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M/S Bremen v Zapata Off -Shore Company: US Common Law Affirmation of Party Autonomy

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I. Introduction

The twentieth century brought issues of party autonomy to the forefront of the development of the conflict of laws. This was true both in new legal instruments, and in the cases that developed the common law.[1] In the US, this elevated status for party autonomy was experienced in both choice of law and choice of forum.[2] In choice of forum, the 1925 enactment of the Federal Arbitration Act ushered in a new respect and higher status for party choice of arbitration as the forum for dispute resolution.[3] A similar evolution occurred several decades later for party choice of court through common law development in the 1972 US Supreme Court decision in *M/S Bremen v Zapata Off-Shore Company*.[4]

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[1] The most prominent examples of legal instruments demonstrating respect for party autonomy are the Brussels Convention of 1968, which has become the Brussels I (Recast) Regulation (European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels, 27 September 1968, 33 OJ Eur Comm (C189/1) 1 (28 July 1990) (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1989 accession of Spain and Portugal) ('Brussels Convention'), and the Rome I Convention, now in the form of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I'), OJ Eur Union, L 177/6, 4 July 2008). Article 25 of the Brussels I (Recast) Regulation provides for honouring party choice of court, and Art 3 of the Rome I Regulation provides for honouring party choice of law. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L351/1, Art 25 ('Brussels I Recast Regulation').

[2] For a discussion of the evolution of US jurisprudence on party autonomy in choice of law, see Brand, *International Business Transaction Fundamentals*, 2nd edn (Wolters Kluwer, 2019) 413–20.

[3] Federal Arbitration Act, 9 USC §1.

[4] 407 US 1 (1972) (*The Bremen*).

The Bremen brought together the development of doctrines dealing with party autonomy in choice of court and *forum non conveniens*. The case also added to the development of US doctrines on applicable law when subject matter jurisdiction lies with federal courts in diversity cases – for which those courts normally apply state, not federal, law under the *Erie* doctrine.[5] When we add the comparison of developments in party choice of arbitration as a forum for dispute settlement with developments in party choice of court, it makes *The Bremen* a rich decision for conflicts scholars and practitioners alike, and an aid in understanding twentieth-century developments in conflict of laws jurisprudence generally in the US.

I begin this chapter with a discussion of fundamental elements of the development of party autonomy in US law and the historical context of the law prior to *The Bremen*. I follow with brief mention of how one prominent political family played a role in the facts that brought about *The Bremen* case. This leads into the facts of the case itself. After reviewing those facts, I discuss the legal analysis applied in the US Supreme Court and the case-specific results of that analysis. I follow with a discussion of how the decision contributed to the development of conflict of laws doctrines, and how those developments fit with the global evolution of related doctrines.

II. Party Autonomy Today: The Context for a Retrospective Look at Choice of Court

Completion of the Hague Convention on Choice of Court Agreements in 2005 has brought a global focus on party autonomy in the selection of national courts for the resolution of private disputes.[6] That Convention, through which contracting states commit to honour both party choice of court and the resulting judgments,[7] is in many ways a legislative representation of both civil law and common law developments regarding party autonomy over the course of the twentieth century.[8] These developments bring together choice of law,[9] choice of court and doctrines dealing

[5] nn 156–62 and accompanying text.

[6] Convention on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) 44 ILM 1294 (Hague Choice of Courts Convention).

[7] ibid Art 5 requires that a court chosen in an exclusive choice of court agreement take jurisdiction, and art 6 requires that a court not chosen decline jurisdiction, with limited exceptions. Article 8 obligates courts in contracting states to recognise and enforce judgments from the chosen court, with limited exceptions found in Art 9.

[8] Civil law developments are perhaps best exemplified in the 'Brussels process' that produced the Brussels I Convention of 1968, and successive iterations of the Brussels I Regulation in 2001 and 2012, respectively. Brussels Convention and Brussels I (Recast) Regulation (n 1) and by the 2015 Hague Principles on Choice of Law in International Commercial Contracts, available at www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-law-principles.

[9] The 2005 Hague Convention on Choice of Court Agreements was the first instrument to have an autonomous choice of law rule providing that the law governing the validity of a choice of court agreement is to be the law of the state of the court chosen in that agreement. Hague Choice of Courts Convention (n 6) Arts 5, 6 and 9. While one may argue whether this truly promotes party autonomy

with how courts handle parallel proceedings when more than one court has jurisdiction to hear the same case. While they implicate all three of the traditional private international law pillars – jurisdiction, applicable law, and the recognition and enforcement of judgments – the discussion that follows focuses on the way in which private parties, through freedom of contract, may influence the exercise of jurisdiction by courts.

In the US, twentieth-century developments brought particular attention to the relationship between choice of court and the common law doctrine of *forum non conveniens*.[10] This relationship involves the intersection of rules that are not always consistent with one another and, in particular, the conflict a court must address when faced with both a party agreement on choice of court (and the respect for party autonomy that results in the enforcement of that agreement), and a request for the exercise of judicial discretion either to keep the case in contravention of a choice of court agreement or to send the case to a court not chosen, under the doctrine of *forum non conveniens*.

The evolution of doctrines of party autonomy in choice of court and the doctrine of *forum non conveniens* intersected in the Supreme Court's 1972 decision in *The Bremen*.[11] As happened in *The Bremen*, these doctrines come together when a motion is brought to stay or dismiss an action on grounds of *forum non conveniens* and there exists a choice of court clause in a contract between the parties. When the choice of court clause derogates from the forum court (as was the case in *The Bremen*), that clause may be a factor weighing in favour of dismissal on grounds of *forum non conveniens* so that the case is tried in the chosen court. When the clause involves prorogation in favour of the forum court, however, its enforcement runs counter to an argument in favour of litigation in another court on the grounds of *forum non conveniens*. In this latter category of cases, respect for the chosen forum may come into conflict with the application of the doctrine of *forum non conveniens* in a manner that allows courts to produce results that can be difficult to reconcile. While the Hague Convention on Choice of Court Agreements gives clear precedence to an exclusive choice of court agreement over the doctrine of *forum non conveniens*,[12] that same result does not always occur in the common law application of the doctrine, particularly in the US.

Following *The Bremen*, US courts have tended to honour choice of court clauses in freely negotiated contracts, even in the face of a *forum non conveniens* motion seeking litigation in a court not chosen by the parties in their contract.[13] In other

(it can have the opposite effect by favouring the stronger party that can impose terms on the weaker party, including the choice of court term) it was championed in the Hague Choice of Courts Convention as a bow to party autonomy generally.

[10] In civil law jurisdictions, this confluence was between choice of court and the doctrine of *lis alibi pendens*.

[11] *The Bremen* (n 4).

[12] Hague Choice of Courts Convention (n 6) Art 5(2).

[13] With the Supreme Court's 1991 decision in *Carnival Cruise Lines*, respect for choice of court clauses became, in the view of some commentators, almost unquestioning in allowing the imposition

cases, the existence of a choice of court agreement in favour of a foreign court can weigh in favour of a *forum non conveniens* motion to dismiss or stay proceedings in the forum not chosen.[14]

The US *forum non conveniens* doctrine – with its inclusion of public interest factors – allows courts broad discretion to decline to hear a case even when it is filed in a court with proper jurisdiction and venue.[15] Nonetheless, as in most countries, courts in the US now generally respect party autonomy in private commercial contracts and will uphold reasonable choice of forum clauses, including choice of court agreements.[16] This has not always been so, however. Prior to 1972, US courts were reluctant to enforce clauses that would choose to have litigation in a court other than the one in which proceedings were first brought.[17] This changed when the Supreme Court, in an admiralty case, ruled clearly in favour of upholding a business-to-business choice of court clause in a freely negotiated contract in *The Bremen*.[18]

III. Choice of Court Prior to *The Bremen*

An exclusive choice of court agreement typically has two functions: first, by party consent it confers the power to adjudicate on a court that, but for the clause, might not have had jurisdiction; and second, it may waive access to the jurisdiction of

of choice of court on weaker parties to a contractual relationship: *Carnival Cruise Lines Inc v Shute*, 499 US 972 (1991). See, eg, Borchers, 'Forum Selection Agreements in the Federal Courts After *Carnival Cruise*: A Proposal for Congressional Reform' (1992) 67 *Washington Law Review* 55; Heiser, 'Forum Selection Clauses in State Courts: Limitations on Enforcement After *Stewart* and *Carnival Cruise*' (1993) 45 *Florida Law Review* 361; Liesemer, 'Carnival's Got the Fun … and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine after *Carnival Cruise Lines Inc v Shute*' (1992) 53 *University of Pittsburgh Law Review* 1025.

[14] See n 143 and accompanying text.

