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Comments

Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum

I. INTRODUCTION

An unsophisticated consumer from Washington state enters into a contract with a sophisticated business entity doing business in Florida. The consumer never has the opportunity to negotiate or bargain for any of the terms of the contract. Can the business entity force the consumer to litigate in Florida? Yes, according to the United States Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*.¹ While the Court regularly has upheld contractual forum selection clauses,² *Shute* is the first Supreme Court decision to address such a clause between a business and a private consumer.³

A forum selection clause is an agreement between contracting parties to litigate their dispute in a pre-selected forum.⁴ In the standard situation, the contract is the product of negotiation between two businesses.⁵ Courts assume that the parties are aware of the implications of agreeing to limit the forum in which a later case may be brought.⁶ If the parties are not aware of such implications,

1. 111 S. Ct. 1522 (1991).

2. See *infra* notes 43-66 and accompanying text.

3. See *infra* notes 103-31 and accompanying text.

4. ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.07 (2d ed. 1991). These agreements are referred to as prorogation clauses in civil law countries. See Arthur Lenhoff, *The Parties' Choice of Forum: "Prorogation Agreements,"* 15 RUTGERS L. REV. 414, 415 (1961). A typical agreement states:

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

Shute, 111 S. Ct. at 1524.

5. Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 133-34.

6. Courts place the burden of proof on the party who violates a forum selection clause and claims unenforceability. *Id.* at 152. In most cases, the party will be a plaintiff who brought suit in a forum different from the one specified in the contract. Placing the burden on the plaintiff is contrary to the general notion that deference be given to the plaintiff's choice of forum. See sources cited *infra* note 17.

general principles of contract law should nevertheless hold them to the terms of the contract, absent fraud or other public policy violations.⁷

This Comment focuses on the situation when a business has a standard form contract containing a forum selection clause, which private consumers must sign prior to receiving goods or services. Such agreements are often called contracts of adhesion because they are offered to the consumer on a "take it or leave it" basis.⁸ While the consumer is obligated to read the contract and is presumed to understand its terms, courts often scrutinize such contracts to protect consumers.⁹

Accordingly, this Comment discusses the enforceability of forum selection clauses in contracts with private consumers. It first discusses forum selection clauses in light of general contract principles and then examines prior Supreme Court cases addressing these clauses.¹⁰ The Comment next looks at two approaches courts have taken to determine the enforceability of forum selection clauses in standardized contracts aimed at private consumers.¹¹ Finally, this Comment proposes that courts should scrutinize forum selection clauses in contracts between businesses and consumers in light of the principle of unconscionability.¹²

II. BACKGROUND

Courts confronted with forum selection clauses in standard form contracts historically have disagreed as to whether such clauses violate public policy.¹³ Typically, in a lawsuit involving a forum selection clause, the defendant will move to transfer under 28 U.S.C. § 1404(a),¹⁴ prompting a determination of the enforceability of the clause. While forum selection clauses in contracts between businesses are regularly enforced, those in standard form contracts

7. CASAD, *supra* note 4, § 3.01[5][c].

8. See *infra* notes 16-21 and accompanying text for a discussion of contracts of adhesion.

9. See *infra* note 22 and accompanying text.

10. See *infra* part II.

11. See *infra* parts III-IV.

12. See *infra* part V.

13. See *infra* part III.

14. Section 1404(a) provides:

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.

28 U.S.C. § 1404(a) (1988).

often receive stricter scrutiny.¹⁵

A. Forum Selection Clauses, Adhesion Contracts, and Unconscionability

A standard form contract presented to a consumer on a "take it or leave it" basis is a contract of adhesion.¹⁶ Generally, such contracts favor the offeror who is often in a superior economic position and thus can dictate terms to an offeree.¹⁷ The adherent to the contract has no opportunity to bargain over many essential terms and may not have even read the contract.¹⁸ Consequently, some courts excuse a consumer from the duty to read holding that: 1) the adherent did not assent to the terms of the contract or 2) a term violates public policy or is unconscionable.¹⁹

An adhesion contract, while presumptively enforceable,²⁰ can be unconscionable.²¹ Courts traditionally have used the doctrine of unconscionability to protect a consumer who entered into an inher-

15. *Colonial Leasing Co. of New Eng. v. Best*, 552 F. Supp. 605, 607 (D. Or. 1982) (noting that forum selection clauses are less likely to be enforced if they appear in adhesion contracts).

16. For an excellent discussion of contracts of adhesion, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983). These contracts are also referred to as "boilerplate" agreements. The term "boilerplate" is defined as "language which is used commonly in documents having a definite meaning in the same context without variation." BLACK'S LAW DICTIONARY 175 (6th ed. 1990).

17. James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 36 n.200 (1976-77); see Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 580 (1969) (describing an adhesion contract as "a contract that sticks the helpless consumer with standard form clauses that he might not have agreed to if he had actually had free choice"); e.g., *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 204 (2d Cir. 1955) (noting that in adhesion contracts "[t]he one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather").

18. See Rakoff, *supra* note 16, at 1179; JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 10-1 (3d ed. 1987); see also John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 933 (1969) (noting that not only does a typical buyer fail to read the terms, but that this buyer probably could not understand or change the terms even if the buyer had read the contract).

19. CALAMARI & PERILLO, *supra* note 18, § 9-44; see, e.g., *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 722-23 (4th Cir. 1981) (obviating the duty to read because forum clause in an adhesion contract violated public policy); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908 (E.D. Wis. 1981) (excusing failure to read because pre-printed forum clause was not the result of a free bargain); *Bank of Indiana v. Holyfield*, 476 F. Supp. 104, 111-12 (S.D. Miss. 1979) (excising clause in a contract of adhesion because it was unreasonable). But see *Credit Alliance Corp. v. Joshco Mining Corp.*, 90 F.R.D. 187, 188 (S.D.N.Y. 1981) (holding that failure to read "does not warrant a finding of procedural unconscionability").

20. See Rakoff, *supra* note 16, at 1191.

21. See Lenhoff, *supra* note 4, at 438 (arguing that courts may be less inclined to apply choice of forum clauses in contracts of adhesion than to individual transactions arrived at by bargaining); see also *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 366-

ently unfair contract.²² Moreover, section 2-302 of the *Uniform Commercial Code* ("UCC")²³ governs a court's determination of unconscionability in consumer contracts. The UCC applies to transactions in goods between a business and a consumer.²⁴ Courts also apply the UCC by analogy to determine the unconscionability of an agreement that does not involve a sale of goods.²⁵

Under the umbrella term "unconscionability" that both the common law and the UCC employ, a court considers such factors as fraud, duress, misrepresentation, and abuse of economic power.²⁶ In the landmark case of *Williams v. Walker-Thomas Furniture Co.*,²⁷ the Court of Appeals for the District of Columbia held that a contract that is unconscionable when formed is unenforceable. Usually, in such a contract, the terms are unreasonably favorable to the seller and the buyer has little choice but to accept the terms as offered.²⁸ Refusal to enforce an unconscionable con-

67 (S.D.N.Y. 1982) (discussing principles of unconscionability as related to adhesion contracts).

22. See Lenhoff, *supra* note 4, at 438; see also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.35 (2d ed. 1980) (discussing cases in which such clauses were held to be unreasonable).

23. U.C.C. § 2-302 (1987). The provision states:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Id.

24. See U.C.C. § 2-102.

25. See EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 584 (4th ed. 1991) ("[I]t is only with the advent of UCC 2-302, limited to transactions in goods but extended by analogy to other types of transactions, that courts began in earnest to grapple with the ramifications of the unconscionability doctrine and to spell out specific content."); see also *Dillman & Assoc., Inc. v. Capitol Leasing Co.*, 442 N.E.2d 311, 316 (Ill. App. Ct. 1982) (holding that UCC provisions regarding unconscionability should be applied by analogy to equipment lease cases); *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906 (Kan. 1976) ("Although the UCC's application is primarily limited to contracts for the present or future sale of goods, many courts have extended the statute by analogy into other areas of the law or have used the doctrine as an alternative basis for their holdings.").

