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NOTES

FOR THE CONVENIENCE OF PARTIES AND WITNESSES, IN THE INTEREST OF JUSTICE: FORUM-SELECTION PROVISIONS AFTER *ATLANTIC MARINE CONSTRUCTION*

Ben Minegar

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FOR THE CONVENIENCE OF PARTIES AND WITNESSES, IN THE INTEREST OF JUSTICE: FORUM-SELECTION PROVISIONS AFTER *ATLANTIC MARINE CONSTRUCTION*[*]

Ben Minegar**

I. INTRODUCTION

Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas[1] is, at first glance, a simple case. Two parties enter into a contract. Party A promises to pay Party B to complete a task. The contract requires litigation in State Court X or Federal Court X. Party B completes the task, but Party A refuses to pay. Party B sues for breach of contract in Federal Court *Y*. What must Federal Court Y do? The contract requires Federal Court Y to transfer the case to Federal Court X—correct? This resolution feels intuitively fair. The parties agreed,

* For an excellent article concerning the topics discussed in this Note, see Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After* Atlantic Marine, 82 FORDHAM L. REV. 2521 (2014). I completed the final draft of this Note before reading Mr. Sorensen's article, from which I drew no support or analysis.

** Lead Executive Editor, University of Pittsburgh Law Review, Volume 76; J.D., University of Pittsburgh School of Law, 2015. Recent changes in the law may not be reflected. Any opinions, errors, or omissions are my own. Thank you to my family for your unwavering and unconditional support at each and every stage of my life, including law school. Thank you to the staff of the *University of Pittsburgh Law Review* for your hard work. Thank you Professor James Flannery and Professor Ben Bratman for your mentorship throughout law school.

[1] 134 S. Ct. 568 (2013).

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after all, where litigation was to occur. In the wake of *Atlantic Marine Construction*, however, the answer is not so simple.

The United States Supreme Court's decision in *Atlantic Marine Construction* involves, at its heart, an enduring American jurisprudential dilemma, pitting the right of private parties to contract against the principles of federalism, judicial economy, and jurisdictional uniformity. Historically, this dilemma has taken myriad forms. The Court in *Atlantic Marine Construction* was, however, tasked with resolving whether a private forum-selection agreement can dictate the propriety of federal "venue" over the express pronouncements of Congress.[2]

Consider, for a moment, the stakes. If the answer is *yes*, private forum agreements preempt federal venue laws, which expressly govern "*all* civil actions" filed in the United States district courts.[3] If the answer is *no*, contracting parties are, in effect, free to breach their forum agreements after using them to leverage transactional value. Both answers undercut fundamental principles of American law, and plotting a path through the murk is no small task.

This Note traces the history of forum-selection agreements to more closely scrutinize the result in *Atlantic Marine Construction*. With this history in mind, this Note offers an analytical framework with which practitioners may more effectively employ (and litigate) forum-selection agreements after *Atlantic Marine Construction*.

II. FORUM-SELECTION PROVISIONS: A BRIEF HISTORY

Initially, American courts rarely enforced forum-selection agreements. Private preselection of forum was said to "oust" the judiciary from its constitutionally prescribed dominion.[4] In the mid-Twentieth Century, however, judges recognized a

[2] The Court was also required to resolve if, and in what manner, the analysis changes when applied to forum-selection clauses requiring a state or foreign forum. *Id.* at 580.

[3] 28 U.S.C. § 1391(a)(1) (2012) (emphasis added).

[4] For example, in 1874, the United States Supreme Court held that "agreements in advance to oust the courts of the jurisdiction conferred by law [are] illegal and void." Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874); *see also* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("Forum selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 496 (Mo. 1992) ("The early cases in many jurisdictions that refused to enforce outbound forum selection clauses often relied upon an 'ouster of jurisdiction' theory as the specific public policy argument supporting [*per se*] invalidity; it was said that the agreement of the parties should not operate to deprive a court of jurisdiction over parties and issues otherwise properly before that court.").

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http://lawreview.law.pitt.edu

broader right to contract, and the "ouster" theory declined in application in the state and federal courts.[5]

A. M/S Bremen

The inflection point for forum-selection agreements came in 1972, when the Court in *M/S Bremen v. Zapata Off-Shore Co.* found forum-selection clauses "*prima facie* valid," unless the resisting party proved the clause "unreasonable."[6] There, after an accident at sea, an American oil-rig owner (Zapata) sued a German tugboat company in a Florida federal court in violation of the parties' maritime contract, which required litigation in London, England.[7] In upholding the agreement, the Court dismissed the "ouster" doctrine as a "vestigial legal fiction" that reflected "a provincial attitude" toward the "fairness of other tribunals."[8] The Court emphasized the growth of international trade and the predictability provided by forum-selection agreements:

> [M]uch uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place (where personal or *in rem* jurisdiction might be established). 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.[9]

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[5] *See* Cent. Contracting Co. v. Md. Cas. Co., 367 F.2d 341 (3d Cir. 1966) (finding a forum-selection enforceable); Nat'l Equip. Rental, Ltd. v. Centra Cast Co., 270 F. Supp. 999, 1000 (E.D.N.Y. 1966) (finding a forum-selection clause "valid and enforceable" on grounds that "the public policy of the State of New York [was] not offended by the stipulation for local venue, nor [was] defendant's acquiescence, obtained presumably as a condition for plaintiff's not inconsiderable commitment of funds to the enterprise whose obligations were guaranteed, shocking to a judicial conscience" and noting that "[a] court should, absent strong countervailing considerations, give the parties' agreement for venue its intended effect"); Cent. Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d 810, 816 (Pa. 1965) ("[A] court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.").

[6] *M/S Bremen*, 407 U.S. at 1 (internal quotations omitted).

[7] *Id.* at 2–4.

[8] *Id.* at 12.

[9] *Id.* at 13–14 (emphasis added).

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http://lawreview.law.pitt.edu

Based upon this reasoning, the Court remanded the case to afford Zapata the opportunity to carry its "heavy burden" of proving not only that the "balance of convenience [was] strongly in favor of trial" in the Florida federal court, but that litigation in London would be "so manifestly and gravely inconvenient" that it would "effectively deprive[]" Zapata of "a meaningful day in court."[10] The Court observed that Zapata could resist the forum-selection agreement only by proving "fraud, undue influence," "overweening bargaining power," or contravention of the selected forum's "strong public policy," whether declared by "statute or by judicial decision."[11] The Court implicitly encouraged the American legal community to "face the realities of the need for certainty in international transactions," such that the nation "might continue to benefit from world trade."[12]

Issues soon arose, however. Courts applied *M/S Bremen* only in admiralty cases based upon the Court's note that the "reasonable" contract in *M/S Bremen* was international and maritime in nature.[13] Judges, moreover, hesitated to enforce forum-selection clauses within contracts of adhesion because the agreement in *M/S Bremen* was not a "form contract with boilerplate language" that Zapata had "no power to alter"[14] but a product of "arm's length negotiation" between "experienced

[10] *Id.* at 19.