[15] For a complete discussion of the US and other common law states' application of the doctrine of *forum non conveniens*, see Brand and Jablonski, Forum Non Conveniens: *History, Global Practice and Future Under the Hague Convention on Choice of Court Agreements* (OUP, 2007).

[16] There is a tendency to refer to choice of court agreements as 'forum selection clauses', setting up a comparison with arbitration agreements. See, eg, Born, *International Commercial Arbitration*, 3rd edn (Wolters Kluwer, 2021) 70 ('contractual dispute resolution provisions typically take one of two basic forms: (a) forum selection clauses; or (b) arbitration agreements'). 'Forum-selection clause' was the term used by the US Supreme Court for the choice of court agreement in *The Bremen* (n 4), 9: ('Forum-selection clauses have historically not been favored by American courts'). With the Convention on Choice of Court Agreements now in effect in more than 30 states, it makes sense for purposes of both consistency and clarity to distinguish between 'arbitration agreements' and 'choice of court agreements': www.hcch.net/en/instruments/conventions/status-table/?cid=98. As the US Supreme Court stated in *Scherk v Alberto-Culver Co* 417 US 506, 519 (1974), 'An agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute'. Both are 'forum-selection clauses', and in this chapter I use 'choice of court agreement' and 'arbitration agreement' to designate these two principal kinds of 'forum-selection agreements'.

[17] nn 19–21 and accompanying text.

[18] *The Bremen* (n 4).

other courts.[19] The idea that parties may submit to jurisdiction by consent has long been recognised in the US.[20] It is the second function that US courts historically tended to question. Thus, prior to *The Bremen*, US courts hesitated to enforce choice of court clauses in international contracts when doing so would 'oust' the US forum court of jurisdiction.[21] This approach was largely inconsistent with the law in other nations, especially many civil law nations, which tended to respect party autonomy in forum selection from a much earlier date.[22]

A choice of court agreement cannot change sovereign rules of jurisdiction. Thus, it really is inappropriate to think of such an agreement as 'ousting' a court of jurisdiction. A court not chosen in a choice of court agreement still has jurisdiction to hear the case if its rules of jurisdiction allow it; it simply is subject to the contractual commitment of the parties that the case be heard in another court. Nonetheless, the ouster doctrine gathered multiple rationales in

[19] Juenger, 'Supreme Court Validation of Forum-Selection Clauses' (1972) 19 *Wayne Law Review* 49, 51.

[20] ibid 51.

[21] See, for example, *Carbon Black Export Inc v The Monrosa* 254 F2d 297, 300–01 (5th Cir 1958), *cert dismissed*, 359 US 180 (1959) ('agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced'). It has been said that this position rested on the rationale that '(1) the parties cannot by agreement in the contract alter the jurisdiction of the courts, and (2) such contractual stipulations are violative of public policy': Nanda, *The Law of Transnational Business Transactions* (Clark Boardman, 1986) §8.02(1)(a). Some commentators consider significant the distinction between conferring and ousting jurisdiction ('prorogation' versus 'derogation' in civil law terms). However, it has also been suggested that 'The real issue … is not whether the parties can by agreement "confer" or "oust" jurisdiction, but whether the selected or ousted court will exercise its own jurisdiction in such a way as to give effect to the intention of the parties': Delaume, *Transnational Contracts* (Oceana, 1986) §6.01. This latter approach is consistent with the language of the decision in *The Bremen* (n 4), 12 ('No one seriously contends in this case that the forum-selection clause "ousted" the District Court of jurisdiction over [the plaintiff's] action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause'). For a discussion of the pre-*Bremen* case law which often held choice of forum provisions void as against public policy, see Gruson, 'Forum-Selection Clauses in International and Interstate Commercial Agreements' (1982) *University of Illinois Law Review* 133, 138–47.

[22] See, for example, *Law v Garrett*, 8 Ch D 26 (CA 1878); *Glenor v Meyer* 2 H Bl 603 (CP 1796). See generally Mehren, 'International Commercial Arbitration: The Contribution of the French Jurisprudence' (1986) 46 *Louisiana Law Review* 1045 (discussing the civil law roots of party autonomy in forum selection); see also Aballi, 'Comparative Developments in the Law of Choice of Forum' (1986) 1 *New York University Journal of International Law and Politics* 178, 205 (mentioning that the civilian tradition of party autonomy allowed for enforcement of choice of court clauses); Cutler, 'Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum' (1985) 20 *Texas International Law Journal* 97, 113, 122 (discussing forum selection clauses acceptance in France and England); Lenhoff, 'The Parties' Choice of a Forum: "Prorogation Agreements"' (1960) 15 *Rutgers Law Review* 414 (noting civil law acceptance of forum selection clauses). But see Brand, *Transactions Fundamentals* (2019) 347 ('The traditional rule in Latin American nations was that the competence of a court to hear a case …, and a choice of forum or choice of law clause would not be taken to oust the court of its competency over a matter'); Mullenix, 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court' (1988) 57 *Fordham Law Review* 291, 309 (noting that enforcement was not universal).

late-nineteenth- and early-twentieth-century decisions in US courts.[23] Some courts justified the ouster doctrine by claiming it protected the rights of the parties to have access to courts.[24] Others followed the doctrine based on concern for the restriction of remedies in a manner that could 'bring the administration of justice into disrepute'.[25]

The Massachusetts Supreme Judicial Court reasoned in 1856, that private parties should not be able to change rules of court, including jurisdictional rules, stating that 'The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law'.[26] The most-quoted language supporting the ouster doctrine came in the US Supreme Court's 1874 decision in *Home Insurance Co v Morse*, where the Court stated that 'agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void'.[27] The ouster doctrine persisted even though other courts, and commentators, criticised it as baseless, thus preventing private agreements from influencing the exercise of jurisdiction by courts.[28]

Two developments helped set the stage for ending the ouster doctrine. The Federal Arbitration Act of 1925 required that courts both honour private agreements to arbitrate and honour the resulting arbitral awards, thus providing legislative foundation for party autonomy in choosing a forum for dispute resolution.[29] The ability to choose arbitration, and thus remove a case from

[23] See Marcus, 'The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts' (2008) 82 *Tulane Law Review* 973, 994–95 ('the ouster doctrine required a court that had jurisdiction over a case to adjudicate, notwithstanding the parties' agreement to litigate elsewhere'); Gruson, 'Forum-Selection Clauses' (1982) 138–47.

[24] *Home Ins Co v Morse*, 87 US 445 (1874) ('every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights'.). See also *Healey v Eastern Building and Loan Assoc*, 17 Pa Super 385, 392 (Pa Super 1901) ('The general jurisdiction of the several courts of the commonwealth is established by law, not only for the security of private rights, but, by securing these, for the promotion of the good order and peace of society. It is against public policy, therefore, that parties should, by the terms of a private agreement, in advance oust their jurisdiction') (*quoting* Rea's Appeal, 13 WNC 546).

[25] *Nute v Hamilton Mut Ins Co* 72 Mass 174 (1856) is the first reported case of the ouster doctrine, in which the Massachusetts Supreme Court rejected a choice of court provision in an insurance policy as an inappropriate attempt to alter a court's procedural rules: at 184. In 1916, the same court interpreted its *Nute* decision to contain a general prohibition on 'ousting' the jurisdiction of a court: *River Paper Co v Hammermill Paper Co* 223 Mass 8, 15–16, 111 NE 678, 680 (1916).

[26] *Nute* (ibid) 184.

[27] *Home Ins Co v Morse* (n 24) 451. See Juenger, 'Supreme Court Validation' (1972).

[28] See, for example, *Kulukundis Shipping Co v Amtorg Trading Corp* 126 F2d 978, 983–84, 1942 AMC 364, 371–72 (2d Cir 1942) (describing the history of hostility to the ouster doctrine); *US Asphalt Ref Co v Trinidad Lake Petroleum Co* 222 F 1006, 1007 (SDNY 1915) ('a more unworthy genesis cannot be imagined'); Professor Leflar criticised the ouster doctrine as a 'traditional thought precluding set[] of senseless words', noting that it may have been helpful when judges were paid per case and thus did not want to find cases outside of their jurisdiction: Leflar, '*The Bremen* and the Model Choice of Forum Act' (1973) 6 *Vanderbilt Journal of Transnational Law* 375, 376, 384.

