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## We're All in the Same Boat: *Carnival Cruise Lines, Inc. v. Shute*

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# COMMENTS

## WE'RE ALL IN THE SAME BOAT: *CARNIVAL CRUISE LINES, INC. v.* *SHUTE*

### I. INTRODUCTION

Forum selection clauses have become common additions to business agreements and play an important role in those agreements.<sup>1</sup> Such clauses provide that the litigation of any dispute arising out of the agreement shall be initiated exclusively in the parties' agreed upon forum.<sup>2</sup> By selecting a forum to resolve disputes, forum selection clauses enhance certainty as to the costs of litigation by preventing jurisdictional conflicts.<sup>3</sup> Furthermore, by reducing the inherent uncertainties involved in international or interstate contracts, forum selection clauses tend to lessen the complexity of the transaction and result in a greater feeling of confidence on behalf of the parties.<sup>4</sup> Finally, by stipulating the forum to hear all disputes, forum selection clauses allow parties to plan in advance for possible disagreements and encourage transactions by reducing the fear of exposing oneself to an unfamiliar jurisdiction.<sup>5</sup>

However, as seen in *Carnival Cruise Lines, Inc. v. Shute*,<sup>6</sup> forum clauses are not without their inadequacies. *Carnival*

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1. See generally Ramon E. Reyes, Jr., Comment, *Medoil Corp. v. Citicorp: Uncertainty Requires an Indepth Inquiry into Forum-Selection Clause Enforceability Issues*, 17 BROOKLYN J. INT'L L. 687 (1991). Courts and commentators also refer to forum selection clauses as "forum clauses," "jurisdiction clauses," "choice-of-forum provisions," or "consensual adjudicatory procedure."

2. Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 134.

3. Reyes, *supra* note 1, at 687.

4. See James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1 (1976).

5. *Id.* at 3.

6. 111 S. Ct. 1522 (1991).

marks a new step in the Supreme Court's support of forum selection clauses.<sup>7</sup> In *Carnival*, the Supreme Court enforced a forum selection clause, which was buried in small print on the back of a cruise ticket. This clause obligated a Washington State passenger to bring suit against the cruise line in Florida.<sup>8</sup> The Court's failure to distinguish the Shutes from the corporate litigants in prior forum selection clause cases is most disturbing. The Court's almost reflexive enforcement of the cruise ticket forum clause contravenes public policy by grouping domestic commercial consumer contracts with international commercial contracts between sophisticated business entities.

This Comment contends that the Supreme Court's enforcement of a forum selection clause which binds a non-commercial plaintiff to a distant jurisdiction, despite the plaintiff's lack of bargaining power in negotiating the clause, is unfair and violative of both federal statute and legal precedent. By applying rigid contractual axioms, the Court has moved away from jurisdictional canons of fairness traditionally applied in case law and has failed to defend the consumer whom Congress has sought to protect.

This Comment will first discuss the history of forum selection clauses. It will then examine the Court's treatment of the

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7. Prior to *Carnival*, the Supreme Court had given forum selection clauses favored status in cases involving commercial litigants. The Court started the ball rolling with *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See *infra* notes 34-68 and accompanying text. Thereafter, the Court extended *The Bremen* to arbitration clauses. In *Sherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court enforced an agreement between an American corporation and a German citizen to arbitrate before the International Chamber of Commerce in Paris. The Court found an agreement to arbitrate before a pre-determined tribunal to be a specialized kind of forum selection clause.

Likewise, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the Supreme Court enforced an arbitration clause in an international contract that designated Japan as the arbitral venue. The Court allowed arbitration before the Japan Commercial Arbitration Association to determine the parties' rights, despite the fact that the merits of the case were controlled by United States antitrust laws. The Court concluded that concerns for international comity, respect for foreign tribunals, and the need for predictability in the international commercial system required enforcement of the agreement. *Id.* at 629.

Further, in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), the Supreme Court held that federal law governs motions to transfer based on forum selection clauses. Justice Kennedy's concurring opinion observed that enforcement of forum clauses serves the dual role of protecting a party's expectations and furthering the interests of the justice system. According to Justice Kennedy, forum selection clauses should be given "controlling weight in all but the most exceptional cases." *Id.* at 33 (Kennedy, J., concurring).

8. *Carnival*, 111 S. Ct. at 1529.

forum selection clause in *Carnival* and how such a clause has been historically interpreted. Next, this Comment will address the Court's failure to uphold Congressional intent as evidenced by the Limitation of Liability Act.<sup>9</sup> The Limitation of Liability Act manifested Congress' intention to guard against liability limiting clauses such as the one in *Carnival*; however, the Court's problematic interpretation misconstrued this plan. This Comment will also examine how other countries treat forum selection clauses in order to show how the *Carnival* decision may be amplified on an international scale. Furthermore, this Comment will discuss the potential effects of *Carnival* on international travel and the next probable step in forum selection clauses, namely, the travel industry's incorporation of foreign jurisdictions as the contractual forum. Finally, this Comment will propose an alternative standard, based on jurisdictional principles, for future courts to employ when faced with forum clauses designating foreign venues.

## II. BACKGROUND

### A. *The History of Forum Selection Clauses*

Forum selection clauses are one of the most important and effective devices parties can use in an attempt to bring stability and certainty to a contractual agreement.<sup>10</sup> Parties selecting a specific forum can designate a particular court that may be better suited to resolve potential disputes arising under the contract and may thereby avoid jurisdictional conflicts.<sup>11</sup> Furthermore, forum selection clauses help the international commercial system instill predictability because such clauses remove the uncertainty of litigating a dispute in an unfamiliar jurisdiction.<sup>12</sup> Consequently, the use of forum selection clauses in international contracts has become common.<sup>13</sup>

As a general rule, parties to a contract may agree in advance to submit to the jurisdiction of a given court should litigation arise.<sup>14</sup> Consent, even prior to the existence of an action, may

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9. 46 U.S.C. § 183c (1988).

10. See Gruson, *supra* note 2, at 134.

11. See Reyes, *supra* note 1, at 687.

12. See *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 629 (1985); see also Reyes, *supra* note 1, at 687.

13. Kurt H. Nadelmann, *The Hague Conference on Private International Law and the Validity of Forum Selecting Clauses*, 13 AM. J. COMP. L. 157 (1964).

14. *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

enable a court to exercise jurisdiction over such parties.<sup>15</sup> Nevertheless, many factors, including the traditional deference to the plaintiff's choice of forum,<sup>16</sup> have provided for an inconsistent history for the enforcement of forum selection clauses in the United States. Prior to 1955, American courts refused to give effect to forum selection clauses that would oust the jurisdiction of the court.<sup>17</sup> Generally, the courts held such clauses void as against public policy in that they attempted to bar an action in an otherwise competent jurisdiction.<sup>18</sup> An additional public policy argument appeared when the clauses were contained in adhesion contracts, thus being the product of unequal bargaining power.<sup>19</sup>

In 1955, the Court of Appeals for the Second Circuit broke the trend of invalidating forum selection clauses in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*<sup>20</sup> *Muller* involved a bill of lading that conferred jurisdiction to the courts of Sweden.<sup>21</sup> In *Muller*, the plaintiff brought suit in New York after cargo it shipped on the defendant's vessel was lost at sea.<sup>22</sup> The Second Circuit employed a reasonableness test in evaluating the forum clause.<sup>23</sup> While the plaintiff claimed that the enforcement of the forum clause would violate the Carriage of Goods by Sea Act (COGSA)<sup>24</sup> (since COGSA declares void clauses lessening a carrier's liability), the Second Circuit enforced the clause under the reasonableness test. The court listed five factors for its decision: (1) ownership of the vessel; (2) nationality of the crew; (3) whether the chosen court would apply the same measure of damages as the current forum; (4) whether the chosen forum's limitation proceedings would be more restrictive than the current forum's; and (5) the likelihood of fair and just adjudication of the dispute in the chosen forum.<sup>25</sup> A number of federal courts followed the trend signalled in *Muller* and enforced forum selec-

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15. Gilbert, *supra* note 4, at 6.

16. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

17. See Reyes, *supra* note 1, at 691.

18. See Gruson, *supra* note 2, at 139.

19. See Reyes, *supra* note 1, at 691-92.

20. 224 F.2d 806 (1955).

21. *Id.*

22. *Id.*

23. *Id.*

24. 46 U.S.C. §§ 1300-1315 (1988).

25. *Muller*, 224 F.2d at 808; see also Reyes, *supra* note 1, at 693.

tion clauses by following the *Muller* criteria or a variation of the *Muller* scheme.<sup>26</sup>

Although *Muller* provided courts with an alternative to the traditional approach, many courts continued to employ public policy considerations in invalidating forum clauses.<sup>27</sup> For example, in 1958, the Fifth Circuit, in *Carbon Black Export v. The S.S. Monrosa*,<sup>28</sup> invoked the traditional rule that "agreements in advance of controversy whose object is to oust the jurisdiction of the court are contrary to public policy and will not be enforced."<sup>29</sup>

Despite the trend signalled by *Muller* and the cases that followed its decision, in 1967, *Muller* was overruled in *Indussa Corp. v. S.S. Ranborg*.<sup>30</sup> *Muller* was overruled on the same grounds that the Second Circuit applied in *Indussa*, namely, that forum selection clauses are inconsistent with COGSA.<sup>31</sup> This change in reasoning came about because the Second Circuit, *en banc*, decided that "the *Muller* court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress."<sup>32</sup> *Indussa* clearly weakened the foundation for forum clauses, however, the reasonableness test employed in *Muller* remained persuasive authority in non-admiralty cases.<sup>33</sup>

#### B. *The Bremen v. Zapata Off-Shore Co.*

Subsequent to *Muller*, the leading case on forum selection clauses was *The Bremen v. Zapata Off-Shore Co.*, a case based on an admiralty claim decided by the United States Supreme Court in 1972.<sup>34</sup> In an opinion by Chief Justice Burger, the

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26. See Gruson, *supra* note 2, at 140-41; Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291 (1988); *Geiger v. Keilani*, 270 F. Supp. 761, 766 (E.D. Mich. 1967) (forum clause enforced under *Muller* reasonableness test); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756, 761-62 (E.D.N.Y. 1967) (forum clauses enforceable if not unreasonable).

27. See Gilbert, *supra* note 4, at 17 n.84.

28. 254 F.2d 297 (5th Cir. 1958).

29. *Id.* at 300-01. In *Carbon Black*, a forum clause in a bill of lading, selecting Italy as the contractual forum, was not enforced after the American plaintiff brought an action in admiralty alleging damages due to nondelivery. *Id.*

30. 377 F.2d 200 (2d Cir. 1967).

31. *Id.* at 204; see also Gilbert, *supra* note 4, at 16-17.

32. *Indussa*, 377 F.2d at 202.

33. See Reyes, *supra* note 1, at 693-94; see also Gruson, *supra* note 2, at 141 n.26.

34. *The Bremen* is not limited to admiralty claims but applies to all forum selection

Court enforced a provision of an international maritime towage contract which provided that "[a]ny dispute arising must be treated before the London Court of Justice."<sup>35</sup>

At issue was a towage contract between Zapata, an American corporation, and Unterweser, a German corporation.<sup>36</sup> Unterweser contracted to tow Zapata's drilling rig, the *Chaparral*, from Louisiana to Italy.<sup>37</sup> The contract, which was subject to review and underwent several modifications from the original submission, included a choice of forum clause providing that all disputes under the contract would be brought in London.<sup>38</sup> Additionally, the contract contained two exculpatory clauses purporting to exempt Unterweser from liability for damages to the drilling rig.<sup>39</sup>

After Unterweser's tug, the *Bremen*, departed Louisiana with the *Chaparral* in tow, a storm arose which seriously damaged the rig.<sup>40</sup> While in international waters, the *Bremen* was instructed by Zapata to take refuge in Tampa, Florida.<sup>41</sup> Based on the injury to their rig, Zapata brought suit in admiralty in the United States District Court in Tampa seeking damages for negligent towage and breach of contract.<sup>42</sup> In response, Unterweser invoked the forum selection clause and motioned to dismiss for lack of jurisdiction or on forum non conveniens grounds or, in the alternative, to stay the suit pending submission of the dispute to the London Court of Justice.<sup>43</sup> Unterweser then sued Zapata in London for breach of contract.<sup>44</sup> The United States District Court refused to enforce the forum selec-

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clauses even if they arise in diversity cases. Gruson, *supra* note 2, at 149.

35. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 3.

The General Towage Conditions of the contract included:

1. . . . [Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

2. . . . b) Damages suffered by the towed object are in any case for account of its Owners.

40. *Id.*

41. *Id.*

42. *Id.* at 4. See *Jones v. Bender Welding and Machine Works, Inc.*, 581 F.2d 1331, 1337 (9th Cir. 1978) (Admiralty law encompasses maritime torts where the locus of the tort occurs on the high seas and the alleged wrong bears a significant relationship to a traditional maritime activity.).

43. *The Bremen*, 407 U.S. at 4.

44. *Id.*

tion clause on the traditional ground that agreements attempting to confer exclusive jurisdiction on one court are invalid on public policy grounds.<sup>45</sup> The district court also denied Unterweser's forum non conveniens motion and enjoined Unterweser from proceeding with the London suit, concluding that Zapata's choice of forum should not be disturbed.<sup>46</sup> The Fifth Circuit Court of Appeals, sitting *en banc*, affirmed and adopted the district court's judgment.<sup>47</sup>

In an 8 to 1 decision, the United States Supreme Court reversed the Fifth Circuit ruling.<sup>48</sup> The Court held that forum selection clauses are *prima facie* valid unless enforcement is shown to be unreasonable.<sup>49</sup> The Court recognized the proposition, stated in *National Equipment Rental, Ltd. v. Szukhent*,<sup>50</sup> that parties may validly consent to jurisdiction of a given court in advance.<sup>51</sup> Chief Justice Burger specifically noted that *The Bremen* did not involve a local conflict between Americans trying to settle their disputes in a "remote alien forum."<sup>52</sup> The Chief Justice stated that in such a case, the remoteness of the venue would carry greater weight in determining the reasonableness of the forum clause.<sup>53</sup> Alternatively, in a case such as *The Bremen*, involving an international commercial transaction, the Court placed a "heavy burden"<sup>54</sup> of proof on the party petitioning the non-contractual forum to show that the clause was unreasonable or unjust or that the clause was invalid for reasons such as fraud or overweening bargaining power.<sup>55</sup> In reaching this conclusion, the Supreme Court emphasized that expansion of overseas commercial and industrial activities would not be encouraged if the Court was to adhere to a "parochial concept"<sup>56</sup>

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45. *Id.* at 6.