26. See MODEL CHOICE OF FORUM ACT § 3(4) (1968); Gilbert, *supra* note 17, at 36.

27. 350 F.2d 445, 449 (D.C. Cir. 1965).

28. *Id.* The *Walker-Thomas* court stated that "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was even given to all the terms." *Id.*

tract prevents oppression and unfair surprise.²⁹

In his frequently cited article on unconscionability, Professor Arthur Leff divides unconscionability into two prongs: procedural and substantive.³⁰ Under procedural unconscionability, courts should look for unfair surprise or an absence of meaningful choice³¹ by asking: was there a lack of knowledge on the part of the buyer? To determine lack of knowledge, courts should consider the following: 1) the consumer's educational level;³² 2) the lack of opportunity to study the contract and inquire about contract terms;³³ 3) whether the clause was stated in overly technical terms—too vague or difficult to understand;³⁴ and 4) if there was a lack of voluntariness on the part of the buyer.³⁵

Under substantive unconscionability, courts should consider: 1) whether the clause was unreasonably one-sided,³⁶ oppressive, or unfavorable to one party;³⁷ 2) whether the creditor or seller unduly expanded his own remedies; or 3) whether the buyer waived his right to a remedy.³⁸ Following this analysis and in accordance with section 2-302(2) of the UCC, courts should give the parties an opportunity to present evidence regarding the questionable term.³⁹ While courts have struggled to define the role forum selection clauses play in contract law, the use of such clauses in standardized

29. *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969).

30. Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). Subsequent authors have recognized the influence of this distinction. See Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752 (1982) (noting that the distinction between substantive and procedural unconscionability "influenced much of the later analysis").

31. U.C.C. § 2-302 cmt. 1 (1987); see *Credit Alliance Corp. v. Joshco Mining Corp.*, 90 F.R.D. 187, 189 (S.D.N.Y. 1981) (holding that unconscionability occurs when there is an absence of meaningful choice for one party).

32. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); see also *Neal v. Lacob*, 334 N.E.2d 435, 440 (Ill. App. Ct. 1975) (plaintiff was a college graduate and an experienced businessman); *Star Credit Corp. v. Ingram*, 337 N.Y.S.2d 245, 248 (Civ. Ct. 1972) ("The courts must provide the necessary instrumentality to pierce the shield of caveat emptor when it is sought to be used as a sword at the throats of the poor and illiterate.").

33. *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1573 (D. Kan. 1986); *York v. Georgia-Pac. Corp.*, 585 F. Supp. 1265, 1278 (N.D. Miss. 1984).

34. *Jutta's Inc. v. Fireco Equip. Co.*, 375 A.2d 687, 690-91 (N.J. Super. Ct. App. Div. 1977); *Seabrook v. Commuter Hous. Co.*, 338 N.Y.S.2d 67, 71-72 (Civ. Ct. 1972).

35. *Walker-Thomas Furniture*, 350 F.2d at 449; *Seabrook*, 338 N.Y.S.2d at 72.

36. *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956, 960 (Del. 1978); *W.L. May Co. v. Philco-Ford Corp.*, 543 P.2d 283, 286-87 (Or. 1975).

37. *Bernina Distrib., Inc. v. Bernina Sewing Mach. Co.*, 646 F.2d 434, 440 (10th Cir. 1981); *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 810 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982); *Cronk v. State*, 420 N.Y.S.2d 113, 118 (Ct. Cl. 1979).

38. *Ford Motor Co. v. Tritt*, 430 S.W.2d 778, 781 (Ark. 1968).

39. U.C.C. § 2-302(2) (1987).

agreements has risen.⁴⁰ Although businesses use adhesion contracts to promote efficiency, this efficiency is often achieved at the expense of the consumer.⁴¹ As a result, courts must consider both the appropriateness of forum selection clauses and their effect on consumers.

B. Supreme Court Cases Interpreting Forum Selection Clauses

Traditionally, courts disfavored forum selection clauses and refused to enforce them, claiming that they were contrary to public policy.⁴² However, in 1972, the United States Supreme Court in *The Bremen v. Zapata Off-Shore Co.*⁴³ reversed this precedent and announced its acceptance of forum selection clauses.⁴⁴ The *Bremen* decision encouraged courts to recognize the parties' choice of forum⁴⁵ and set forth a reasonableness test that both federal and state courts have used to determine the validity of forum selection clauses.⁴⁶ According to *Bremen*, forum selection clauses are presumptively valid.⁴⁷ The Court stated, however, that it would not

40. See Lenhoff, *supra* note 4, at 443.

41. *Id.* at 438.

42. See Note, *Contracts—Exclusive Jurisdiction Provision in Bill of Lading Held Valid*, 25 FORDHAM L. REVIEW 133, 134 (1956) ("exclusive jurisdiction contracts have found little popularity in the United States"); e.g., *Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958) (holding that agreements whose object is to oust a court of jurisdiction will not be enforced) *cert dismissed*, 359 U.S. 180 (1959). See generally ALBERT A. EHRENZWEIG, CONFLICT OF LAWS § 41 (1962) (discussing opposition to agreements to oust a court of its jurisdiction); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 11.3 (1982) (discussing how courts have considered such agreements to violate public policy).

Generally, courts refused to enforce forum selection clauses because they would oust a competent court of jurisdiction. As Arthur Corbin noted:

It is a generally accepted rule in the United States that an express provision in a contract that no suit shall be maintained thereon, except in a particular court or in courts of a particular county, state, or nation, is not effective to deprive any court of jurisdiction that it otherwise would have over litigation based on that contract.

6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1445 (1962).

43. 407 U.S. 1 (1972).

44. *Id.* at 10; see also Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068, 1083 (1989) (noting that "*The Bremen* has led to a turnabout").

45. See de By, *supra* note 44, at 1083.

46. According to the *Bremen* Court, the correct approach in deciding a case involving the enforceability of a forum selection clause would be "to enforce the forum selection clause specifically unless [the contesting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15; see also SCOLES & HAY, *supra* note 42, §§ 11.5-11.6.

47. *Bremen*, 407 U.S. at 15 ("[I]n light of present day commercial realities and ex-

enforce a clause that was unreasonable, unjust, or involved fraud or overreaching.⁴⁸

Writing for the majority in *Bremen*, Chief Justice Burger first focused on the experience and relative sophistication of the parties.⁴⁹ The contract in *Bremen* was between two sophisticated businesses that freely negotiated the terms of the contract.⁵⁰ The Court found no evidence of fraud, undue influence, or overreaching bargaining power.⁵¹ Furthermore, the Court determined that the parties were aware of the effect of this agreement when formulating the contract.⁵²

The *Bremen* Court also considered whether enforcement of the forum selection clause would contravene a strong public policy favoring the plaintiff's choice of forum.⁵³ In this case, the Court found that considerations of public policy favored enforcement of the clause.⁵⁴ Finally, the Court looked at whether the chosen forum was "seriously inconvenient,"⁵⁵ noting that the party seeking to invalidate the clause needs to show that enforcement would be so inconvenient as to deprive that party of its day in court.⁵⁶ The Court concluded that the plaintiff failed to meet this burden and,

panding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside").

48. *Id.* *Bremen* was not the first case in which a court applied a reasonableness test to determine the enforceability of a forum selection clause. The United States Court of Appeals for the Second Circuit used that test in *William H. Muller & Co. v. Swedish Am. Line*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955).

49. *Bremen*, 407 U.S. at 12.

50. *Id.* The Court noted that "[t]he choice of . . . forum was made in an arm's-length negotiation by experienced and sophisticated businessmen." *Id.* The Court further found strong evidence that the presence of the forum selection clause was a prominent factor that the parties considered while conducting their negotiations. *Id.* at 14.

51. *Id.* at 12. The Court deferred to the Fifth Circuit's finding that "this was not simply a form contract with boilerplate language that Zapata had no power to alter." *Id.* at 12 n.14.

