Fin., LLC*, 715 S.E.2d 240, 242 (N.C. Ct. App. 2011) (requiring North Carolina plaintiff to bring a claim for \$4575 in Iowa).

196. *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229, 241–42 (Ct. App. 2005).

a cruise ship contract when it required the litigant to travel to Florida on a small-dollar claim, recognizing that the travel expenses “could conceivably be greater than the actual claim.”<sup>197</sup> A different New York state court held that forcing the plaintiff, with a claim of less than \$2000, to travel to Utah to litigate would be unreasonable.<sup>198</sup>

Perhaps the best example of state courts’ varied reactions to small claims are the AOL cases of the late 1990s and early 2000s. These cases all grappled with a particular forum selection clause in consumer contracts with America Online, Inc. (“AOL”) designating Virginia as the chosen forum. This clause proved especially problematic for state courts because Virginia does not have a class action mechanism, and the nature of the AOL contracts for telecommunications services meant that plaintiffs would often be bringing small-dollar claims in a distant forum.<sup>199</sup> While some of the AOL cases were decided on public policy grounds, other state courts analyzed these clauses through the lens of reasonableness.<sup>200</sup> The results of these courts’ reasonableness analyses are, however, far from uniform.

A few states invalidated the forum selection clause in the AOL contract as unreasonable. The Washington Supreme Court, for example, held that requiring plaintiffs to litigate their small consumer claims in a state without a class action mechanism would “undermine[] the very purpose” of the law under which the plaintiffs brought suit.<sup>201</sup> Other states upheld the clauses as reasonable. The Maryland Supreme Court, for example, upheld the AOL forum selection clause at issue despite the fact that the “[plaintiff’s] personal loss is so insignificant, it is impractical for him to bring an individual action and thus, if he cannot bring a class action, he will be unable to recover the \$10 or so that he claims to have lost.”<sup>202</sup> A court in Rhode Island also upheld the AOL clause as reasonable, albeit under a different, nine-factor test.<sup>203</sup>

---

197. *Sellers v. Carnival Cruise Line*, No. 873.SCK 2014 – 1, slip op. at 1 (N.Y. City Civ. Ct. Aug. 31, 2015).

198. *See Oxman v. Amoroso*, 659 N.Y.S.2d 963, 967 (Yonkers City Ct. 1997); *see also Full House Ent., Inc. v. Auto Life RX*, 922 N.Y.S.2d 912, 913 (App. Div. 2011) (refusing to uphold a forum selection where “plaintiff noted that, pursuant to the terms of the warranty, the maximum it could hope to recover in this action against appellant was \$3,500, and that the costs associated with prosecuting its claims against appellant in Arizona, including the costs of transporting witnesses and evidence, would be so high as to render any potential recovery illusory and the warranty unenforceable”); *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536 (Pa. Super. Ct. 1990) (“First, we note that enforcement of these clauses would seriously impair [the defendants’] ability to pursue their defenses. Where it is more expensive to defend a cause of action than to pay a default judgment solely because of the location in which the matter is being adjudicated, litigation in the foreign forum is no longer a matter of mere inconvenience or additional expense; rather it rises to the level of serious impairment of the parties’ ability to defend against the action.”).

199. *See infra* notes 203–10. This depended, of course, on where the plaintiff lived.

200. *See supra* text accompanying notes 47 and 52.

201. *Dix v. ICT Grp.*, 106 P.3d 841, 845 (Wash. Ct. App. 2005), *aff’d*, 161 P.3d 1016, 1024 (Wash. 2007).

202. *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 464 (Md. 1997).

203. *See Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46, at \*13 (R.I. Super. Ct. May 27, 1998).

Still, the courts in other states rendered conflicting decisions as to whether the lack of a class action procedure in the chosen forum is unreasonable when the claims in question were very small. In *Sweeney v. Am. Online* [sic], a Florida court invoked both the smallness of the claim and the lack of class action procedure as bases for finding the AOL forum selection clause unreasonable:

[T]he Court concludes that the only option available to the plaintiffs would be to pursue their individual claims in a Virginia small claims court. That option would not be economically feasible and would prevent the plaintiffs from utilizing their class action remedy. Therefore, the Court will not enforce the forum selection clause finding that to do so would be *unjust and unreasonable*.<sup>204</sup>

Another Florida court, by comparison, found the exact same clause was “not unreasonable.”<sup>205</sup> Similarly, while one New York court found that due to the small amount of the plaintiff’s claim against AOL, it would be unreasonable to require him to travel to Virginia to litigate his case,<sup>206</sup> a different New York opinion upheld the clause despite the fact that Virginia did not permit class action lawsuits.<sup>207</sup>

State practice in this area, in short, is considerably more varied than under the duplicative litigation rationale discussed above. The case law suggests that while courts in some states are sensitive to these issues, courts in other states are either conflicted or see no problem with requiring plaintiffs to travel great distances to litigate small claims in a forum that does not allow for class actions.<sup>208</sup>

### 3. Serious Inconvenience

A serious inconvenience to the plaintiff, such that “he will for all practical purposes be deprived of his day in court,” is one of the few specific examples of

204. No. 99-5359, 2000 Fla. Cir. LEXIS 762, at \*11–12 (Fla. Cir. Ct. June 20, 2000) (emphasis added).

205. *Celmins v. Am. On Line*, 748 So. 2d 1041, 1041 (Fla. Dist. Ct. App. 1999) (“Although Celmins argues that the forum selection clause contained in his contract with AOL should not be enforced, we find that this clause does not result in unequal bargaining power and was not unreasonable.”); *see also* *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (“The unavailability of a class action procedure in the transferee forum is not sufficient, standing alone, to render an otherwise valid forum-selection clause unenforceable.”).

206. *Scarcella v. Am. Online, Inc.* 798 N.Y.S.2d 348, 348 (N.Y.C. Civ. Ct. 2004), *aff’d*, 811 N.Y.S.2d 858, 858 (App. Term 2005).

207. *AOL Time Warner, Inc. v. Gates*, No. 604141/02, 2003 N.Y. Misc. LEXIS 751, at \*6 (Sup. Ct. May 15, 2003) (“Plaintiffs in opposing the motion have not argued that they will not be able to pursue their rights under New York’s consumer protection statutes in Virginia. Although plaintiffs assert that Virginia Law bars class actions, that is not equivalent to the assertion, not made by plaintiffs, that Virginia courts, federal or state, will not consider claims asserting violations of New York’s consumer protection statutes. Plaintiffs’ arguments therefore fail to provide a basis for this court to ignore its prior rulings upholding the enforceability of the forum selection clause.”).

208. By our count, the only states to address forum selection clauses in these AOL contracts are California, Florida, Maryland, Massachusetts, New York, and Washington.

unreasonableness contemplated by *The Bremen*.<sup>209</sup> However, the Court also expressed skepticism that many chosen forums would be deemed seriously inconvenient because this fact would be foreseeable to sophisticated contracting parties at the time of drafting and hence priced into the agreement.<sup>210</sup> The Court did hint that certain additional factors, such as selection of a “remote alien forum” and the presence of an adhesive contract, might present a serious inconvenience.<sup>211</sup> However, this discussion proved to be dicta, as the Court found no serious inconvenience on the part of the contracting parties in *The Bremen*.<sup>212</sup>

Like the small claims argument, a party’s argument that the forum is inconvenient for litigation is generally not enough to overcome a valid forum selection clause.<sup>213</sup> However, the state courts have occasionally given teeth to this concept and refused to uphold forum selection clauses on this basis.

As a general rule, the decisions that refuse to enforce clauses because the chosen forum is exceptionally inconvenient are rooted in a sense that the plaintiff will not get effective—or perhaps any—relief in the chosen forum. In examining these cases, several themes emerge. First, state courts are generally unsympathetic to claims of serious inconvenience as between sophisticated corporate actors. This argument is only successful in cases involving small businesses or natural persons.<sup>214</sup> Second, parties typically cannot show a “serious inconvenience” on the sole basis that the cost of travel to the forum is significant, although state courts differ on how significant these costs must be before it constitutes a serious inconvenience.<sup>215</sup>

---

209. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).

210. *Id.* at 16 (“Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.”).

211. *See id.* at 17.

212. *Id.* at 18.

213. *HealthTrio, Inc. v. Margules*, No. 06C-04-196, 2007 WL 544156, at \*3 (Del. Super. Ct. Jan. 16, 2007) (“Mere inconvenience or additional expense is not the test of unreasonableness. In light of present day commercial realities, a forum clause should control absent a strong showing that it should be set aside.” (quoting *Eisenmann Corp. v. Gen. Motors Corp.*, No. C.A.99C-07-260-WTQ, 2000 WL 140781, at \*7 (Del. Super. Ct. Jan. 28, 2000))); *see also Fabian v. Steve Brady Inc.*, 49 Pa. D. & C.4th 242, 255 (Ct. Com. Pl. 2000) (“We recognize that mere inconvenience in terms of expense or travel time does not alone constitute a violation of due process.”). The federal courts have proven even more unsympathetic to arguments about cost and inconvenience. *See Williams v. Aire Serv, LLC*, No. 1:18-cv-099-NT, 2018 U.S. Dist. LEXIS 175947, at \*12 (D. Me. Oct. 12, 2018) (enforcing forum selection clause notwithstanding plaintiff’s assertion that it would make “bankruptcy . . . almost certain”).

214. *See, e.g., Shafer Plaza VI, Ltd. v. Lang*, No. 2007-CA-001391-MR, 2008 Ky. App. LEXIS 577, \*4–5 (Oct. 31, 2008) (“As small business owners, the time and expense of travelling to Texas to pursue their suit would essentially deprive the Langs of their day in court.”); *see also Williams v. Ill. State Scholarship Comm’n*, 563 N.E.2d 465, 471 (Ill. 1990) (refusing to enforce a forum selection clause in guaranteed student loan (GSL) agreements as against students who had defaulted on their student loans after defendants “admit[ed] that plaintiffs were not sophisticated business persons engaged in arm’s length negotiations”).

215. *See, e.g., HealthTrio*, 2007 WL 544156, at \*3.

Instead, a successful claim of serious inconvenience generally *does* involve the court reviewing the travel expenses of the plaintiff and sometimes witnesses and determining, in its own judgment, whether the expenses would effectively deprive the plaintiff of her day in court.<sup>216</sup> In conducting this analysis, courts often focus on the question of whether the forum is so remote as to be prohibitively expensive for the resisting party.<sup>217</sup> The variation here between state courts arises in answering the questions of “how remote is too remote?” and “how expensive is too expensive?,” two necessarily fact-driven determinations.