[29] Federal Arbitration Act (n 3) §§1–14. See Juenger (n 19). ('If a court would yield to a private agreement requiring the parties to seek justice before the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission … why not defer to the courts of a sister state?'); Borchers,

consideration by courts that otherwise have jurisdiction, weakened the arguments behind the ouster doctrine. The second development was the willingness of federal courts exercising admiralty subject matter jurisdiction to embrace party choice, particularly in international cases.[30]

The Second Circuit Federal Court of Appeals began to carve away at the ouster doctrine in 1949, in *Krenger v Pennsylvania Railroad Co*,[31] when it honoured a choice of court agreement it found to be reasonable, while continuing to claim allegiance to the ouster doctrine. In his concurring opinion, Learned Hand J found there to be no 'absolute taboo against [choice of court] contracts at all',[32] insisting that choice of court clauses are only invalid when they are unreasonable.[33] The same Court followed in 1955, in *Wm H Muller & Co v Swedish American Line Ltd*,[34] enforcing a choice of court clause in admiralty, holding that such clauses are enforceable as long as they are 'not unreasonable'.[35] The *Muller* court echoed Hand J's concurrence in *Krenger*, which had been a case of diversity jurisdiction. In *Muller*, the Court applied a *forum non conveniens* test, weighing the choice of court agreement selecting Swedish courts against other *forum non conveniens* factors in determining the reasonableness of the agreement.[36] Noting the many contacts with Sweden, and the likelihood of a just outcome in Swedish courts, the Court found that the agreement was reasonable and should be enforced.[37]

Despite the Second Circuit's decision in *Muller*, the Fifth Circuit held fast to the ouster doctrine in its 1958 decision in *Carbon Black Export v The Monrosa*,[38] providing a blanket refusal to enforce a choice of court agreement.[39] The *Carbon Black* decision provided a new anchor for the ouster doctrine, supporting the view that a US court with jurisdiction to adjudicate had the absolute responsibility to

'Forum Selection Agreements in the Federal Courts After *Carnival Cruise*' (1992) 61–62 (describing the Federal Arbitration Act as a 'crack' in the 'crumbling ouster doctrine').

[30] This was likely due to admiralty jurisdiction's broad inclusion of all things relating to the sea, including suits between foreigners for acts done in foreign waters: 28 USC §1333. See Marcus, 'The Perils of Contract Procedure' (2008) 997. In the early twentieth century, a number of admiralty courts followed the Ouster Doctrine and declared choice of forum clauses void per se. See, for example, *Kuhnhold v Compagnie Generale Transatlantique* 251 F 387, 388 (SDNY 1918); *Gough v Hamburg Amerikanische Packetfahrt Aktiengesellschaft* 158 F 174, 175 (SDNY 1907); *Prince Steam-Shipping Co v Lehman* 39 F 704, 704 (SDNY 1889). However, dismissal of jurisdiction in admiralty courts often relied on the doctrine of *forum non conveniens*: Marcus (n 23) 996. The doctrine originated in admiralty courts as early as the eighteenth century but did not move into mainstream courts until the mid-nineteenth century. In admiralty, the doctrine was meant to limit the adjudicatory power US Courts had over aliens to avoid insulting foreign powers.

[31] *Krenger v Pennsylvania RR* 174 F2d 556, 560–61 (2d Cir), *cert denied*, 338 US 866 (1949).

[32] ibid 560–61 (Hand J, concurring).

[33] ibid.

[34] 224 F2d 806 (2d Cir 1955).

[35] ibid 808.

[36] ibid.

[37] ibid.

[38] 254 F2d 297 (5th Cir 1958).

[39] The Supreme Court originally granted certiorari in the *Carbon Black* case, setting up a resolution of the conflict with the Second Circuit, but then dismissed the writ because the clause at issue in *Carbon Black* was not drafted broadly enough to cover an *in rem* action. *Carbon Black* (n 21).

exercise that jurisdiction.[40] This remained particularly troubling for courts exercising admiralty jurisdiction, who took the doctrine as preventing them from declining jurisdiction even when it might be reasonable to do so.[41]

Commentators tended to reject the harshness of the ouster doctrine and the *Carbon Black* decision, instead embracing the Second Circuit's 'reasonableness' doctrine set forth by *Muller*.[42] By 1964, the Supreme Court signalled a possible shift, recognising the validity of a non-exclusive choice of court agreement in a purely domestic contract.[43] Nonetheless, the ambivalent state of US law on choice of court was reflected in the black letter of the Restatement (Second) Conflict of Laws, completed in 1971, where section 80 stated: 'The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable'.[44]

The cases demonstrate that the development of US law on choice of court agreements must be considered along with the doctrine of *forum non conveniens*, and many courts simply deal with a choice of court agreement as one factor in a *forum non conveniens* analysis.[45] This was clearly the case in the Second Circuit's *Muller* decision, which balanced the choice of court agreement there with other traditional *forum non conveniens* factors.[46] While the *forum non conveniens* doctrine was not a firm part of US law until it became widely accepted through the Supreme Court's 1947 decision in *Gulf Oil v Gilbert*,[47] the *Gilbert* list of private interest factors generally is applied to include the extent to which the parties have agreed on a court or otherwise waived jurisdiction in other courts.[48]

In 1948, Congress effectively pre-empted common law *forum non conveniens* in the context of the transfer of a case from one Federal District Court to another by enacting 28 USC §1404(a). That provision states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.[49]

[40] Marcus (n 23) 994–95.

[41] See, for example, *Can Malting Co v Paterson SS Ltd* 285 US 413, 422 (1932) ('the proposition that a court having jurisdiction must exercise it is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners').

[42] See, for example, Juenger (n 19) 55.

[43] *National Equipment Rental Ltd v Szukhent* 375 US 311, 315–16 (1964).

[44] Restatement (Second) Conflict of Laws §80 (1971). In 1988, this provision was amended to read: 'The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable'.

[45] nn 138–143 and accompanying text.

[46] *Muller* (n 34) (weighing the *forum non conveniens* factors against the choice of court agreement in order to measure reasonableness).

[47] *Gulf Oil Corp v Gilbert* 330 US 501, 504 (1947). For a more detailed discussion of the development and application of the *forum non conveniens* doctrine in the US, see Brand and Jablonski, Forum Non Conveniens (1007) 37–74.

[48] See Brand and Jablonski (n 15) 46.

[49] 28 USC §1404(a).

IV. Zapata Off-Shore Drilling Company: Of Oil Rigs and Presidents

The Bremen is most interesting for its legal impact. Its ties to US political history, however, add a gloss to the context of the case. The Zapata Off-Shore Company was founded by George HW Bush, who later became the 41st President of the United States.

The path to George HW Bush's ownership of Zapata Off-Shore began with the involvement of both of his grandfathers in the early development of the US oil industry. His paternal grandfather, Samuel Bush, was President of Buckeye Steel Casings, a company in which the Rockefeller family's Standard Oil held a large minority interest.[50] George HW Bush's maternal grandfather, George Herbert Walker, was a Director of Petroleum Bond and Share, and the Barnsdall Corporation, both involved in the oil industry.[51] He was also president of Georgian Manganese, a mineral enterprise in the Soviet Caucasus owned by Averell Harriman, who also acquired Dresser Manufacturing, which provided oil field services.[52]

George HW Bush's father, Prescott Bush, was on the board of directors of Dresser Manufacturing, which became heavily involved in defence contracting in World War II.[53] Soon after his 1945 marriage to Barbara Pierce, George HW Bush moved to Odessa, Texas, to work at a subsidiary of Dresser and learn the oil business.[54] After a number of associations with others to develop both land-based and off-shore drilling operations, Bush focused on off-shore drilling, with global operations in the Persian Gulf, Trinidad and Borneo.[55] His efforts were supported by his uncle, Herbert Walker, who helped finance the Zapata Off-Shore Company.[56] Bush and the company moved to Houston, where the oil rig business grew, concluding contracts with Gulf Oil, Standard Oil of California and Royal Dutch Shell, in the Persian Gulf.[57]

After an unsuccessful 1964 run for a US Senate seat from Texas, George HW Bush won a seat in the US House of Representatives, taking that office in January 1967. He sold his Zapata Off-Shore Company stock for approximately $1 million, and his uncle, Herbert Walker Jr, continued to be the primary investor in the company.[58]

[50] Phillips, *American Dynasty: Aristocracy, Fortune, and the Politics of Deceit in the House of Bush* (Penguin Books, 2005) 151.
[51] ibid 151.
[52] ibid 152.
[53] ibid 152–53.
[54] Schweizer and Schweizer, *The Bushes: Portrait of a Dynasty*, 1st edn (Anchor Books, 2005) 95.
[55] ibid 140.
[56] The name of the company came earlier when Bush and his then business partner, George John Overby, saw a movie poster for the Marlon Brando film, *Viva Zapata*, and decided to name their company at that time Zapata Petroleum: Schweizer and Schweizer (n 55) 104.
[57] Schweizer and Schweizer, *The Bushes* (2005) 140.
[58] ibid.