52. *Id.* at 16. The Court noted that there was "strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including the fixing of monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.* at 14.

53. *Id.* at 15; *see also* *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (finding that a plaintiff's right to bring an action in any eligible forum is a protected right under § 5 of the Federal Employers' Liability Act).

54. *Bremen*, 407 U.S. at 15-16 (holding that a freely negotiated contract between German and American companies represented a reasonable effort to provide a neutral forum of litigation and, therefore, that public policy dictated enforcement).

55. *Id.* at 16. The Court noted, however, that if the clause was freely negotiated and the parties contemplated the claimed inconvenience, considerations of convenience should not be used to defeat an otherwise valid forum selection clause. *Id.*

56. *Id.* at 18. In this respect, the Court found that the plaintiff could depose witnesses rather than having them testify in person. *Id.* at 19.

therefore, that the case should be tried in London, England, pursuant to the forum selection clause.⁵⁷

Despite the Supreme Court's presumption of the validity of forum selection clauses in *Bremen*, a few states refused to follow suit, claiming that such clauses violated public policy.⁵⁸ This posed a problem for federal courts sitting in diversity,⁵⁹ who had to decide whether to follow the law of a state that considers the clauses *per se* invalid or to apply the reasonableness test in *Bremen*. The United States Supreme Court attempted to resolve this dilemma in *Stewart Organization, Inc. v. Ricoh Corp.*⁶⁰

In *Ricoh*, an Alabama corporation entered into an agreement with a New Jersey manufacturer to market copiers.⁶¹ When the Alabama corporation brought suit in an Alabama federal district court, the New Jersey manufacturer moved to transfer under 28 U.S.C. § 1404(a)⁶² or, in the alternative, to dismiss or transfer for improper venue under 28 U.S.C. § 1406.⁶³

The Supreme Court held that section 1404(a), and not the state law, applied to the venue dispute.⁶⁴ Moreover, the Court stated that in determining a section 1404(a) motion to transfer, a forum selection clause is merely one factor a court should consider; it is not dispositive.⁶⁵ The Court did not, however, address the issue of

57. *Id.* at 18-19. The Court distinguished the case of two Americans agreeing to litigate in a remote alien forum. *Id.* at 17. In such a case, "[t]he remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the party claiming should bear a heavy burden of proof." *Id.*

58. *See, e.g., Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554 (Ala. 1980) (finding such clauses to be invalid and unenforceable); *Cartridge Rental Network v. Video Entertainment, Inc.*, 209 S.E.2d 132 (Ga. App. Ct. 1974) (finding that such provisions are void); *State ex rel. Gooseneck Trailer Mfg. Co. v. Barken*, 619 S.W.2d 928 (Mo. App. Ct. 1981) (holding that the state court was not bound by the *Bremen* decision).

59. *See de By, supra* note 44, at 1071 (noting that "[t]he circuits are currently split on the question of the applicable law for determining the enforceability of forum selection clauses").

60. 487 U.S. 22 (1988).

61. *Id.* at 24.

62. 28 U.S.C. § 1404(a) (1988); *see supra* note 14.

63. *Ricoh*, 487 U.S. at 24. Section 1406 provides:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

28 U.S.C. § 1406 (1988).

64. *Ricoh*, 487 U.S. at 28.

65. *Id.* at 31. The Court held that "[t]he forum selection clause, which represents the

which law the district court should apply when there is no federal law on point.⁶⁶

Thus, following the logic of *Bremen* and *Ricoh*, lower courts apply a predictable analysis when ruling on motions by defendants to transfer actions due to forum selection clauses.⁶⁷ A court first will note the existence of the forum selection clause.⁶⁸ Consistent with the holding in *Ricoh*, the court then will state that the clause is only one factor a court should consider in ruling on a motion to transfer.⁶⁹ The court next will balance the three evaluative factors of section 1404(a): the convenience of the parties, the convenience of the witnesses, and the interest of justice.⁷⁰ Finally, the court will determine the relative weight to afford the forum selection clause, and then will rule on the motion to transfer.⁷¹

Although this approach provides a predictable analysis, it also leads to inconsistent results. Courts may find the forum selection clause valid but nevertheless disagree as to how much emphasis such a clause deserves. Further, while the *Bremen* rationale en-

parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a)." *Id.*; see also *G.H. Miller & Co. v. Hanes*, 566 F. Supp. 305, 307 (N.D. Ill. 1983) (clause is only one factor a court should consider); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908-09 (E.D. Wis. 1981) (consideration of other criteria in addition to the forum selection clause is appropriate to a motion under § 1404(a)); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 74 (S.D.N.Y. 1978) (forum selection clause is only one factor a court considers).

66. For a discussion of the *Ricoh* opinion and the *Erie* question, see de By, *supra* note 44, at 1074-75. de By notes that following *Erie*, in the absence of an applicable federal statute or rule, federal courts sitting in diversity should apply state law rather than the federal common law set out in the *Bremen* reasonableness test. *Id.* at 1084.

67. See, e.g., *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 548-49 (N.D. Tex. 1982) (following the *Bremen* reasonableness test); *Gordonsville Indus., Inc. v. American Artos Corp.*, 549 F. Supp. 200, 205 (W.D. Va. 1982) (stating that application of *Bremen* rule is appropriate); *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 370 (S.D.N.Y. 1982) (balancing convenience and fairness); *Full-Sight Contact Lens Corp.*, 466 F. Supp. at 73 (following the "correct approach").

68. See *Nelson v. Master Lease Corp.*, 759 F. Supp. 1397, 1400 (D. Minn. 1991) (noting that a forum selection clause is only one factor a court should consider in ruling on a motion to transfer).

69. *Id.* at 1399 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988)).

70. 28 U.S.C. § 1404(a) (1988); see *supra* note 14; *Full-Sight Contact Lens Corp.*, 466 F. Supp. at 74 (citing *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757-58 (3d Cir. 1973)).

71. See *Gruson*, *supra* note 5, at 200 ("Courts give varying weight to the forum-selection clause in their consideration of whether to transfer a case for alleged inconvenience."); see also *Red Bull Assoc. v. Best W. Int'l Inc.*, 862 F.2d 963, 967 (2d Cir. 1988) (finding that a forum selection clause deserves less weight in a civil rights case); *Nelson*, 759 F. Supp. at 1399-1400 (discussing prior cases determining the relative weight to afford a forum selection clause); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761-62 (E.D.N.Y. 1967) (finding that the clause deserved "some weight").

forces forum selection clauses between business parties as long as they are not fraudulent or overreaching,⁷² the *Bremen* decision left unclear whether this rationale extended to contracts between a business and a consumer.

III. DISCUSSION

Even though the *Bremen* opinion did not address the validity of a forum selection clause contained in an adhesion contract between a business and a consumer,⁷³ courts nonetheless have applied the *Bremen* reasonableness test to such cases.⁷⁴ Consequently, opposing views have arisen regarding the use of the reasonableness test and the enforceability of forum selection clauses in adhesion contracts with consumers. One approach looks at the clause from the viewpoint of the consumer and in many cases finds it unconscionable or violative of public policy.⁷⁵ The other approach stresses the importance of business efficiency and upholds the clause as dispelling any confusion over where a party should bring suit, thus conserving judicial resources.⁷⁶ The cases discussed below illustrate these opposing views.

A. *The Unconscionability of Forum Selection Clauses in Consumer Contracts*

In *Williams v. Illinois State Scholarship Commission*,⁷⁷ the plaintiffs brought a class action against the Illinois State Scholarship Commission ("ISSC") to enjoin it from filing loan collection

72. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). See generally *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (discussing when a forum selection clause is the product of fraud), *reh'g denied*, 419 U.S. 885 (1974); *Hoes of Am., Inc. v. Hoes*, 493 F. Supp. 1205, 1208 (C.D. Ill. 1979) (forum selection clause was enforceable absent evidence "that enforcement would be unreasonable and unjust or that clause was invalid for such reasons as fraud or overreaching").