[11] *Id.* at 12, 15.

[12] Phoebe Kornfeld, *The Enforceability of Forum-Selection Clauses After* Stewart Organization, Inc. v. Ricoh Corporation, 6 ALASKA L. REV. 175, 181 (1989).

[13] *See, e.g.*, Prof'l Ins. Corp. v. Sutherland, 700 So. 2d 347, 350 (Ala. 1997) ("Of course, as an exercise of the Supreme Court's federal admiralty jurisdiction . . . the decision in [*M/S Bremen*] does not mandate that state courts enforce [forum-selection] provisions outside of an admiralty context. In declaring Alabama's law of contracts, this [c]ourt is free to independently assess the public policy of this state, subject only to the requirements of federal law.").

[14] *See, e.g.*, Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377 (7th Cir. 1990) (asking whether the plaintiff should have been "prevented from enforcing the [forum-selection] clause because it [was] "buried in the fine print and was not 'freely negotiated'" and noting the "widespread judicial suspicion of the form contract—the dreaded 'contract of adhesion,' the contract that is offered by the authoring party on a take it or leave it basis rather than being negotiated between the parties"); Bos Material Handling, Inc. v. Crown Controls Corp., 186 Cal. Rptr. 740, 744 (Cal. Ct. App. 1982) (noting that California courts in 1982 "scrutinize[d] such contracts [of adhesion containing forum-selection provisions] with care and refuse[d] to honor the selection if to do so would result in substantial injustice to the adherent" and that the party seeking to avoid enforcement of the forum-selection provision was "entitled to an evidentiary hearing on whether the [] agreement is adhesive and, if so, whether the [agreed-to] forum comport[ed] with the reasonable expectations of [the plaintiff] or is unduly oppressive") (internal quotations and citations omitted).

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http://lawreview.law.pitt.edu

and sophisticated businessmen."[15] These issues remained unresolved for nearly two decades.

B. Shute

In 1991, the Court in *Carnival Cruise Lines, Inc. v. Shute*[16] held that *M/S Bremen*'s "reasonableness" test applies to domestic and adhesion contracts. There, the Shutes purchased Carnival cruise tickets through a Washington travel agency.[17] The tickets required litigation in a Florida federal court.[18] While at sea, Eulala Shute slipped and sustained injuries.[19] The Shutes sued in a Washington federal court, which granted Carnival's motion to dismiss.[20] The United States Court of Appeals for the Ninth Circuit reversed and allowed the suit to proceed in Washington, invalidating the Florida forum-selection clause because it "was not freely bargained for."[21]

The Supreme Court reversed and found the forum-selection clause "reasonable" under *M/S Bremen*, though it did not stem from arm's length negotiation.[22] The Court reasoned that the tickets represented a "purely routine," reasonable passage contract "nearly identical" to those "issued by [Carnival] and most other cruise lines."[23] The Court found it "entirely unreasonable" to assume that the Shutes or "any other cruise passenger" would "negotiate" a forum-selection agreement in purchasing an "ordinary commercial cruise ticket."[24] "[C]ommon sense" dictated that such tickets are invariably "form contract[s]," the terms of

[15] *M/S Bremen*, 407 U.S. at 12; *see also id.* at 14 ("There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.").

[16] 499 U.S. 585 (1991).

[17] *Id.* at 587–88.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 589.

[22] *Id.* at 597.

[23] *Id.* at 593.

[24] *Id.*

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http://lawreview.law.pitt.edu

which are not "subject to negotiation."[25] For these reasons, the Court enforced the forum-selection clause as reasonable, requiring transfer to the Florida federal court.

Legal scholars impugned *Shute*, contending that adhesive consumer forum-selection agreements should be *per se* unenforceable "as a matter of pure contract law" because they compel "unwitting plaintiffs" to forfeit legitimate claims based merely upon their "frequent inability" to sue in a "distant, inconvenient courtroom."[26] Despite this criticism, however, the *Shute* Court affirmed that the enforceability of forum-selection agreements does not depend upon arm's length negotiation.

III. FEDERAL VENUE AND PRIVATE FORUM SELECTION: *STEWART*

In 1988, the Court in *Stewart Organization, Inc. v. Ricoh Corp.*[27] addressed whether a private forum-selection agreement can supersede federal law with respect to the propriety of "venue" in a preselected forum.

There, an Alabama business contracted with a New York business to market copier products.[28] The contract required litigation in a New York federal or state

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[25] *Id.* In upholding the clause, the Court noted:

> Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. 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. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason 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.

Id. at 593–94.

[26] *See* Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 325–26 (1992).

[27] 487 U.S. 22 (1988).

[28] *Id.* at 24.

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http://lawreview.law.pitt.edu

court.[29] Relations soured, and the plaintiff sued in an Alabama federal court in violation of the agreement.[30] The defendant argued that the forum-selection clause mandated either: (A) transfer to the New York federal court under 28 U.S.C. § 1404(a); or (B) dismissal for "wrong" and "improper" "venue" under 28 U.S.C. §§ 1391 and 1406, and Federal Rule of Civil Procedure 12(b)(3).[31] Sitting in diversity, the Alabama district court denied both motions, citing *Erie Railroad Co. v. Tompkins*[32] and Alabama law, which, at the time, disfavored forum-selection agreements.[33]

The United States Court of Appeals for the Eleventh Circuit reversed and dismissed the case for improper "venue" under Rule 12(b)(3), holding: (A) that "venue" in diversity cases is governed by *federal* law under *Erie*; and (B) that the forum-selection clause was "reasonable" under *M/S Bremen* and, thus, enforceable to render "venue" in Alabama "wrong" under § 1406.[34]

The Supreme Court reversed the Eleventh Circuit's application of *M/S Bremen*, holding that the "first question" under *Erie* should have been whether § 1404(a) controlled the defendant's request to give effect to the agreement to litigate in New York.[35]

Why did it matter whether the Alabama district court enforced the forum-selection agreement under §§ 1406(a) or 1404(a)? Although not emphasized in *Stewart*, §§ 1404(a) and 1406(a) differ both textually and interpretatively. Under § 1404(a), district courts "*may*" transfer cases "to any other district" in which the case "might have been brought" initially.[36] In other words, § 1404(a) gives district courts discretion to transfer cases in which the transferor court is already a *proper* "venue." Conversely, § 1406(a) provides that the district court "of a district in which is filed a case laying venue in the *wrong* . . . district *shall* dismiss, or if it be

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); N. Braman, Jr., *The Still Unrepressed Myth of* Erie, 18 U. BALT. L. REV. 403, 407–14 (1989) (discussing *Erie* and its progeny).

[33] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 24 (1988).