V. *The Bremen v Zapata Off-Shore Company*[59]

A. The Facts

Also in 1967, Zapata Off-Shore Company entered a contract to drill wells in the Adriatic Sea. To do so, they needed a tug to tow their rig, the *Chapparal*, from Louisiana to a point just off the Italian coast near Ravenna, Italy.[60] Zapata solicited and received bids from several companies, including Unterweser Reederei, a German firm.[61] When Unterweser submitted the low bid for the job, it was asked by Zapata to provide a contract for approval.[62] Unterweser submitted its contract, which contained the details of the towage, as well as a choice of court clause and two clauses that would exculpate Unterweser from liability to the drilling rig, even for damage resulting from the negligence of Unterweser or its employees.[63] The choice of court clause stated: 'Any dispute arising must be treated before the London Court of Justice'.[64]

A Zapata vice president reviewed the contract submitted by Unterweser, and made several changes, but did not alter the choice of court clause or the exculpatory clauses.[65] The Zapata vice president then signed the contract with those changes and forwarded it to Unterweser in Germany. Unterweser accepted the changes in November 1967.

Unterweser selected the deep-sea tug, the *Bremen*, to tow the *Chapparal*. The Bremen departed Venice, Louisiana, with the *Chaparral* oil rig in tow on 5 January 1968.[66] On 9 January, while still in the Gulf of Mexico, a storm caused the elevator legs attached the *Chapparal* to break off and fall into the sea, and also caused serious damage to the rig's platform.[67] Zapata instructed the *Bremen* to tow the rig to port in Tampa, Florida.[68]

B. The Legal Development of the Case

With the tug and platform in Florida, on 12 January 1968, Zapata brought suit in admiralty in the US District Court in Tampa,[69] claiming *in personam* jurisdiction

[59] *The Bremen* (n 4).
[60] ibid 2.
[61] ibid.
[62] ibid.
[63] The exculpatory clauses stated: '1. … [Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow. 2 … b) Damages suffered by the towed object are in any case for the account of its owners'. *The Bremen* (n 4) 3, fn 2.
[64] *The Bremen* (n 4) 2.
[65] ibid 3. The contract also provided that any insurance for the *Chapparal* was to be 'for account of Zapata', and Zapata chose to be self-insured on all its rigs.
[66] ibid.
[67] ibid.
[68] ibid.
[69] US district courts have subject matter jurisdiction for admiralty and maritime matters under Art III, S 2 of the United States Constitution and 28 USC §1333.

over Unterweser for damages and *in rem* jurisdiction over the *Bremen*, alleging breach of contract and negligent towing.[70] Unterweser moved to dismiss the action for either lack of jurisdiction or on *forum non conveniens* grounds or, in the alternative, to stay the action pending the submission of the dispute to the 'London Court of Justice' pursuant to the choice of court clause in the contract.[71]

Unterweser also commenced an action against Zapata in the High Court of Justice in London, seeking damages for breach of the towage contract.[72] Zapata's challenge to jurisdiction in London (by motion to set aside service outside the jurisdiction) was rejected, leaving the parties with parallel proceedings in the US and England.[73] Lord Willmer, in the English Court of Appeal, noted that 'The law on the subject … is not open to doubt …. It is always open to parties to stipulate that a particular Court shall have jurisdiction over any dispute arising out of their contract'.[74] While he also stated that this 'is not an inflexible rule', and that the English court has discretion, he did not find 'sufficient circumstances … to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in' England.[75]

The District Court in Tampa denied Unterweser's motion to dismiss or stay Zapata's action there, relying on the Fifth Circuit's statement in the *Carbon Black* decision that 'agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced'.[76] That Court also issued an anti-suit injunction, enjoining Unterweser from pursuing its action in the UK.[77]

The Fifth Circuit Court of Appeals upheld the District Court's application of the *forum non conveniens* doctrine as applied by the District Court, also giving little weight to the choice of court clause. It instead gave significant weight in the *forum non conveniens* analysis to preserving the choice by a US plaintiff of a US court.[78] The Appeals Court also expressed concern about the exculpatory clauses in the towing contract, which it found to be 'apparently contrary to public policy

[70] The relatively quick filing of the case allowed Zapata to claim *in rem* jurisdiction over the Bremen through arrest by the US marshal while the vessel was still in port. The tug was then released. Unterweser provided security in the amount of $3,500,000, the amount of damages Zapata was claiming in the suit: *The Bremen* (n 4) 4.

[71] *The Bremen* (n 4) 4. Note that there is (and was) no 'London Court of Justice'. Willmer LJ interpreted these words to mean the High Court of Justice in the UK: *Unterweser Reederei GmbH v Zapata Off-Shore Co* ('*The Chaparral*') [1968] 2 Lloyd's Rep 158, 162–63 (CA).

[72] *The Bremen* (n 4) 4.

[73] *The Chaparral*.

[74] ibid 162–63.

[75] ibid 162–63.

[76] *The Bremen* (n 4) 6, quoting *Carbon Black* (n 21) 300–01. See also *Re Unterweser Reederei GmbH* 428 F2d 888, 893 (5th Cir 1970) (using the same language).

[77] *Re Unterweser Reederei GmbH* 296 FSupp 733 (MD Fla 1969).

[78] This element relies heavily on the language in *Gulf Oil Corp v Gilbert* (n 47) 508 that 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed': *The Bremen* (n 4) 6.

and unenforceable in American courts', stating that such clauses 'would be held prima facie valid and enforceable by an English court'.[79] Thus,

> The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.[80]

The decision of the original Court of Appeals panel of three judges, which included a dissent by one of them, was taken up by the Fifth Circuit *en banc*. The result was a *per curium* adoption of the original Court of Appeals majority opinion, with six of the 14 judges participating then joining a dissent written by Wisdom J, who had written the dissent in the original panel.[81] The principal focus of the earlier majority opinion was on the doctrine of *forum non conveniens*, with the choice of court clause being one factor considered by the Court. The decision found that factor to be outweighed by other factors, including the plaintiff's choice of forum to begin litigation, and the fact that the exculpatory clauses, considered to be in violation of US public policy, would be upheld in a UK court.[82]

In the Supreme Court, the majority opinion, written by Burger CJ, held the choice of court clause in the towing contract to be enforceable. Burger's analysis began with language focused more on practical matters of international trade than on prior common law:

> Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[83]

Burger acknowledged that the decision he authored went against existing US common law, stating that 'Forum-selection clauses have historically not been

[79] *Re Unterweser Reederei, GmbH* (n 7), 895.

[80] ibid.

[81] *Re Unterweser Reederei GmbH* 446 F2d 907 (1971).

[82] The Supreme Court listed the following factors considered by the Court of Appeals in the balancing test required by the *forum non conveniens* doctrine: (1) the flotilla never 'escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court'; (2) a considerable number of potential witnesses, including Zapata crewmen, resided in the Gulf Coast area; (3) preparation for the voyage and inspection and repair work had been performed in the Gulf area; (4) the testimony of the Bremen crew was available by way of deposition; (5) England had no interest in or contact with the controversy other than the forum-selection clause. *The Bremen* (n 4) 7.

[83] *The Bremen* (n 4) 8–9.

favored by American courts'.[84] Noting that the case was one in admiralty jurisdiction, he went on to state that the 'correct doctrine to be followed' in such cases is that choice of court clauses 'are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances'.[85] He then reasoned that, if, as the Court had held in *National Equipment Rental Ltd v Szukhent*,[86] parties may validly consent to be found for service of process through contractual agents in jurisdictions in which they have no other presence, then it was logical to uphold an agreement to suit in a specific court as well.[87] He also found support in comparative common law analysis, acknowledging that the approach he was now championing 'is substantially that followed in other common-law countries including England'.[88]

Burger's opinion seemed to cut away at the application of *forum non conveniens* balancing of factors in cases involving choice of court clauses. Thus, the fact that the damage occurred in the Gulf of Mexico, which is closer to the US than to the UK, was merely fortuitous, and 'The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting'.[89] Moreover, after noting that both the District Court and the Court of Appeals had 'placed the burden on Unterweser to show that London would be a more convenient forum than Tampa', he clearly states that 'the contract expressly resolved that issue'.[90] He then seems to distance the appropriate analysis for choice of court further from the doctrine of *forum non conveniens*, stating, 'The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching'.[91]

Burger CJ's opinion returns to a discussion of *forum non conveniens*, however, when he notes that a choice of court clause in a 'freely negotiated private international agreement' itself rebuts any claim of inconvenience for either party in a *forum non conveniens* analysis.[92] In doing so, he reverts to language used in a *forum non conveniens* analysis, stating that, on the convenience scale,

> Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there

[84] ibid 9.
[85] ibid 10, citing cases including the *Muller* decision of the Second Circuit.
[86] 375 US 311 (1964).
[87] *The Bremen* (n 4) 11.
[88] ibid.
[89] ibid 13–14.
[90] ibid 15.
[91] ibid.
[92] ibid 16.