73. *Bremen*, 407 U.S. at 12, 15, 16; see also RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1988). Section 80 states: "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable." *Id.* Further, according to comment c: "A court will entertain an action brought in violation of a choice-of-forum provision if it finds that the provision was obtained by fraud, duress, the abuse of economic power or other unconscionable means." *Id.* § 80 cmt. c.

74. See, e.g., *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 758-60 (E.D. Va. 1986) (refusing to uphold the forum selection clause specifically because the factors relied on in *Bremen* were not present in *Yoder* as a business and the consumer were operating under a wide disparity in bargaining power).

75. See *infra* part III.A.

76. See *infra* part III.B.

77. 563 N.E.2d 465 (Ill. 1990).

actions only in Cook County, Illinois.⁷⁸ ISSC required Guaranteed Student Loan ("GSL") borrowers to sign venue waiver clauses as a condition of receiving a loan.⁷⁹ After this suit was filed, the Illinois General Assembly amended section 30-15.12 of the School Code to require ISSC to file all collection actions in Cook County, Illinois.⁸⁰

The plaintiffs claimed that both the statute and the forum selection clause violated public policy, and due process and equal protection under both the state and federal constitutions.⁸¹ The trial court granted summary judgment for the plaintiffs, finding that ISSC's practices, as well as section 30-15.12 of the School Code, were unconstitutional.⁸² Additionally, the court issued an injunction requiring ISSC to bring suit either in a defaulter's county of residence or the county where the defaulter obtained the loan, and to cease using the unconstitutional clause.⁸³

In its discussion of the plaintiffs' motion for summary judgment, the trial court applied the balancing test articulated in *Mathews v. Eldridge*⁸⁴ to determine whether the statute violated due process.⁸⁵ Finding a due process violation, the trial court declared the statute unconstitutional, and the defendants appealed to the Illinois Supreme Court.⁸⁶

The Illinois Supreme Court began its analysis with the three *Mathews* factors.⁸⁷ Under the first factor, the court ruled that the plaintiffs' fundamental right of access to the courts was deprived

78. *Id.* at 467. The plaintiffs claimed that Cook County was an improper venue because they did not reside in or obtain their loans in Cook County. *Id.*

79. *Id.* at 468.

80. *Id.* at 469. The amendment stated:

The Commission *shall* file any and all lawsuits on delinquent and defaulted student loans in the County of Cook where venue *shall be deemed to be proper*. 1987 Ill. Laws 3443, eff. Jan. 1, 1988 (codified at ILL. REV. STAT. ch. 122, para. 30-15.12 (1989)) (amending ILL. REV. STAT. ch. 122, para. 30-15.12 (1985)) (emphasis added).

81. *Williams*, 563 N.E.2d at 467.

82. *Id.* The court also found that such practices violated public policy. *Id.* Furthermore, the trial court held that the "defendants had denied [the] plaintiffs their fundamental right of access to the courts by filing collection actions in a distant and inconvenient forum and by not presenting a compelling interest in doing so." *Id.* at 469.

83. *Id.* at 467.

84. 424 U.S. 319 (1976). According to *Mathews*, to decide if a statute or governmental policy violates due process, a court must weigh three factors: 1) the private interest; 2) the risk of erroneous deprivation along with the probable value of safeguards; and 3) the government's interest. *Id.* at 335.

85. *Williams*, 563 N.E.2d at 469.

86. *Id.* at 469-70. A finding of unconstitutionality vests the losing party with a direct right of appeal to the Illinois Supreme Court. ILL. REV. STAT. ch. 110A, para. 302(a) (1985).

87. *Williams*, 563 N.E.2d at 473; see *supra* note 84 for the three *Mathews* factors.

by ISSC's practice of bringing suit in a potentially distant and inconvenient forum.⁸⁸ As to the second factor, the supreme court found that any risk of an erroneous deprivation could be cured by allowing the plaintiffs to defend themselves in a more convenient forum.⁸⁹ As to the third factor, the court found the argument that the government had an interest in standardizing its procedures to keep costs down unpersuasive.⁹⁰ According to the court, requiring all default actions to be filed in Cook County, Illinois only added to a substantial backlog.⁹¹ Additionally, the court observed that the least expensive location most likely would be where witnesses and evidence are located, and that the attorney general, who would try the case, has offices throughout the state.⁹² The supreme court concluded that all three factors weighed in favor of allowing the plaintiffs to defend either where they reside or where they obtained the loan.⁹³

In addition, the Illinois Supreme Court ruled that the forum selection clauses were contrary to public policy.⁹⁴ Even though the plaintiffs acknowledged the clauses and did not object to their presence, the court refused to enforce them.⁹⁵ Referring to the agreements as adhesion contracts, the court emphasized the inequality of bargaining power between the parties and ISSC's policy of offering the loans on a "take it or leave it" basis.⁹⁶ Furthermore, the

88. *Williams*, 563 N.E.2d at 473-75. The court noted that such a practice resulted in some plaintiffs being sued up to 290 miles away from where they resided and where they obtained their loans. *Id.* at 468.

89. *Id.* at 475, 476-77. The court found that the amendment to § 30-15.12, *supra* note 80, was in direct conflict with the intent of the Illinois general venue statute, ILL. REV. STAT. ch. 110, para. 2-101 (1989), which is "to make it more convenient to litigate the action by conducting the trial in the same venue where the transaction took place." *Williams*, 563 N.E.2d at 478.

90. *Williams*, 563 N.E.2d at 481. The court noted that judging by the distribution of the population within the state, nearly half of all suits would be in Cook County anyway. *Id.* at 482.

91. *Id.* at 481-82.

92. *Id.* at 482.

93. *Id.*

94. *Id.* at 487. Adopting the reasoning of *Calanca v. D & S Mfg. Co.*, 510 N.E.2d 21 (Ill. App. Ct. 1987), the court ruled that "[t]he adhesional nature of these GSL agreements also supports our conclusion that *Calanca's* reasoning requires voiding the forum selection clauses they contain." *Williams*, 563 N.E.2d at 487.

95. *Williams*, 563 N.E.2d at 487.

96. *Id.*; see *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380 (9th Cir. 1984) (providing a similar case in federal court involving a lessor bringing actions against non-resident lessees for breach of leasing agreement); see also *G.H. Miller & Co. v. Hanes*, 566 F. Supp. 305, 308 (N.D. Ill. 1983) ("If a forum selection clause is a part of a 'boiler-plate' agreement, its significance is greatly reduced as such a classification indicates an inequality in the parties' bargaining power.").

court focused on the effect of the clause on the parties and found that it resulted in forum abuse, unfair burdening of a forum with no relation to the litigation, and violations of public policy.⁹⁷

In so holding, the *Williams* court acknowledged that, under *The Bremen v. Zapata Off-Shore Co.*,⁹⁸ such a forum selection clause would be enforced unless trial in the contractual forum would, for all practical purposes, deprive a party of its day in court.⁹⁹ In *Williams*, however, the court found that the clause had the effect of depriving the class members of their right to be heard.¹⁰⁰ Therefore, the Illinois Supreme Court concluded that forum selection clauses in adhesion contracts are unconscionable and will not be enforced.¹⁰¹

The foregoing analysis in *Williams* is appealing in its simplistic extension of the *Bremen* reasonableness test. In essence, forum selection clauses in adhesion contracts will not be enforced due to the consumer's lack of bargaining power. However, this approach to forum selection clauses in adhesion contracts was subsequently rejected by the United States Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*.¹⁰²

B. Carnival Cruise Lines, Inc. v. Shute

In *Carnival Cruise Lines, Inc. v. Shute*, Eulala Shute, a Washington state resident, purchased a ticket for a cruise departing from California.¹⁰³ Carnival, a Panamanian corporation with offices based in Florida, then sent Shute a ticket with the forum selection clause printed on the back.¹⁰⁴ Shute did not have the opportunity to read the contract prior to purchasing the ticket and another clause in the contract stated that the ticket was nonrefundable.¹⁰⁵ Thus, even if Shute had read the clause and objected to it, she would have lost her money if she had chosen not to take the cruise.

