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# FORUM SELECTION CLAUSES IN DIVERSITY ACTIONS

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Forum selection clauses in diversity actions pose several dilemmas for practitioners in the Seventh Circuit. Specifically, the Seventh Circuit has not squarely ruled whether a court should utilize federal or state law in determining if a forum selection clause is enforceable in an action based on diversity jurisdiction. While the Seventh Circuit has approved the use of either § 1404(a) or Federal Rule of Civil Procedure 12(b)(3) to enforce a forum selection clause, there is considerable confusion amongst the Circuits regarding which mechanism is appropriate to enforce a forum selection clause in a diversity action when the action has been filed in a jurisdiction other than the one agreed on by the parties.

## I. DETERMINING WHAT LAW APPLIES

### A. *Historical Perspective*

#### 1. *M/S Bremen v. Zapata Off-Shore Co.*

Prior to 1972, courts largely rejected forum selection clauses.<sup>1</sup> Then in 1972, the tide changed; the Supreme Court rendered its opinion in *M/S Bremen v. Zapata Off-Shore Co.*<sup>2</sup>

In *Bremen*, a Houston-based company, Zapata, contracted with a German corporation, Unterweser, to tow its rig from Louisiana to Italy.<sup>3</sup> The contract provided that “[a]ny dispute arising [from this contract] must be treated before the London Court of Justice.”<sup>4</sup> When Unterweser’s sea tug, The Bremen, towed the rig, it caused significant damage to Zapata’s rig.<sup>5</sup> Consequently, Zapata requested The Bremen to tow the damaged rig to the nearest port: Tampa, Florida.<sup>6</sup>

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1. Julia L. Erickson, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1094 (1988); Leandra Lederman, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 427-28 (1991).

2. 407 U.S. 1 (1972).

3. *Bremen*, 407 U.S. at 2.

4. *Id.*

5. *Id.* at 3.

6. *Id.*

Shortly thereafter, Zapata filed suit in admiralty against Unterweser and The Bremen in the district court in Tampa, Florida seeking \$3.5 million in damages for negligent towage and breach of contract.<sup>7</sup> In response, Unterweser moved to dismiss the suit for lack of jurisdiction and for forum non conveniens or in the alternative, moved to stay the action until it was submitted to the "London Court of Justice" as required by the parties' agreement.<sup>8</sup>

In upholding the forum selection clause in the parties' agreement, the Supreme Court held that forum selection clauses in admiralty are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."<sup>9</sup> Since the decision, courts have only refused to enforce forum selection clauses under very specific circumstances: "(1) fraud[;] (2) the nature of the relationship between the parties[;] . . . (3) the nature of the contractual forum[;] (4) the clause violates public policy of the forum state; (5) statutory restrictions on forum-selection clauses[, and] (6) . . . the contractual forum is inconvenient."<sup>10</sup>

## 2. *Stewart Org., Inc. v. Ricoh Corp.*

After *Bremen*, the Supreme Court again evaluated the enforceability of a forum selection clause in *Stewart Org., Inc. v. Ricoh Corp.*<sup>11</sup> In *Stewart*, the parties entered into a contract containing a forum selection clause, which required the parties to bring all disputes resulting from the contract in Manhattan, New York.<sup>12</sup> After a dispute arose, the plaintiff, Stewart, sued the defendant, Ricoh, in the Northern District of Alabama alleging, among other things, breach of contract.<sup>13</sup> Shortly thereafter, Ricoh moved pursuant to 28 U.S.C. § 1404(a) to transfer the case to the Southern District of New York, or alternatively, to dismiss the action pursuant to § 1406(a).<sup>14</sup> In denying the motion, the district court held that Alabama law, which disfavors forum selection clauses, controlled the enforceability of the forum selection clause.<sup>15</sup> On appeal, the Eleventh Circuit reversed the district court's ruling and held that federal law governs venue questions in diversity cases and, therefore, under federal law, the forum selection clause was enforceable.<sup>16</sup>

On certiorari, the Supreme Court affirmed the Eleventh Circuit's holding, but provided a different analytical framework.<sup>17</sup> The court noted that the decision to apply a federal statute, such as § 1404(a) in a diversity

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7. *Id.* at 3-4.

8. *Id.* at 4.

9. *Id.* at 10.

10. Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 164 (1982).

11. 487 U.S. 22 (1988).

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

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 25.