[34] *Id.* at 25.

[35] *Id.* at 29. The Court agreed that questions of "venue" in diversity actions are governed by *federal* law (i.e., § 1404(a)) under *Erie*.

[36] 28 U.S.C. § 1404(a) (2012) (emphasis added).

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http://lawreview.law.pitt.edu

in the interest of justice, transfer such case to any district . . . in which it could have been brought."[37] In other words, § 1406(a) *requires* dismissal or transfer in cases in which the transferor court is an *improper* "venue."

Whether the plaintiff's selection of "venue" is proper is determined (in the majority of civil actions) under 28 U.S.C. § 1391(b), which enumerates three circumstances in which "venue" in a federal district is proper: (1) federal districts in which any defendant resides, if all defendants are residents of the state in which that district is located; (2) federal districts in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated; or (3) federal districts in which any defendant is subject to personal jurisdiction, if subsections (1) and (2) cannot be satisfied.[38]

In *Stewart*, the Northern District of Alabama (i.e., the prospective transferor court) was *already* a proper "venue" under §§ 1391(b)(1) and (c)(2): The defendant conducted business and, thus, "resided" in the Northern District of Alabama.[39] Dismissal under § 1406(a) for suing in the "wrong" (i.e., improper) "venue" was, therefore, an inappropriate mechanism by which to enforce the forum-selection agreement.[40] The issue remained, however, that the plaintiff sued in the Northern District of Alabama in violation of the parties' agreement to sue only in the *New York* federal court.

In resolving this issue, the *Stewart* Court found (implicitly and without emphasis) that where a plaintiff sues in a *proper* federal "venue" (as determined by § 1391) in violation of a valid forum-selection agreement, the transferor court must treat the defendant's attempt to enforce the agreement as a motion to transfer under § 1404(a).[41] The Court observed that § 1404(a) mandates an "individualized, case-

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[37] *See* J-Crew Mgmt., Inc. v. Atl. Marine Const. Co., A-12-CV-228-LY, 2012 WL 8499879, at *4 (W.D. Tex. Aug. 6, 2012) ("Rule 12(b)(3) and [§] 1406(a) are the procedural vehicles for dismissing or transferring an action that has been brought in an improper forum. In contrast, where an action has been brought in a forum that is 'proper' within the meaning of [§ 1391], [§] 1404(a) serves as the vehicle for transferring the action to a more convenient forum.").

[38] 28 U.S.C. § 1391(b)(1–3) (2012).

[39] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 n.8 (noting that the defendant "[conducted] business" in the Northern District of Alabama).

[40] *Id.*

[41] *See generally* 14D CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2013).

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http://lawreview.law.pitt.edu

by-case consideration of convenience and fairness,"[42] within which the parties' forum-selection agreement receives "neither dispositive," "nor no" consideration.[43] Rather, the agreement was to receive the consideration "Congress provided in § 1404(a)," which directed the federal district courts to:

> [t]ake account of factors other than those that bear solely on the parties' *private* ordering of their affairs [by contract]. The district court also must weigh in the balance the convenience of the witnesses and those *public-interest factors* of systemic integrity and fairness that, in addition to private concerns, come under the heading of the interest of justice.[44]

In so holding, the *Stewart* Court reasoned that by allowing a *private* agreement to render improper what Congress expressly deemed proper (i.e., "venue" under § 1391), the very "constitutional provision" for a federal court system would be undermined.[45] With this reasoning, the Court emphasized federalism and uniformity over contractual freedom. Unfortunately, *Stewart*'s implicit holding disordered the process by which federal courts enforced forum-selection provisions for nearly two decades.

IV. *STEWART* DIVIDES THE FEDERAL CIRCUITS

As noted above, the Court in *Stewart* held implicitly that federal district courts must apply § 1404(a)'s discretionary balancing test to enforce forum-selection agreements that require a federal forum. Issues arose, however, as courts struggled to comprehend *Stewart*'s framework.

The federal circuits divided with respect to the very issues resolved implicitly in *Stewart*, including whether: (A) private forum-selection agreements can render venue improper for purposes of § 1406(a), despite that § 1391(a) governs "venue" in "*all*" federal civil actions; or whether (B) private forum agreements are merely one factor among many the court must weigh for transfer under § 1404(a).[46]

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[42] *Stewart*, 487 U.S. at 29.

[43] *Id.* at 31.

[44] *Id.* at 30 (emphasis added).

[45] *Id.* at 32 (internal quotations omitted).

[46] This arcane question can be broken down as follows: Can a *private* agreement designating a particular federal venue override a federal law that designates expressly the forums in which federal "venue" is proper? And, if the answer is no, what weight, if any, should the court give the parties' valid forum-

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http://lawreview.law.pitt.edu

Litigants were concerned whether courts applied §§ 1406 or 1404 to enforce forum-selection clauses because, among other things, the decision determined whether *Van Dusen v. Barrack*[47] applied. In 1964, the Court in *Van Dusen* held that a transferee court in a § 1404(a) transfer must apply the choice-of-law rules the transferor court would have applied had the case not been transferred. Indeed, *Van Dusen* is justified for § 1404 transfers that *do not* involve forum-selection provisions: A change of venue upon transfer from a *proper* venue "should simply change the courtroom," not "the law to be applied to the merits of the case."[48] Conversely, *Van Dusen* does not apply to § 1406(a) transfers—and rightly so. Mandating that the transferee court apply the law of a transferor court that is an *improper* venue would allow the plaintiff to "capture favorable [law]" therefrom, in promotion of forum shopping.[49]

Problems arose after *Stewart*, however, when courts applied *Van Dusen* to § 1404(a) transfers that *did* involve forum-selection provisions. After *Stewart*, and under *Van Dusen*, plaintiffs had incentive to violate the forum-selection agreements to which they had agreed. Provided the plaintiff sued in a "proper" federal "venue" under § 1391, she could capture the transferor court's choice-of-law rules if the defendant successfully motioned to transfer under § 1404(a).

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selection agreement where one party flouts it and sues in an otherwise "proper" venue not designated in the agreement? With respect to the federal circuit split, see, e.g., Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 534–35 (6th Cir. 2002) ("We recognize that the circuits are not in agreement about whether a claim that an action is filed in a forum other than that designated in a contract's forum selection clause may be raised in a Rule 12(b)(3) motion. . . . In essence, the difference of opinion centers around whether the parties' contractual designation of forum can render the venue dictated by statute 'improper.'"); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289 (11th Cir. 1998) ("[W]e note that some uncertainty exists as to both the appropriate vehicle for motions to dismiss on the basis of forum-selection clauses[.]"); The Hipage Co. v. Access2Go, Inc., 589 F. Supp. 2d 602, 607 (E.D. Va. 2008) (identifying the split); Ambraco, Inc. v. M/V Clipper Faith, C.A. No. 06-99662007, 2007 WL 1550960, at *1 (E.D. La. 2007) (quoting Haynsworth v. The Corporation, 121 F.3d 956, 961 (5th Cir. 1997) (declining to resolve the question on grounds that "the Fifth Circuit has accepted Rule 12(b)(3) as a proper method for seeking dismissal for improper venue based on a forum selection clause"); Kahn v. Am. Heritage Life Ins. Co., C.A. No. 06-01832, 2006 WL 1879192, at *7 (E.D. Pa. 2006); Nebraska Plastics, Inc. v. Holland Colors Americas, Inc., No. 4:01CV603, 2002 WL 1477635, at *2 (D. Neb. 2002); *see generally* 17 MOORE'S FEDERAL PRACTICE § 111.04 (3d ed. 2012) (discussing the federal circuit split).