97. *Williams*, 563 N.E.2d at 486 ("The forum selection clause in the case at bar results in the contravention of the policy underlying the general venue statute, ridiculous long-distance forum abuse, and the unfair burdening of a forum not connected with the litigation.").

98. 407 U.S. 1, 18 (1972).

99. *Williams*, 563 N.E.2d at 486.

100. *Id.* at 487.

101. *Id.* The court found that the "defendant's use of venue waiver or forum selection clauses is contrary to public policy." *Id.*

102. 111 S. Ct. 1522 (1991).

103. *Id.* at 1524.

104. *Id.*; cf. *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 381-82 (9th Cir. 1984) (standard form lease with small print).

105. *Shute*, 111 S. Ct. at 1529 (Stevens, J., dissenting).

While the ship was in international waters off the coast of Mexico, Shute slipped on a wet deck during a guided tour of the ship's galley.¹⁰⁶ Shute sued Carnival for negligence in the United States District Court for the Western District of Washington.¹⁰⁷

Carnival responded with a motion for summary judgment based on the forum selection clause and the court's lack of personal jurisdiction.¹⁰⁸ The district court granted the motion without discussing the forum selection clause because it found that Carnival lacked the requisite minimum contacts with Washington.¹⁰⁹ The Court of Appeals for the Ninth Circuit reversed, finding that the district court had personal jurisdiction over Carnival and that the forum selection clause should not be enforced.¹¹⁰ Following the *Bremen* reasonableness test, the court of appeals concluded that Ms. Shute did not freely bargain for the clause.¹¹¹ In addition, the court of appeals noted that Shute was physically and financially incapable of bringing suit in Florida, such that enforcement of the forum selection clause would violate due process by depriving Shute of her day in court.¹¹²

Addressing only the enforceability of the forum selection clause, the United States Supreme Court held that the clause was reasonable and should be enforced.¹¹³ Justice Blackmun, writing for the majority,¹¹⁴ gave little weight to the fact that this was a form contract, not subject to negotiation, and that there was a lack of bargaining parity.¹¹⁵ Rather than applying the *Bremen* reasonableness

106. *Id.* at 1524.

107. *Id.*

108. *Id.* According to Carnival, Shute was required to bring suit in the State of Florida and the Washington district court lacked personal jurisdiction over Carnival. *Id.*

109. *Id.* According to *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), considerations of due process require that non-resident defendants have certain minimum contacts with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

110. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 387, 389 (9th Cir. 1990).

111. *Id.* at 388. According to the court of appeals, a forum selection clause in an adhesion contract is not enforceable because it is not the subject of bargaining. *Id.* at 389. The court stated, "[b]ecause this provision was not freely bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions." *Id.*

112. *Id.* at 389. This conclusion was in line with the holding in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972), that a forum selection clause should not be enforced if it would serve to deprive a party of his day in court.

113. *Shute*, 111 S. Ct. at 1527 ("In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account for the realities of form passage contracts.").

114. Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Souter joined in the opinion. *Id.* at 1524.

115. *Id.* at 1527. *But see* *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp.

test, the Supreme Court concluded that standard form contracts generally are permissible even though they are not the subject of negotiation.¹¹⁶

The Court analyzed the clause by weighing the private and public interest factors used to decide a section 1404 motion to transfer.¹¹⁷ With respect to the private interest factors, the Court determined that Carnival had a strong interest in limiting the fora in which it potentially could be subject to suit.¹¹⁸ The Court reasoned that such a clause benefitted Shute because she paid less for her ticket due to the savings Carnival enjoyed by limiting the fora in which it could be sued.¹¹⁹

Addressing the public interest factors, the Court noted that the clause dispelled any confusion about where to file suit, thus sparing both litigants and the court the time and expense of pretrial motions to determine the correct forum.¹²⁰ The Court also looked to the concept of fundamental fairness and concluded that Carnival did not insert the clause in order to discourage litigation.¹²¹ Furthermore, the Court stated that there was no evidence of fraud or overreaching.¹²² Unlike the Court in *Bremen*,¹²³ the Court in

1132, 1135 (D. Minn. 1968) (holding that the fact that a forum selection clause is not bargained for is enough to characterize it as unreasonable).

116. *Shute*, 111 S. Ct. at 1527. *Contra* Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380, 382 (9th Cir. 1984) (holding that take it or leave it clause in a form contract is the type of unfair or unreasonable clause that should be invalidated); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986) (stressing that inequality of bargaining power and use of form contracts are important factors in determining whether to enforce a forum selection clause); *Galli v. Travelhost, Inc.*, 603 F. Supp. 1260, 1263 (D. Nev. 1985) (refusing to enforce forum selection clause when evidence indicated that it was not freely bargained for).

117. For a discussion of § 1404 motions, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.17 (1985). See also *supra* note 14; *supra* text accompanying note 70.

118. *Shute*, 111 S. Ct. at 1527 ("Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora.").

119. *Id.* But see *Rakoff*, *supra* note 16, at 1234 (arguing that even if consumers benefit by lower prices, there is no guarantee that there has been an overall gain in social welfare).

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

121. *Id.* at 1528. The Court noted that "suggestion of such a bad-faith motive is belied by two facts: [Carnival] has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports." *Id.* But see *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986) (noting that the effect of forum selection clauses can be to deter consumers from suing large corporations in distant forums).

122. *Shute*, 111 S. Ct. at 1528.

123. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14 (1972). In *Bremen*, the Supreme Court focused on factors that indicated *Shute* should have been decided the other way. The *Bremen* Court stated the following regarding the case before it:

Shute did not observe evidence that showed lack of fraud.

In his dissenting opinion, Justice Stevens¹²⁴ disagreed with the majority's conclusion that the passenger was aware of the clause and noted that a person could only become aware of the clause after purchasing the ticket.¹²⁵ Because it was part of an adhesion contract, Justice Stevens found the forum selection clause to be per se unenforceable.¹²⁶ According to Stevens, such clauses are the product of unequal bargaining power and undermine the strong public interest in deterring negligent conduct.¹²⁷ Implicit in this rationale is the notion that many potential plaintiffs would be unable to bring suit in Florida,¹²⁸ a conclusion that directly opposed the majority's finding that Florida was a convenient forum.¹²⁹

In addition, the dissent found the clause to be unreasonable because it lessened the potential plaintiff's ability to bring suit.¹³⁰ Rather than deferring to the interests of business, the dissent advocated a continuation of the *Bremen* reasonableness test¹³¹ and recommended analyzing forum selection clauses in adhesion contracts under the principle of unconscionability.

The choice of [the] forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, . . . [this was] a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, . . . [and t]here [was] strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

Id.

124. Justice Marshall joined in the dissent. *Shute*, 111 S. Ct. at 1529.

125. *Id.* (Stevens, J., dissenting). Justice Stevens attached a copy of the passage ticket to his dissent to illustrate that "only the most meticulous passenger is likely to become aware of the forum selection provision." *Id.* (Stevens, J., dissenting); see also Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 74 (N.J. 1960) (provision difficult to read).

126. *Shute*, 111 S. Ct. at 1531 (Stevens, J., dissenting). Justice Stevens based this holding on traditional principles of federal admiralty law and the Limitation on Shipowner's Liability Act, 49 STAT. 1480, codified as amended, 46 U.S.C. APP. § 183c (1988). *Id.* at 1530 (Stevens, J. dissenting).

127. *Shute*, 111 S. Ct. at 1530 (Stevens, J., dissenting).

128. *Id.* at 1532 (Stevens, J., dissenting) (noting that the forum selection clause "certainly lessens or weakens [Shute's] ability to recover for the slip and fall incident").

129. *Id.* at 1528; see *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 872 (D. Minn. 1980) (weight given to inconvenience depends on equality of bargaining power). *But see Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F. Supp. 71, 74 (S.D.N.Y. 1978) (inconvenience is not a relevant factor if the agreement was entered into freely).