Forum selection clauses have two effects; one is prorogation, which is consent to the jurisdiction of a particular court and the other is derogation, constituting a denial of exercise of jurisdiction to any court other than the contracted forum. For a fuller discussion of the effects of forum selection clauses, see Gilbert, *supra* note 4, at 5.

46. *The Bremen*, 407 U.S. at 6-7.

47. *Id.* at 7.

48. Justice Douglas was the lone dissenter. *Id.* at 20.

49. *Id.* at 10.

50. 375 U.S. 311 (1964).

51. *The Bremen*, 407 U.S. at 11 (citing *National Equip. Rental*, 375 U.S. at 315-16).

52. *Id.* at 17.

53. *Id.*

54. *Id.*

55. *Id.* at 12.

56. *Id.* at 9.



that all disputes must be resolved in American courts.<sup>57</sup>

Further, the Court stated that in cases involving *freely negotiated* contracts, the Court would place less emphasis on the remoteness of the contractual forum.<sup>58</sup> In considering the reasonableness of this particular forum, the Court specifically noted that the choice of forum was made by "experienced and sophisticated businessmen" and was unaffected by "undue influence."<sup>59</sup> Furthermore, there was evidence that the choice of England as the contractual forum was essential to the contract as an effort to bring certainty to the agreement. This certainty derived from England's neutrality in deciding disputes arising from voyages that transverse the waters of many jurisdictions.<sup>60</sup> Additionally, this forum choice also served to allow the parties to take advantage of England's "long experience in admiralty litigation."<sup>61</sup> Thus, *The Bremen* provided a new and more open approach whereby United States courts would give effect to freely negotiated foreign forum clauses.

*The Bremen* controls the field of admiralty to the extent that no federal legislation to the contrary applies.<sup>62</sup> At first glance, it may appear that the "lessening of liability" provision of the COGSA<sup>63</sup> applies to the forum selection clause in *The Bremen*. COGSA pertains to "all contracts for carriage of goods by sea to or from ports of the United States."<sup>64</sup> However, the Supreme Court expressly noted the inapplicability of COGSA to the towage contract.<sup>65</sup> More specifically, the Court reasoned that since *The Bremen* did not arise out of a contract of carriage, COGSA was not applicable to the case at hand.<sup>66</sup>

Since *The Bremen*, the Supreme Court has supported the use of forum selection clauses in contracts between sophisticated businesspersons and has held these clauses to be *prima facie*

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57. *Id.*

58. *Id.* at 12.

59. *Id.*

60. *Id.* at 12-13.

61. *Id.* at 12.

62. Kurt H. Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124, 134 (1973).

63. 46 U.S.C. § 1303(8) (1988).

64. 46 U.S.C. § 1312 (1988).

65. *The Bremen*, 407 U.S. at 10 n.11.

66. *Id.*; see also Wade H. Gately, Comment, *Union Insurance Society of Canton, Ltd. v. S.S. Elikon — the Carriage of Goods by Sea Act and Forum Selection Clauses*, 10 DENV. J. INT'L. L. & POL'Y 593, 594 (1981).

valid.<sup>67</sup> Nonetheless, the Court has also displayed hesitation in enforcing such clauses if a party can show that enforcement would be unreasonable, against public policy, or if the parties who sued would be deprived of their day in court because the contractual forum would be gravely inconvenient.<sup>68</sup>

### III. CARNIVAL CRUISE LINES, INC. v. SHUTE

#### A. *Facts*

In *Carnival Cruise Lines, Inc. v. Shute*, the Shutes, residents of the State of Washington, purchased tickets from a Washington travel agent for a seven day cruise aboard the Carnival Cruise Lines (Carnival) ship, the *Tropicale*.<sup>69</sup> The cruise was set to sail from Los Angeles, California, to Puerto Vallarta, Mexico.<sup>70</sup> The tickets were issued by Carnival in Miami, Florida, which served as Carnival's principal place of business, and were forwarded to the Shutes in Washington.<sup>71</sup>

The passage contract ticket contained a forum selection clause requiring all disputes which should arise to be litigated in Florida.<sup>72</sup> The clause, typed in fine print,<sup>73</sup> read as follows:

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.<sup>74</sup>

A further reading of the ticket reveals a clause preventing a refund for an unused ticket. Paragraph 16(a) of the ticket provides, "[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by

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67. Linda S. Mullenix, *If They Could Sue Me Now: Minimum Contacts on the Love Boat*, 1990-91 Term PREVIEW, U.S. SUP. CT. CASES, 135, 137; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (praising the values of international comity, sensitivity to international commercial system, and predictability).

68. Mullenix, *supra* note 67, at 137.

69. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1524 (1991).

70. *Id.*

71. *Id.*

72. *Id.*

73. The small type size and the forum selection provision's position as the eighth of twenty-five paragraphs on the back of the ticket prompted Justice Stevens to append a facsimile of the ticket to the Court's opinion. *Id.* at 1536.

74. *Id.*

a passenger."<sup>75</sup>

While in international waters, Mrs. Shute was injured when she slipped on a deck mat during a conducted tour of the ship.<sup>76</sup> The Shutes filed suit against Carnival Cruise Lines in Washington District Court, alleging negligence on the part of Carnival Cruise Lines and its employees.<sup>77</sup>

### B. District Court Decision

Although Carnival disseminates advertising in Washington, holds seminars in Washington and distributes brochures to Washington travel agents, who in turn pass them along to potential customers, the district court, in an unreported opinion, granted Carnival's motion for summary judgment based on lack of personal jurisdiction.<sup>78</sup> The district court found Carnival's contacts with Washington to be insufficient to support the exercise of personal jurisdiction.<sup>79</sup> The court based its decision on the fact that Carnival is not registered to do business in Washington, owns no property in Washington and has never operated ships in Washington ports.<sup>80</sup> Because the district court found personal jurisdiction lacking, it did not address the forum selection clause issue.

### C. Circuit Court Decision

The United States Court of Appeals for the Ninth Circuit reversed the District Court's granting of summary judgment, thereby holding Carnival's forum related activities sufficient to assert jurisdiction.<sup>81</sup> Since the court found personal jurisdiction to be present, it then had to address the forum clause issue in order to determine whether the court would be divested of jurisdiction. Addressing this issue, the court found the forum selection clause to be unenforceable as a matter of public policy.<sup>82</sup>

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75. *Id.* at 1529.

76. *Id.* at 1524. Mrs. Shute's two-page complaint, filed in Seattle, Washington, stated: "During the tour, members of the vessel's crew negligently placed water on the vessel's deck in the galley area, directly in the path of egress of the passengers taking the guided tour. Plaintiff Eulala Shute slipped on the wet deck and was severely injured." See Mullenix, *supra* note 67, at 135.

77. *Carnival*, 111 S. Ct. at 1524.

78. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 379 (9th Cir. 1990).