The Pennsylvania case of *Fabian v. Steve Brady Inc.* provides the prototypical rationale for this subset of unreasonableness cases.<sup>218</sup> In that case, the Pennsylvania state court cites several factors from *The Bremen* suggesting that a forum selection clause may be unreasonable on serious inconvenience grounds, including a remote alien forum and unsophisticated bargaining parties:

[I]t is clear that there would be considerable hardship to plaintiff in litigating in the State of Missouri. *Missouri is a long way from Pennsylvania.* Plaintiff is of limited financial means, and he lacks experience in legal and business matters. We recognize that mere inconvenience in terms of expense or travel time does not alone constitute a violation of due process. However, in this case, much more than mere inconvenience is involved. *Considering the distance between Missouri and Pennsylvania, plaintiff's limited financial means, and his inexperience with long-distance litigation,* we are convinced that a trial of the parties' dispute in the State of Missouri would place plaintiff at

---

216. See, e.g., *All. Food Mgmt. Corp. v. Rensselaer Hartford Graduate Ctr., Inc.*, No. CV055002441S, 2007 Conn. Super. LEXIS 920, at \*8–9 (Super. Ct. Apr. 10, 2007) (“[The resisting party] testified further that he would not be able to afford to pursue a case against [defendant] Rensselaer . . . if compelled to bring his case in New York. Ordinarily, the additional travel and costs associated in bringing the case to the contractual forum would not amount to a hardship to the party bringing suit if that party were, as in this case, a corporate entity. This case is different. Based on [plaintiff's] testimony, the court finds that the inconvenience would be such that the plaintiff would be denied its day in court.”); *Shafer Plaza*, 2008 Ky. App. LEXIS 577, at \*4–5 (“As small business owners, the time and expense of travelling to Texas to pursue their suit would essentially deprive the [plaintiffs] of their day in court.”); *Zilbert v. Proficio Mortg. Ventures, L.L.C.*, No. 100299, 2014 Ohio App. LEXIS 1803, at \*15–16 (Ohio Ct. App. May 1, 2014). (“Weighing the above factors, we find that enforcing the forum selection clause in this case would result in litigation in a jurisdiction so unreasonable, difficult, and inconvenient to create a considerable risk that [plaintiff] would be deprived of his day in court. The degree of distance between the two states would contribute to a significant increase in the cost of litigating this action . . . [Plaintiff] was making a modest salary. He might have difficulty securing witnesses because of the increased cost of witness fees involved in litigating the action in Utah. [Plaintiff] and any witnesses traveling to Utah would be seriously inconvenienced by the need to obtain extended leave from jobs or to cover familial obligations.” (emphasis added)).

217. See *infra* note 228.

218. 49 Pa. D. & C.4th 242 (Ct. Com. Pl. 2000).

such a distinct disadvantage that he would probably have to default in the proceeding.<sup>219</sup>

While most courts faced with “serious inconvenience” claims consider the cost and distance of the chosen forum, state courts differ sharply on what exactly constitutes a “serious inconvenience.” On one end of the spectrum, a Mississippi state court once concluded that it would cause a serious inconvenience to the Mississippi plaintiff to require her to travel to Florida for litigation, despite the fact that Mississippi and Florida are geographically (relatively) close.<sup>220</sup> On the other end of the spectrum, one Florida state court found that requiring a financially destitute Honduran sailor, injured on the deck of a ship, to litigate his claims in Malta—a small island in the Mediterranean Sea—was not unreasonable.<sup>221</sup> In the latter case, the Florida court noted that the plaintiff lived in a “poor, rural community in Honduras . . . [was] unemployed, ha[d] no savings, and ha[d] barely enough money to support his family.”<sup>222</sup> The chosen Maltese forum lay one thousand miles from the plaintiff’s home.<sup>223</sup> The chosen forum in that case, as the plaintiff argued, was undoubtedly “no forum at all for him.”<sup>224</sup> Nevertheless, the Florida court found the clause reasonable in part due to the sailor’s contacts with the Mediterranean when he worked aboard the ship.<sup>225</sup> In a different case in this same vein, a New York court found that requiring a single mother, residing in New York, to litigate her employment claims in Missouri did not constitute such a “serious inconvenience” as to deprive her of her day in court.<sup>226</sup>

Most state courts that have contemplated claims of serious inconvenience fall somewhere in the middle. In some cases, courts have found that forums in

---

219. *Id.* at 255 (emphasis added). The court went on to cite several more reasons for striking down the clause.

220. *Rigsby v. Am. Credit Couns., Inc.*, 215 So. 3d 526, 531–33 (Miss. Ct. App. 2017) (“It is not realistic to expect Rigsby or any other Mississippi ‘Client’ to incur the expense and devote the time necessary to travel hundreds of miles to litigate such a claim in Palm Beach County, Florida.”).

221. *Castro v. Pullmantur, S.A.*, 220 So. 3d 531 (Fla. Dist. Ct. App. 2017).

222. *Id.* at 535.

223. *Id.*

224. *Id.*

225. *Id.* at 537. This finding, of course, is misplaced. Simply because the sailor plaintiff may have had contacts with Mediterranean while he worked aboard the ship in no way reflects his financial ability to return to the Mediterranean to litigate a claim on his own dime.

226. *Horton v. Concerns of Police Survivors*, 62 A.D.3d 836, 836–37 (N.Y. App. Div. 2009) (“Although the plaintiff averred that she is a single mother who resides with her teenaged daughter in Dutchess County, New York, this claim was insufficient, standing alone, to demonstrate that enforcement of the selection clause would be unjust. The plaintiff offered no evidence that the cost of commencing a wrongful discharge of action in Missouri would be so financially prohibitive that, or all practical purposes, she would be deprived of her day in court.” (citations omitted)).

Switzerland<sup>227</sup> or England<sup>228</sup> may prove so inconvenient as to deprive the American plaintiff of her day in court. Courts sometimes look not only to the financial, but also the physical, condition of the plaintiff in making a serious inconvenience determination. In one recent case, a New York state court found that the plaintiff's numerous health problems, including prior cardiac surgery, a kidney tumor, and knee pain that inhibited his ability to walk, precluded enforcement of a forum selection clause that would require him to travel over six hundred miles to litigate his claim.<sup>229</sup>

In summary, when parties bring claims that enforcement of the forum selection clause is unreasonable on the grounds that it would cause them serious inconvenience, courts will sometimes look to the financial ability of the resisting party to travel and how remote the forum is. Because these are questions of degree, a heavy amount of judicial discretion is involved, leading to varied results. In some states, traveling a few hundred miles constitutes a serious inconvenience. In others, traveling several thousand miles (without the means to do so) is not.

### *C. No Notice of the Clause*

As a general principle of contract law, parties are held to the bargain they sign or otherwise agree to, regardless of whether the parties actually read or understood the terms of the agreement. However, in some circumstances—most notably in the context of cruise ship passenger tickets and online agreements—state courts have occasionally shown themselves to be reluctant to enforce forum selection clauses without notice or otherwise “reasonable communication” to the parties of the clause itself.

The first iteration of this trend seemingly came in *Carnival Cruise Lines v. Shute*, albeit in dicta.<sup>230</sup> The Court in that case declined to examine whether the forum selection clause, in small print on the back of the passenger's ticket, was reasonably communicated to the plaintiffs, as the plaintiffs did not argue they had no notice of the clause.<sup>231</sup> However, in discussing form passage contracts, the *Carnival Cruise* Court created an entirely different test for forum selection clauses contained on cruise ship tickets, requiring that courts examine these particular clauses for “fundamental fairness.”<sup>232</sup> In making a point of notice, reasonable communication, and fundamental fairness, the court provided an avenue since taken by both federal and

227. *Karlis v. Tradex Swiss AG*, No. 07-3527 BLS1, 2007 Mass. Super. LEXIS 331, at \*10–11 (Sep. 7, 2007) (“[T]rial for these parties in Switzerland will be so gravely difficult and inconvenient that they will for all practical purposes be deprived of their day in court. [This Court], therefore, chooses not to enforce the forum selection clause, if it exists at all.”).

228. *See Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A.*, No. 070692, 2000 Phila. Ct. Com. Pl. LEXIS 79, at \*29 (Oct. 11, 2000) (“Here, [Plaintiff] asserts in its Answer that it ‘is not and will not be litigating . . . in England, primarily because it lacks sufficient resources to do so. As such, dismissal of the present action will effectively leave [Plaintiff] without a remedy’ for the Defendants’ alleged misconduct.”).

229. *Trombley Painting Corp. v. Glob. Indus. Servs., Inc.*, 15 N.Y.S.3d 715 (Sup. Ct. 2015).

230. 499 U.S. 585 (1991).

231. *Id.* at 590.

232. *Id.* at 586.

state courts to reject forum selection clauses in cruise ship contracts on the grounds that the plaintiff did not have notice of the clause.

On the whole, state courts classify a forum selection clause as unreasonable on lack-of-notice grounds when the plaintiff is especially vulnerable, thereby violating some notion of fundamental fairness. These decisions arise in three common scenarios: 1) forum selection clauses on the back of form cruise ship passenger tickets; 2) forum selection clauses hidden in online agreements; or 3) forum selection clauses physically hidden, due to the placement of the clause and the size of the print, in otherwise lengthy contracts. In these scenarios, courts will sometimes find the clause to be unreasonable.

### 1. Cruise Ships

At first blush, cruise ship contracts might seem like an odd category in which to make a special rule for the enforceability of forum selection clauses. However, state courts frequently invoke the portion of the *Carnival Cruise* decision that suggests a forum selection clause in specifically a cruise ship contract may be unreasonable if it is not “reasonably communicated” to the parties. Prior notice and an opportunity to refuse consent to the forum selection clause are particularly important in this context. In a case decided immediately after the Supreme Court handed down *Carnival Cruise*, the California Court of Appeal refused to uphold a similar forum selection clause in another Carnival Cruise Lines contract because the “plaintiff did not have sufficient notice of the forum-selection clause prior to entering into the contract for passage.”<sup>233</sup> The court further held that “[a]bsent such notice, the requisite mutual consent to that contractual term is lacking and no valid contract with respect to such clause thus exists.”<sup>234</sup>

In a case decided a few years later, the Texas Court of Appeals struck a similar note when it held that “the way in which [Norwegian Cruise Line] imposed the forum selection clause upon the appellants *after* they paid for the cruise in full offends our notion of fair play and does not pass the test of fundamental fairness.”<sup>235</sup> The court went on to hold that

[p]arties who intend to deprive Texas citizens of the right to use their courts by way of a forum selection clause must give notice of that intention in an effective manner, and at a time that affords an opportunity to reject such a term without penalty. A fundamental fairness test can tolerate nothing less.<sup>236</sup>

A Wisconsin appellate court likewise found that when the plaintiffs received notice of the clause only forty-five days before the cruise, and would have had to give up thousands of dollars to avoid the clause, the clause lacked the fundamental fairness

---

233. *Carnival Cruise Lines v. Superior Ct.*, 286 Cal. Rptr. 323, 328 (1991).