> is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.[93]

While the Court of Appeals had relied on the US/English difference in treatment of exculpatory clauses as a matter of public policy in refusing to enforce the choice of London courts, Burger CJ quotes at length from Wisdom J's dissent in that Court in support of being extremely careful in exercising any reliance on domestic public policy grounds for upending party agreements, especially where 'the conduct in question is that of a foreign party occurring in international waters outside our jurisdiction'.[94]

Ultimately, in any common law balancing test, one of the most important factors is the burden of proving which side the balance of factors favours. On this matter, Burger CJ found that the District Court 'erroneously placed the burden of proof on Unterweser to show that the balance of convenience was strongly in its favor'.[95] In a footnote, he states that the London Court had applied 'the proper burden of proof', when it noted that 'There is probably a balance of numbers in favour of the Americans, but not, as I am inclined to think, a very heavy balance'.[96] Providing guidance for the trial court on remand, he noted that Zapata (as the party asking that the choice of court agreement *not* be honoured) would have the 'opportunity to carry *its heavy burden* of showing not only that the balance of convenience is strongly in favour of trial in Tampa (that is, that it will be far more inconvenient for Zapata to litigate in London than it will be for Unterweser to litigate in Tampa), but also that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court'.[97]

One of the clear results of the decision in *The Bremen* was to put to rest the ouster doctrine that had provided the foundation for denying effect to party choice of court, with the result being that choice of court clauses are thus seen as having nothing to do with the existence or non-existence of jurisdiction. Rather:

> The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.[98]

[93] ibid 18.
[94] ibid, quoting *Re Unterweser Reederei, GmbH* (n 76) 907–08 (Wisdom J, dissenting).
[95] ibid.
[96] ibid fn 19.
[97] ibid 19 (emphasis added).
[98] ibid 12.

What Burger CJ's opinion did not do was use the opportunity presented to clearly separate the analysis of choice of court agreements from the doctrine of *forum non conveniens*. This was unfortunate. By not providing for a clear separation, the Supreme Court left open the continued confusion raised by the question of just how the presence of a freely negotiated choice of court agreement affects a motion for dismissal on the grounds of *forum non conveniens*. This stands in stark contrast to the position taken, for example, in the EU under the Brussels I (Recast) Regulation, where a choice of court agreement naming the court of a Member State gives that court jurisdiction that is explicitly stated to be exclusive.[99] In the EU system, there is no balancing to be done. The existence of a valid choice of court agreement both starts and ends the analysis.

VI. *The Bremen* and the Continued Development of US Common Law on Choice of Court Agreements[100]

A. General Development of Choice of Court Doctrine

While *The Bremen* was a case in admiralty, it did not take long for both lower federal courts[101] and state courts[102] to extend its rationale to non-admiralty cases. Subsequent courts,[103] and the Restatement,[104] have interpreted *The Bremen* to provide a presumption of validity for a choice of court agreement, with the party contesting the agreement carrying the burden of proving grounds for an exception.

[99] Brussels I (Recast) Regulation (n 1) Art 25.

[100] This section of the current chapter is developed largely from Brand and Jablonski (n 15) 187–210.

[101] See, for example, *Coastal Steel Corp v Tilgham Wheelabrator Ltd* 709 F2d 190 (3d Cir), *cert denied*, 464 US 938, 104 S Ct 349 (1983); *Crown Beverage Co v Cerveceria Moctezuma SA* 663 F2d 886, 888 (9th Cir 1981); *Staco Energy Prod Co v Driver-Haris Co* 509 F Supp 1226, 1227 (SD Ohio 1981) (dictum); *Republic Int'l Corp v Amco Eng'rs Inc* 516 F2d 161, 168 (9th Cir 1975); *Shepard Niles Crane & Hoist Corp v Fiat SpA* 84 FRD 299, 305 (WDNY 1979) (dictum); *Hoes of Am Inc v Hoes* 493 F Supp 1205, 1209 (CD Ill 1979); *Cruise v Castleton Inc* 449 F Supp 564 (SDNY 1978); *Gaskin v Stumm Handel GmbH* 390 F Supp 361 (SDNY 1975).

[102] See, for example, *Abadou v Trad* 624 P2d 287 (Alaska 1981); *Volkswagenwerk AG v Klippan GmbH* 611 P2d 498 (Alaska), *cert. denied*, 449 US 974 (1980); *Societe Jean Nicolas et Fils JB v Mousseux* 123 Ariz 59, 597 P2d 541 (1979); *Smith, Valentino & Smith Inc v Superior Court* 17 Cal 3d 491, 551 P2d 1206, 131 Cal Rptr 374 (1976); *Elia Corp v Paul N Howard Co* 391 A2d 214 (Del Super Ct 1978); *Green v Clinic Mawsters Inc* 272 NW2d 813 (SD 1978); *Hi Fashion Wigs Profit Sharing Trust v Hamilton Inv Trust* 579 SW2d 300 (Tex Civ App 1979).

[103] See, for example, *Santamauro v Taito do Brasil Industria E Comercia* 587 F Supp 1312, 1314 (ED La 1984) ('The burden is on the party resisting enforcement of the clause to prove that the choice was unreasonable, unfair or unjust, or to show that the clause is invalid by reason of fraud or overreaching or that enforcement would contravene a strong public policy of this forum'); *City of New York v Pullman Inc*, 477 F Supp 438, 441 fn 10 (SDNY 1979), *aff'd*, 662 F2d 919 (2d Cir 1981), *reh'g denied*, 28 September 1981, *cert denied*, 454 US 1038, 102 S Ct 1038 (1982) ('Agreements entered into by knowledgeable parties in an arm's-length transaction that contain a forum selection provision are enforceable absent a showing of fraud, overreaching, unreasonableness or unfairness').

[104] Restatement (Second) of the Conflict of Laws §80 (1971).

While Burger CJ indicated that choice of court agreements would be enforced, he noted qualification to this rule by limiting it to agreements 'unaffected by fraud, undue influence, or overweening bargaining power'.[105] His *Bremen* analysis ultimately provided three exceptions to the enforcement of a choice of court clause: (1) where enforcement of the provision would result in substantial inconvenience, or denial of an effective remedy;[106] (2) where there has been fraud, overreaching, or unconscionable conduct in contract relations;[107] and (3) where enforcement would result in a violation of public policy or the transaction is otherwise unfair, unjust or unreasonable.[108] Success in the application of these exceptions is relatively rare.[109] The first – dealing with inconvenience or denial of an effective remedy – is worth further comment, however, since it can be seen as a modified *forum non conveniens* analysis. In the language of *The Bremen* decision:

> [W]here 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.[110]

The continued validity of some form of *forum non conveniens* analysis in the face of an otherwise valid choice of court agreement clearly is inconsistent with full respect for party autonomy in choosing a forum. Cases have most clearly faced this limitation on party choice when dealing with the related issues of transfer between

[105] *The Bremen* (n 4) 12.

[106] ibid 18.

[107] ibid 15. The Supreme Court further developed the fraud exception in *Scherk v Alberto-Culver Co* (n 16) when it stated: 'This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud … the clause is unenforceable. Rather, it means that [a] … forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion'. *Scherk v Alberto-Culver Co* (n 16) 519 fn 14 (emphasis in original).

[108] *The Bremen* (n 4) 15. The Court rejected Zapata's argument that the exculpatory clause contained in the agreement violated US public policy.

[109] Commentators have divided these exceptions in different ways. See, for example, Covey and Morris, 'The Enforceability of Agreements Providing for Forum and Choice of Law Selection' (1984) 61 *Denver Law Journal* 837, 842 ('The primary limitations … are fraud, public policy, adhesion, statutory restrictions and inconvenience of the contractual forum'); Gruson (n 21) 163–85 (dividing the exceptions into the categories of (1) fraud, (2) bargaining relationship between the parties, (3) nature of the selected forum, (4) public policy of the forum, (5) statutory restrictions on forum-selection clauses, (6) inconvenience of the contractual forum and (7) other instances of unreasonableness). See also The Model Choice of Forum Act, §3, which lists the following exceptions to enforcement of choice of forum clauses: '(1) the 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. Reese, 'The Model Choice of Forum Act' (1969) 17 *American Journal of Comparative Law* 292, 294.