79. *Id.*

80. *Id.*

81. *Id.* at 389.

82. *Id.*

In an effort to reaffirm and define the Ninth Circuit's jurisdictional standards, the Court of Appeals explicitly adopted a "but for" test in analyzing whether a cause of action arises from a defendant's solicitation of business in the forum.<sup>83</sup> The "but for" test requires a causal nexus between the cause of action and the defendant's forum activities.<sup>84</sup> In this case, the court found that Mrs. Shute never would have been injured but for Carnival's solicitation of business in Washington.<sup>85</sup> In asserting jurisdiction through the "but for" test, the Ninth Circuit also held that exercising personal jurisdiction over Carnival comported with due process since Carnival had purposely availed itself of the privilege of doing business in Washington.<sup>86</sup>

Next, the Court of Appeals examined the effect of the forum selection clause upon the question of jurisdiction.<sup>87</sup> Carnival

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83. *Id.* at 385.

84. *Id.*

85. *Id.* at 386.

86. The Court of Appeals found Carnival's contacts with Washington insufficient to exercise general jurisdiction. Carnival's contacts with Washington were not deemed continuous and systematic; thus, an exercise of general jurisdiction would violate due process. However, under the Ninth Circuit's three pronged specific jurisdiction test, an exercise of specific jurisdiction over Carnival comports with due process. The three-part test provides: (1) the defendant must purposely avail himself of the privilege of conducting activities in the forum; (2) the claim must arise out of the defendant's activities (the "but-for" test); and (3) the exercise of jurisdiction must be reasonable. *Id.* at 381; see also *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

The Court of Appeals found Washington's long-arm statute to be satisfied as well. The Ninth Circuit withdrew its initial opinion and requested that the Washington Supreme Court render a decision concerning the reach of the state's jurisdictional statute. *Shute v. Carnival Cruise Lines, Inc.*, 872 F.2d 930, 930 (9th Cir. 1989). The Washington Supreme Court held that assertion of personal jurisdiction over Carnival Cruise Lines would not offend the long-arm statute. The court buttressed its holding by stating that the long-arm statute extended as far as permitted by constitutional due process requirements. *Shute v. Carnival Cruise Lines, Inc.*, 783 P.2d 78 (Wash. 1989). Thereafter, the Ninth Circuit amended its opinion repeating its original conclusions. *Shute*, 897 F.2d at 377.

The Washington jurisdictional statute, WASH. REV. CODE ANN. § 4.28.185 (West 1988), provides, in pertinent part, as follows:

"(1) Any person whether or not a citizen or resident of this state, who, in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of said acts: (a) the transaction of any business within the state . . . ."

87. Carnival attempted to quash jurisdiction by showing that Washington would be an unreasonable forum since the contracted forum was Florida. However, the Court of Appeals stated that Carnival proffered no authority that a forum selection clause can be used to derogate Washington's jurisdiction. *Shute*, 897 F.2d at 386.

maintained that even if it was subject to personal jurisdiction in Washington, the district court was required to transfer the action to a Florida court pursuant to 28 U.S.C. § 1406(a), which provides for the dismissal or transfer of cases brought in the wrong venue.<sup>88</sup> In response to this argument, the Ninth Circuit held that the forum selection clause in this case was unreasonable and, therefore, unenforceable.<sup>89</sup> In determining the effect of the forum selection clause, the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.* guided the Ninth Circuit's analysis. According to *The Bremen*, forum selection clauses are *prima facie* valid unless "enforcement would be unreasonable and unjust or the clause is invalid for such reasons as fraud or overreaching."<sup>90</sup> Following the Supreme Court's mandates, the Court of Appeals found Carnival's forum selection clause to be unreasonable for two reasons. First, unlike the parties in *The Bremen*, the parties in *Carnival* were unequal in bargaining power.<sup>91</sup> Indeed, the Shutes had no opportunity to bargain over the provision and were, in fact, presented the provision on a "take-it-or-leave-it" basis.<sup>92</sup> The Ninth Circuit placed great weight upon this disparity of bargaining power in holding the clause unenforceable.<sup>93</sup> Second, the Ninth Circuit held that the clause was unenforceable because of the grave inconvenience which would be presented to the Shutes and potential witnesses should the litigation occur in Florida.<sup>94</sup> The Circuit Court noted that the Shutes were "physically and financially incapable" of litigating the case in Florida.<sup>95</sup> Once again focusing on the language of *The Bremen*, the Circuit Court stated that enforcement of the forum selection provision would "deprive the Shutes of

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88. *Id.* at 387. 28 U.S.C. § 1406(a) states:

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

89. *Shute*, 897 F.2d at 389.

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

91. *Shute*, 897 F.2d at 388; *see also* *Yoder v. Heinhold Commodities, Inc.*, 630 F. Supp. 756, (E.D. Va. 1986) (unequal bargaining power and use of form contracts are factors in determining enforceability of forum selection clauses).

92. *Shute*, 897 F.2d at 388.

93. *Id.* at 389.

Forum selection clauses in adhesion ("take-it-or-leave-it") contracts have always been faced by judicial hostility. *See, e.g.*, *Bank of Indiana v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979).

94. *Shute*, 897 F.2d at 389.

95. *Id.*

their day in court.”<sup>96</sup>

In reaching its decision, the Ninth Circuit only briefly addressed the plaintiff's assertions regarding statutory law. The plaintiffs alleged that enforcement of the forum selection clause would violate the Limitation of Liability Act.<sup>97</sup> This Act makes it unlawful for vessel owners to include in a ticket contract provisions “purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss, or injury, or the measure of damages therefore.”<sup>98</sup> Any contract provision that violates this statute is void.<sup>99</sup> Circuit Judge Fletcher, writing for the Ninth Circuit, refused to address the effect of the statute on forum selection agreements. Judge Fletcher reasoned that because the Circuit found the clause unenforceable as a matter of public policy, the statute did not have to be addressed.<sup>100</sup> However, Judge Fletcher did comment that Congress' intent in passing the statute was to provide for closer examination of the fairness of a form ticket contract.<sup>101</sup> Nevertheless, because the forum selection provision violated the strong public policy of the circuit, the Court of Appeals declined to examine the provision under a statutory light.

In sum, the Ninth Circuit expounded two essential rulings. First, it held that by its continuous solicitation in Washington State, Carnival Cruise Lines had availed itself of the benefits of Washington state and thus, the Shutes claim “arose out of” Carnival's dissemination of advertising in the state.<sup>102</sup> Indeed, “but-for” Carnival's solicitation, the Shutes never would have gone on the cruise that led to her slip-and-fall.<sup>103</sup> Second, the Ninth Circuit found the forum selection clause to be unenforceable because it would effectively deny the Shutes their day in court and because the clause was not freely bargained for.<sup>104</sup> In order to

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96. *Id.*; see *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (“[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”).

97. *Shute*, 897 F.2d at 389 n.12; 46 U.S.C. § 183c.

98. 46 U.S.C. § 183c.

99. *Id.*

100. *Shute*, 897 F.2d at 389 n.12.

101. *Id.*

102. *Id.* at 383, 386.

103. *Id.* at 386.

104. *Id.* at 389.

resolve the questions of jurisdiction and enforcement of its contractual forum clause, Carnival Cruise Lines appealed to the United States Supreme Court.