234. *Id.*

235. *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 236 (Tex. App. 1999) (emphasis in original).

236. *Id.*



required by *Carnival Cruise*.<sup>237</sup> New York takes the test one step further, requiring the defendant to show not only that it gave the plaintiff notice of the clause but also that the plaintiff was “meaningfully informed” of the clause.<sup>238</sup>

## 2. Online Agreements

A surprising number of state courts have taken the “reasonably communicated” test developed in the context of cruise ship contracts and used it to decide whether to enforce forum selection clauses written into contracts concluded on the internet. In 2018, for example, a New York court concluded that forum selection clauses contained in agreements “buried at the bottom of a webpage or tucked away in obscure corners of the website” should not be enforced because they were not reasonably communicated to the online user.<sup>239</sup> Another New York court framed it this way: “[E]-commerce merchants cannot blithely assume that the inclusion of sale terms, listed somewhere on a hyperlinked page on their Web site, will be deemed part of any contract of sale.”<sup>240</sup> And a Massachusetts court once struck down a forum selection clause on the basis that the online user had “inadequate notice” of the clause.<sup>241</sup> While it is too early to draw any definitive conclusions, and while there are many cases where state courts have enforced forum selection clauses over the objection that the user lacked notice of the clause, a few state courts have reasoned that just as passengers on cruise ships must have adequate notice of forum selection clauses contained on their contracts, so too must online users have knowledge of a forum selection clause before agreeing to the terms of an online agreement.

---

237. *Johnson v. Holland Am. Line-Westours*, 557 N.W.2d 475, 479 (Wis. Ct. App. 1996). *But see* *Bowen v. Norwegian Cruise Line*, 52 Va. Cir. 314, 315 (2000) (upholding a forum selection clause designating Florida even though “plaintiffs did not receive their Passenger Ticket Contracts until approximately 10 days prior to departure . . . [and] plaintiffs did not receive their Passenger Ticket Contracts until after they had paid for their vacations in full, and the vacation prices were non-refundable”).

238. *Pogoda v. Meyers*, No. 110383/2009, 2010 N.Y. Misc. LEXIS 5056, at \*14 (Sup. Ct. Oct. 4, 2010) (“Royal Caribbean has failed to conclusively establish that plaintiff had ample opportunity to become ‘meaningfully informed’ of the forum selection clause of the Ticket Contract.” (emphasis omitted)). This appears to be the only New York case dealing with forum selection clauses in this context, so it remains to be seen whether or not this is indeed a higher burden for the resisting party to meet.

239. *Swipe Ice Corp, Inc. v. UPS Mail Innovations, Inc.*, No. 517343/17, 2018 N.Y. Misc. LEXIS 341, at \*4 (Sup. Ct. Feb. 1, 2018) (quoting *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506, 511 (Sup. Ct. 2016)).

240. *Jerez v. JD Closeouts, LLC*, 943 N.Y.S.2d 392, 398–99 (Dist. Ct. 2012). *But see* *Martinez v. Affordable Seating, Inc.*, No. 13-16-00103-CV, 2016 Tex. App. LEXIS 11340, \*7 (Oct. 20, 2016) (upholding a forum selection clause that was contained on the company’s website because the contract between the parties incorporated by reference the terms on the website).

241. *Williams v. Am. Online, Inc.*, No. 00–0962, 2001 Mass. Super. LEXIS 11, \*7 (Super. Ct. Feb. 8, 2001).

### 3. Other Agreements

Despite the general principle that parties are bound by the terms of their contract, whether or not they read them,<sup>242</sup> a few courts have proved willing to invalidate a forum selection clause when it is physically hidden in an otherwise lengthy contract, especially if the clause is preprinted and nonnegotiated.<sup>243</sup> A typical example of the kind of considerations employed by courts in this area is found in this New York opinion, which struck down a forum selection clause because

[t]he admission agreement totals sixteen (16) pages, with the forum selection clause contained on the fifteen [sic] (15) page (ninth numbered page) of the agreement in a section titled ‘Consent to Jurisdiction and Governing Law.’ Within that section, the designation of Westchester County as a choice forum is in small typeface, *un-bolded*, and *un-capitalized*. Notably, the section is . . . inconspicuous . . . Nothing about the admission agreement’s section on forum selection, on its face, signifies either its import or its relevance.<sup>244</sup>

As the passage suggests, courts often focus on the location of the forum selection clause, emphasizing such details as a contract that comprises “9 pages, single-spaced,

---

242. See, e.g., *St. Petersburg Bank & Trust Co. v. Boutin*, 445 F.2d 1028, 1032 (5th Cir. 1971) (“One who reads a written document, or signs it (even without reading it) is bound by its terms.”).

243. See, e.g., *Lava Laundry v. Daniels Equip. Co.*, No. 04-1410 F, 2004 Mass. Super. LEXIS 492, at \*2–3 (Super. Ct. Oct. 13, 2004) (“In soliciting plaintiff’s consent to the sales agreement, defendant urged that the order must be placed that same day to take advantage of a special promotion. During this meeting, which lasted only a few minutes, defendant advised plaintiff’s representative of the purchase price and asked for a signature. Only after the agreement was signed did defendant give a copy to plaintiff. There was no mention, much less negotiation, of any of the terms and conditions contained on the back side of the sales order form, nor did defendant make any allegation that plaintiff had notice of the forum selection clause. This lack of bargaining, which New Hampshire specifically looks for, and lack of notice of the clause, combined with the aggressive tactics used by defendant in soliciting plaintiff’s consent, inform this court’s finding that enforcement of the forum selection clause would be unfair and unreasonable.” (citations omitted)); see also *Lavitman v. Uber Techs., Inc.*, No. SUCV201204490, 2015 Mass. Super. LEXIS 7, at \*7 (Super. Ct. Jan. 26, 2015) (“Lavitman has presented facts from which a reasonable finder of fact could conclude that Lavitman never saw the Terms and Conditions at the outset of the Uber-Lavitman relationship. Such a finding would preclude the ‘unambiguous manifestation of assent’ that is required for the electronically communicated forum-selection clause to be enforceable, because, on this view of the facts, Uber failed to communicate that clause to Lavitman.”); *Eshaghpour v. Zepso Indus., Inc.*, 101 N.Y.S.3d 836, 837 (App. Div. 2019) (“However, the Terms and Conditions section never appeared in the proposed agreement that plaintiff ultimately reviewed and signed, and it is undisputed that plaintiff never saw the Terms and Conditions page. Indeed, the final 29-page agreement, which did not include the ‘Terms and Conditions,’ was paginated consecutively and signed on each page by both parties.”).

244. *Epps v. Anthony*, No. 805061/2018, 2019 N.Y. Misc. LEXIS 2323, at \*11–12 (Sup. Ct. Apr. 22, 2019) (emphasis in original).

in 10-point font, and contains 31 numbered paragraphs.”<sup>245</sup> One Connecticut court struck down a forum selection clause when “[t]here were no negotiations here between the parties as to the terms of the contract, the *provision was buried in small print among sixteen other clauses* under a heading ‘Limited Warranty’ and the plaintiff was pressured into an immediate purchase by representations that the deal was good for one day only.”<sup>246</sup> A Massachusetts court similarly found a forum selection clause unreasonable when, among other reasons, the “the *obscure positioning* of the forum selection clause in the boilerplate language of [defendant’s] warranty agreement raise[d] potentially litigable questions about whether the [plaintiffs] actually intended to include the forum selection provision in the contract.”<sup>247</sup> And a New Jersey court once held that “the forum selection clause was unreasonably masked from the view of the prospective purchasers because of its *circuitous mode of presentation*.”<sup>248</sup> Implicit in these analyses is the underlying presumption that the hidden clause should not be enforced because the plaintiff had never received notice that the clause existed.<sup>249</sup>

As a general rule, state courts still adhere to the notion that parties must be held to their bargain, and a simple lack of notice regarding a forum selection clause is not enough to overcome its *prima facie* validity. However, in certain specific contexts—cruise ships, online agreements, and contracts where the clause is one of many provisions in a lengthy, nonnegotiated agreement—courts sometimes relax this traditional rule and hold the forum selection clause at issue is unreasonable for lack of notice.

#### *D. No Reasonable Relationship to the Parties*

In evaluating whether a forum selection clause is reasonable, state courts will also sometimes evaluate how closely the forum is connected to the parties. In *The Bremen*, of course, the chosen forum (London) lacked a significant connection to either the home state of the plaintiff (United States) or that of the defendant (Germany). This fact notwithstanding, the Court acknowledged that there may well be other cases where the choice of a “remote alien forum” may render a forum selection clause unenforceable.<sup>250</sup> In the years since that case was decided, a number of U.S. courts have refused to enforce outbound clauses on this basis. In the words of a Connecticut court presented with a forum selection clause requiring all disputes to be litigated in New York:

---

245. *Okeke v. Dynamex Operations E., Inc.*, No. MICV201002017F, 2013 Mass. Super. LEXIS 46, at \*5 (Super. Ct. May 12, 2013).

246. *Clarkson v. Classic Motor Carriages, Inc.*, No. 31 09 29, 1992 Conn. Super. LEXIS 3656, at \*8 (Super. Ct. Dec. 28, 1992) (emphasis added).

247. *Kwasniewski v. Gulf Stream Coach, Inc.*, No. 98–2334B, 1999 Mass. Super. LEXIS 144, \*9–10 (Super. Ct. Apr. 20, 1999) (emphasis added).

248. *Hoffman v. Supplements Togo Mgmt., LLC*, 18 A.3d 210, 219 (N.J. Super. Ct. App. Div. 2011) (emphasis added).