[47] 376 U.S. 612 (1964).

[48] RICHARD D. FREER, CIVIL PROCEDURE 271 (Vicki Been et al. eds., 3d ed. 2012).

[49] *Id.* at 273.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

Other notable issues arose for litigants seeking to enforce forum-selection agreements. Under *Stewart*'s discretionary "convenience and fairness" test,[50] courts construed forum-selection clauses merely as "significant factor[s]" figuring "centrally" within § 1404(a).[51] When defendants sought to enforce agreements under § 1404(a), district judges, therefore, had near plenary discretion to define what constituted the "fair" and "convenient" circumstances in which a forum-selection provision merited a § 1404(a) transfer. Within *Stewart*'s discretionary framework, some courts concluded that plaintiffs waived the right to contest the "convenience" of venue in the agreed-upon court (i.e., private interest factors) upon the execution of a forum-selection agreement, even though *Stewart* requires the court to weigh public interest factors as well.[52] In assessing whether to transfer under § 1404(a), these courts gave near-dispositive weight to forum-selection agreements, in tacit recognition of contractual freedom. Other courts denied § 1404(a) transfers despite forum-selection agreements on grounds that public interest factors outweighed the defendant's private interest in enforcing the agreement.[53] These courts used a federal procedural rule (§ 1404(a)) to render bargained-for contractual provisions unenforceable, tacitly emphasizing federalism, judicial economy, and jurisdictional uniformity over contractual freedom.

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[50] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988).

[51] *Id.* at 28–29 (emphasis added).

[52] *See, e.g.*, CoStar Realty Info., Inc. v. Field, 612 F. Supp. 2d 660, 673 (D. Md. 2009) ("[A] defendant that has assented to a valid contract cannot preclude enforcement of a valid mandatory [forum-selection] clause by claiming that it would be inconvenient to travel to a different state."); United Consumers Club, Inc. v. Prime Time Mktg. Mgmt., Inc., No. 2:07-CV-358, 2008 WL 2572028, at *3 (N.D. Ind. 2008) ("[W]hen a valid forum selection clause exists the convenience of the parties may not be asserted as grounds supporting a transfer."); Modius, Inc. v. Psinaptic, Inc., No. C 06-02074 SI, 2006 WL 1156390, at *14–15 (N.D. Cal. 2006) (noting that the defendant's convenience counts less when defendant signed a forum-selection clause); Am. Airlines, Inc. v. Rogerson ATS, 952 F. Supp. 377, 384 (N.D. Tex. 1996) (stating that a valid forum selection clause in a contract waives a party's right to contest venue in that forum).

[53] *See, e.g.*, Red Bull Assocs. v. Best W. Int'l, Inc., 862 F.2d 963, 966 (2d Cir. 1988) (denying transfers to a court specified in forum-selection clause based on federal public policy favoring civil rights law enforcement); *CoStar Realty*, 612 F. Supp. 2d at 673 (denying transfer because the chosen forum "was [as] convenient as any other," including the one specified by the forum-selection agreement); IFC Credit Corp. v. Burton Indus., Inc., C.A. No. 04C5906, 2006 WL 1302362, at *4 (N.D. Ill. 2006) (denying transfer on grounds that public and private interest factors outweighed transfer to the selected forum); Mind-Peace, Inc. v. Pharmacon Int'l Inc., No. 2:06CV632, 2006 WL 2849811, at *2 (S.D. Ohio 2006) (denying a motion to transfer to the specified forum when the parties had no connection to the forum and no witnesses resided there).

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http://lawreview.law.pitt.edu

The Court in *Stewart* left other important issues unresolved. The Court did not determine which party bore the burden of proving "fairness and convenience" under § 1404(a). This left open whether district courts were required to place the burden on the defendant—the party seeking to enforce the forum-selection agreement—or the plaintiff—the party seeking to avoid the agreement's enforcement.

In addition, the Court in *Stewart* did not address the procedure by which district courts were to enforce forum-selection provisions specifying *nonfederal* forums, including state and foreign tribunals. This left open whether district courts were required to transfer or dismiss the case under *forum non conveniens* or § 1406(a), or dismiss under Rules 12(b)(3) or 12(b)(6).

These issues divided the federal circuits for nearly two decades, resulting in systemic unpredictability with respect to the enforceability of otherwise valid forum-selection agreements.

V. ENTER *ATLANTIC MARINE CONSTRUCTION*

A. In the District Court

In 2009, the United States Army Corps of Engineers contracted with Atlantic Marine Construction Company ("Atlantic") to build a child-development center at Fort Hood in Killeen, Texas.[54] In 2010, Atlantic subcontracted with J-Crew Management ("J-Crew") for labor and materials for the work required of Atlantic under the prime contract.[55] The subcontract contained a "mandatory" forum-selection clause, under which Atlantic and J-Crew agreed to litigate in either the Circuit Court for the City of Norfolk, Virginia or the United States District Court for the Eastern District of Virginia.[56]

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[54] J-Crew Mgmt., Inc. v. Atl. Marine Const. Co., A-12-CV-228-LY, 2012 WL 8499879, at *1 (W.D. Tex. Aug. 6, 2012).

[55] *Id.*

[56] Brief for Petitioner at 4, Atl. Marine Constr. Co., Inc. v. United States Dist. Court for W. Dist. of Tex., 134 S. Ct. 568 (2013) (No. 12-929). The forum selection clause provided, in pertinent part:

> [J-Crew] agrees that all . . . disputes . . . shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.

J-Crew Mgmt., 2012 WL 8499879, at *1.