17. *Id.*

action, involves less analysis than an *Erie* decision.<sup>18</sup> The Court offered the following analytical framework for lower courts to follow. First, a court must determine if the statute is “sufficiently broad to control the issue before the Court.”<sup>19</sup> If the federal law controls, the district court must then determine whether, under the Constitution, the law was enacted using a valid exercise of Congressional authority.<sup>20</sup> Finally, if Congress enacted the law properly, then the court must apply the federal law or rule.<sup>21</sup> Consequently, “a district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress’ constitutional powers.”<sup>22</sup>

As a result, the Court determined that § 1404(a) and not state law controlled the parties’ forum selection clause<sup>23</sup> because “Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command.”<sup>24</sup>

### B. *What law applies?*

Since *Bremen* was an admiralty case, it may not bind federal courts in other areas of law. Nonetheless, federal courts have applied *Bremen* to determine the enforceability of forum selection clauses in various diversity cases. Some courts hold *Bremen* applies when there is no conflict between state and the federal law, as existed in *Bremen*.<sup>25</sup> Others apply *Bremen* even when federal and state law conflict.<sup>26</sup>

Conversely, a few courts have held that state law governs the enforceability of forum selection clauses in diversity cases where federal and

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18. *Id.* at 26 (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)).

19. *Id.* (citing *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)). The Court noted that “[t]his question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute.” *Id.* at 26-27.

20. *Id.* at 27 (citing *Hanna*, 380 U.S. at 471).

21. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)). However, “[w]hen a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, [the Supreme Court] and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.” *Id.* (quoting *Hanna*, 380 U.S. at 471).

22. *Id.*

23. *Id.* at 32.

24. *Id.* at 31.

25. *Erickson*, *supra* note 1, at 1096. Despite holding that state law applies, some courts follow *Bremen* when state law and federal law are the same. *See Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 344 (3rd Cir. 1966) (holding that there is no need to decide which law to follow since federal and state law recognize the same principle); *ECC Computer Ctrs. of Ill., Inc. v. Entre Computer Ctrs., Inc.*, 597 F. Supp. 1182 (N.D. Ill. 1984) (holding *Bremen* applied since the federal and state rules are not significantly different); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1143 (W.D. Va. 1979) (finding that *Bremen* applied since state law conformed with federal law).

26. *Erickson*, *supra* note 1, at 1096.

state law conflict.<sup>27</sup> However, in those cases, the issue is further complicated where the parties have a choice of law clause in addition to a forum selection clause.<sup>28</sup>

The Supreme Court has yet to provide a definitive resolution of *Erie* issues, which has divided the commentators and split the circuits.

### 1. State Law Governs

Federal common law developed under admiralty jurisdiction is not freely transferable to the diversity setting.<sup>29</sup> Accordingly, *Bremen* may not always apply, especially in those cases where diversity forms the basis of the federal court's jurisdiction.

In diversity cases, *Erie Railroad Co. v. Tompkins*<sup>30</sup> and its progeny directly address conflicts between federal and state law. *Erie* held that federal courts deciding cases based on diversity jurisdiction must apply state law to substantive issues and abolished general federal common law.<sup>31</sup> Subsequently, the Court in *Hanna v. Plumer*<sup>32</sup> held that where there is a direct conflict between a federal procedural rule and a state rule, the federal rule governs.<sup>33</sup> The Court further noted that when no federal procedural rule is on point, courts should apply the outcome-determinative test with the goals of "discouragement of forum-shopping and avoidance of inequitable administration laws."<sup>34</sup> Therefore, under *Erie*, in a diversity case, a court must apply a valid federal procedural rule when it directly conflicts with a state rule.<sup>35</sup> However, where procedure and substance cannot be distinguished, federal law only replaces state law "if the federal interest is strong and the federal law does not alter the outcome of the case in a manner that encourages forum shopping or . . . results in the inequitable administration of the laws."<sup>36</sup>

Some courts have held that state law applies on the question of whether federal or state law governs the enforceability of a forum selection clause.<sup>37</sup> Specifically, the Third and Eighth Circuits have held that forum selection clauses are substantive, and therefore, state law applies.<sup>38</sup> While the Seventh

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27. *Id.* at 1096-97.

28. See Gruson, *supra* note 10, at 155-56 (discussing the effects of choice of law clauses on the enforceability of forum selection clauses).

29. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) (noting that admiralty law is limited to the federal common law).

30. 304 U.S. 64 (1938).

31. *Id.* at 78.

32. 380 U.S. 460 (1965).

33. *Hanna*, 380 U.S. at 471-74.

34. See *Stewart*, 487 U.S. at 27, n.6.

35. *Erickson*, *supra* note 1, at 1101 (paraphrasing *Hanna*, 380 U.S. at 470).

36. *Id.*

37. *E.g.*, *Leaswell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011 (S.D. W. Va. 1976) (assuming state law controlled); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 3 (S.D.N.Y. 1974) (applying the state law regarding forum selection clauses); *Lev v. AAMCO Automatic Transmissions, Inc.*, 289 F. Supp. 669 (E.D.N.Y. 1969) (holding that the law of the forum state applies in deciding the validity of a forum selection clause).

38. *Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir.

Circuit has not directly ruled on this issue, Judge Adelman in the Eastern District of Wisconsin, suggested in *McCloud Construction, Inc. v. Home Depot USA, Inc.*,<sup>39</sup> that state law should apply.

In *McCloud*, the parties entered into an agreement that included the following provision: “the law of the State of Georgia shall control and any civil action in furtherance thereof shall be brought in either the U.S. District Court for the Northern District of Georgia, Atlanta Division, or the Superior Court of Cobb County, Georgia.”<sup>40</sup> Thereafter, the plaintiff brought a breach of contract action in a Wisconsin state court against Home Depot.<sup>41</sup> Home Depot removed the action to a federal court based on diversity jurisdiction<sup>42</sup> and then moved to dismiss the action for improper venue, or in the alternative, sought to have the case transferred to the Northern District of Georgia.<sup>43</sup> Opposing the motion, the plaintiff argued that the forum selection clause violated the public policy of Wisconsin because state law voids “provisions . . . requiring any litigation, arbitration or dispute resolution process on the contract occur in another state,” and therefore, the clause was invalid.<sup>44</sup>

In analyzing what law applied to the motion to dismiss, the Court undertook an *Erie* analysis and found that *Hanna* set forth the appropriate analysis to decide whether state or federal law applied.<sup>45</sup> After reviewing (1) “how tightly or loosely the state law [was] bound . . . with the definition of the rights and obligations of the parties;”<sup>46</sup> (2) “whether federal law would be outcome determinative;”<sup>47</sup> and (3) the state concerns in comparison to factors favoring the application of federal law, the Court concluded “that state law should determine whether the . . . forum selection clause is enforceable.”<sup>48</sup>

#### a. Conflict of Law Provisions

An important question in diversity actions is what law applies. The choices available are the law of the forum, the law set forth in the contract, or the law as determined by the forum’s conflict of laws rules. Despite the

1986) (applying state law); *Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357 (3rd Cir. 1986) (holding that commercial contracts do not need federal substantive law to govern their interpretation, therefore, state law applied). *But see* *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (applying federal law); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147 (S.D. Tex. 1979) (applying federal law).

39. 149 F. Supp. 2d 695 (E.D. Wis. 2001). *But see* *Indymac Mortgage Holdings, Inc. v. Reyad*, 167 F. Supp. 2d 222, 243 (D. Conn. 2001) (applying Rule 12(b)(6) in part because the parties agreed that the rule applied to the forum selection clause).

40. *McCloud*, 149 F. Supp. at 697.

41. *Id.* at 696.

42. *Id.*

43. *Id.* at 697.

44. *Id.* (quoting WIS. STAT. ANN. § 779.135(2) (West Supp. 2000)).

45. *Id.* at 699-700.

46. *Id.* at 700 (citing *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 535-36 (1958)).

47. *McCloud*, 149 F. Supp. at 1077 (citing *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

48. *Id.*

choices, most courts apply the law set forth in the contract to determine whether the forum selection clause is enforceable.<sup>49</sup> However, in some circumstances, the law set forth in the parties' agreements offends the public policy of the forum and should not be employed.<sup>50</sup>

## 2. Federal Law Governs

Other circuits treat forum selection clauses in diversity cases as procedural matters and therefore apply federal common law to determine their validity.<sup>51</sup> In some cases, courts have applied federal law because there was no dispute between the parties as to whether federal law applied<sup>52</sup> or because the application of federal or state law would produce the same result.<sup>53</sup> However, courts have suggested that federal law should determine the enforceability of forum selection clauses in all cases involving international transactions.<sup>54</sup>

### C. Seventh Circuit Decisions

The Seventh Circuit has not yet resolved the question of what law applies in evaluating the enforceability of a forum selection clause in diversity actions. The Court has issued several rulings relating to forum selection clauses, but has not made a clear indication as to what law it would apply in a diversity action where there is a forum selection clause.