*D. The United States Supreme Court Decision*

1. The Majority

The Supreme Court reversed the Ninth Circuit Court of Appeals and enforced the forum selection clause in Mrs. Shute's cruise ticket.<sup>105</sup> The majority opinion, authored by Justice Blackmun, rejected the Court of Appeals' reasoning that a forum selection clause in a form ticket contract is never enforceable due to lack of equal bargaining power.<sup>106</sup> The Court, applying the principles articulated in *The Bremen*, adopted a reasonableness test for consumer contracts and, after weighing the facts, found the clause enforceable.

Justice Blackmun, expressing the views of seven members of the court, identified four reasons why the forum selection clause was reasonable.<sup>107</sup> First, since cruise lines carry passengers from all over the world, cruise lines have an interest in limiting the fora where they will be subject to suit.<sup>108</sup> Second, choice-of-forum clauses add certainty by specifying the forum in which suits must be brought, thereby sparing litigants needless costs.<sup>109</sup> Third, forum selection clauses conserve judicial resources by obviating the need to decide jurisdictional issues.<sup>110</sup> Finally, by limiting the fora in which it may be sued, a cruise line is able to offer reduced fares to passengers.<sup>111</sup> Under this analysis, the Court reshaped *The Bremen* reasonableness standard to "account for the realities of form passage contracts."<sup>112</sup> Thus, a forum selection clause no longer has to be "bargained for" to be enforceable.<sup>113</sup>

In reaching its determination, the majority criticized the Ninth Circuit's use of the language articulated in *The*

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105. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527-28 (1991).

106. *Id.* at 1527.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* ("... an individual will not have bargaining parity with the cruise line.").

*Bremen*.<sup>114</sup> In *The Bremen*, the Court evaluated a hypothetical agreement set in a "remote alien forum."<sup>115</sup> In examining this hypothetical, *The Bremen* Court stated that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause."<sup>116</sup> By analogizing this hypothetical to the case at hand, the Court of Appeals found "independent justification" to hold that the clause should not be enforced because of the hardship claimed by the Shutes.<sup>117</sup> In contrast to the Ninth Circuit's determination, the Supreme Court found no evidence of physical or financial hardship and determined that Florida is not a "remote alien forum," thus distinguishing *The Bremen* hypothetical.<sup>118</sup> Additionally, Justice Blackmun reasoned that since the Shutes admitted that they had notice of the forum clause, they did not satisfy the "heavy burden of proof" standard of serious inconvenience set forth in *The Bremen*.<sup>119</sup>

Next, the majority rejected the Shutes contention that the forum selection clause violates section 183c of the Limitation of Liability Act.<sup>120</sup> Again, section 183c provides that a shipowner cannot limit the amount of its liability by inserting a provision denying the right of a claimant to litigate a claim "by [a] court of competent jurisdiction."<sup>121</sup> The Court held that the forum selection clause did not violate section 183c because Florida is a "court of competent jurisdiction" within the plain language of

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114. *Id.* ("... the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in *The Bremen*.").

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

116. *Id.*

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

118. *Carnival*, 111 S. Ct. at 1528.

119. *Id.*; see *The Bremen*, 407 U.S. at 17.

120. *Carnival*, 111 S. Ct. at 1528. 46 U.S.C. § 183c provides:

"It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect."

121. See 46 U.S.C. § 183c(2).



the statute.<sup>122</sup> In response to plaintiffs' claim that enforcement of the clause would violate Congress' intended goal,<sup>123</sup> the Court referred to legislative history to show that the statute was not meant to invalidate all forum selection clauses.<sup>124</sup> Instead, the Court suggested that Congress merely intended the statute to prevent shipowners from limiting liability for negligence or from removing the issue of negligence from judicial scrutiny.<sup>125</sup> The Court reasoned that because the forum clause does allow for judicial resolution in Florida, the clause does not violate section 183c.<sup>126</sup> Thus, the majority utilized the literal meaning of the statute and the grounds for it to reject the Shutes' claim that the forum clause violated section 183c.

## 2. The Dissent

Justice Stevens, joined by Justice Marshall, wrote a dissent which not only questioned the majority's analysis, but expressed concern for consumers as well. The dissent rejected the majority's view that the clause was reasonable and cited the liberal intent of The Limitation of Liability Act as well as cases analyzing the analogous provision of COGSA to support its view that the clause should not be enforced.

Justice Stevens began by commenting on the unfairness of the clause.<sup>127</sup> Justice Stevens, who appended a facsimile of the Shutes' ticket to the opinion, wrote, "only the most meticulous passenger is likely to become aware of the forum selection provision."<sup>128</sup> The dissent also pointed out that the clause making the ticket non-refundable places the average passenger in a no-win situation. Indeed, the dissent noted that passengers must either risk having to file suit in Florida or forfeit their money.<sup>129</sup> Jus-

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

123. *Id.* at 1529. Justice Blackmun reasoned that plaintiffs' claim of hardship was based on the distance of the forum (Washington to Florida) and that their contention was that § 183c was enacted to avoid having a plaintiff travel a great distance.

124. The Court found that the legislative history of § 183c suggested that the section was enacted to guard against the removal of the issue of liability from any court by means of a contractual clause. See S. REP. No. 2061, 74th Cong., 2d Sess. 6 (1936); H.R. REP. No. 2517, 74th Cong., 2d Sess. 6 (1936).

125. *Carnival*, 111 S. Ct. at 1528.

126. *Id.*

127. *Id.* at 1529 (Stevens, J., dissenting).

128. *Id.* Clearly, Justice Stevens appended a facsimile of the ticket and wrote about the "meticulous passenger" in a direct response to the majority's implication that a Carnival passenger is fully aware of the forum clause.

129. *Id.*

tice Stevens concluded that the no-refund clause, coupled with the fact that passengers do not receive their tickets until after payment constituted unfair bargaining.

Next, the dissent analyzed forum selection clause case law and policy considerations as they relate to the consumer. Case law prior to *The Bremen* consistently held forum selection clauses such as the one in this case to be unenforceable.<sup>130</sup> Justice Stevens offered disparate bargaining power and public interest in deterring negligence as two reasons for such holdings.<sup>131</sup> Also, the dissent questioned the majority's theory that passengers will benefit in the form of reduced fares if cruise lines can limit their exposure to suit.<sup>132</sup> Justice Stevens reasoned that under the majority's theory, all liability-limiting clauses, even complete waivers of liability, would be enforceable.<sup>133</sup> Enforcement of such clauses would be "at odds with longstanding jurisprudence."<sup>134</sup> According to the dissent, clauses tending to limit liability hurt the consumer and therefore established doctrine should be followed to keep such limitations in check.

Next, the dissent fully examined section 183c of the Limitation of Liability Act. Definitively, the dissent stated that section 183c was enacted expressly to invalidate limitations on shipowners' liability. Therefore, the dissent argued, the forum clause is "null and void" under section 183c.<sup>135</sup> The dissenters reasoned that legislative history reveals Congress' intent to restrict all lessening of shipowners' liability and to "put a stop to all such practices and practices of a like character."<sup>136</sup> Although the statute does not refer to forum selection clauses specifically, Justice Stevens claimed that the statute's liberal language was broad enough to encompass them.<sup>137</sup>

Justice Stevens also noted that the Courts of Appeals, interpreting the analogous provision of COGSA, have unanimously invalidated forum selection clauses incorporated in bills of lad-

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130. *Id.* at 1530.