[110] *The Bremen* (n 4) 16.

federal courts under 28 USC §1404(a). A year after *The Bremen*, in *Plum Tree Inc v Stockment*,[111] the Third Circuit US Court of Appeals stated:

> Congress set down in § 1404(a) the factors it thought should be decisive on a motion for transfer. Only one of these – the convenience of the parties – is properly within the power of the parties themselves to affect by a forum-selection clause. The other factors – the convenience of witnesses and the interest of justice – are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties. Such an agreement does not obviate the need for an analysis of the factors set forth in § 1404(a) and does not necessarily preclude the granting of the motion to transfer.[112]

While the interpretation of a statute is a different matter than the application of a common law doctrine, the §1404(a) analysis is very similar to that applied under the common law doctrine of for a *forum non conveniens*,[113] and the Third Circuit in *Stockment*, clearly applied the balancing of both private interest and public interest factors to the §1404(a) analysis.

As noted earlier,[114] in the EU, Article 25 of the Brussels I (Recast) Regulation allows a useful comparison with US case law on business-to-business choice of court issues.[115] Article 25 provides that where parties have agreed 'that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction'.[116] The same article goes on to provide that '[s]uch jurisdiction shall be exclusive unless the parties have agreed otherwise'.[117] Because the Brussels Regulation does not allow for declining such exclusive jurisdiction, Article 25 ends the analysis when the alternative forum is another EU Member State, and no *forum non conveniens* claim may be asserted.[118]

There exist at least two important differences between the Brussels scheme for choice of court clauses and that existing under the common law in the US. First,

[111] 488 F2d 754 (3d Cir 1973).

[112] *Plum Tree Inc* (n 111) 757–58.

[113] The State of New York has taken a clear position on the intersection between choice of court and *forum non conveniens*, but in a rule that only applies in limited circumstances. When New York recodified its doctrine of *forum non conveniens* in 1984, the legislature specifically provided that its courts cannot stay or dismiss an action on *forum non conveniens* grounds where the contract contains both a New York choice of forum clause and a New York choice of law clause and the transaction involved exceeds $1,000,000 in value. NY CPLR §327 (McKinney, 2001) (1984 NY Laws, Ch 421, §2). This provision assures that New York courts will accept jurisdiction in accordance with the parties' choice in large transnational contracts, and that a *forum non conveniens* challenge cannot be used to frustrate the agreement of the parties. It does not, however, provide a similar rule when the choice of court agreement leads away from New York courts.

[114] n 99 and accompanying text.

[115] Brussels I Recast Regulation (n 1), Art 25.

[116] ibid.

[117] ibid.

[118] But see *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2003] ECR I-14693 (holding that Brussels I (Recast) Regulation, Art 29 *lis pendens* (first seised) rule trumps Art 25 exclusive choice of court rule). For more general discussion of the *Italian torpedo* problem this creates, see Brand, 'Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments' (2014) 358 *Recueil des cours de l'Académie de La Haye* 212–47.

unlike the Brussels rule, US courts have not been willing to consider the allocation of authority to the chosen court to be either absolute[119] or exclusive.[120] Thus, the existence of a choice of court clause does not guarantee that the dispute may be resolved only in that forum, unless the clause expressly creates such exclusivity.[121] In this respect, under the Brussels system, European courts go further in their respect for the chosen court.

The other difference works the other way. US courts will uphold choice of court clauses in consumer contracts where European courts will not do so. The Brussels rule honours a choice of court clause in a consumer contract only if the agreement: (1) is entered into after the dispute has arisen; (2) allows the consumer to bring proceedings in courts other than those otherwise available; or (3) provides for jurisdiction in the courts of the state that is the habitual residence of both the consumer and the other party.[122] Similar limitations are included for insurance contracts and individual contracts of employment.[123]

US law provides no such limitation on the enforcement of choice of court clauses for consumer, insurance, and employment contracts. In *Carnival Cruise Lines Inc v Shute*,[124] the Supreme Court upheld enforcement of a clause requiring that disputes be brought in the state courts of Florida. A Washington State consumer purchased a cruise ticket from a local travel agent for a trip off the coast of Mexico.[125] The choice of court clause in fine print was on a cruise ticket that was not received until after the consumer had arranged and paid for the cruise.[126] Blackmun J relied in part on an economic rationale to enforce the clause, stating that 'passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued'.[127] Thus, the Supreme Court made clear the wide breadth of the *Bremen* policy favouring enforcement of choice of court clauses, encompassing even consumer contracts that contain no element of true negotiation.[128]

[119] See, for example, *Sudduth v Occidental Peruana Inc*, 70 F Supp 2d 691 (ED Tex 1999) (denying defendant's motion to dismiss on *forum non conveniens* grounds in favour of the chosen court, holding that the mandatory choice of court clause was invalid under *Bremen*); *Dentsply International Inc v Benton*, 965 F Supp 574 (MD Pa 1997) (refusing to enforce the mandatory choice of court clause in an employment contract holding that it was the result of unequal bargaining power).

[120] See, for example, *Steve Weiss & Co Inc v INALCO*, 1999 WL 386653 (SDNY 1999) (not reported in F Supp 2d) (stating that 'where parties only specify in a contract clause where jurisdiction is proper' the clause generally will not be enforced unless other language clearly identifies 'the parties intent to make jurisdiction exclusive'); *Hull 753 Corp v Flugzeugwerke* 58 F Supp 2d 925 (ND Ill 1999) (holding that a clause granting jurisdiction to German courts was not exclusive absent clear language that only German courts shall have jurisdiction).

[121] nn 136–47 and accompanying text.

[122] Brussels I (Recast) Regulation (n 1), Art 19.

[123] ibid Arts 15 and 23.

[124] 499 US 585 (1991).

[125] ibid 587.

[126] ibid.

[127] ibid 594.

[128] For a discussion of the application of the unconscionability doctrine to invalidate such clauses, see Mullenix, 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses' (2015) 66 *Hastings Law Journal* 719.

B. The Convergence of Choice of Court Clauses and the *Forum Non Conveniens* Doctrine

The US common law doctrines on enforcement of choice of court clauses and *forum non conveniens* have had an uncomfortable evolutionary relationship, necessitating a clear understanding of the manner in which the two doctrines intersect. *The Bremen* does provide some guidance on the intersection of the doctrines of choice of court and *forum non conveniens*, but its language has not always been consistently considered in subsequent lower court decisions. The Court of Appeals, in its treatment of the case, concluded that 'a forum-selection clause "will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought"'.[129] It determined that 'the District Court did not abuse its discretion in refusing to decline jurisdiction on the basis of *forum non conveniens*'.[130] While the Supreme Court decided the case with a primary focus on the choice of court agreement, and not on a *forum non conveniens* analysis, it specifically remanded the case to the trial court in a manner that would seem to mix the choice of court and *forum non conveniens* analyses:

> [T]o allow Zapata opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of trial in Tampa (that is, that it will be far more inconvenient for Zapata to litigate in London than it will be for Unterweser to litigate in Tampa), but also that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court, we remand for further proceedings.[131]

This language can be interpreted to require a modified version of *forum non conveniens* analysis, in which the burden is on the party seeking to avoid the chosen court to prove that court to be 'manifestly and gravely inconvenient'.[132] Subsequent courts have neither followed this balancing of conveniences approach, nor have they applied the same allocation of the burden of proof in all regards.

The categorisation of choice of court agreements in US jurisprudence creates special issues in the application of *The Bremen* principles in the context of a *forum non conveniens* analysis. In most US courts, there exists a presumption that a choice of court agreement is persuasive and not mandatory (ie, non-exclusive, not exclusive). An exclusive ('mandatory') choice of court clause[133] may lead honouring that clause if, under *The Bremen* analysis, there is no substantial inconvenience, fraud or public policy reason for a contrary result, but a majority presumption of non-exclusivity may prevent enforcement at the outset.[134] Moreover, courts have interpreted certain choice of court clauses to be non-exclusive, but accompanied

[129] *The Bremen* (n 4) 7 (quoting from the Court of Appeals).
[130] ibid.
[131] ibid 19.
[132] ibid.
[133] Courts often use the term 'mandatory' clause to refer to an exclusive clause in US courts.
[134] nn 136–137 and accompanying text.

by a waiver of the right to challenge jurisdiction and venue when an action is brought in the chosen court.[135] In these situations, the application of the clause may depend upon which party gets to the court first, and the court in which it files the case.

The combination of the choice of court and *forum non conveniens* doctrines creates the possibility of at least six different basic factual relationships with conceivable further variations on each of them. This can be demonstrated in the following table:

Table 5.1 *Forum non conveniens* status

Choice of court clause	**Chosen court**	**Court not chosen**
Exclusive clause	1	2
Non-exclusive clause (with waiver of right to contest)	3	4
Non-exclusive clause	5	6

This table demonstrates the possibilities at the intersection between choice of court and *forum non conveniens*, and the complexity that remains despite what might seem like reasonable clarity in the majority opinion in *The Bremen*.