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49. Gruson, *supra* note 10, at 186.

50. *McCloud*, 149 F. Supp. 2d at 701.

51. See *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 497 (9th Cir. 2000) (holding federal law governs the effect of forum selection clauses in diversity cases); *Nauert v. Nava Leisure USA, Inc.*, No. 99-1073, 2000 U.S. App. LEXIS 6862, at \*8 (10th Cir. Apr. 14, 2000) (finding that a motion to dismiss based on a forum selection clause is analyzed in the same way other motions to dismiss are); *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997) (holding that federal law applies to whether a case should be dismissed); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 115 (5th Cir. 1996) (joining other courts that hold federal law applies transfers and dismissals based on forum selection clauses); *Royal Bed & Spring Co., Inc. v. Famossul Industria e Comercio de Movies Ltd.*, 906 F.2d 45, 50 (1st Cir. 1990) (holding that federal principles govern forum non conveniens); *Jones v. Weinbrecht*, 901 F.2d 17, 19 (2nd Cir. 1990) (deciding that venue and the enforceability of forum selection clauses are procedural questions); *Sun World*, 801 F.2d at 1069 (holding that forum selection is a procedural matter).

52. *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 498 (10th Cir. 2002); *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1293 n.5 (3rd Cir. 1996).

53. *Baker v. Leboeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1105 (6th Cir. 1997); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995); *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1098 n.3 (6th Cir. 1994); *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487, 488-89 (6th Cir. 1992).

54. *MacPhail v. Oceanering Int'l Inc.*, 302 F.3d 274, 278 (5th Cir. 2002) (holding "that federal courts must presumptively uphold forum selection clauses in international transactions"); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993) (holding that forum selection clauses in international agreements is governed by *Bremen*).

1. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*

In *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*,<sup>55</sup> the defendant, Midwhey Powder Company (Midwhey), entered into an agreement with the engineering firm, Edward & Lee, to purchase a system which processed untreated whey.<sup>56</sup> In order to finance the transaction, Edward & Lee suggested that Midwhey use Heller Financial, Inc. (Heller), which resulted in Midwhey entering into a progress payment agreement (Agreement) and an equipment lease (Lease) with Heller.<sup>57</sup> Under the terms of the Agreement, Heller was to advance money to Edward & Lee at Midwhey's authorization and if Midwhey did not accept the equipment, Heller could demand that it repay the amount of all advances made plus any interest.<sup>58</sup>

Conversely, the Lease only became effective if Midwhey accepted the equipment.<sup>59</sup> The lease required Midwhey to "submit at Heller's election to the exclusive jurisdiction and venue of any courts federal, state, or local, having a situs within Illinois with respect to any dispute, claim, or suit whether directly or indirectly arising out of or relating to [the] lease or Midwhey's obligations;" and provided that the Lease would be governed by Illinois law.<sup>60</sup>

After Midwhey did not accept the equipment and refused to repay Heller, Heller filed suit in federal court in the Northern District of Illinois alleging that Midwhey breached both the Agreement and the Lease.<sup>61</sup> Midwhey moved to dismiss the case for lack of personal jurisdiction or in the alternative, moved to transfer the case to another venue.<sup>62</sup>

In affirming the district court's denial of the motion to dismiss, the Seventh Circuit relied on federal law and noted that "[i]n the commercial context, parties, for business or convenience reasons, frequently 'stipulate in advance to submit their controversies for resolution within a particular jurisdiction.'"<sup>63</sup> As a result, the Court concluded that a forum selection clause should control unless there is a "strong showing that it should be set aside."<sup>64</sup>

2. *Northwestern National Insurance Co. v. Donovan*

In *Northwestern National Insurance Co. v. Donovan*,<sup>65</sup> the Court, in dicta, addressed the question of what law applies to forum selection clauses. Plaintiff appealed the district court's dismissal of its breach of contract

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55. 883 F.2d 1286 (7th Cir. 1989).

56. *Heller*, 883 F.2d at 1288.