249. *See Prows v. Pinpoint Retail Sys.* 868 P.2d 809, 813 (Utah 1993).

250. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972).

It is undisputed that New York had no material relationship to plaintiff's employment, to the operations of the defendant or to the Employment Agreement itself . . . . To be enforceable, a choice of forum clause must not be "unreasonable." To satisfy this "reasonableness" standard, the forum must have "some material relationship to the transaction." It is undisputed that throughout plaintiff's tenure as an employee, [the employer] had no New York office, and plaintiff did not work in New York other than to travel there for an occasional meeting with third parties.<sup>251</sup>

A New York court echoed this sentiment in refusing to enforce a forum selection clause selecting the courts of Delaware: "[N]either the parties nor the agreement has any connection to the State of Delaware: none of the parties is [sic] located in Delaware, the nondisclosure agreement was not executed in Delaware, and performance of the agreement was not to take place in Delaware."<sup>252</sup> Accordingly, the court concluded that "the prima facie enforceability and validity of the forum selection clause has been rebutted."<sup>253</sup> The Arkansas Court of Appeals has staked out a similar position: "Arkansas courts enforce forum-selection clauses but only if there is a substantial connection between the contract and the forum state."<sup>254</sup>

These opinions also often emphasize not only the lack of material relationship between the chosen forum and the parties but also that the parties' contacts point to the current forum as the proper place for adjudication of the dispute. Consider this Texas opinion refusing to enforce a foreign forum selection clause:

The defendant, Phillips, was a resident of *Texas*. Defendant General Resources Corporation was a *Texas* domiciliary. The contract was

---

251. *Farrell v. Capula Inv. US, LP*, 69 Conn. L. Rptr. 486 (Super. Ct. 2019) (citations omitted); *see also Federated Fin. Corp. of Am. v. Jenkins*, 719 S.E.2d 48, 52 (N.C. Ct. App. 2011) (citing the lack of a "rational nexus" between the parties and the chosen forum in declining to enforce an outbound forum selection clause).

252. *U.S. Merch., Inc. v. L&R Distribs., Inc.*, 122 A.D.3d 613, 614 (N.Y. App. Div. 2014). *But see Chiarizia v. Xtreme Rydz Custom Cycles*, 43 A.D.3d 1353, 1354, (N.Y. App. Div. 2007) ("Here, plaintiff's sole challenge to the forum selection clause was that New York was the more convenient forum because all of the witnesses and the motorcycle itself are located in New York, and it would be a great economic hardship on him to pay for all of the witnesses to travel to Florida for a trial of this action. That challenge is insufficient, however, because plaintiff has failed to demonstrate that enforcement of the forum selection clause would, in effect, deny him his day in court, and he has failed to allege that the clause was the result of fraud or overreaching.").

253. *U.S. Merch.*, 122 A.D.3d at 614; *see also Jentar Trucking, Inc. v. Tun*, No. A-3456-06T5, 2008 N.J. Super. LEXIS 781, at \*17-18 (Super. Ct. App. Div. July 15, 2008) (refusing to uphold a California forum selection clause, "see[ing] no reason . . . for holding that this litigation commenced by a New Jersey entity (and another entity with no relationship with California other than its attorney had offices there) should be required to litigate their suit against two New Jersey defendants in California when there is no defendant who resides in, has offices in, or has any meaningful relationship with California").

254. *Williams v. Johnson Custom Homes*, 264 S.W.3d 569, 578 (Ark. Ct. App. 2007) (Griffen, J., dissenting) (citation omitted) (citing *Nelms v. Morgan Portable Bldg. Corp.*, 808 S.W.2d 314 (1991)).

entered into in *Texas*. The parties agreed to apply *Texas* law. The lawsuit alleged *Texas* common-law claims of breach of contract, fraud and breach of fiduciary duty among other things. The *Texas* court had both personal and subject matter jurisdiction over this claim.<sup>255</sup>

Notably, courts sometimes couple this reasonable relationship factor with other previously mentioned reasonableness factors, most often serious inconvenience. After all, a forum without any reasonable relationship to the parties may also likely cause the parties—and their witnesses—a serious inconvenience in litigating there. One Washington appellate case decided early in the modern era reasoned that where “all contacts were made in Washington, partial performance was to be within the state, all the plaintiff’s witnesses reside within the State of Washington . . . it would be unjust, inequitable and unreasonable to require Plaintiff and all the witnesses to travel to New York State to litigate the case.”<sup>256</sup> A Pennsylvania state court later invoked the same rationale: “[S]ince all of the essential contacts, witnesses and circumstances of this case exist in [one county], it would cause plaintiff unjustifiable and onerous expense to litigate this matter in a contractually created forum.”<sup>257</sup> A Michigan court likewise found that a forum selection clause requiring the parties to litigate in South Carolina when “[t]he only connection between this case and South Carolina is that [a nonparty] to this dispute, is based in that state” was “substantially less convenient” and therefore unenforceable.<sup>258</sup>

---

255. *Gen. Res. Org. v. Deadman*, 907 S.W.2d 22, 27–28 (Tex. App. 1995) (emphasis added); *see also Morgan Trailer Mfg. Co. v. Hydraroll, Ltd.*, 59 A.2d 926, 931 (Pa. Super. Ct. 2000) (refusing to enforce a forum selection clause designating England because “[t]he employees in the lawsuit reside in *Pennsylvania*, Morgan has offices in *Pennsylvania*, most witnesses reside in the United States, all of Morgan’s documentary evidence is in the United States, and Hydraroll, LLC is a *Pennsylvania* corporation with a place of business in Berks County, *Pennsylvania*. We find it particularly compelling that Hydraroll/Transpotech now has a *Pennsylvania* division (Hydraroll, LLC) and thus has a local base of operations . . . The clause is thus unreasonable” (emphasis added)); *Colemont Ins. Brokers of Conn., LLC v. Byrne*, No. HHBCV074015231, 2008 Conn. Super. LEXIS 505, at \*6–7 (Super. Ct. Feb. 25, 2008) (concluding clause selecting a Texas forum was unreasonable when all parties were based in Connecticut); *Chase Com. Corp. v. Barton*, 571 A.2d 682, 684 (Vt. 1990) (refusing to uphold a forum selection clause designating New Jersey when the plaintiff since moved its business and the “[d]efendants have not offered any reason to require Vermont courts to defer to those in New Jersey nor advanced any argument that a New Jersey venue would serve their own interests, other than their evident interest in ousting Vermont as the forum state”).

256. *Exum v. Vantage Press, Inc.*, 563 P.2d 1314, 1315 (Wash. Ct. App. 1977).

257. *Bauman v. Choice One Commc’ns.*, 56 Pa. D. & C.4th 518, 522–23 (Ct. Com. Pl. 2002).

258. *McGee v. Ferndale Hist. Soc’y*, No. 2014-140029-CK, 2014 Mich. Cir. LEXIS 277, at \*5 (Cir. Ct. Jul. 9, 2014); *see also Dyersburg Machine Works, Inc. v. Rentenbach Eng’g Co.*, 650 S.W.2d 378, 380–81 (Tenn. 1983) (“[T]he Kentucky forum is a *substantially less convenient* place for trial in this case wherein all witnesses are Tennessee residents, the plaintiff and the defendants, McCarley Corporation and Rentenbach Corporation, are Tennessee corporations and Firemen’s Fund is a New Jersey corporation authorized to do business in Tennessee. We note, too, that the distance from Dyersburg to Brownsville, Tennessee, where this action was brought is approximately 35 miles while the distance from Dyersburg to Louisa, Kentucky, the ‘selected forum,’ is approximately 500 miles.” (emphasis

This is not to suggest that U.S. courts invariably strike down outbound clauses where the chosen jurisdiction lacks a reasonable relationship to the parties or the transaction. There are many cases where such clauses have been upheld.<sup>259</sup> If the chosen forum has *no* material connection to the parties, however, and if litigating in that forum will cause a serious inconvenience, some courts have deemed the clause unreasonable and unenforceable.<sup>260</sup>

### *E. Contracts of Adhesion*

In attempting to evade the enforcement of a forum selection clause, plaintiffs often cry foul when the clause is contained within a contract of adhesion. A contract of adhesion is typically described as a nonnegotiable agreement presented to the party on a “take-it-or-leave-it” basis<sup>261</sup> and is almost always imposed upon an unsophisticated party by a sophisticated one.<sup>262</sup> One can hardly fault plaintiffs for challenging the enforceability of forum selection clauses in adhesive contracts, as the *Bremen* Court suggested that “overweening bargaining power,” often present in contracts of adhesion, may require a finding of unreasonableness.<sup>263</sup> However, a plaintiff’s complaint of the presence of an adhesion contract is usually unsuccessful. This is likely because the Supreme Court in *Carnival Cruise* clarified that a forum selection clause in an adhesion contract, such as the one at issue in that case, does

---

added) (citation omitted); *Blackwell ex rel. Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 631–32 (Tenn. 2017) (applying *Dyersburg*).

259. See, e.g., *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 16 Cal. Rptr. 2d 417, 426 (Ct. App. 1993); *Espresso Disposition Corp. 1 v. Santana Sales & Mktg. Grp., Inc.*, 105 So. 3d 592, 595 (Fla. Dist. Ct. App. 2013).

260. This general pattern is, of course, not always the case. See, e.g., *Doe v. Cedars Acad., LLC*, No. 09C–09–136 JRS, 2010 Del. Super. LEXIS 559, at \*28 (Super. Ct. Oct. 27, 2010) (enforcing forum selection clause over unconscionability argument where only connection to the chosen forum was the forum selection clause itself, thus dismissing any need to show a “material connection” to California).

261. See, e.g., *Campbell v. Marriott Ownership Resorts Inc.*, No. E064139, 2016 Cal. App. LEXIS 1603, at \*11–12 (Ct. App. Mar. 2, 2016); see also Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (giving a list of seven factors that identify contracts of adhesion).

262. Rakoff describes this aspect of adhesive contracts in the following way: “The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine . . . [while] [t]he adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.” Rakoff, *supra* note 261, at 1177.

263. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972). Apparently, at least one court in the country has cited overwhelming bargaining power, by itself, as grounds for invalidating a forum selection clause. See *Long Beach Auto Auction, Inc. v. United Sec. All., Inc.*, 936 So. 2d 351, 356 (Miss. 2006) (“Here, the system had been installed, the lease agreements concluded and binding, consideration passed with the deposit and first month’s rent paid, all before the warranty was delivered. The window of opportunity to negotiate more favorable terms was already closed. Refusal to sign would leave the purchaser/lessor with no written express warranty. At this juncture, United possessed overweening bargaining power to effect its will regarding forum selection. Therefore, this Court conclusively finds the forum selection clause violates the first prong of the [*The Bremen*] test.”).

not necessarily equate to unfair bargaining between the parties.<sup>264</sup> Instead, the *Carnival* Court focused on “fundamental fairness” as the touchstone for reasonableness in contracts of adhesion.<sup>265</sup>

The California state courts, for example, have held that a forum selection clause in an adhesion contract is only unreasonable if one party exercised “unfair use of superior power to impose the contract upon the other party.”<sup>266</sup> An Iowa court expressed the rationale this way: “[O]ur State does not void most contractual provisions simply based on a finding that the contract was one of adhesion . . . . Instead, our courts recognize that specified clauses in adhesive contracts may be subject to invalidation if it is proven that they are unconscionable, do not meet the reasonable expectations of the parties, or are otherwise legally indefensible.”<sup>267</sup> These courts typically reason that just because the “forum-selection clause was not a negotiated term does not mean that enforcing it would be unreasonable.”<sup>268</sup> When these courts do invalidate forum selection clauses contained in adhesion contracts, they most often cite other grounds for a finding of unreasonableness in addition to the contract of adhesion.<sup>269</sup> The few states, like Minnesota, with rules that would

---

264. See Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 90 (1992) (“Another basis for invalidating a forum selection agreement under the *The Bremen* principles is the lack of actual negotiation and the existence of ‘overweening bargaining power.’ *Carnival Cruise*, however, rejected this as a defense altogether. From the standpoint of showing an inequality of bargaining power and a lack of actual negotiation, *Carnival Cruise* offers appealing facts for setting aside the agreement. As Judge Posner, speaking of the Ninth Circuit’s opinion in *Carnival Cruise*, noted: ‘If there ever was a case for stretching the concept of fraud in the name of unconscionability, it was [*Carnival Cruise*]; and perhaps no stretch was necessary.’ Moreover, the factors substituted for analysis of the bargaining strength of the parties are sure to result in validation of nearly every conceivable agreement. The Supreme Court’s refusal to invalidate the *Carnival Cruise* agreement, therefore, signalled [sic] that the adhesive nature of a contract is no longer a defense to enforcement of a forum selection agreement.” (alteration in original) (footnotes omitted)).

265. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (“It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.”).

266. *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 16 Cal. Rptr. 2d 417, 425 (Ct. App. 1993); see also *Botach Mgmt. Grp. v. Landmark Am. Ins. Co.*, No. BC473953, 2012 Cal. Super. LEXIS 13825, at \*9–10 (App. Dep’t Super. Ct. Nov. 29, 2012) (upholding forum selection clause in contract of adhesion).

267. *Hotchkiss v. Int’l Profit Ass’n.*, No. 0-932/09–1632, 2011 Iowa App. LEXIS 293, at \*7–8 (Apr. 13, 2011).

268. *Gen. Mortg. Acceptance Corp. v. Inter-Tel Leasing, Inc.*, No. 01-99-00809-CV, 1999 Tex. App. LEXIS 9448, at \*3 (Dec. 23, 1999).

269. See, e.g., *Alcaide, Inc. v. R. W. Granger & Sons*, No. 31 94 49, 1995 Conn. Super. LEXIS 3043, at \*5–6 (Super. Ct. Oct. 31, 1995) (citing both the lack of negotiation in the adhesion contract and the contacts of the defendant with the current forum in refusing to uphold the outbound clause); see also *Farrell v. Capula Inv. US*, No. FSTCV196040464S, 2019 Conn. Super. LEXIS 2868, at \*18–23 (Super. Ct. Oct. 21, 2019) (listing a number of reasons why the clause was unenforceable, including lack of bargaining on a “take it or leave it” basis, no material relationship to the chosen forum, and the lack of ability to pursue the claim in the chosen forum due to the statute of limitations there); *Shafer Plaza VI, Ltd. v.*

seemingly invalidate forum selection clauses solely on the basis that they were contained in an adhesive contract have never actually done so.<sup>270</sup> Cases where the courts invalidate an outbound forum selection clause solely on the basis that it was written into a contract of adhesion are rare.

## VI. FRAUD (AND OTHER CONTRACT DEFENSES)

Forum selection clauses are subject to the same contract defenses as any other contractual provision. If one of the parties never signed the contract containing the clause, for example, the clause is unenforceable due to lack of mutual assent.<sup>271</sup> If the court concludes that the contract is unconscionable or lacks consideration, then the clause is likewise unenforceable.<sup>272</sup> In conducting our review of state cases, we generally paid little mind to cases where the clause was challenged on the basis of contract rules of general application because there was nothing “special” about the way that the courts were treating forum selection clauses. There was, however, one traditional contract defense that plays out differently in the forum-selection-clause context. That defense is fraud.

In weighing whether to enforce an outbound forum selection clause in the face of a fraud claim, most courts have held that it is not enough to prove that the *contract containing the clause* was induced by fraud. Instead, the party challenging the clause must show that the *clause itself* was the product of fraud. As one court in Colorado put it: “[T]o render a forum selection clause unenforceable, the party seeking to avoid the clause must show that the clause itself was procured by fraud.”<sup>273</sup> As a court in Virginia explained: “[A]ny fraud sufficient to vitiate the forum selection provision must be directed specifically at the insertion of the forum selection clause in the

---

Lang, No. 2007-CA-001391-MR, 2008 Ky. App. LEXIS 577, at \*4-5 (Oct 31, 2008) (citing serious inconvenience, the “complicated eighteen-page” contract, and a lack of material relationship in addition to the adhesion contract as reasons for striking down the forum selection clause); *W.R. Grace & Co. v. Multi Rest. Concepts, Inc.*, 504 So. 2d 493, 493 (Fla. Dist. Ct. App. 1987) (refusing to uphold a forum selection clause due to the “defendants’ overwhelming bargaining power” and violation of the public policy of Texas); *Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353, 355 (N.C. Ct. App. 1998) (citing lack of consideration in addition to “unequal bargaining power” in striking down the clause).

270. *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 890-91 (Minn. 1982) (“The elements of unreasonableness can be divided into three categories: (1) the chosen forum is a seriously inconvenient place for trial; (2) the choice of forum agreement is one of adhesion; and (3) the agreement is otherwise unreasonable. . . . Forum selection clauses in contracts which are termed adhesion—‘take-it-or-leave-it’—contracts and which are the product of unequal bargaining power between the parties are unreasonable.”).

271. *Connors v. Rolls-Royce N. Am., Inc.*, 127 A.3d 1133, 1138 (Conn. App. Ct. 2015) (concluding defendant had never signed contract containing forum selection clause).

272. Wisconsin, in particular, regularly utilizes the doctrine of unconscionability to evaluate the enforceability of a forum selection clause. *See Wargaski v. NCI Grp., Inc.*, No. 2018AP2014, 2019 Wisc. App. LEXIS 642, at \*4-5 (Dec. 4, 2019) (discussing the unconscionability doctrine but ultimately finding the clause enforceable); *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 887 (Wis. Ct. App. 2004).

273. *Edge Telecomm, Inc. v. Sterling Bank*, 143 P.3d 1155, 1162 (Colo. App. 2006) (emphasis added).



contract and be proven by clear and convincing evidence.”<sup>274</sup> This doctrinal approach—which tracks the approach set forth by the U.S. Supreme Court in the arbitration context<sup>275</sup>—is followed by courts in a majority of U.S. states.<sup>276</sup>

There was not a single case in our dataset in which a plaintiff successfully proved that the forum selection clause itself was induced by fraud.<sup>277</sup> As a practical matter, therefore, the application of the test set forth above will virtually never result in the invalidation of a clause on the basis of fraud. However, not every state has adopted this test. The courts in Tennessee and Utah, for example, have held that a forum selection clause is invalid if it is contained in a contract procured by fraud.<sup>278</sup> In adopting this test, the Utah Supreme Court explained that “[t]he benefit of this approach is that it protects defrauded plaintiffs from being forced to litigate fraudulent contracts in a potentially inconvenient forum not of their choosing.”<sup>279</sup> In the states that follow this approach, there is no special rule as it relates to the invalidation of forum selection clauses due to fraud. If the plaintiff can establish that the contract as a whole was procured by fraud, then this is sufficient to invalidate the entire agreement—including the forum selection clause.

The courts in a number of states have ping-ponged back and forth between the two approaches. The courts of New York, for example, sometimes focus exclusively on the clause in evaluating claims of fraud.<sup>280</sup> At other times, they focus on the

---

274. *Ash-Will Farms, LLC v. Leachman Cattle Co.*, 61 Va. Cir. 165, 169 (2003).

275. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (concluding that an arbitration clause was unenforceable notwithstanding allegations that the contract containing the clause was fraudulently induced).

276. *See Karon v. Elliott Aviation*, 937 N.W.2d 334, 341–43 (Iowa 2020) (listing sixteen states that follow this approach); *see also ROW Equip., Inc. v. Norfolk S. Ry. Co.*, 844 S.E.2d 264, 267 (Ga. Ct. App. 2020) (adopting this rule).

277. *See Crowson v. Sealaska Corp.*, 705 P.2d 905, 911 (Alaska 1985) (describing the requirement that the challenging party prove that some portion of the bribe payments were specifically allocable to the forum selection clauses as an “impossible burden”).

278. *Lamb v. Megaflyght, Inc.*, 26 S.W.3d 627, 632 (Tenn. Ct. App. 2000) (“Therefore, we find that Plaintiffs were fraudulently induced into entering the contract. As such, the contract should be rescinded and the forum selection clause should be rendered invalid.”); *see also Overton v. Westgate Resorts, Ltd.*, No. E2014-00303-COA-R3-CV, 2015 Tenn. App. LEXIS 45, at \*35 (Jan. 30, 2015) (stating the same rule); *Energy Claims Ltd. v. Catalyst Inv. Group*, 325 P.3d 70, 85 (Utah 2014).

279. *Energy Claims*, 325 P.3d at 85.