130. *Shute*, 111 S. Ct. at 1533 (Stevens, J., dissenting). The plaintiff here was an individual, not a large corporation, thus there would be a substantial added burden in a trial at the opposite end of the country. *Id.* (Stevens, J., dissenting).

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

IV. ANALYSIS

Following the *Shute* decision, a question remains as to whether courts should refuse to enforce forum selection clauses in adhesion contracts. The Supreme Court left other questions unanswered as well. For example, the Supreme Court failed to decide which party has the burden of proof in a motion to transfer—the plaintiff who signed the forum selection clause but chose to ignore it by filing suit in a different venue, or the defendant who would prefer the transfer and who is the presumed beneficiary of the forum selection clause.¹³² The Court also failed to set forth a test for determining when a forum selection clause in an adhesion contract is unconscionable.

A. *The Shute Decision's Failure to Adequately Consider Reasonableness from a Consumer's Point of View*

The *Shute* opinion significantly favors the efficiency of business over concerns about the unequal bargaining power of consumers.¹³³ In its analysis, the *Shute* Court ignored the fundamental principles of unconscionability.¹³⁴ Unlike *Bremen* in which the Court stated the reasons why the contract was not the result of fraud,¹³⁵ the *Shute* Court simply stated that there was no evidence of fraud or overreaching without pointing to any support for this conclusion.¹³⁶

Further, under section 2-302 of the UCC which governs unconscionability,¹³⁷ the court must give the parties the opportunity to

132. See Gruson, *supra* note 5, at 200 (arguing that “under *Bremen* a court should not dismiss or transfer an action on the basis that the contractual forum is inconvenient for the defendant unless the defendant bears the same heavy burden of proof which the plaintiff has to bear when he attacks the enforcement of a forum-selection clause”).

133. According to the *Shute* Court:

Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line [W]e do not adopt the Court of Appeals' determination that a nonnegotiated forum selection clause is never enforceable simply because it is not the subject of bargaining.

Shute, 111 S. Ct. at 1527.

134. See *supra* notes 19-41 and accompanying text. Writing about the Ninth Circuit's decision in *Shute*, Judge Richard Posner noted, “[i]f ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary.” *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990).

135. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14 (1972); see relevant text of *Bremen* quoted *supra* note 123.

136. *Shute*, 111 S. Ct. at 1528.

137. U.C.C. § 2-302 (1987). According to comment 1:

The basic test is whether, in the light of the general commercial background

present evidence as to the commercial setting, purpose, and effect of such a clause. In the *Shute* opinion, the Court focused solely on the benefit Carnival received by having the forum selection clause. It is clear that the drafting party benefits from a forum selection clause.¹³⁸ What the Court also must consider, however, are the disadvantages to the consumer who is forced to agree to this clause.

The *Shute* opinion emphasized that the knowledge of the consumer is irrelevant to the reasonableness of the contract.¹³⁹ Instead, the Court focused on reasonableness from the drafter's point of view. The court of appeals concluded that Shute lacked the resources necessary to litigate in Florida; therefore, enforcement of the clause would serve to deprive Shute of her day in court.¹⁴⁰ The Supreme Court ignored the inconvenience and hardship to the consumer and validated the clause based on the reasonableness of the drafter's business concerns. This reasoning, however, contradicts the Court's earlier holding in *Bremen* which favored forum selection clauses only if the parties had equal bargaining power.

The differences between the *Bremen* and *Shute* decisions are numerous. In *Bremen*, the Court noted that the nature of the transaction was "far from routine."¹⁴¹ In the *Shute* case, however, Carnival presumably sold thousands of similar tickets every week. Also, in *Bremen*, the Court focused on the sophistication of the parties involved and found that both parties were businesses with equal bargaining power.¹⁴² Conversely, neither party in *Shute* ever suggested that Ms. Shute had the same knowledge and experience as Carnival. Furthermore, the *Bremen* Court noted that the contract was not a form contract with boilerplate language that the

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

Id. § 2-302 cmt. 1 (citations omitted).

138. See, e.g., *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986) (clause was inserted solely for the convenience of the defendant); *Couch v. First Guar. Ltd.*, 578 F. Supp. 331, 333 (N.D. Tex. 1984) (forum clause was inserted only for the convenience of the defendant); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 907-08 (E.D. Wis. 1981) ("it is safe to assume that the forum-selection clause is in the contract for the convenience of the defendant and for no other reason").

139. This is shown by the fact that Shute could not have known of the forum selection clause until she was already bound to the terms of the contract. See *supra* text accompanying notes 103-05.

140. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 389 (9th Cir. 1990).

141. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972).

142. *Id.*

plaintiff had no power to alter.¹⁴³ In sum, the very facts that were absent in *Bremen* and which supported that Court's enforcement of the forum selection clause, were present in *Shute* and, thus, required the *Shute* Court to disregard the forum selection clause.¹⁴⁴

Moreover, according to section 211(3) of the *Restatement (Second) of Contracts*, when looking at a standardized agreement, a court should ask whether the party seeking enforcement of the term had reason to believe that the adherent would not have assented to the contract if aware of the questionable term.¹⁴⁵ In the case of a forum selection clause, it is unlikely that the plaintiff was aware of the clause or of the consequences of agreement to it. A typical customer focuses on such terms as the price, type of payment (cash or credit), and warranty terms.¹⁴⁶ It is unlikely that a consumer will recognize the effect of agreeing to litigate in a pre-selected forum when signing the contract.¹⁴⁷ On the other hand, it is very likely that Carnival was aware of the objectionable nature of the same clause in its contracts. At the time of the *Shute* decision, there were at least twenty prior or pending personal injury cases filed against Carnival in the plaintiff's choice of forum.¹⁴⁸ This

143. *Id.* at 12-13.

144. *Id.* at 12-14; see relevant text of *Bremen* quoted *supra* note 123.

145. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

146. Rakoff, *supra* note 16, at 1226-27.

147. *Id.* at 1226 ("It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies.").

148. *Carnival Cruise Lines, Inc. v. Superior Court of Cal.*, 111 S. Ct. 1614 (1991); *Mount Olive Baptist Church Travel Club v. Carnival Cruise Lines, Inc.*, 848 F.2d 192 (6th Cir. 1988); *Armstrong v. Carnival Cruise Lines, Inc.*, 787 F.2d 579 (1st Cir. 1986); *Goldberg v. Carnival Cruise Lines, Inc.*, 701 F.2d 172 (5th Cir. 1983); *Heyl v. Carnival Cruise Lines, Inc.*, 625 F.2d 1012 (5th Cir. 1980); *Partesi v. Carnival Cruise Lines, Inc.*, No. 90-276, 1990 WL 302890 (D.N.J. Nov. 26, 1990); *Ostrowitz v. Carnival Cruise Lines, Inc.*, No. 89 CV 2760, 1990 WL 127657 (E.D.N.Y. Aug. 23, 1990); *Walker v. Carnival Cruise Lines, Inc.*, No. 87-C-115, 1987 WL 28413 (N.D. Ill. Dec. 22, 1987); *Stack v. Carnival Cruise Lines, Inc.*, No. 86-5150, 1987 WL 16770 (D.N.J. Sept. 4, 1987); *Everett v. Carnival Cruise Lines, Inc.*, 677 F. Supp. 269 (M.D. Pa. 1987); *Putz v. Carnival Tours, Inc.*, No. 86-2213, 1987 WL 7674 (E.D. Pa. Mar. 10, 1987); *Clark v. Carnival Cruise Lines, Inc.*, No. C86-444TB, 1987 WL 16935 (W.D. Wash. Feb. 17, 1987); *Alexander v. Carnival Tours, Inc.*, No. 86-A-1951, 1986 WL 14673 (D. Colo. Dec. 11, 1986); *Dirks v. Carnival Cruise Lines, Inc.*, 642 F. Supp. 971 (D. Kan. 1986); *Cilberto v. Carnival Cruise Lines, Inc.*, No. 85-4017, 1986 WL 2560 (E.D. Pa. Feb. 25, 1986); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985); *Luby v. Carnival Cruise Lines, Inc.*, No. H-84-2036, 1985 WL 6420 (D. Md. Apr. 2, 1985); *Catalana v. Carnival Cruise Lines, Inc.*, 618 F. Supp. 18 (D. Md. 1984); *King v. Carnival Cruise Lines, Inc.*, No. 82-2791, 1984 WL 1423 (W.D. La. Mar. 9, 1984); *Lasky v. Carnival Cruise Lines, Inc.*, 598 A.2d 29 (Pa. 1991).