57. *Id.*

58. *Id.* at 1288-89.

59. *Id.* at 1289.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1290 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)).

64. *Id.* at 1290-91 (citing *Breman*, 407 U.S. at 15).

65. 916 F.2d 372 (7th Cir. 1990).

actions for lack of personal jurisdiction.<sup>66</sup> In the parties' agreements, defendants consented to a forum selection clause dictating Wisconsin as the place for any suit.<sup>67</sup> In their arguments to the Court, both parties asserted that federal common law applied.<sup>68</sup> Agreeing, the Court noted that "the issue of validity [of a forum selection clause] is one of federal law, though . . . litigants are . . . permitted to designate what law shall control their case."<sup>69</sup> In enforcing the clause, the Court noted the existence of the split between the Circuits and suggested that *Stewart* should resolve this split.<sup>70</sup>

### 3. *Paper Express, Ltd. v. Pfankuch Maschinen GMBH*

In *Paper Express, Ltd. v. Pfankuch Maschinen GMBH*,<sup>71</sup> the plaintiff brought an action in federal court against the defendant for breach of warranty.<sup>72</sup> After which, the defendant moved to dismiss the complaint for improper venue relying on the forum selection clause in the relevant transactional documents exchanged between the parties.<sup>73</sup> The relevant clause provided that "the supplier's principal place of business [was] the forum for resolving all contractual disputes; in this case that would be Ahrensburg, the town in northern Germany where Pfankuch [was] located."<sup>74</sup>

Before addressing the validity of the forum selection clause, the Seventh Circuit first analyzed whether the clause was a forum-selection clause using federal, rather than state, law.<sup>75</sup> After determining that the clause was in fact a forum selection clause, the Seventh Circuit affirmed the district court's ruling dismissal of the complaint for improper venue.<sup>76</sup> However, in its opinion the Seventh Circuit failed to offer any guidance as to whether state or federal law was appropriate in enforcing forum selection clauses.<sup>77</sup>

### 4. *Roberts & Schaefer Co. v. Merit Contracting, Inc.*

In *Roberts & Schaefer Co. v. Merit Contracting, Inc.*,<sup>78</sup> the plaintiff sued the defendant in Illinois state court alleging that defendant was in breach of the contract.<sup>79</sup> Thereafter, the defendant removed the case to a federal district court on the basis of diversity jurisdiction, and filed a motion

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66. *Id.* at 373.

67. *Id.* at 373-74.

68. *Id.* at 374.

69. *Id.* (citing *Casio, Inc. v. S.M. & R. Co.*, 755 F.2d 528, 531 (7th Cir. 1985)).

70. *Id.*

71. 972 F.2d 753 (7th Cir. 1992).

72. *Paper Express*, 972 F.2d at 754.

73. *Id.*

74. *Id.* at 754-55.

75. *Id.* at 755.

76. *Id.* at 758.

77. *See id.* at 755-58 (relying strictly on the federal common law).

78. 99 F.3d 248 (7th Cir. 1996).

79. *Roberts*, 99 F.3d at 251.

to dismiss for lack of personal jurisdiction.<sup>80</sup> Plaintiff then moved to remand the case back to the state court because the forum selection clause vested jurisdiction in the Illinois state court.<sup>81</sup>

In remanding the case, the Seventh Circuit addressed which law governed the enforceability of the forum selection clause.<sup>82</sup> The Court held that Illinois law determined the validity of the forum selection clause because the parties agreed that Illinois law would govern.<sup>83</sup> However, in making its decision, the Court did not address whether the application of Illinois law was appropriate.<sup>84</sup>

##### 5. *AAR International, Inc. v. Nimelias Enterprises S.A.*

In *AAR International, Inc. v. Nimelias Enterprises S.A.*,<sup>85</sup> the plaintiff, AAR International, Inc. (AAR), leased a plane to Vacances Heliades S.A. (VH).<sup>86</sup> A short time later, VH sublet the plane to Nimelias Enterprises S.A. (Nimelias), who then sublet the plane to Princess Airlines (Princess).<sup>87</sup> Over a year later, in Athens, Greece, VH filed a complaint against AAR asserting that AAR breached the lease between the parties and sought an order prohibiting the departure of the plane from Greece until its claim was heard.<sup>88</sup> Subsequently, the Greek court entered a provisional order granting VH's request to prohibit the departure of the plane.<sup>89</sup>