131. *Id.*

132. *Id.* at 1530 n.4.

133. *Id.*

134. *Id.*

135. *Id.* at 1529.

136. *Id.* at 1532. See also H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6-7 (1936).

137. *Carnival*, 111 S. Ct. at 1532. Justice Stevens writes, "[t]he absence of a specific reference is adequately explained by the fact that such clauses were already unenforceable under the common law . . ."

ing.<sup>138</sup> The forum selection clauses in those cases required suit to be brought in foreign jurisdictions.<sup>139</sup> Although *Carnival's* forum clause selected an American venue, Justice Stevens resolved that the burdens faced by individual plaintiffs are proportional to the cost to a corporation of conducting overseas litigation. Hence, the dissent reasoned that analogous cases construing the Limitation of Liability Act should have the same outcome as COGSA cases decided by the Courts of Appeals.

Justice Stevens concluded by stating that even without the benefit of section 183c, he would still apply the common law prevalent prior to *The Bremen* and invalidate the forum clause.<sup>140</sup> Clearly, the dissent grounded its censure of the majority opinion on the need to protect the rights of cruise ship passengers, which rights case law and statute had formerly guarded.

#### IV. ANALYSIS

In the context of international and interstate contracts, forum selection clauses may be useful devices, lending certainty and stability to a transaction.<sup>141</sup> However, in the setting of *Carnival Cruise Lines, Inc. v. Shute*, enforcement of a forum clause is unfair and violative of both federal statute and legal precedent. The Supreme Court, in an effort to serve the interests of the justice system, has failed to defend the consumer that Congress has specifically sought to protect.<sup>142</sup>

In 1936 Congress passed the Limitation of Liability Act to prevent shipping lines from taking advantage of their passengers. The Supreme Court's "plain language"<sup>143</sup> analysis of the Limitation of Liability Act fails to enforce Congress' intent. Furthermore, it is this Comment's contention that the Supreme Court misapplied the Court's holding and dictum in *The Bremen*. Essentially nothing is left of the reasonableness test laid out in *The Bremen*. To enforce a forum selection clause in a contract between an unknowing consumer and a large corporate

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138. *Id.*

139. *Id.* at 1533. See, e.g., *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988); *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967).

140. *Carnival*, 111 S. Ct. at 1533.

141. See Gilbert, *supra* note 4, at 2.

142. See Linda S. Mullenix, *Forum-Shoppers Should Discover a Wider Market*, NAT'L L.J., Aug. 19, 1991, at S12. ("Carnival Cruise Lines is a blatantly anti-consumer decision.").

143. *Carnival*, 111 S. Ct. at 1528.

defendant teeters on dangerous ground. The door has now swung wide open for the travel industry to lessen, if not virtually eliminate, its liability in cases where the corporate defendant enjoys the upper-hand by utilizing adhesive consumer contracts.

*A. The Court's Failure to Give Effect to the Limitation of Liability Act*

The Supreme Court's application of the Limitation of Liability Act failed to give force to Congress' intent regarding the 1936 statute. The obvious purpose of the Limitation of Liability Act is to prevent vessel owners from taking advantage of their overwhelming bargaining power in their dealings with passengers.<sup>144</sup> The Court's validation of the forum clause, incorporated in a form contract ticket between a corporate defendant and an individual, fails to protect consumers — the group which Congress aimed to protect.

An examination of the statute's legislative history exposes the liberal intent that Congress had in mind when drafting the statute. The following excerpt from the House Report emphasizes the statute's remedial purpose:

During the course of the hearings on the bill (H.R. 9969) there was also brought to the attention of the committee a practice of providing on the reverse side of steamship tickets that in the event of damage or injury caused by the negligence or fault of the owner or his servants, the liability of the owner shall be determined by arbitration. The amendment to chapter 6 of title 48 of the Revised Statutes proposed to be made by section 2 of the committee amendment is intended to, and in the opinion of the committee will, *put a stop to all such practices and practices of a like character.* (emphasis added)<sup>145</sup>

In the Supreme Court's decision, the majority focused on the House Report's use of the word "arbitration."<sup>146</sup> This focus,

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144. Respondent's Brief at 36, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (No. 89-1647).

145. H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6-7 (1936); *see also* S. REP. NO. 2061, 74th Cong., 2d Sess. 6-7 (1936).

146. *Carnival*, 111 S. Ct. at 1529, *citing* S. REP. NO. 2061, 74th Cong., 2d Sess. 6 (1936); H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6 (1936). ("The legislative history of § 183c suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that the question of liability and the measure of damages shall be determined by arbitration.")

combined with the statute's "plain language" reference to "a trial by [a] court of competent jurisdiction," lead the majority to conclude that Congress only intended to do away with foreign arbitration clauses, not to prohibit forum selection clauses.<sup>147</sup>

The Court's conservative construction was ill conceived. Remedial statutes should be interpreted liberally to effectuate their purpose.<sup>148</sup> Accordingly, the Court should have eschewed their plain language analysis and, alternatively, should have employed a liberal reading to effectuate Congress' intent. The plain language of a statute does not necessarily encompass legislative purpose.<sup>149</sup> Clearly, the statute's expansive wording, providing that any contractual stipulation "purporting. . .to lessen" a shipowner's liability is void, would encompass forum selection clauses.<sup>150</sup> The Supreme Court, in *Just v. Chambers*,<sup>151</sup> stated that one purpose of the Limitation of Liability Act was "to afford an opportunity for the determination of claims against the vessel and its owners."<sup>152</sup> Where a forum selection clause requires the filing of a suit in a distant state, it serves as a large deterrent to the filing of suits by consumers against large corporations.<sup>153</sup> Indeed, the hurdles that a plaintiff might face, such as high costs and inability to procure witnesses, might prove insuperable to effective relief. Accordingly, an expansive interpretation of section 183c would invalidate Carnival's forum clause because it does not afford plaintiffs such as the Shutes a realistic opportunity to have their dispute litigated.

The application of a forum selection clause may not wholly prevent a passenger from determination of his or her claim, but it does present unreasonable hardship to the attainment of redress. Often, traditional methods of statutory construction, such as the Court's "plain language" analysis, lead to irrational results and should be forsaken in favor of a system which takes into account the probable consequences of alternate interpreta-

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147. *Carnival*, 111 S. Ct. at 1529.

148. *Peyton v. Rowe*, 391 U.S. 54 (1967).

149. It is a fallacy to assume that the plain language of a statute fully encompasses legislative intent. Harry H. Wellington & Lee A. Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1549-50 (1963).

150. *Carnival*, 111 S. Ct. at 1532 (Stevens, J., dissenting).

151. 312 U.S. 383 (1940).

152. *Id.* at 385.