This does not include the presumably large number of other cases that plaintiffs brought in lower state courts which were dismissed and unreported.

provides ample evidence that Carnival knew that consumers objected to the forum selection clause.

The *Shute* Court also refused to consider adequately the burden to Shute in having to litigate in Florida. According to the Court, passengers benefit from the presence of a forum selection clause by having reduced fares.¹⁴⁹ The Court focused on the overall benefit consumers receive at the time of contracting, instead of the effect in the event the consumer chooses to bring suit. The Court found that Florida was not an inconvenient forum¹⁵⁰ without ever considering Shute's resources and her ability to litigate in Florida.¹⁵¹ Instead, the Court looked to the convenience to Carnival—a test which again completely contradicts the purpose of the *Bremen* test.

B. *The Preferable Approach of Bremen and Williams*

Courts should continue to apply the *Bremen* reasonableness test when determining the enforceability of forum selection clauses in consumer contracts. The *Bremen* Court recognized the value of business efficiency,¹⁵² but noted that concern for commerce should not override considerations of fraud and unreasonableness.¹⁵³ In *Bremen*, the forum selection clause was in a contract between two sophisticated businesses.¹⁵⁴ This factor seemed to weigh heavily in the *Bremen* Court's decision to enforce the clause. Yet, in the case of an adhesion contract like the one in *Williams*,¹⁵⁵ it is clear that the consumer lacked the ability to negotiate because the contract was presented on a "take it or leave it" basis.¹⁵⁶

This is not to suggest that businesses should never use standard

149. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991).

150. *Id.* at 1528.

151. *Id.* at 1527. The Court refused to defer to the court of appeals's finding that Shute was "physically and financially incapable of pursuing this litigation in Florida" because there was no reference to this in the district court opinion. *Id.* at 1527-28.

152. *The Bremen v. Zappa Off-Shore Co.*, 407 U.S. 1, 15 (1972).

153. *Id.*

154. *Id.* at 12.

155. *Williams v. Illinois State Scholarship Comm'n*, 563 N.E.2d 465 (Ill. 1990); see *supra* notes 77-101.

156. See Nicholas S. Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172, 181-82 (1965) (observing that "the ability to demand special treatment is only meaningful when the value or amount of business is not completely insignificant in relation to the size of the offeror's business").

The United States Supreme Court has previously recognized the unfairness of an adhesion contract forced upon a consumer. In *New York Cent. R.R. v. Lockwood*, the Court stated:

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts . . . He prefers, rather, to . . . sign any paper the

form contracts with consumers. As the *Shute* Court noted, the reality of business today mandates their use.¹⁵⁷ In this respect, there are a variety of terms that a business may include in an adhesion contract without violating public policy. A forum selection clause, however, should not be one of those terms.

The Illinois Supreme Court in *Williams* was correct in concluding that forum selection clauses in adhesion contracts presented to consumers are contrary to public policy.¹⁵⁸ The savings that consumers enjoy from the presence of such clauses do not outweigh the potential inequity of forcing consumers to sue in the business's choice of forum.¹⁵⁹ Not only is this result unconscionable, it may deny consumers due process of law.

In *Williams v. Walker-Thomas Furniture Co.*,¹⁶⁰ the court found the average consumer knew little about the contract beyond the amount of money in question and the general terms of payment.¹⁶¹ A typical consumer lacks the intent to agree to every specific clause in fine print.¹⁶² While a consumer typically is bound to the contract agreed to, courts will use the doctrine of unconscionability to protect consumers from objectionable terms or practices. In many cases, a forum selection clause in an adhesion contract may be an objectionable term. Rather than focusing on the demands of business, courts should consider the effect on consumers and evaluate forum selection clauses in adhesion contracts by considering whether the effect is unconscionable.¹⁶³

C. *A Valid Forum Selection Clause Should Be Dispositive When Deciding a Motion to Transfer*

Certainly, a forum selection clause in an agreement between two

carrier presents In most cases, he has no alternative but to do this, or abandon his business.

84 U.S. (17 Wall.) 357, 359 (1873).

157. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991).

158. *Williams*, 563 N.E.2d at 487.

159. As Justice Stevens stated in *Shute*, "[t]he fact that the cruise line can reduce its litigation costs . . . by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable." *Shute*, 111 S. Ct. at 1529 (Stevens, J., dissenting).

160. 350 F.2d 445 (D.C. Cir. 1965).

161. *Id.* at 449.

162. See Spanogle, *supra* note 18, at 933 ("The traditional incantation by the court is that the consumer is bound by what he signed, and the printed clauses control. This doctrine violates the consumer's expectations to the extent that it does not represent his understanding of the contract terms.").

163. See *Williams v. Illinois State Scholarship Comm'n*, 563 N.E.2d 465, 486 (Ill. 1990) (focusing on the effect that a forum selection clause has on the parties in light of the public policy behind the general venue statute).

relatively sophisticated businesses should be enforced.¹⁶⁴ Such an agreement is usually the product of negotiation between the parties.¹⁶⁵ Likewise, adhesion contracts generally are enforceable. Adhesion contracts save businesses time and resources and generally should not be criticized. When adhesion contracts between a consumer and a business contain forum selection clauses, however, the result is neither fair nor reasonable.

In light of the Supreme Court's preference for encouraging business autonomy,¹⁶⁶ the *Ricoh* Court's conclusion that a valid forum selection should only be one consideration when ruling on a motion to transfer,¹⁶⁷ should be overruled. If a court finds a contract to be enforceable, there is no reason why the court should not enforce all of the terms as written.

Currently, a court will conclude that the parties' agreement to litigate in a chosen forum is valid, yet nonetheless refuse to enforce that term after considering the convenience of witnesses, or the interests of justice. The recent opinion in *Nelson v. Master Lease Corp.*¹⁶⁸ is an excellent example of this paradox. In *Nelson*, the court concluded that the forum selection clause was not unconscionable, yet refused to enforce the clause because the convenience of the parties weighed in the plaintiff's favor.¹⁶⁹ In effect, the *Nelson* court removed the forum selection clause from the contract despite its conclusion that the clause was valid.

The *Shute* opinion will inevitably result in confusion among the federal and state courts that have dutifully applied the *Bremen* reasonableness test. In *Shute*, the Supreme Court failed to explain why an adhesion contract presented to a consumer with virtually no bargaining power on a "take it or leave it" basis was not based on fraud and did not violate public policy.¹⁷⁰ As a result, courts must now determine whether the *Shute* decision should be confined

164. See *Friedman v. World Trans., Inc.*, 636 F. Supp. 685, 690 (N.D. Ill. 1986) (holding that the *Bremen* exceptions do not apply to sophisticated individuals and companies).

165. See *In re Fireman's Fund Ins. Co.* 588 F.2d 93, 95 (5th Cir. 1979) (finding that the parties negotiated the contract and that the petitioner failed to prove that the chosen venue was unreasonable); *Advent Elecs., Inc. v. Samsung Semiconductor*, 709 F. Supp. 843, 847 (N.D. Ill. 1989) (finding that the clause was part of a bargained-for contract between two companies of significant size and experience); *Giordano v. Witzer*, 558 F. Supp. 1261, 1265 (E.D. Pa. 1983) (observing that the plaintiffs were represented by counsel and the agreement gave the plaintiffs substantial rights).

166. See *supra* text accompanying notes 114-20.

167. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988).

168. 759 F. Supp. 1397 (D. Minn. 1991).