The majority US rule is that all choice of court clauses are non-exclusive unless clearly stated otherwise.[136] The rationale for this position has been stated as follows:

> To be mandatory, a forum selection clause must contain language that clearly designates a forum as the exclusive one.
>
> A permissive clause merely grants jurisdiction to the named forum, and does not preclude a cause of action from being brought elsewhere. If the court determines that a forum selection clause is not mandatory, that does not mean that the clause is effectively written out of the contract. It simply means that the clause does not preclude a party from bringing suit in any jurisdiction where venue is proper.
>
> For a forum selection clause to be mandatory, the clause must clearly display the intent of the contracting parties to choose a particular forum to the exclusion of all other fora. Despite containing forceful words like 'shall,' the clause will not be deemed mandatory unless it is clear that the clause mandates the exclusive use of a particular forum.[137]

This strong preference for interpreting choice of court clauses as non-exclusive provides some guidance, but is not always conclusive in all courts. At least one court would appear to find all choice of court clauses to be exclusive.[138]

[135] See Brand and Jablonski (n 15) 201–02.

[136] See, for example, *Steve Weiss & Co Inc v INALCO SpA* 1999 WL 386653 (SDNY 1999) (not reported in F Supp 2d) ('In the absence of specific exclusionary language, this court will not assume an intent to confer exclusive jurisdiction on Italian courts').

[137] *Arguss Communications Group Inc v Teletron Inc* 2000 WL 36936 *6–7 (DNH 1999) (not reported in F Supp 2d) (citations omitted).

[138] *Florida Polk County v Prison Health Servs Inc* 170 F3d 1081, 1083–84 (11th Cir 1999) ('It is a venerable principle of contract law that the provisions of a contract should be construed so as to give every

A split in Federal Circuit Courts demonstrates the lack of clarity on the interplay of an exclusive choice of court clause with the doctrine of *forum non conveniens*. The Second Circuit has indicated that a federal district court should begin by applying *The Bremen* test to determine the enforceability of a choice of court clause, and that a defendant's motion to dismiss on *forum non conveniens* grounds should be considered only if the court first finds that the parties did *not* form a contract with a valid choice of court clause.[139] The Fifth Circuit has taken a similar approach, rejecting a *forum non conveniens* challenge to an exclusive choice of court clause on the grounds that 'increased cost and inconvenience are insufficient reasons to invalidate foreign forum-selection or arbitration clauses'.[140] The Seventh Circuit has interpreted *The Bremen* to mean that a choice of court clause is to be enforced unless the

> party challenging its enforcement can 'clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching,' or that 'trial in the [chosen] forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'[141]

Thus, the Seventh Circuit finds an exclusive choice of court clause presumptively valid and enforceable.[142] The First Circuit, on the other hand, has ruled that a choice of court clause does not control the decision on a *forum non conveniens* motion to dismiss, but is 'simply one of the factors that should be considered and balanced' by the court in its *forum non conveniens* analysis.[143]

Despite this split in the Circuits (and recognising that not all courts give clear consideration to whether the clause in question is exclusive or non-exclusive), the general approach to exclusive choice of court clauses is to enforce them, either under *The Bremen* test or under a *forum non conveniens* analysis.[144] Chosen courts

provision meaning,' and 'To read the forum–selection clause as permissive would render it surplusage, [but to] read the clause as mandatory – thus requiring all litigation arising out of the contract to take place in the [selected court] – gives the provision meaning').

[139] *Evolution Online Sys Inc v Koninklijke PTT Nederland NV* 145 F3d 505, 509–10 (2d Cir 1998). See also *Sudduth v Occidental Peruana Inc* (n 119), where the district court denied the defendant's motion to dismiss on *forum non conveniens* grounds only after determining that a mandatory choice of court clause was invalid under the *Bremen* standards.

[140] *Mitsui & Co (USA) Inc v Mira M/V* 111 F3d 33, 37 (5th Cir 1997).

[141] *AAR International Inc v Nimelias Enterprises SA*, 250 F3d 510, 525 (7th Cir 2001), quoting from *The Bremen* (n 4) 15, 17. See also *Northwestern Nat'l Ins Co v Donovan* 916 F2d 372, 378 (7th Cir 1990) (holding that agreement to an exclusive choice of court clause waives objections to venue on the basis of cost or inconvenience to the party).

[142] *AAR International* (ibid) 525, quoting from *Bonny v Society of Lloyd's* 3 F3d 156, 160 (7th Cir 1993).

[143] *Royal Bed & Spring Co Inc v Famossul Industria e Comercio de Moveis Ltda* 906 F2d 45, 51 (1st Cir 1990).

[144] See, for example, *Mercier v Sheraton International Inc* 981 F2d 1345 (1st Cir 1992) (applying *forum non conveniens* analysis despite apparent exclusive choice of court clause but dismissing in favour of the Turkish court named in the clause). When New York recodified its doctrine of *forum non conveniens* in 1984, it specifically provided that its courts cannot stay or dismiss an action on *forum non conveniens* grounds where the contract contains both a New York choice of forum clause and a New York choice of law clause and the transaction involved exceeds $1,000,000. NY CPLR §327 (McKinney's 2001) (1984 NY Laws, Ch 421, §2).

have kept cases when faced with a *forum non conveniens* motion to dismiss,[145] and courts not chosen have dismissed cases in favour of the court selected in the clause.[146] Nonetheless, some courts have refused to enforce clauses choosing another court when considered in the context of a motion to dismiss based on *forum non conveniens*.[147]

While the Second Circuit relies strictly on a *Bremen* analysis when the choice of court clause is exclusive,[148] it applies a *forum non conveniens* analysis when addressing a non-exclusive choice of court clause. This is demonstrated in the case of *John Boutari & Son, Wines & Spirits SA v Attiki Importers & Distribs*,[149] where the Second Circuit held that dismissal of an action on a distributorship contract

[145] See, for example, *Heller Financial Inc v Midwhey Powder Co* 883 F3d 1286 (7th Cir 1989) (denying motion for dismissal or transfer under 28 USC §1404(a)); *Poddar v State Bank of India*, 79 F Supp 2d 391, 393 (SDNY 2000) (denying dismissal where clause created mandatory jurisdiction in courts in both India and the US); *Cambridge Nutrition AG v Fotheringham*, 840 F Supp 299 (SDNY 1994) (enforcing New York choice of court clause despite motion to dismiss brought by Spanish defendant for whom trial in New York was inconvenient).

[146] See, for example, *Royal Bed & Spring Co v Famoussul Industria E Comercio de Moveis Ltda* (n 143) (enforcing Brazilian choice of court clause in distributorship agreement under a *Bremen* analysis); *Caribe BMW Inc v Bayerische Motoren Werke Aktiengesellschaft* 821 F Supp 802, *set aside, vacated and remanded on other grounds*, 19 F2d 745 (1st Cir 1994) (finding German choice of court clause valid and enforceable on a multi-factor analysis); *Bonny v Society of Lloyd's* (n 142) (honouring English choice of court clause under *Bremen* analysis by dismissal of action under securities underwriting contract); *General Elec Co v G Siempelkamp GmbH & Co*, 29 F3d 1095 (6th Cir 1994) (dismissing case on *forum non conveniens* challenge in favour of German courts in accordance with choice of court clause in the sales contract); *Omron Healthcare v Maclaren Exports*, 28 F2d 600 (7th Cir 1994) (applying *forum non conveniens* analysis to enforce English choice of court clause in distributorship contract); *Aceequip Ltd v Am Eng'g Corp* 153 F Supp 2d 138 (DC Conn 2001) (denying motion to dismiss in favour of Japanese court when mandatory clause selected Connecticut forum); *Lawler v Schumacher Filgters Am* 832 F Supp 1044 (ED Va 1993) (enforcing choice of court clause in consultancy agreement naming German courts as the chosen forum); *Hunter Distrib Co v Pure Beverage Partners* 820 F Supp 284 (ND Miss 1993) (granting motion to dismiss for improper venue when faced with choice of court clause naming Arizona courts); *TUC Electronics Inc v Eagle Telephonics Inc* 698 F Supp 35 (D Conn 1988) (dismissing case brought in Connecticut in face of New York state court choice of court clause, applying combination of *Bremen* and *forum non conveniens* factors); *Santamauro v Taito do Brasil Industria E Comercia Ltda* 587 F Supp 1312 (ED La 1984) (applying *Bremen* analysis to dismiss action on sales contract brought in Louisiana despite Brazilian choice of court clause); *Skyline Steel Corp v RDI/Caesars Riverboat Casino LLC* 44 F Supp 2d 1337, 1338 (ND Ala 1999) (sending case to chosen forum under 28 USC §1404(a) transfer statute, but stating, 'the law of the Eleventh Circuit is that forum selection clauses are virtually impossible to overcome by an application of the general principles of forum non conveniens').