153. See *Yoder v. Heinhold Commodities, Inc.*, 630 F. Supp. 756 (E.D. Va. 1986).

tions.<sup>154</sup> A clause stipulating that a passenger must travel 3,000 miles to resolve a dispute certainly tends to "lessen, weaken or avoid" a shipowner's liability by attaching cost and complexity. This result is precisely what Congress intended to avoid by enacting section 183c.<sup>155</sup> As a general rule, once a court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."<sup>156</sup> Given Congress' intent to protect passengers against the avoidance of shipowner liability, this rule dictates that the Court interpret section 183c so as to allow plaintiffs such as the Shutes an opportunity to litigate their cases.

Although section 183c does not expressly proscribe forum selection clauses,<sup>157</sup> another argument which supports the assertion that its language encompasses forum selection clauses can be found in case law prior to 1936. More specifically, the absence of a specific reference to forum selection clauses in the Act is explained by the fact that, under common law, such clauses were already unenforceable at the time the statute was enacted.<sup>158</sup> Early forum selection clause history reveals a marked opposition toward such agreements. Common reasons used to decline enforcement of forum selection clauses included "public policy" and the assertion that such agreements should not "oust the jurisdiction" of competent courts.<sup>159</sup> In 1874 the Supreme Court stated that "agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void."<sup>160</sup> Because prior case law such as this relied upon a public policy argument to invalidate forum clauses, clauses such as the one in *Carnival* would not have been used by carriers even prior to the passage of the Act. Thus, Congress may have not anticipated a need to proscribe forum clauses because the courts already did so. However, Congress did construct the statute with a wide breadth in

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154. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 885 (1930).

155. Respondent's Brief at 36, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (No. 89-1647).

156. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1983).

157. In fact, 46 U.S.C. § 183c does not specifically mention any clause at all. See Official Transcript at 41, *Carnival Cruise Lines, Inc. v. Eulala Shute*, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (No. 89-1647).

158. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1532 (1991) (Stevens, J., dissenting) (citing *Moskal v. United States*, 111 S. Ct. 461 (1990)).

159. For a discussion of forum selection clause history prior to 1936, see Gilbert, *supra* note 4, at 12-13.

160. *Insurance Co. v. Morse*, 87 U.S. (920 Wall.) 445, 451 (1874).

order to condemn "all such practices," including jurisdictional provisions.<sup>161</sup> Accordingly, prior history evidences that section 183c is not inapplicable to forum clauses merely because it does not expressly proscribe such clauses.

*B. Comparison of the Limitation of Liability Act to The Carriage of Goods by Sea Act*

In 1936 Congress passed the Carriage of Goods by Sea Act (COGSA).<sup>162</sup> COGSA represents the American enactment of the Hague Rules, a series of international maritime conferences in the 1920's.<sup>163</sup> COGSA is part of an international effort to achieve consistency and simplification of bills of lading used in international trade.<sup>164</sup> In terms of statutory construction and breadth of intent, COGSA and the Limitation of Liability Act are virtually identical.<sup>165</sup> The Courts of Appeals, applying COGSA to cargo cases, have refused to enforce forum selection provisions requiring suit in foreign jurisdictions.<sup>166</sup> These cases have reasoned that enforcement of forum selection clauses in cargo cases would have the practical effect of substantially lessening carrier liability.<sup>167</sup> COGSA cases are arguably distinguishable from cases such as *Carnival* in that COGSA cases involve disputes between corporate litigants and foreign choice of forum provisions. However, the burden on individuals like the Shutes is akin to the burden of overseas litigation for the cargo companies.<sup>168</sup> Therefore, the similarities between the statutes are such that cases applying the statutes should yield comparable results.

The juxtaposition of COGSA section 1303(8) and section

161. *Carnival*, 111 S. Ct. at 1532 (Stevens, J., dissenting).

162. 46 U.S.C. § 1300 (1936).

163. See *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981).

164. *Id.* at 723.

165. The pertinent provision of COGSA, § 1303(8) reads as follows:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier of the ship from liability from loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

166. *Carnival*, 111 S. Ct. at 1532. See also Paul S. Edelman, *The Supreme Court and a Forum Selection Clause*, N.Y.L.J., June 7, 1991, at 9.

167. *Hodes v. S.N.C. Achille Lauro Altrigestione*, 858 F.2d 905, 914 (3d Cir. 1988).

168. *Carnival*, 111 S. Ct. at 1533 (Stevens, J., dissenting).

183c, both passed in 1936, reveals substantial similarity. COGSA states that "any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability . . . or lessening such liability . . . shall be null and void and of no effect."<sup>169</sup> This language is indistinguishable from section 183c, which nullifies "any provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant."<sup>170</sup> Considering the similarities in the wording that Congress chose, an inference can be drawn that Congress intended for the statutes to operate similarly. Courts interpreting COGSA have determined that Congress specifically intended COGSA to prevent shipowners from exercising unfair bargaining power.<sup>171</sup> Thus, any provision that lessens the carrier's liability is given no effect. Therefore, it seems logical that when applying section 183c to a forum clause requiring a plaintiff to travel across the United States in order to file suit, a holding nullifying the clause would likewise follow. The disparate treatment afforded these two provisions by federal courts cannot be rationalized by an examination of the text itself. Therefore, the Court's interpretation of section 183c in *Carnival* must be viewed with skepticism given that the Court examined the "plain language" of the statute.

A study of COGSA case law reveals that the Courts of Appeals have regularly refused to enforce forum selection clauses. The leading case applying COGSA to forum selection clauses is *Indussa Corporation v. S.S. Ranborg*.<sup>172</sup> Indussa, a New York corporation, was the cosignee of nails and barbed wire being shipped aboard a Norwegian ship, the *Ranborg*, from Antwerp, Belgium to San Francisco.<sup>173</sup> In the bill of lading<sup>174</sup> there was a clause that required all disputes to be settled in Norway while the clause paramount made COGSA applicable.<sup>175</sup> Indussa, having located the *Ranborg* in American waters, brought an *in rem* action in New York district court alleging that the shipment had

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169. 46 U.S.C. § 1303(8) (1936).

170. 46 U.S.C. § 183c (1936).

171. See, e.g., *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724 (4th Cir. 1981); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967); see also Gately, *supra* note 66, at 593.

172. 377 F.2d 200 (2d Cir. 1967).

173. *Id.*

174. A bill of lading is a receipt for goods, contract for their carriage, and documented evidence of title. *Schwab v. Erie R. Co.*, 293 N.Y.S. 842, 846 (Mun. Ct. 1937).