Shortly thereafter, VH filed a second action in Greece seeking damages for the failure of the plane's original engine.<sup>90</sup> A few weeks later, AAR sued VH, Nimelias and Princess for breach of contract in the Northern District of Illinois.<sup>91</sup> Consequently, VH, Nimelias and Princess requested that the district court abstain from hearing the case or dismiss the action for forum non conveniens.<sup>92</sup>

In opposition to the motion, AAR argued that the forum selection clause in the agreement dictated that all actions resulting from the lease be brought in Illinois.<sup>93</sup> The Court, without discussion as to what law applies, denied the motion on the basis that defendants waived their rights to complain about venue when they agreed to the forum selection clause in the lease.<sup>94</sup> In discussing the enforceability of the forum selection clause, the Court referred to federal law but made no mention of whether the application

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* (failing to discuss why federal law did not apply).

85. 250 F.3d 510 (7th Cir. 2000).

86. *AAR*, 250 F.3d at 513.

87. *Id.*

88. *Id.* at 514.

89. *Id.* at 515.

90. *Id.*

91. *Id.*

92. *Id.* at 517.

93. *AAR*, 250 F.3d at 523-24.

94. *Id.* at 526.

of federal or state law was appropriate.<sup>95</sup>

## 6. Current Disposition

While the Seventh Circuit has applied state law in some instances and federal law in others, there has been no specific articulation by the Seventh Circuit regarding which is the appropriate law to use in cases founded on diversity jurisdiction. *Stewart* appears to have resolved this issue in a diversity action where the party seeking to enforce the forum selection clause sought a transfer pursuant to § 1404(a). But, as discussed below, § 1404(a) may not be the only appropriate mechanism enforcing a forum selection clause because *Stewart's* analysis does not necessarily apply to actions where other federal civil rules are used to enforce a forum selection clause, additional guidance for the practitioner is necessary.

## II. DISMISSAL MECHANISMS

Currently, neither the Federal Rules of Civil Procedure nor the federal common law specify what mechanism a party should use to enforce a forum selection clause.<sup>96</sup> In fact, the Ninth Circuit acknowledged it has “not [even] identified which procedural rule governs a motion to dismiss premised on the enforcement of a forum selection clause.”<sup>97</sup> As a result, there has been considerable discussion in the courts as to what is the appropriate mechanism for dismissing an action based on a forum selection clause.<sup>98</sup> In this area, the Seventh Circuit has provided its practitioners with some guidance.

### A. § 1404(a)

One mechanism for enforcing a forum selection clause is 28 U.S.C. § 1404(a),<sup>99</sup> which provides that “[f]or 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.”<sup>100</sup> Therefore, if a contract has a valid forum-selection clause, courts may use § 1404(a) to transfer a case.<sup>101</sup>

However, there are problems associated with using § 1404(a) to enforce forum selection clauses. For example, transfers under § 1404(a) assume that the transferor court has proper jurisdiction and venue and that the federal

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95. *See id.* at 524-26 (citing and discussing only federal common law).

96. Lederman, *supra* note 1, at 433.

97. *Arguetta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).

98. *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114 (5th Cir. 1996) (holding that the dismissal of a suit under 28 U.S.C. § 1406(a) to be an appropriate means of enforcing forum selection clauses); *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993) (holding that Rule 12(b)(6) is the proper manner to enforce a forum selection clause); *Commerce Consultants Int'l, Inc. v. Vetterie Riunite*, 867 F.2d 697, 698 (D.C. Cir. 1989) (affirming a motion to dismiss for improper venue under Rule 12(b)(3)); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 94-95 (5th Cir. 1979) (approving order transferring venue pursuant to 28 U.S.C. § 1404(a)).

99. Lederman, *supra* note 1, at 433.

100. 28 U.S.C. § 1404(a) (2000).