[147] See, for example, *Sudduth v Occidental Peruana Inc* (n 119) (refusing enforcement of clause requiring disputes to be brought in Peruvian courts where both parties were in the US); *Pearcy Marine v Seacor Marine* 847 F Supp 57 (SD Tex 1993) (finding London choice of court clause to be unenforceable as a result of unequal bargaining power). Similarly, courts have found that the existence of a valid choice of court clause does not prevent a transfer for *forum non conveniens* purposes under 28 USC §1404(a). *Plum Tree Inc* (n 111) 757–58 (3d Cir 1973) ('Such an agreement does not obviate the need for an analysis of the factors set forth in §1404(a) and does not necessarily preclude the granting of the motion to transfer').

[148] *Evolution Online Sys Inc v Koninklijke PTT Nederland NV* (n 139) 509–10.

[149] 22 F3d 51 (2d Cir 1994). See also *Blanco v Banco Industrial de Venequela SA* 997 F2d 974 (2d Cir 1993) (affirming a dismissal on *forum non conveniens* grounds even though New York was one of three jurisdictions named in a non–exclusive choice of court clause).

on *forum non conveniens* grounds was erroneous, and that the case should be tried in a US Federal District Court despite a choice of court clause choosing a Greek court. The result was based in part on a finding that the clause was permissive and not mandatory. The Ninth Circuit applied a similar analysis to a case involving a clause selecting the Hong Kong courts but affirmed a dismissal on grounds of *forum non conveniens*.[150]

At least one commentator has stated that, in cases dealing with the convergence between choice of court clauses and the *forum non conveniens* doctrine, it makes 'little difference' whether the *Bremen* factors are applied, or the case is analysed under the *forum non conveniens* analysis.[151] This does not seem to hold true in all circumstances, however. In US courts, the designation of the type of choice of court clause helps determine whether the court will focus on a *Bremen* or a *forum non conveniens* analysis. This determination, in turn, has a substantial impact on the burden placed on each of the parties and the opportunity to challenge the trial court's decision on appeal.

Even if one can carefully catalogue each case to fit within the chart set forth above, that will not explain some US cases, or the opinions of some commentators. It has been suggested that 'Using *forum non conveniens* terminology, the parties lack the authority to contractually reallocate the various public interest factors, or those private ones of third parties not related to the contract'.[152] The same author suggests that, at a minimum, 'the existence of a forum selection clause should remove the individual parties' convenience or inconvenience from the court's consideration of the various private and public interest factors'.[153] The US is alone in requiring a balance of public interest factors among those countries in the common law world that have adopted the *forum non conveniens* doctrine. All other jurisdictions weigh only private interest factors in their *forum non conveniens* analysis.[154] The idea that *any* choice of court agreement, no matter what the type, may decide the private interest balance in favour of the chosen forum but will still subject the parties to a *forum non conveniens* analysis on the public interest factors would mean that no court could stop with the *Bremen* factors, and that the balancing required under traditional *forum non conveniens* analysis would always be necessary, even in the face of a valid, exclusive choice of court agreement. Even the cases that take this approach, however, often end up enforcing the choice of court agreement.[155]

[150] *FIL Leveraged US Government Bond Fund Ltd v TCW Funds Management Inc* 156 F3d 1236 (9th Cir 1998).

[151] McLemore, 'Forum–Selection Clauses and Seaman Personal Injury' (2000) 25 *Tulane Maritime Law Journal* 327, 350 ('The issue is essentially one of fairness and justice').

[152] Heiser, 'Forum Selection Clauses in State Courts' (1993) 396.

[153] ibid 397. See *Arthur Young & Co v Leong* 383 NYS2d 618, 619 (App Div), *appeal dismissed*, 390 NY2d 927 (1976) (stating that the existence of a choice of court clause 'obviated considerations of inconvenience to a party or a witness').

[154] See Brand and Jablonski (n 15) 111–13.

[155] See, for example, *Smith, Valentino & Smith Inc v Superior Court* 131 *Cal Rptr* 374, 551 P2d 1206, 1209–10 (Cal 1976) (enforcing Pennsylvania choice of court clause despite residence of plaintiff's

The US Supreme Court in *Erie v Tompkins* held that, in cases brought in Federal District Court under diversity subject matter jurisdiction (ie, cases not involving a question related to the Constitution, a federal statute, or a treaty), the court must apply state substantive statutory and common law.[156] Thus, while the federal court applies its own procedural rules, it generally must apply state substantive law in determining the issues before it. While there are some very limited areas of federal common law, when common law is applied in federal district courts exercising diversity subject matter jurisdiction, it most often is state common law that is being applied. This raises the question of whether the decision in *The Bremen* is either a rule on a procedural matter (in which case federal law applies) or created a rule of federal common law. The US Supreme Court has yet to address these questions.

Three cases in the US Supreme Court have addressed the question of enforceability of choice of court clauses.[157] Many thought the *Erie* question was going to be addressed in *Stewart Organization v Ricoh Corp*,[158] but the Court applied the 28 USC §1404(a) transfer statute, avoiding the question of whether there is federal common law on either choice of court or *forum non conveniens*. Because the Court has yet to comment on the *Erie* question in the wake of the *Bremen* decision, the applicable law has remained relatively unguided. The Circuits remain split on the *Erie* question for the enforceability of choice of court clauses in the context of diversity jurisdiction. Seven circuits have held that the enforceability of a choice of court clause implicates federal procedure.[159] The Seventh and Tenth Circuits have held that the law governing the contract as a whole also governs the enforceability of the choice of court agreement.[160] The First Circuit has not affirmatively decided the issue.[161] The Fourth Circuit has had different panels reach different conclusions, the first applied *Erie* and the second applied federal law.[162]

witnesses in California); *Prudential Resources Corp v Plunkett*, 583 SW2d 97, 99–100 (Ky Ct App 1979) (enforcing choice of court clause even where one party's witnesses would have to be presented by deposition since they would be unable to appear in person); *Hauenstein & Bermeister Inc v Met–Fab Indus* 320 NW2d 886, 890 (Minn 1982) (enforcing choice of court clause where inconvenienced witnesses could submit testimony by deposition).

[156] *Erie RR Co v Tompkins* 304 US 64 (1938).

[157] See *Stewart Org Inc v Ricoh Corp* 487 US 22, 33–41 (1988); *Scherk v Alberto-Culver Co* (n 16); *The Bremen* (n 4).

[158] *Stewart Org Inc v Ricoh Corp* (n 157) 33–41.

[159] *Phillips v Audio Active Ltd* 494 F3d 378 (2d Cir 2007); *Jumara v State Farm Ins Co* 55 F3d 873 (3d Cir 1995); *Ginter ex rel Ballard v Belcher, Prendergast & Laporte* 536 F3d 439 (5th Cir 2008); *Wong v PartyGaming Ltd* 589 F3d 821 (6th Cir 2009); *Fru–Con Const. Corp v Controlled Air Inc* 574 F3d 527 (8th Cir 2009); *Doe 1 v AOL LLC* 552 F3d 1077 (9th Cir 2009); *Manetti-Farrow Inc v Gucci America Inc* 858 F2d 509 (9th Cir 1988); *P & S Business Machines Inc v Canon US A Inc* 331 F3d 804 (11th Cir 2003).

[160] *Abbott Laboratories v Takeda Pharmaceutical Co Ltd* 476 F3d 421 (7th Cir 2007); *Yavuz v 61 MM Ltd*, 465 F3d 418 (10th Cir 2006).

[161] *Rivera v Centro Medico de Turabo Inc* 575 F3d 10 (1st Cir 2009).

[162] *Nutter v New Rents Inc* 945 F2d 398 (4th Cir 1991) (applying *Erie*); *Bryant Elec Co v City of Fredericksburg* 762 F2d 1192 (4th Cir 1985) (applying federal law).

VII. Conclusion

The case of *The Bremen* provides both a turning point toward greater respect for party autonomy and an incomplete resolution of issues involving proper treatment of choice of court agreements in international contracts. By clearly rejecting the ouster doctrine that had gained hold in US jurisprudence during the first half of the twentieth century, it brought choice of court analysis more closely in line with the treatment of arbitration agreements under the New York Convention. By not clearly separating choice of court analysis from the *forum non conveniens* doctrine, the case failed adequately to bring choice of court clauses clearly in line with arbitration clauses. It thus left arbitration in a preferred position in international contracts when compared to choice of court, frustrating both contract drafters and dispute resolution advocates. US ratification and implementation of the 2005 Hague Convention on Choice of Court Agreements could go a long way to solve the concerns left hanging by *The Bremen*.