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http://lawreview.law.pitt.edu

The relationship fell apart. J-Crew alleged that Atlantic failed to pay for materials and work performed.[57] In violation of the forum agreement, J-Crew sued Atlantic in the United States District Court for the Western District of Texas, seeking damages for breach of the subcontract.[58] Atlantic moved to dismiss under Rule 12(b)(3) on grounds that the forum-selection clause rendered "venue" in the Western District of Texas "wrong" under § 1406(a).[59] Alternatively, Atlantic moved to transfer the case to the Eastern District of Virginia under § 1404(a).[60]

The Texas district court found that the forum-selection clause was "a valid part of the parties' contract" and sought to determine "whether and how" the clause should be enforced: via (A) dismissal or transfer pursuant to § 1406(a) and Rule 12(b)(3) "on the basis of improper venue"; or (B) transfer "for convenience" under § 1404(a).[61] Recognizing that *Stewart* implicitly resolved the issue, the district court applied Fifth Circuit precedent based thereon:

> [The] *type* of forum designated in the forum-selection clause is determinative of whether dismissal or transfer is the proper means of giving effect to the parties' contractual choice of venue. When a forum-selection clause designates a state-court forum, an arbitral forum, or a forum in a foreign country, the proper remedy is dismissal. In such cases, the Fifth Circuit has applied the Supreme Court's ["reasonableness"] rule as stated in [*M/S Bremen*] to determine the enforceability of a forum-selection clause. . . . By contrast, where a forum-selection clause designates a specific federal forum or allows the parties to select the state or federal courts of a different forum, the majority of district courts in this circuit have held that a motion to transfer under [§] 1404(a) is the proper approach. This result finds support in the Supreme Court's decision in [*Stewart*].[62]

[57] *Id.*

[58] *Id.*

[59] *Atl. Marine Constr.*, 134 S. Ct. at 576.

[60] *J-Crew Mgmt.*, 2012 WL 8499879, at *1.

[61] *Id.* at *4.

[62] *Id.* (emphasis added) (internal quotations and citations omitted).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
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Because Atlantic and J-Crew entered into and intended to perform the subcontract in the Western District of Texas, the Texas district court found itself a proper "venue" under § 1391(b)(2).[63]

The Texas district court, then, assessed the weight to be accorded the parties' forum-selection clause for purposes of Atlantic's § 1404(a) motion to transfer. As noted by the district court, and discussed above, the decision to transfer under § 1404(a) is committed "to the *discretion* of the district court," which, under *Stewart*, must weigh private and public interest factors.[64] The Texas district court found that the parties' forum-selection clause was "*only one* such factor" and that Atlantic, "as movant, [bore] the burden of establishing the propriety of transfer."[65]

Take a moment to consider Atlantic's situation at this point in the litigation. Atlantic and J-Crew entered into a valid contract, under which J-Crew agreed to sue in a specific state or federal forum in Virginia. J-Crew *blatantly* breached the agreement by suing in the Western District of Texas, under circumstances that fortuitously rendered the Texas district court a proper "venue" under § 1391. Instead of being required to enforce the valid agreement via transfer, the Texas district court had near plenary discretion to employ, in effect, any rationale it deemed relevant in assessing the "weight" of the agreement within *Stewart*'s § 1404(a) "balancing-of-interests" and "convenience" analysis. Making matters worse for Atlantic, the district court placed the burden of demonstrating the propriety of transfer on *Atlantic*—despite that J-Crew plainly violated their forum-selection agreement.[66]

In accordance with its broad discretion, the Texas district court found that "[a] balancing of the [private and public] interest factors" militated against a § 1404(a) transfer to Virginia[67] because Atlantic had failed to meet its burden. The case, therefore, remained in the Western District of Texas.[68]

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[63] *Id.* at *5.

[64] *Id.* at *5–6 ("In addition to the factors set forth in the statutory text [of § 1404(a)], courts consider a nonexhaustive and nonexclusive list of public and private interest factors, none of which are of dispositive weight.").

[65] *Id.* at *5.

[66] *Id.*

[67] *Id.* at *5–8.

[68] *Id.* at *8.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

B. In the Court of Appeals

Atlantic petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus compelling the Texas district court to dismiss the case or effect transfer to the Virginia district court based upon the forum-selection agreement.[69] The Fifth Circuit denied Atlantic's petition, emphasizing federalism and judicial economy over contractual freedom:

> The core of *Stewart* is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract. Rather the agreement of parties will signify in the district court's allocating decision, tempering the private agreement's reflection of private interests with the public interest attentive to the usual metrics of this case law, such as time to trial and convenience of witnesses.[70]

Circuit Judge Catharina Haynes, in a special concurrence, disagreed and emphasized the principles of contractual freedom:

> Plainly stated, the Supreme Court has made clear that forum-selection clauses are enforceable [under *M/S Bremen* and *Shute*]. The effect of the [Texas] district court's ruling, however, is to make forum-selection clauses enforceable by specific performance only *at the election of the district court*, which is free to render a decision that evades practical review, given our substantial limits on *mandamus* review, and the practical unavailability of review on appeal following final judgment. . . . *We should not leave the enforcement by specific performance of otherwise valid contractual forum-selection clauses to the vicissitudes of virtually unfettered judicial discretion*. Absent some compelling countervailing factor forum-selection clauses such as this one should be and should have been enforced by transfer or dismissal.[71]

In January 2013, Atlantic petitioned the United States Supreme Court for a *writ of certiorari*, presenting the issues whether: (1) *Stewart* "change[d] the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences

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[69] *In re* Atl. Marine Constr. Co., 701 F.3d 736, 738 (5th Cir. 2012).

[70] *Id.* at 743.

[71] *Id.* at 743, 749 (Haynes, J., concurring) (emphasis added) (internal citations omitted).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

analysis" under § 1404(a); and, if so (2) "how should [federal] district courts allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause?"[72] The Court granted Atlantic's petition on April 1, 2013, with oral arguments scheduled for October 9, 2013.[73]

C. In the United States Supreme Court

At oral arguments, Justice Elena Kagan framed the issue in *Atlantic Marine Construction* within the context of *Stewart* and the text of §§ 1404(a), 1406(a), and 1391:

> Section [1391(a)] says the following, "Except as otherwise provided *by law*"—not *by contract*—"*by law*, this section shall govern—*shall* govern—the venue of all—*all* civil actions brought in district courts of the United States." And then [§ 1391(b)] goes on to specify certain rules for where venue in a case can lie. So if I'm looking at that, I'm thinking, well, those rules apply. And they can't be reversed or countermanded . . . by contract, by parties' agreement [with respect to choice of forum] except to the extent that the contract can figure centrally into the [§ 1404(a)] analysis.[74]

Justice Samuel Alito, writing for a unanimous Court, agreed with Justice Kagan and rejected Atlantic's argument that the proper procedure for the enforcement of the forum-selection clause was a motion to dismiss under § 1406(a) and Rule 12(b)(3). In so holding, the Court made explicit *Stewart*'s "implicit" holding, ruling:

> Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is "wrong" or "improper." Whether venue is "wrong" or "improper" depends *exclusively* on whether the court in which the case was brought satisfies the requirements of federal venue laws [under § 1391], and those provisions say nothing about a forum-selection clause. . . . When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be

[72] Petition for Certiorari at i, Atl. Marine Const. Co., Inc. v. United States Dist. Court for W. Dist. of Tex., 134 S. Ct. 568 (2013) (No. 12-929).