280. *See J&M Realty Servs. Corp. v. SS&C Techs., Inc.*, No. 160123/2014, 2015 WL 4554457, at \*2 (N.Y. App. Div. July 16, 2015) (“Further, any allegations of fraud or overreaching must concern the forum selection clause itself.”); *Confederación Sudamericana de Fútbol v. Int’l Soccer Mktg., Inc.*, 78 N.Y.S.3d 301, 303 (App. Div. 2018) (“Notwithstanding the larger backdrop of fraud against which this dispute arises, plaintiff failed to show that the forum selection clause should be invalidated on grounds of fraud.”); *see also Patricia Youngblood Reyhan, Choice of What? The New York Court of Appeals Defines the Parameters of Choice-of-Law Clauses in Multijurisdictional Cases*, 82 ALB. L. REV. 1241, 1254–55 (2019) (“New York courts presume their validity, overcoming that presumption only in cases where general contract principles, such as fraud, duress, overreaching or unconscionability, or damage to a fundamental public policy would undermine the clause. Even as to these grounds, they must go to the forum selection clause itself and not to the contract as a whole.” (footnote omitted)).

contract more broadly.<sup>281</sup> One can also find decisions that cut both ways in California<sup>282</sup> and Florida.<sup>283</sup> We take no position on which approach is the “correct” one for courts to adopt. We only point out that, as a practical matter, to require the challenging party to show that the forum selection clause was itself obtained by fraud is to conclude that the clause should be enforced.

There are, of course, many other contract doctrines that may lead to the invalidation of a forum selection clause.<sup>284</sup> In focusing our attention on fraud, we do not mean to suggest that these other doctrines are unimportant. We merely highlight

---

281. *Sprung v. MacGregor*, No. 504677/19, 2019 N.Y. Misc. LEXIS 5436, at \*7 (Super. Ct. Oct. 3, 2019) (“There is no mechanism whereby an entire contract can be void when procured by fraud in the execution, yet somehow the forum selection clause can remain viable.”); *DeSola Grp. v. Coors Brewing Co.*, 605 N.Y.S.2d 83, 84 (App. Div. 1993) (“Even assuming the Agreement is applicable, the forum selection clause contained therein is unenforceable since the record is replete with allegations indicating that the entire agreement was permeated with fraud.”).

282. *Compare AMS Staff Leasing NA v. Superior Ct.*, No. G032507, 2004 Cal. App. LEXIS 6110, at \*8 (June 28, 2004) (“Plaintiffs do not assert the forum selection clause, separate and apart from the agreement itself, was the product of fraud or coercion. Rather, plaintiffs assert they were fraudulently induced into entering the agreement as a whole. Plaintiffs’ fraud claims therefore do not render the forum selection clause unenforceable.”), *with Xytest Corp. v. Somerset Cap. Corp.*, No. A088192, 2002 Cal. App. LEXIS 9282, at \*1 (Oct. 3, 2002) (“The trial court found that fraud on the part of the Mitchells so permeated their dealings with FET and Thermonics that agreements and transactions between them were void and unenforceable.”).

283. *Compare Holder v. Burger King Corp.*, 576 So. 2d 973, 974 (Fla. Dist. Ct. App. 1991) (“Absent proof that the forum selection clause is the product of fraud the parties should litigate all claims, including fraud claims, in the agreed on forum.”), *with First Pac. Corp. v. Sociedade de Empreendimentos e Construcoes, Ltda.*, 566 So. 2d 3, 4 (Fla. Dist. Ct. App. 1990) (“At the time it entered the contract and agreed to the choice-of-forum clause, SECL could not foresee that it would be subjected to fraudulent treatment. Under these circumstances, enforcement of the clause would contravene Florida policies incorporated into the statutes under which SECL seeks relief.”).

284. *See, e.g., Bucks Hill Realty v. Genter Healthcare*, No. UWYCV166029957S, 2017 Conn. Super. LEXIS 5946, at \*9 (Mar. 10, 2017) (concluding that the existence of the contract was in doubt and declining to enforce the clause); *Lewis v. Royal Bank of Scot., PLC*, No. HHDCV106013983S, 2011 Conn. Super. LEXIS 1306, at \*5–6 (May 24, 2011) (concluding that the plaintiff was not a party to an agreement with the defendant that contained a clause); *Nancy’s Tree Planting, Inc. v. Garden Res. Grp.*, No. CV03082622, 2004 Conn. Super. LEXIS 283, at \*8 (Feb. 3, 2004) (finding no evidence of contract formation); *Courtney v. Intuitive Surgical, Inc.*, No. N15C-01-027, 2015 Del. Super. LEXIS 564, \*3 (Oct. 30, 2015) (“[T]he Court finds that there is a material question of fact as to whether a valid contract was formed between Ms. Courtney and Intuitive that would make the forum selection clause enforceable against Ms. Courtney.”); *Lopez v. United Cap. Fund, LLC*, 88 So. 3d 421, 426 (Fla. Dist. Ct. App. 2012) (finding the clause impossibly vague and nonspecific); *Casavant v. Norwegian Cruise Line, Ltd.*, 829 N.E.2d 1171, 1182 (Mass. App. Ct. 2005) (“Here the ticket purchasers took no affirmative action to accept the contract.”); *Int’l Metal Sales, Inc. v. Glob. Steel Corp.*, No. 03-07-00172-CV, 2010 Tex. App. LEXIS 2201, at \*41 (Mar. 24, 2010) (“We conclude that there was legally insufficient evidence to support implied findings or conclusions that IMS formed contracts with the Global Steel entities that contained the forum-selection clause in dispute.”).

the fact that claims of fraud operate differently in the forum selection clause context than other contractual defenses.

## VII. IMPLICATIONS

The foregoing survey of state practice seeks to distill a sprawling and complicated body of case law into a (relatively) tractable set of rules and principles. There are, moreover, a number of specific insights that flow from this discussion that may be of particular interest to scholars. The most important of these insights relates to the differences between state and federal practice when it comes to the enforceability of forum selection clauses.

In 1938, the U.S. Supreme Court held in *Erie Railroad Co. v. Tompkins* that federal courts sitting in diversity should apply the substantive law of the state in which they sit.<sup>285</sup> This ruling was motivated in part by the Court's desire to discourage forum shopping between state and federal courts in the same state. In 1988, however, the Supreme Court held in *Stewart Organization, Inc. v. Ricoh Corp.* that the federal district courts should apply federal law—not state law—to determine the enforceability of an outbound forum selection clause in the context of a motion to transfer under 28 U.S.C. § 1404.<sup>286</sup> As Justice Scalia noted in his dissent in *Stewart*, this disparity between state and federal practice seems likely to encourage forum shopping.<sup>287</sup> Any time a federal court sitting in diversity applies a different law from the state in which it sits, plaintiffs have an incentive to choose the court—and therefore the law—that better suits their interests, exactly the type of gamesmanship *Erie* was designed to prevent. In the years since *Stewart* was decided, a number of scholars have pointed to this theoretical problem, without concrete data to support whether the problem actually exists.<sup>288</sup>

To make an empirical assessment, one must analyze whether the federal courts are, in fact, more likely to enforce outbound forum selection clauses than the state courts. It is possible—indeed, it is likely—that the answer to this question may vary by state and by circuit. To know for sure, however, it is necessary first to collect data on state practice. Until this task is done, it is impossible to evaluate whether the incentives for forum shopping in this area are significant enough to prompt a shift in behavior on the part of actual litigants.

This Article has provided this data. In so doing, it moves us one step closer to resolving the questions posed above. In future work, we plan to map federal court practice using a similar methodological approach set forth in this Article. Once this task is done, we will be able to compare state and federal practice and, at long last,

285. 304 U.S. 64 (1938).

286. 487 U.S. 22 (1988).

287. *Id.* at 40 (Scalia, J., dissenting) (“With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and nonresident defendants will be encouraged to shop for more favorable law by removing to federal court. In the reverse situation—where a State has law favorable to enforcing such clauses—plaintiffs will be encouraged to sue in federal court. This significant encouragement to forum shopping is alone sufficient to warrant application of state law.”).

288. See *supra* note 20 (collecting sources).

offer a definitive empirical answer as to whether there is or is not an *Erie* problem when it comes to the enforcement of outbound forum selection clauses in state and federal courts.

#### CONCLUSION

The existing literature contains remarkably little empirical data about the willingness of state courts to enforce outbound forum selection clauses. This Article seeks to fill this gap. It shows that state courts enforce these clauses roughly three-quarters of the time. It also offers a comprehensive account of the reasons why these provisions sometimes go unenforced. A concise summary of our findings on this issue is set forth below:

- (1) When a court refuses to give effect to an outbound forum selection clause, it usually cites one of two justifications: (a) public policy or (b) unreasonableness.
- (2) When a court strikes down a forum selection clause on the grounds that it is contrary to public policy, it is generally seeking to protect an in-state resident against (a) having to litigate in a foreign forum or (b) having her claim be governed by foreign law that provides less protection than the law of the forum.
- (3) When a state court refuses to enforce a forum selection clause on reasonableness grounds, it usually does so for a relatively predictable set of reasons. This list includes: (a) avoiding duplicative litigation; (b) the chosen forum cannot provide any relief to the plaintiff due to timeliness or jurisdictional problems, the small amount of the claim, or serious inconvenience; (c) the parties did not have notice of the clause, particularly in the context of a form passage contract or online agreement; or (d) the chosen forum lacks a reasonable relationship to the parties or the transaction.

It is our hope that this information will prove useful to scholars seeking to understand state and federal judicial practice, to litigants striving to determine whether a particular provision is enforceable, and to judges struggling to hack their way through this dense doctrinal thicket.