101. *Stewart*, 487 U.S. at 31; *Heller*, 883 F.2d at 1293.

court in which the suit is being transferred to could have heard the case originally.<sup>102</sup> In addition, because a forum selection clause is only one of the factors courts consider under § 1404(a), it is possible that a court could find that other factors outweigh the forum selection clause.<sup>103</sup> Finally, a party who transfers an action pursuant to § 1404(a) may lose the benefit of a choice of law clause contained in the agreement, even though the law that would have been applied is supposed to follow the case.<sup>104</sup>

#### B. Federal Rule of Civil Procedure 12(b)(3)

Another mechanism available is a motion to dismiss a claim for improper venue under Federal Rule of Civil Procedure 12(b)(3).<sup>105</sup> The Seventh Circuit endorses this as the most appropriate way to handle a dismissal based on a forum selection clause.<sup>106</sup>

But a few courts have criticized the use of Rule 12(b)(3) as improper because the rule rests on the erroneous assumption that a forum selection clause in itself creates "improper" venue in noncontractual forums.<sup>107</sup> Such an assumption is incorrect since venue can be proper in a number of different places. At least one district court in the Seventh Circuit has held that under a 12(b)(3) motion, a court should use the framework of a § 1404(a) analysis.<sup>108</sup>

#### C. Federal Rule of Civil Procedure 12(b)(6)

Another mechanism endorsed by a few courts is a motion to dismiss under Rule 12(b)(6).<sup>109</sup> However, "[u]nder the Supreme Court's standard for resolving motions to dismiss based on a forum selection clause, the pleadings are not accepted as true, as would be required under a Rule 12(b)(6) analysis."<sup>110</sup>

#### D. Forum non conveniens

Forum non conveniens is another doctrine which would allow for the dismissal of an action when a more convenient forum is elsewhere.<sup>111</sup> Some

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102. Lederman, *supra* note 1, at 435.

103. *Id.* at 437-38.

104. *Id.* at 438.

105. FED. R. CIV. P. 12(b)(3).

106. *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995). *See also* *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 851 (9th Cir. 1997); *Riley v. Kingsley Underwriting*, 969 F.2d 953, 956 (10th Cir. 1992) (noting that "a motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under [Federal Rule of Civil Procedure] 12(b)(3)").

107. Lederman, *supra* note 1, at 445.

108. *Computer Assocs. Int'l, Inc. v. Quest Software, Inc.*, 2003 WL 21799259, at \*3 (N.D. Ill. July 24, 2003).

109. *J.B. Harris, Inc. v. Razei Bar Indus., Ltd.*, No. 98-9191, 1999 U.S. App. LEXIS 8577, at \*6 (2d Cir. May 4, 1999); *See also Lambert*, 983 F.2d at 1112 n.1 (stating that dismissal due to a forum selection clause involved a Rule 12(b)(6) motion, and not a Rule 12(b)(3) motion).

110. *Argueta*, 87 F.3d at 324.

111. Lederman, *supra* note 1, at 443.

courts believe that forum non conveniens is the most appropriate mechanism to enforce a forum selection clause.<sup>112</sup>

### E. Seventh Circuit's Position

The Seventh Circuit has implicitly approved the use of two of the above mechanisms. For cases where the forum selection clause mandates that the action be brought in a specific federal court in the United States or "any court" in a specific state, the use of § 1404(a) is appropriate.<sup>113</sup> For cases where the forum selection clause mandates that actions be brought outside the United States or in a state court, the Seventh Circuit has recommended the use of a 12(b)(3) motion.<sup>114</sup>

## III. CONCLUSION

While the Seventh Circuit may have given practitioners some guidance on what mechanisms to employ when seeking to enforce a forum selection clause, the Seventh Circuit should directly address whether state or federal law governs the enforceability of a forum selection clause in a diversity action where the party seeks to dismiss the action pursuant to 12(b)(3) or some other mechanism besides § 1404(a).

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112. See *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 148 (2nd Cir. 2000) (noting that forum non conveniens, not § 1404(a), is the appropriate analytical mechanism where the alternate forum is a foreign country); *Mobil Sales & Supply Corp. v. JSC Lieutuvos Energija*, No. 98-7741, 1998 U.S. App. LEXIS 32573, at \*3-5 (2nd Cir. Dec. 18, 1998); *Ferraro Foods, Inc. v. M/V Izzet Incekara*, No. 01 Civ. 2682 (RWS) 2001 U.S. Dist. LEXIS 12338, at \*9 n.1 (S.D.N.Y. Aug. 15, 2001) (citing *Guidi*, 224 F.3d at 148)).

113. *Stewart*, 487 U.S. at 29.

114. *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995) (implying that a 12(b)(3) motion is more appropriate than a 12(b)(6) motion because "judicial economy requires selection of the proper forum at the earliest possible opportunity"). *Stewart*, 487 U.S. at 24.