[73] Transcript of Oral Argument at 1, Atl. Marine Constr. Co., Petitioner v. United States Dist. Court for the W. Dist. of Tex., 2013 WL 5565509 (U.S.) (U.S. Oral. Arg., Oct. 9, 2013) (No. 12-929).

[74] *Id.* at 8 (emphasis added).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

> dismissed or transferred under § 1406(a). Whether the parties entered into a contract containing a forum-selection clause has *no bearing* on whether a case falls into one of the categories of cases listed in § 1391(b). As a result, a case filed in a district that falls *within* § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3).[75]

The Court held that where a party breaches a *valid*[76] forum-selection clause that points to a specific *federal* forum by suing in an otherwise *proper* federal "venue" (under § 1391) other than that agreed upon, the aggrieved party may seek to enforce the forum-selection clause only by a motion to transfer filed under § 1404(a).[77]

The Court, moreover, rejected the Fifth Circuit's finding that a forum-selection clause specifying a *nonfederal* forum—i.e., a state or foreign forum—should be enforced under Rule 12(b)(3), which permits a party to file a pre-answer motion to dismiss for "improper venue." The Court reasoned that "[i]f venue is proper under [§ 1391], it does not matter for the purposes of Rule 12(b)(3) whether the forum-selection clause points to a federal or a nonfederal forum."[78] The Court, therefore, held that a litigant seeking to enforce a forum-selection provision that specifies a state or foreign forum may seek transfer only under *forum non conveniens*, a common law doctrine permitting transfer to a more convenient forum.[79] In terms of practical application, the Court noted that because "both § 1404(a) and *forum non conveniens* entail the same balancing-of-interests standard," district judges must evaluate forum-selection clauses requiring nonfederal forums "in the same way" they evaluate forum-selection clauses requiring federal forums: by examining public and private interest factors.[80] The Court rejected the Fifth Circuit's application of *M/S Bremen*'s "reasonableness" test to enforce state or foreign forum-selection clauses.

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[75] *Atl. Marine Constr.*, 134 S. Ct. at 577 (emphasis added).

[76] *See id.* at 581 n.5 (noting that the Court's analysis presupposed a contractually valid forum-selection clause).

[77] *Id.*

[78] *Id.* at 580.

[79] *Id.*; *see generally* Markus Petsche, *A Critique of the Doctrine of* Forum Non Conveniens, 24 FLA. J. INT'L L. 545, 547 (2012) (for an excellent discussion of the history and use of the doctrine).

[80] *Atl. Marine Constr.*, 134 S. Ct. at 580.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

Finally, the Court addressed the weight to be accorded a forum-selection clause within the § 1404(a) or *forum non conveniens* transfer analysis. The Court held that where a defendant files a motion to transfer based upon a valid forum-selection clause, the district court "should *ordinarily* transfer the case to the forum specified" and should deny transfer "[o]nly [where] *extraordinary circumstances* unrelated to the convenience of the parties *clearly* disfavor a transfer."[81] In terms of practical application, the Court clarified that:

> In the typical case *not* involving a forum-selection clause, a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate *both* the convenience of the parties [i.e., the private interest factors] and various public-interest considerations . . . [to] decide whether, on balance, a transfer would serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice."[82]

According to the Court, however, the calculus changes where a "valid" forum-selection clause is present, "which 'represents the parties' agreement'" with respect to the "most proper forum." In so holding, the Court sought to balance the principles of federalism with contractual freedom:

> The enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. For that reason, and because the overarching consideration under § 1404(a) [and *forum non conveniens*] is whether a transfer would promote "the interest of justice," a valid forum-selection clause *should be given controlling weight in all but the most exceptional cases*. . . .[83]

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[81] *Id.* at 575, 581; *see also id.* at 579 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)) (noting that "a proper application of § 1404(a) requires that a [valid] forum-selection clause be 'given controlling weight in all but the most *exceptional* cases'") (emphasis added).

[82] *Id.* at 581 (emphasis added).

[83] *Id.* (emphasis added). The Court also noted, in tacit support of contractual freedom, that:

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

The Court, therefore, held that the presence of a *valid* forum-selection clause "requires" the district courts to adjust the "usual" § 1404(a) or *forum non conveniens* transfer analysis in three ways.[84]

First, if a *valid* forum-selection clause is present, the plaintiff's choice of forum "merits *no weight*" as it normally would for a motion to transfer under the "plaintiff's venue privilege," as expounded upon in *Van Dusen*. Rather, "as the party defying the forum-selection clause," the *plaintiff* "bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted."[85]

Second, the presence of a *valid* forum selection clause now prohibits the district court from "consider[ing] arguments about the parties' *private interests*" when evaluating a defendant's § 1404(a) or *forum non conveniens* motion to transfer, on grounds that: "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation."[86]

District courts must now "deem the private-interest factors to weigh *entirely* in favor" of the forum specified by the contract because "[w]hatever inconvenience [the parties] would suffer by being forced to litigate in the contractual forum" agreed upon was "clearly foreseeable at the time of contracting."[87] District judges, therefore, "may consider arguments about *public*-interest factors *only*," and because those factors "rarely defeat a transfer motion," the "practical result" is that

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> unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

Id. at 583.

[84] *Id.* at 581.

[85] *Id.* at 581–82 (emphasis added). With respect to this first change, the Court reasoned:

> [W]hen a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its "venue privilege" before a dispute arises. Only that initial choice deserves deference, and the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed.

Id. at 582.

[86] *Id.* (emphasis added).

[87] *Id.* (emphasis added).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

"forum-selection clauses *should* control except in *unusual cases*."[88] The Court emphasized that although it is "conceivable in a particular case" that the district court could "refuse to transfer a case notwithstanding the counterweight" of a forum-selection provision, "such cases will not be common."[89]

Third, and finally, where a party to a valid forum-selection clause violates its contractual obligation by filing suit in a different, yet "proper," federal "venue," a § 1404(a) transfer "will not carry with it the original venue's choice-of-law rules" as would otherwise have been required by *Van Dusen*.[90] The district court in the contractually-selected venue, therefore, "[must] not apply the law of the transferor venue" upon a § 1404(a) transfer.[91] The Court did not address choice-of-law within the context of a *forum non conveniens* transfer, where *Van Dusen* does not apply.