## APPENDIX

ALABAMA

Consumer Lease—ALA. CODE § 7-2A-106(2) (2021)  
Foreign Law—ALA. CONST., art. I, § 13.50(e) (2021)  
Heavy Equipment Dealer—ALA. CODE § 8-21B-13 (2021)  
Motor Vehicle Franchise—ALA. CODE § 8-20-4(3)(m)(4) (2021)

ALASKA

Consumer Lease—ALASKA STAT. ANN. § 45.12.106(b) (West 2020)  
Student Loan Contract—ALASKA STAT. ANN. § 14.48.160(a)(4) (West 2020)

ARIZONA

Construction Contract—ARIZ. REV. STAT. § 32-1186(A)(1); ARIZ. REV. STAT. § 34-227; ARIZ. REV. STAT. § 41-2583 (LexisNexis 2021)  
Consumer Lease—ARIZ. REV. STAT. ANN. § 47-2A106(B) (2021)  
Equipment Dealer Contract—ARIZ. REV. STAT § 44-6709(B) (2021)

ARKANSAS

Construction Contract—ARK. CODE ANN. § 4-56-104(c); ARK. CODE ANN. § 22-9-214(c) (2020)  
Consumer Automobile Purchase—ARK. CODE ANN. § 4-75-413(a)(2) (2020)  
Consumer Lease—ARK. CODE ANN. § 4-2A-106(2) (2020)  
Foreign Law—ARK. CODE ANN. §1-1-103(c)-(d)(1) (2020)  
Motor Vehicle Franchise—ARK. CODE ANN. § 23-112-403(b)(1)(B) (2020)  
Restaurant Franchise—ARK. CODE ANN. § 4-72-603(c) (2020)  
Sales Representatives—ARK. CODE ANN. § 4-70-302(c) (2020)

CALIFORNIA

Beer Manufacturer/Wholesaler Agreement—CAL. BUS. & PROF. CODE § 25000.6(a) (West 2021)  
Child Support Contract—CAL. FAM. CODE § 5614(b)(7) (West 2021)  
Construction Contract—CAL. CIV. PROC. CODE § 410.42(a) (West 2021)  
Consumer Contract—CAL. CIV. PROC. CODE § 116.225 (West 2021)  
Consumer Lease—CAL. COM. CODE § 10106(b) (West 2021)  
Consumer Credit—CAL. CIV. PROC. CODE § 116.225 (West 2021)  
Employment Agreement—CAL. LAB. CODE § 925(a)(1) (West 2021)  
Equipment Dealer Contract—CAL. BUS. & PROF. CODE § 22927 (West 2021)  
Franchise Agreement—CAL. BUS. & PROF. CODE § 20040.5 (West 2021)

COLORADO

Consumer Credit—COLO. REV. STAT. ANN. § 5-1-201(8)(c) (West 2021)  
Consumer Lease—COLO. REV. STAT. ANN. § 4-2.5-106(2) (West 2021)  
Foreclosure—COLO. REV. STAT. ANN. 6-1-1106(1)(c) (West 2021)  
Motor Vehicle Franchise—COLO. REV. STAT. § 44-20-132(1)(a) (2021)

CONNECTICUT

Consumer Lease—CONN. GEN. STAT. ANN. § 42a-2A-106(b) (West 2021)

Construction Contract—CONN. GEN. STAT. ANN. § 42-158m (West 2021)

Franchise Agreement—CONN. GEN. STAT. ANN. § 42-133f(f) (West 2021)

DELAWARE

Consumer Lease—DEL. CODE ANN. tit. 6, § 2A-106(2) (2021)

Foreclosure – DEL. CODE ANN. tit. 6, § 2424B (2021)

Statutory Trust – DEL. CODE ANN. tit. 12, § 3804(e) (2021)

FLORIDA

Construction Contract—FLA. STAT. ANN. § 47.025 (West 2020); Fla. Stat. Ann. § 255.05(1)(e) (West 2020) (for public buildings)

Consumer Lease—FLA. STAT. ANN. § 680.1061(2) (West 2020)

Motor Vehicle Franchise—FLA. STAT. ANN. § 320.64(31)(a) (West 2020)

Transfer of Liens to Security—FLA. STAT. ANN. § 713.24(3) (West 2020)

GEORGIA

Consumer Lease—GA. CODE ANN. § 11-2A-106(2) (2021)

High-Cost Home Loan—GA. CODE ANN. § 7-6A-5(6) (2021); GA. CODE ANN. § 7-6A-7(g) (2021)

Motor Vehicle Franchise—GA. CODE ANN. § 10-1-623 (2021)

Payday Lending Transaction—GA. CODE ANN. 16-17-2(c)(1) (2021)

HAWAII

Consumer Credit—HAW. REV. STAT. ANN. § 476-30(f)(4) (LexisNexis 2021)

Consumer Lease—HAW. REV. STAT. ANN. § 490:2A-106(b) (LexisNexis 2021)

Insurance—HAW. REV. STAT. ANN. § 431:10-221(a)(2) (LexisNexis 2021)

Motor Vehicle Franchise—HAW. REV. STAT. ANN. § 437-52(a)(1) (LexisNexis 2021)

IDAHO

Consumer Credit—IDAHO CODE § 28-41-201(8)(c) (2020)

Consumer Lease—IDAHO CODE ANN. § 28-12-106(2) (West 2021)

General Prohibition—IDAHO CODE ANN. § 29-110 (West 2021)

ILLINOIS

Construction Contract—815 ILL. COMP. STAT. ANN. 665/10 (West 2021)

Consumer Lease—810 ILL. COMP. STAT. ANN. 5/2A-106(2) (West 2021)

Franchise Agreement—815 ILL. COMP. STAT. ANN. 705/4 (West 2021)

INDIANA

Construction Contract—IND. CODE ANN. § 32-28-3-17(2) (West 2021)

Consumer Credit—IND. CODE ANN. § 24-4.5-1-201(6)(c) (West 2021)

Consumer Lease—IND. CODE ANN. § 26-1-2.1-106(2) (West 2021)

Franchise Agreement—IND. CODE ANN. § 23-2-2.7-1(10) (West 2021)

IOWA

Construction Contract—IOWA CODE § 537A.6 (2020)  
 Consumer Credit—IOWA CODE ANN. § 537.1201(6)(a)(4) (West 2020)  
 Consumer Lease—IOWA CODE ANN. § 554.13106(2) (West 2020)  
 Franchise Agreement—IOWA CODE ANN. § 523H.3 (West 2020); IOWA CODE ANN. § 537A.10(3) (West 2020)  
 Motor Vehicle Franchise—IOWA CODE ANN. § 322A.19 (West 2020)  
 Transfer on Death Security Registration—IOWA CODE ANN. § 633D.8(7) (West 2020)

KANSAS

Construction Contract—KAN. STAT. ANN. § 16-121(e) (West 2020)  
 Consumer Credit—KAN. STAT. ANN. § 16a-1-201(8)(c) (West 2020)  
 Consumer Lease—KAN. STAT. ANN. § 84-2a-106(2) (West 2020)  
 Dealer Agreement—KAN. STAT. ANN. § 16-121(e) (West 2020)  
 Foreign Law—KAN. STAT. ANN. § 60-5105(b) (West 2020)  
 Franchise Agreement—KAN. STAT. ANN. § 16-121(e) (West 2020)  
 Motor Carrier Transportation Contract—KAN. STAT. ANN. § 16-121(e) (West 2020)

KENTUCKY

Consumer Lease—KY. REV. STAT. ANN. § 355.2A-106(2) (West 2021)

LOUISIANA

Child Support Contract—LA. STAT. ANN. § 51:1444(B)(1) (2020)  
 Construction Contract—LA. STAT. ANN. § 9:2779(B)(1) (2020); LA. STAT. ANN. § 38:2196(B)(1) (2020) (for public contracts); LA. STAT. ANN. § 48:251.8(1) (2020) (for public highway contracts)  
 Consumer Credit—LA. STAT. ANN. § 9:3511(C)(2) (2020)  
 Consumer Transaction—LA. STAT. ANN. § 51:1418(C) (2020)  
 Employment Agreement—LA. STAT. ANN. § 23:921(A)(2) (2020)  
 Foreign Law—LA. STAT. ANN. § 9:6001(E) (2020)  
 General Prohibition—LA. CODE CIV. PROC. ANN. art. 44 (2020)  
 Insurance Contract—LA. STAT. ANN. § 22:868(A)(2) (2020)  
 Lease of Movable Property—LA. STAT. ANN. § 9:3303(F)(2) (2020)  
 Motor Vehicle Franchise—LA. STAT. ANN. § 32:1261(A)(1)(a)(v) (2020)  
 Out-of-State Telephone Solicitor—LA. STAT. ANN. § 51:1407(A) (2020)

MAINE

Consumer Credit—ME. REV. STAT. tit. 9-A, § 1-201(8)(C) (West 2020)  
 Consumer Lease—ME. REV. STAT. tit. 11, § 2-1106(2) (West 2020)  
 Residential Mortgage Loan—ME. REV. STAT. tit. 9-A, § 8-506(6)(I) (West 2020)

MARYLAND

Consumer Lease—MD. CODE ANN., COM. LAW § 2A-106(2) (West 2020)  
 Foreclosure—MD. CODE ANN., REAL PROP. § 7-310(b) (West 2020)  
 Insurance—MD. CODE ANN., INS. § 12-209(4) (West 2020)

MASSACHUSETTS

Consumer Lease—MASS. GEN. LAWS ANN. ch. 106, § 2A-106(2) (West 2020)  
High-Cost Home Loan—MASS. ANN. LAWS ch. 183C, § 13 (LexisNexis 2021)  
Insurance—MASS. ANN. LAWS CH. 175, § 22 (LexisNexis 2021)

MICHIGAN

Consumer Lease—MICH. COMP. LAWS ANN. § 440.2806(2) (West 2020)  
Franchise Agreement—MICH. COMP. LAWS ANN. § 445.1527(f) (West 2020)  
Model Choice of Forum Act—MICH. COMP. LAWS ANN. § 600.745(3) (West 2020)

MINNESOTA

Construction Contract—MINN. STAT. ANN. § 337.10(1) (West 2020)  
Consumer Lease—MINN. STAT. ANN. § 336.2A-106(2) (West 2020)  
Consumer Short-term Loan—MINN. STAT. ANN. § 47.601(2)(a)(2) (West 2020)  
Franchise Agreement—MINN. R. 2860.4400(J) (2020)  
Motor Vehicle Franchise—MINN. STAT. ANN. § 80E.135(1) (West 2020)

MISSISSIPPI

Construction Contract—MISS. CODE. ANN. § 87-7-9(1) (West 2020)  
Consumer Lease—MISS. CODE. ANN. § 75-2A-106(2) (West 2020)  
Franchise Agreement—MISS. CODE. ANN. § 75-77-17 (West 2020)  
Motor Vehicle Franchise—MISS. CODE. ANN. § 75-77-17 (West 2020)  
General Retailer Agreement—MISS. CODE. ANN. § 75-77-17 (West 2020)

MISSOURI

Consumer Lease—MO. ANN. STAT. § 400.2A-106(2) (West 2021)  
Structured Settlement—MO. ANN. STAT. § 407.1066(4) (West 2021)

MONTANA

Consumer Lease—MONT. CODE ANN. § 30-2A-106(2) (West 2020)  
Construction Contract—MONT. CODE ANN. § 28-2-2116(1) (West 2020)  
General Prohibition—MONT. CODE ANN. § 28-2-708 (West 2020)  
Timeshare Agreement—MONT. CODE ANN. § 37-53-306(3) (West 2020)