169. *Id.* at 1403.

170. See *supra* text accompanying notes 137-38.

to its facts or whether forum selection clauses in virtually all adhesion contracts should be enforced.

In making this determination, courts should realize that adhesion contracts involving consumers are a special category meriting greater protection. The Illinois Supreme Court in *Williams* recognized that enforcement of such clauses may result in a violation of due process due to the hardship of the consumer being forced to travel to an inconvenient forum.¹⁷¹ While *Williams* involved the consumer as a defendant in a loan default action, the same principal should hold true when the consumer is a plaintiff. A consumer with a valid claim against a business should not be precluded from bringing suit by virtue of his or her signature on a standard form contract containing a forum selection clause. When a business can effectively immunize itself from suit by inserting a forum selection clause in small print in a complex adhesion contract, the result is unconscionable.

Certainly not all forum selection clauses are unconscionable. In the case of a valid forum selection clause, the principle set forth in *Stewart Organization, Inc. v. Ricoh Corp.*¹⁷² that a forum selection clause should not be dispositive, should be overruled. Since the forum selection clause is one of the contract terms, contract law should control. If the parties agreed to the term and it is not unconscionable, then it should be applied without further discussion.

V. PROPOSAL

A contract of adhesion is inherently different from a regular contract.¹⁷³ To protect the unwary consumer, courts interpreting forum selection clauses in contracts between businesses and consumers should find the clauses prima facie unenforceable¹⁷⁴ and place the burden on the business to demonstrate that the forum

171. *Williams v. Illinois State Scholarship Comm'n*, 563 N.E.2d 465, 473 (Ill. 1990).

172. 487 U.S. 22 (1988).

173. CALAMARI & PERILLO, *supra* note 18, § 9-44; *see also* Couch v. First Guar. Ltd., 578 F. Supp. 331, 333 (N.D. Tex. 1984) (“[J]ustice requires that a distinction be drawn between freely negotiated contracts and standard form contracts”).

174. *See* Rakoff, *supra* note 16, at 1176; *see, e.g.*, Colonial Leasing Co. v. Pugh Bros. Garage, 735 F.2d 380, 382 (9th Cir. 1984) (disregarding forum selection clauses in adhesion contracts); Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 759 (E.D. Va. 1986) (“The court is wary of forum selection clauses that appear in form contracts between individuals and large corporations.”).

Significantly, the original draft of § 2-302 of the U.C.C. on unconscionability was limited in its application to adhesion contracts. UNIFORM REVISED SALES ACT, § 23 (PROPOSED FINAL DRAFT No. 1, 1944), *noted in* Wilson, *supra* note 156, at 187 n.91. This tends to prove that adhesion contracts should be closely scrutinized.

selection clause is not unconscionable.¹⁷⁵ The following proposal outlines the analysis a court should undertake when faced with a forum selection clause in an adhesion contract. This proposal also discusses the procedures a court should follow if it determines that such a clause in an adhesion contract is *not* unconscionable.

When confronted with a motion to transfer to the forum specified by a forum selection clause in an adhesion contract, a court's initial determination should be the enforceability of the clause. The court must consider the bargaining power of the parties making the contract in order to determine whether the clause is unconscionable.¹⁷⁶ A court must look at both procedural and substantive unconscionability.

For a typical consumer, being forced to litigate in an inconvenient forum prevents the filing of suit.¹⁷⁷ In order to protect consumers, courts should place the burden on businesses to prove that a consumer understood the consequences of agreeing to such a clause.¹⁷⁸ The problem with a forum selection clause in adhesion contracts is not only the consumer's lack of knowledge, but also the inability to bargain over such a term.¹⁷⁹ Businesses have a duty

175. As one author argues, "many terms that might be enforceable if included in negotiated agreements should not be enforced if imposed through contracts of adhesion, quite simply because they exacerbate the authoritarian relationship inherent in the use of such forms." Rakoff, *supra* note 16, at 1266.

Currently, adhesion contracts are not the subject of heightened scrutiny. See *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990) (noting that prior decisions "treat a forum selection clause basically like any other contractual provision"). According to the court in *Donovan*, the facts of *Shute* were unique and forum selection clauses in adhesion contracts should not be subject to a heightened scrutiny for unconscionability. *Id.* at 377.

176. According to the court in *Donovan*, "[i]f a clause really is buried in illegible 'fine print'—or if as in *Shute* it plainly is neither intended nor likely to be read by the other party—this circumstance may support an inference of fraud." 916 F.2d at 377; see also *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 85 (N.J. 1960) ("the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly").

177. See *Yoder*, 630 F. Supp. at 759 ("[W]here the clause requires the filing of a suit in a distant state it can serve as a large deterrent to the filing of suits by consumers against large corporations.").

178. CALAMARI & PERILLO, *supra* note 18, § 9-44.

179. See *Mueller*, *supra* note 17, at 581; see also *Galli v. Travelhost, Inc.*, 603 F. Supp. 1260, 1263 (D. Nev. 1985) (finding no evidence that the parties engaged in any bargaining over the clause); *Couch v. First Guar. Ltd.*, 578 F. Supp. 331, 334 (N.D. Tex. 1984) (stating that nearly all cases refusing to enforce a forum clause rely on the disparity in bargaining power); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908 (E.D. Wis. 1981) (discussing the fact that the clause was not freely bargained for); *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983, 986 (S.D. W. Va. 1980) (relying on disparate bargaining power to deny the defendant's motion to dismiss for improper venue due to forum selection clause).

to deal with consumers in a fair and open manner¹⁸⁰ which should include notifying consumers of the forum selection clause and its effect. A finding as to unconscionability, however, does not end the court's analysis.

If the court determines that the clause is not unconscionable and hence enforceable, then the court should enforce the clause and grant the motion to transfer. A valid clause should not be merely one factor that a court looks at when deciding a section 1404(a) motion to transfer, it should be dispositive.¹⁸¹ According to general principles of contract law, the court should give effect to the reasonable expectations of the parties.¹⁸² As long as it is not unconscionable, a valid forum selection clause should negate considerations of convenience and the interest of justice.

In contrast, if a forum selection clause is found to be unconscionable, the court then should decide the motion to transfer as if the forum selection clause were not present. This approach is consistent with both section 211(3) of the *Restatement (Second) of Contracts*¹⁸³ and section 2-302(1) of the *Uniform Commercial Code*.¹⁸⁴ Thus, the court should consider the convenience of the parties, the convenience of witnesses, and the interest of justice, as it would in any other case.

VI. CONCLUSION

Public policy requires that, at the very least, a business using an adhesion contract should have the duty to ensure that a consumer is aware of the forum selection clause *prior* to entering into the agreement.¹⁸⁵ This does not impose a substantial burden on the business when weighed against the potential harm a consumer might face if forced to litigate in an inconvenient forum.

According to the *Shute* decision, the Supreme Court believes a

180. See *Henningsen*, 161 A.2d at 88 (discussing cases in which a limitation of liability was not given effect because it was "not brought to the buyer's attention and he was not made understandingly aware of it," thus violating the duty of fairness).

181. According to Gilbert, *supra* note 17, at 11, in a motion to dismiss on the ground of *forum non conveniens*, the presumption is against dismissal and in favor of the plaintiff's choice of forum. Gilbert argues that "[t]he presumption should be reversed in the choice of forum context to favor the parties' choice absent other indications of unreasonableness." *Id.*

182. 1 CORBIN, *supra* note 42, § 1.

183. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

184. U.C.C. § 2-302 (1987).

185. *Seabrook v. Commuter Hous. Co.*, 338 N.Y.S.2d 67, 73 (Civ. Ct. 1972) (explaining that unconscionability imposes the duty on the party with bargaining superiority to explain to the inferior party any provision that is one-sided).

desire for business efficiency should override any concern a court might have for protecting individuals.¹⁸⁶ This conclusion opens the door to businesses forcing consumers to consent to a variety of unconscionable practices, all in the name of business efficiency.

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186. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991).