With these new principles established, the Court reversed the Fifth Circuit's decision and remanded the case to the Texas district court to consider transfer to Virginia under § 1404(a), noting that "no public-interest factors that might support the denial of [Atlantic's] motion to transfer" seemed apparent from the record before it.[92]

VI. THE IMPLICATIONS OF *ATLANTIC MARINE CONSTRUCTION*

As discussed throughout this Note, the enforcement of forum-selection agreements involves, at its heart, an enduring dilemma between the right of private parties to contract and the principles of federalism, judicial economy, and jurisdictional uniformity. The United States Supreme Court has emphasized repeatedly that the enforcement of valid forum-selection clauses protects the parties' legitimate expectations and furthers the nation's justice and economic systems. At the same time, however, allowing a *private* agreement to render improper what Congress expressly deemed proper would undermine the constitutional provision for a federal court system, which carries with it congressional power to make rules governing the practice and procedure of the federal courts. As stated, there is no easy way to plot a path through the murk.

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[88] *Id.* (emphasis added).

[89] *Id.*

[90] *Id.* at 582–83.

[91] *Id.*

[92] *Id.* at 584.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

Questions remain, however. Did the Court do enough in *Atlantic Marine Construction* to protect *both* the right to contract and the principles of federalism, judicial economy, and uniformity? What practical effect will *Atlantic Marine Construction* have for judges and practitioners with respect to the enforceability of forum-selection provisions?

Without doubt, the Court in *Atlantic Marine Construction* sought first to protect the principles of federalism. The Court held unanimously that private agreements cannot circumvent congressional venue law (i.e., § 1391)—and rightly so. The Constitution's creation of the federal court system, at its most fundamental level, demands such a result. If a private agreement had power to alter express congressional pronouncements with respect to "venue," litigants would likely argue that private agreements have power to alter *other* federal (or state) statutory mandates—perhaps both procedural and otherwise.[93] Such a finding would have been untenable for this reason.

But did the Court do enough to protect contractual freedom with respect to choice-of-forum? The answer to this question will depend upon how the lower courts construe the word "valid" as applied in *Atlantic Marine Construction*. Indeed, it is imperative to remember that the Court decided *Stewart* and *Atlantic Marine Construction* with the presumption that the underlying forum-selection clause was "valid" and enforceable against the parties.[94] The issue in *Atlantic Marine Construction* was, therefore, merely the *procedure* by which a litigant who seeks to enforce such a "valid" clause must proceed. This is reflected in the first sentence of the Court's opinion, which states: "[t]he question in [*Atlantic Marine Construction*] concerns the *procedure* that is available for a *defendant* in a civil case who seeks to enforce a forum-selection clause."[95] This language must guide judges and litigants in interpreting and arguing *Atlantic Marine Construction*—a case that does not speak, in any capacity, to the *substance* by which federal courts must measure the "validity" of a challenged forum-selection agreement.

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[93] Speculation with respect to specific examples of such cases is beyond the scope of this Note.

[94] In *Atlantic Marine Construction*, "there was no dispute that the forum-selection clause was *valid*," and the Court was meticulous in specifying that its holding was that a district court should transfer a case "[w]hen the parties have agreed to a *valid* forum-selection clause." *See Atl. Marine Constr. Co.*, 134 S. Ct. at 576–84 (emphasis added) (qualifying "forum-selection clause" with the word "valid" twelve times).

[95] *Id.* at 575 (emphasis added).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

What, then, constitutes a "valid" forum-selection clause in the wake of *Atlantic Marine Construction*? Unfortunately, the Court failed to even *hint* at the answer, and this question will likely produce the next circuit split (and Supreme Court resolution thereof) with respect to the enforceability of forum-selection agreements.

One theory is that a "valid" forum-selection provision is one that is "reasonable," as defined by *M/S Bremen* and *Shute*, both of which (presumably) still mean something with respect to the preliminary substantive assessment of whether to enforce a forum-selection clause. Alternatively, however, some posit that "validity" translates to enforceability under *state* contract law.[96]

Neither answer is correct, however, given the pronouncements of *Stewart*, and *Atlantic Marine Construction*'s extensive endorsement thereof.[97] As discussed above, the Court in *Stewart* rejected *M/S Bremen*'s "reasonableness" test to enforce the forum-selection clause at issue, concluding that "the first question" should have been whether § 1404(a) controlled.[98] *Atlantic Marine Construction* reaffirmed *Stewart* and merely explicated the bounds of the § 1404(a) framework further. Confusingly, however, the *Stewart* Court also noted that *M/S Bremen* "may prove *instructive* in resolving the parties' dispute."[99] Unfortunately, *Atlantic Marine Construction* did not clarify in what capacity *M/S Bremen* is "instructive" with respect to the substantive enforcement of forum-selection provisions.

With respect to whether state contract law defines "validity," it is imperative to note that *Stewart* merely required the Alabama district court to "integrate" into

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[96] For instance, in the Texas district court, J-Crew argued unsuccessfully that Texas law—which provides that a forum-selection clause that makes any conflict arising under the contract subject to litigation in the courts of another state is "voidable by the party obligated by the contract to perform the construction or repair"—rendered the parties' forum-selection clause void. *See J-Crew Mgmt.*, 2012 WL 8499879, at *2 (citing TEX. BUS. & COMM. CODE §§ 272.001(a), (b) (2012)). The Court in *Atlantic Marine Construction* did not discuss this issue further.

[97] *See, e.g.*, *Atl. Marine Constr. Co.*, 134 S. Ct. at 579 (expressing concern that a "contrary view would all but drain *Stewart* of any significance").

[98] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988).

[99] *Id.* at 28. The only explanation the Court offered in *Stewart* was that "federal common law developed under admiralty jurisdiction [is] not freely transferable to [a] diversity setting." *Id.* (citing Tex. Indus. Inc. v. Radcliff Materials, Inc., 541 U.S. 630, 641–42 (1981)). In *Stewart*, Justice Anthony Kennedy noted, in his concurrence, that the justifications of *M/S Bremen* should "guide" the district court's analysis under § 1404(a), a proposition directly at odds with the majority in *Stewart*. *Id.* at 33 (Kennedy, J., concurring).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

"its weighing of" the "interest[s] of justice" under § 1404(a) the fact that Alabama law "categorical[ly]" disfavored forum-selection clauses.[100] The *Stewart* Court noted that its "determination that § 1404(a) govern[ed] the parties' dispute," despite "any contrary Alabama policy," made it "unnecessary to address the contours of state law."[101] Regrettably, *Atlantic Marine Construction* left *Stewart*'s pronouncement that state law is "unnecessary" untouched—and it is still good law with respect to the "validity" of forum-selection provisions.

It appears, then, that *Atlantic Marine Construction* left the definition of "validity" to the federal circuit courts. Litigants arguing forum-selection agreements should, therefore, expect and prepare for the unexpected with respect to the standards by which the district courts deem their agreements "valid" after *Atlantic Marine Construction*.