NEBRASKA

Construction Contract—NEB. REV. STAT. § 45-1209(3) (2019)  
Consumer Lease—NEB. REV. STAT. ANN. § 2A-106(2) (West 2020)  
Foreclosure—NEB. REV. STAT. ANN. § 76-2715(3) (West 2020)  
Model Choice of Forum Act—NEB. REV. STAT. ANN. § 25-415 (West 2020)  
Student Loan Contract—NEB. REV. STAT. ANN. § 85-1645(4) (West 2020)

NEVADA

Construction Contract—NEV. REV. STAT. ANN. § 108.2453(2)(d) (West 2020)  
Consumer Contract—NEV. REV. STAT. § 97B.100(2) (2019)  
Consumer Credit—NEV. REV. STAT. § 97B.100(2) (2019)  
Consumer Lease—NEV. REV. STAT. ANN. § 104A.2106(2) (West 2020)  
Student Loan Contract—NEV. REV. STAT. ANN. § 394.590(1)(d) (West 2020)



NEW HAMPSHIRE

Consumer Lease—N.H. REV. STAT. ANN. § 382-A:2A-106(2) (2020)  
 Model Choice of Forum Act—N.H. REV. STAT. ANN. § 508-A:3 (2020)  
 Motor Vehicle Franchise—N.H. REV. STAT. ANN. § 357-C:3(1-b)(p)(2) (2020); N.H. REV. STAT. ANN. § 357-C:6(III) (2020)  
 Sales Representatives—N.H. REV. STAT. ANN. § 339-E:2(III)

NEW JERSEY

Consumer Lease—N.J. STAT. ANN. § 12A:2A-106(2) (West 2020)  
 Franchise Agreement—N.J. STAT. ANN. § 56:10-10 (West 2020)  
 High-Cost Home Loan—N.J. STAT. ANN. § 46:10B-26(e) (West 2020)  
 Motor Vehicle Franchise—N.J. STAT. ANN. § 56:10-7.3(a)(2) (West 2020)

NEW MEXICO

Construction Contract—N.M. STAT. ANN. § 57-28A-1(A)(2) (2020)  
 Consumer Lease—N.M. STAT. ANN. § 55-2A-106(2)-(3) (2020)  
 Foreclosure—N.M. STAT. ANN. § 47-15-5(G)(3) (2020)  
 Health Care Practitioner Employment Agreement—N.M. STAT. ANN. § 24-1I-2(B)(2) (2020)  
 High-Cost Home Loan—N.M. STAT. ANN. § 58-21A-5(C) (2020)

NEW YORK

Construction Contract—N.Y. GEN. BUS. LAW § 757(1) (2020)  
 Consumer Lease—N.Y. U.C.C. LAW § 2-A-106(2) (2014)

NORTH CAROLINA

Construction Contract—N.C. GEN. STAT. § 22B-2 (1995)  
 Consumer Lease—N.C. GEN. STAT. § 25-2A-106(2) (1993)  
 Foreign Law—N.C. GEN. STAT. § 1-87.17 (2013)  
 General Prohibition—N.C. GEN. STAT. § 22B-3 (1995)  
 Insurance Contract—N.C. GEN. STAT. § 58-3-35(a) (2020)

NORTH DAKOTA

Consumer Lease—N.D. CENT. CODE § 41-02.1-06(2) (2019)  
 Model Choice of Forum Act—N.D. CENT. CODE § 28-04.1-03 (2019)

OHIO

Construction Contract—OHIO REV. CODE ANN. § 4113.62(D)(2) (LexisNexis 2020)  
 Consumer Lease—OHIO REV. CODE ANN. § 1310.04(B) (LexisNexis 2020)  
 General Franchise—OHIO REV. CODE ANN. § 1334.06(E) (LexisNexis 2020)

OKLAHOMA

Construction Contract—OKLA. STAT. TIT. 15, § 821(B)(1) (2019); OKLA. STAT. TIT. 15, § 221(E) (2019); OKLA. STAT. TIT. 61, § 227(B)(1) (2019) (for public highway contracts)  
 Consumer Credit—OKLA. STAT. TIT. 14A, § 1-201(9)(c) (2019)  
 Consumer Lease—OKLA. STAT. TIT. 12A, § 2A-106(2) (2019)

Deferred Deposit Lending Agreement—OKLA. STAT. TIT. 59, § 3150.12(E)(1)(c) (2019)

Foreign Law—OKLA. STAT. TIT. 12 § 20 (2019)

General Prohibition—OKLA. STAT. TIT. 15, § 216 (2019)

#### OREGON

Construction Contract—OR. REV. STAT. § 701.640(1)(a) (2019)

Consumer Contract—OR. REV. STAT. § 81.150(2) (2019)

Consumer Lease—OR. REV. STAT. § 72A.1060(2) (2019)

Foreclosure—OR. REV. STAT. § 646A.710(2)(d) (2019)

Motor Vehicle Franchise—OR. REV. STAT. § 650.165(2) (2019)

#### PENNSYLVANIA

Construction Contract—73 PA. STAT. AND CONS. ANN. § 514 (West 2020)

Consumer Lease—13 PA. STAT. AND CONS. STAT. § 2A106(b) (2020)

#### RHODE ISLAND

Construction Contract—6 R.I. GEN. LAWS ANN. § 6-34.1-1(a) (2021)

Consumer Lease—6A R.I. GEN. LAWS § 6A-2.1-106(2) (2021)

Franchise Agreement—19 R.I. GEN. LAWS ANN. § 19-28.1-14 (2021)

Home Loan—34 R.I. GEN. LAWS ANN. § 34-25.2-5(e) (2021)

Insurance—R.I. GEN. LAWS ANN. § 27-4-13 (2021)

#### SOUTH CAROLINA

Consumer Credit—S.C. CODE ANN. § 37-1-201(10)(d) (2020)

Consumer Lease—S.C. CODE ANN. § 36-2A-106(2) (2020)

General Prohibition—S.C. CODE ANN. § 15-7-120(A) (2020)

#### SOUTH DAKOTA

Consumer Lease—S.D. CODIFIED LAWS § 57A-2A-106(2) (2020)

Franchise Agreement—S.D. CODIFIED LAWS § 37-5-11 (2020)

General Prohibition—S.D. CODIFIED LAWS § 53-9-6 (2020)

Insurance Contract—S.D. Codified Laws § 58-15-50 (2020)

Motor Vehicle Franchise—S.D. Codified Laws § 32-6B-49.1(2) (2020)

#### TENNESSEE

Construction Contract—TENN. CODE ANN. § 66-11-208(a) (2020)

Consumer Contract—TENN. CODE ANN. § 47-18-113(b) (2020)

Consumer Lease—TENN. CODE ANN. § 47-2A-106(2) (2020)

Deferred Presentment Services Agreement—TENN. CODE ANN. § 45-17-112(s)(1)(B) (2020)

Franchise Agreement—TENN. CODE ANN. § 47-25-1312 (2020)

Foreign Law—TENN. CODE ANN. § 20-15-104(a) (2020)

Model Choice of Forum Act—*Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d 378, 380 (Tenn. 1983)

Motor Vehicle Franchise—TENN. CODE ANN. § 47-25-1913(b) (2020)

Student Loan Contract—TENN. CODE ANN. § 49-7-2015(a)(2)(D) (2020)

TEXAS

Construction Contract—TEX. BUS. & COM. CODE ANN. § 272.001(b) (West 2019)  
 Consumer Lease—TEX. BUS. & COM. CODE ANN. § 2A.106(b) (West 2019)  
 Sales Representatives—TEX. BUS. & COM. CODE § 54.002(c)

UTAH

Construction Contract—UTAH CODE ANN. § 13-8-3(2) (LexisNexis 2020)  
 Consumer Lease—UTAH CODE ANN. § 70A-2a-106(2) (LexisNexis 2020)  
 Insurance—UTAH CODE ANN. § 31A-21-314(2)(b) (LexisNexis 2020)

VERMONT

Agricultural Finance Lease—VT. STAT. ANN. TIT. 9, § 2389(b) (2020)  
 Consumer Lease—VT. STAT. ANN. TIT. 9A, § 2A-106(2) (2020)  
 Credit Card Terminal Finance Lease—VT. STAT. ANN. TIT. 9, § 2482i(5)(A) (2020)  
 Motor Vehicle Franchise—VT. STAT. ANN. TIT. 9, § 4100a(b) (2020); VT. STAT. ANN. TIT. 9 § 4097(15)(B) (2020)

VIRGINIA

Construction Contract—VA. CODE ANN. § 8.01-262.1(A) (2020)  
 Consumer Lease—VA. CODE ANN. § 8.2A-106(2) (2020)  
 Insurance—VA. CODE ANN. § 38.2-312 (2020)

WASHINGTON

Actions by or Against Counties—WASH. REV. CODE ANN. § 36.01.050 (2020)  
 Consumer Lease—WASH. REV. CODE § 62A.2A-106(2) (2020)  
 Insurance Contract—WASH. REV. CODE ANN. § 48.18.200(1)(b) (2020)  
 Motor Vehicle Franchise—WASH. REV. CODE ANN. § 46.96.240 (2020)  
 Student Loan Contract—WASH. REV. CODE ANN. § 28B.85.140(4) (2020); WASH. REV. CODE ANN. § 28C.10.170(4) (2020)  
 Timeshare Agreement—WASH. REV. CODE ANN. § 64.36.120(3) (2020)  
 Sales Representatives—WASH. REV. CODE ANN. § 49.48.160(1)

WEST VIRGINIA

Consumer Lease—W. VA. CODE § 46-2A-106(2) (2020)

WISCONSIN

Construction Contract—WIS. STAT. ANN. § 779.135(2) (2020)  
 Consumer Contract—WIS. STAT. ANN. § 421.201(10)(c) (2020)  
 Consumer Credit—WIS. STAT. § 421.201(10)(c) (2020)  
 Consumer Lease—WIS. STAT. § 411.106(2) (2020)  
 Insurance Contract—WIS. STAT. ANN. § 631.83(3)(b)

WYOMING

Consumer Lease—WYO. STAT. ANN. § 34.1-2.A-106(b) (2020)  
 Consumer Credit—WYO. STAT. ANN. § 40-14-120(j)(iii) (2020)