Despite that *Atlantic Marine Construction* failed to define "validity," litigants will undoubtedly cite the case for its strong proposition that forum-selection clauses "should be given controlling weight in all but the most exceptional cases," without first addressing the "validity" of the agreement at issue.[102] Courts and litigants must remember, however, that *Atlantic Marine Construction*'s "exceptional cases" language has meaning *only* within the context of a § 1404(a) or *forum non conveniens* transfer analysis, arising: (1) after the forum-selection clause has been deemed "valid" and enforceable under the law of the applicable circuit; *and* (2) after the plaintiff breached the "valid" agreement by suing in a *proper*

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[100] *Id.* at 30.

[101] *Id.* at 30 n.9.

[102] In fact, some have already done so. *See, e.g.*, James E. Goldschmidt, *Near-Absolute Choice of Forum: Supreme Court Further Strengthens Forum Selection Clauses*, COMM. LITIG. LAW UPDATE (Dec. 2013), http://www.quarles.com/publications/near-absolute-choice-of-forum-supreme-court-further-strengthens-forum-selection-clauses/ (noting that, in "[t]urning from statutory venue provisions to contractual forum selection clauses," the Court "stressed that forum selection clauses represent 'bargained for' rights of the parties and the parties' 'legitimate expectations' must be respected, except in the 'most exceptional cases,'" thereby "strengthen[ing] the enforceability of such clauses and reinforce[ing] their importance in contract negotiations"). Courts have already expressed concern and confusion over "validity" after *Atlantic Marine Construction*. *See, e.g.*, Bright v. Zimmer Spine, Inc., 14-CV-00095-WMA, 2014 WL 588051, at *2 (N.D. Ala. Feb. 14, 2014) (noting that "[d]efendant undoubtedly feels that [*Atlantic Marine Construction*'s] recentness, unanimity, and enthusiasm in endorsing contracted for expectations combine to remove any question that might linger about the irresistible power of a forum-selection clause. Instead, [that case] only renews this court's discomfort with the *Stewart* cases"; but granting § 1404(a) transfer because the court would not "pursue the subject so far as to hold that [*Atlantic Marine Construction*] has implicitly overruled or narrowed the import of *Stewart*, especially when *Atlantic Marine Construction* cites *Stewart* extensively and with approval").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2014.325
http://lawreview.law.pitt.edu

federal "venue" under § 1391. Where these elements are present, *Atlantic Marine Construction* is operative, and either § 1404(a) or *forum non conveniens* provides the proper procedural mechanism by which a defendant must seek to enforce the agreement. Without both of these elements, however, *Atlantic Marine Construction* does not apply and should not be cited as a substantive standard by which the forum-selection provision is deemed "valid."

VII. THE CORRECT APPROACH TO "VALIDITY": STATE LAW AND BIFURCATION

To recap, *Atlantic Marine Construction* successfully addressed *Stewart*'s overly broad grant of judicial discretion under § 1404(a) but failed to define contractual "validity." The Court's repeated references to "validity" will likely divide the lower courts. The fairest approach to determining whether a forum-selection clause is "valid" (which must be done before determining the appropriate *procedural* mechanism under *Atlantic Marine Construction*) is a bifurcated approach espoused (but not applied) by United States District Judge William Marsh Acker Jr. of the Northern District of Alabama:

> If a court must determine that a forum-selection clause is "valid" before the clause is enforced with a § 1404 transfer order, [which it must do under the implicit holding of *Atlantic Marine Construction*,] it follows that the court must look to *state contract law* to determine the *validity* of the clause *before* it applies § 1404. In such a case, the state issue is *first* and *separate* from the federal issue [of transfer under *Atlantic Marine Construction*], and federal law could not be said to preempt applicable state law. Under such circumstances there should be no question that courts must apply state law pursuant to the "twin aims of *Erie*" test, under which a court cannot apply a federal rule if doing so would encourage forum shopping or produce inequitable administration of the law.[103]

If, after applying state law, the district court deems the contract "valid," it should apply *Atlantic Marine Construction* to test the propriety of transfer (as opposed to the "validity" of the contract itself) under either § 1404(a) or *forum non conveniens*, under which a valid forum-selection agreement should, of course,

[103] *Bright*, 2014 WL 588051, at *2 (citing *Stewart*, 487 U.S. at 33–41) (Scalia, J., dissenting) (analyzing a forum-selection clause under *Erie* and concluding that "[t]he Eleventh Circuit's rule clearly encourages forum shopping . . . [because] suit might well not be pursued, or might not be as successful, in a significantly less convenient forum," and that the rule "allow[s] an unfair discrimination between noncitizens and citizens of the forum state")).

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control in all but the most exceptional cases. There, the "protection of legitimate interests" and "foreseeability" rationales underlying the very notion of forum-selection provisions operate: The bargained-for contract is "valid" and enforceable against the parties under the only substantive law that governs (most) private contracts—*state* law.

If, however, after applying state law, the district court deems the forum-selection agreement *invalid* and unenforceable under state law, it, of course, merits no weight within *Atlantic Marine Construction*'s procedural transfer analysis. In such a case, the rationales underlying forum-selection provisions do not operate: The contract is legally deficient under substantive state law, "invalid," and unenforceable against the parties.

VIII. CONCLUSION: OVERTURN *STEWART*

Application of the bifurcated approach set forth above would require the Court to overturn *Stewart*—which held broadly, and without practical clarification, that federal law alone governs a district court's decision "to give effect" to forum-selection provisions. While *Atlantic Marine Construction* (ostensibly) provides better protection for "valid" forum-selection clauses under certain circumstances, the Court must clarify what constitutes a "valid" clause to truly protect the legitimate expectations of contracting parties. Such a clarification would require the Court to overturn *Stewart*—a case that continues to muddle the enforceability of forum-selection provisions in federal courts more than two decades after its resolution.

If this bifurcated approach is conflated into one step—under which *Atlantic Marine Construction* is applied without first assessing the "validity" of the forum-selection provision under state law—district judges will *again* have near plenary discretion to employ, in effect, any rationale they deem relevant in assessing the "weight" and "fairness" of the (purported) agreement within *Atlantic Marine Construction*'s framework. Under such an approach, judges will be free to enforce or invalidate state law-controlled forum-selection provisions by way of purely *procedural* mechanisms (i.e., § 1404 or *forum non conveniens*), without first assessing the contract's *substantive* validity, provided they deem their own decision in the "interest of justice"—a quintessentially amorphous and subjective standard.

Litigants should, therefore, be weary of viewing *Atlantic Marine Construction* as a victory in support of forum-selection provisions (and contractual freedom in general) until the Court resolves the issues set forth in this Note. Litigants attempting to enforce forum-selection agreements in federal court should continue to seek to establish the validity of their contracts under state law (under *Erie*)—only after which should they argue that *Atlantic Marine Construction* mandates enforcement by way of § 1404 or *forum non conveniens*. Unfortunately, it will take

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time (and client and judicial resources) before the Court is faced with the opportunity to settle the issues created by *Stewart* and left unresolved by *Atlantic Marine Construction*. With any luck, such an opportunity will arise sooner rather than later.

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