175. *Indussa*, 377 F.2d at 201.



arrived damaged.<sup>176</sup> In response, the Norwegian shipowner sought to enforce the forum selection clause.<sup>177</sup> The Second Circuit Court of Appeals, sitting *en banc*, overturned precedent<sup>178</sup> and held that COGSA prohibited such clauses because they might lessen a carrier's liability by subjecting the claim to a distant court.<sup>179</sup> The court, noting the barrier that forum clauses place in the way of enforcing liability, stated that such clauses are "an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum."<sup>180</sup>

Likewise, the Fourth Circuit, applying section 3(8) of COGSA, overrode a foreign forum selection clause in *Union Insurance Society of Canton, Ltd. v. S.S. Elikon*.<sup>181</sup> The *Elikon* controversy arose out of a shipment of air conditioners from Virginia to Kuwait aboard a West German-owned freighter.<sup>182</sup> Upon delivery in Kuwait, the air conditioners were damaged.<sup>183</sup> Union Insurance Society, as marine insurers, paid a substantial claim to the cosignee of the cargo and subsequently sued the West German shipowner for indemnification.<sup>184</sup> The suit was brought in admiralty in the United States District Court for the Eastern District of Virginia despite a forum selection clause in the bill of lading designating the Court of Bremen, West Germany as the contractual forum.<sup>185</sup> Another clause provided that the bill of lading was subject to the provisions of COGSA.<sup>186</sup> The *Elikon* court, citing *Indussa*, invalidated the forum clause under the authority of COGSA. The Court of Appeals reasoned that, as opposed to the negotiated clause in *The Bremen*, the *Elikon* clause was incorporated in an adhesion contract.<sup>187</sup> Noting that the West German company was headquartered in Bremen, the court suggested that Congress intended COGSA to ameliorate bills of lading with one-sided form provisions such as the clause here.<sup>188</sup>

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176. *Id.*

177. *Id.*

178. *Id.* at 204. The Second Circuit explicitly overruled *Wm. H. Muller & Co., Inc. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955).

179. *Indussa*, 377 F.2d at 203.

180. *Id.*

181. 642 F.2d 721 (4th Cir. 1981).

182. *Id.* at 722.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 724.

188. *Id.*

The *Elikon* court did not intend to suggest that only jurisdictional provisions found in adhesion contracts would be invalidated under COGSA. Indeed, the court, citing language from *Indussa*, stated that any jurisdictional provision requiring trial abroad would be invalid under COGSA because the clause "might" lessen the carrier's liability.<sup>189</sup> Thus, under *Elikon*, the mere chance that a forum clause might lessen liability would be enough to render the clause unenforceable under COGSA.

The paramountcy of COGSA section 3(8) has been demonstrated in forum selection clause litigation throughout the federal courts.<sup>190</sup> Given the similarities between COGSA section 3(8) and the Limitation of Liability Act section 183c, as well as the wealth of case law applying COGSA to forum clauses, one must wonder why the majority failed to address COGSA in *Carnival*. The Supreme Court based its analysis in *Carnival* on the holding of *The Bremen*, but failed to address COGSA. Perhaps most important, *The Bremen* offered the view that forum selection clauses are presumptively valid in the absence of any congressional policy on the subject.<sup>191</sup> In fact, *The Bremen* court expressly noted COGSA's inapplicability to the case.<sup>192</sup> Indeed, COGSA was found inapplicable in *The Bremen* because a drilling rig was not considered a "good" and there was no bill of lading.<sup>193</sup> The *Carnival* Court failed to recognize dictum voiced in *The Bremen* that explicitly noted the inapplicability of any statute.

Instead, the Supreme Court should have applied the reasoning expressed in the COGSA decisions. As much as Congress intended COGSA to ameliorate bills of lading with one-sided form clauses, it likewise intended the Limitation of Liability Act to operate in the same fashion regarding consumer contract form clauses. Of course, the differences in the cases are apparent. *Carnival* dealt with an individual being forced to litigate her claim in the "competent jurisdiction" of Florida, whereas the COGSA

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189. *Id.* (citing *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967)).

190. See *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988) (forum selection clause selecting The Republic of China tends to lessen the Chinese shipowners' liability); *Conklin & Garrett Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) (COGSA invalidates a choice of forum clause selecting a Finnish forum); see also *Pacific Lumber & Shipping Co. v. Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979).

191. See *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724 (4th Cir. 1981); Nadelmann, *supra* note 62, at 134.

192. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 n.11 (1972).

193. See 46 U.S.C. § 1301(b); *Elikon*, 642 F.2d at 724 n.3.

decisions dealt with large corporate litigants required to travel overseas. The forum selection clause in *Carnival* does not mandate suit in a foreign jurisdiction, and therefore might have less of an impact on a victim's ability to recover.<sup>194</sup> However, as previously mentioned, the burden on consumers like Mrs. Shute of conducting a trial across the United States is likely to be proportional to the additional cost incurred by a large corporation conducting a trial overseas.<sup>195</sup> Had the majority considered the COGSA decisions, they would have realized the inequity of forcing a plaintiff to sue in a "distant court"<sup>196</sup> and how enforcement of forum selection clauses tends to "lessen the [ship's] liability."<sup>197</sup> It was unrealistic for the Court to believe that no reduction in *Carnival's* liability occurred upon enforcement of the clause requiring the Shutes to litigate in Florida.

### C. *The Court's Misapplication of The Bremen*

The Supreme Court, in an effort to serve judicial economy, extended *The Bremen* precedent so as to equate sophisticated commercial litigants with consumers who have little bargaining power. The Court's balancing of the clause's reasonableness was unevenly tipped in favor of the corporate defendant, as evidenced by the four factors cited by the Court to support its reasonableness determination. Since the Supreme Court's 1972 *Bremen* decision, the Court has repeatedly shown favoritism toward the enforcement of forum selection clauses. There can be little doubt that the travel industry has taken notice.

*The Bremen* held that forum selection clauses are prima facie valid unless enforcement is shown to be unreasonable.<sup>198</sup> In evaluating the reasonableness of *Carnival's* forum clause, the Court cited four factors, three of which benefited the corporate defendant. The first factor cited is that forum clauses enable cruise lines to limit the fora where they are sued. This factor obviously benefits the cruise line.<sup>199</sup> The second and third factors, namely, adding certainty to an agreement and preserving judicial resources, work together to express the goal of reducing

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194. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1533 (1991) (Stevens, J., dissenting).

195. *Id.*

196. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203 (2d Cir. 1967).

197. *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840, 842 (5th Cir. 1988).

198. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

199. *Carnival*, 111 S. Ct. at 1527.

litigation to the benefit of both the cruise line and the courts.<sup>200</sup> The fourth factor reasons that consumers will benefit from reduced fares as the result of limiting the fora where cruise lines would be amenable to suit.<sup>201</sup> However, this fourth factor is weak on theory and practical effect.<sup>202</sup> Under this reasoning, all exculpatory clauses could be enforced if passengers were compensated by an imposed reduced fare.<sup>203</sup> Certainly, allowing shipowners to avoid all liability in cases such as this one cannot be considered beneficial to passengers if the only benefit received from the shipowners' exculpation is a slightly reduced passenger fare. Given the fact that three out of the four factors cited by the Court in no way reflect the impact of the forum clause on passengers, it is hard to see how the Court was able to use these factors to judge the reasonableness of subjecting such passengers to the clause's harsh terms.

Clearly, the Supreme Court's "reasonableness" analysis fails to properly balance the interest of individual consumers. *The Bremen* court recognized that a forum clause may be unreasonable if the contractual forum is seriously inconvenient for the plaintiff.<sup>204</sup> Such inconvenience can be proven if the party seeking to escape the clause is "for all practical purposes . . . deprived of his day in court."<sup>205</sup> There is little doubt that being forced to travel across the continental United States to resolve a slip-and-fall case would constitute serious inconvenience. Furthermore, although the majority disagreed,<sup>206</sup> the Court of Appeals did find evidence that the Shutes were physically and financially unable to litigate in Florida.<sup>207</sup> Admittedly, one party's inconvenience is another party's convenience, but an individual faced with suing a large corporate defendant in a distant state is

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200. *Id.*

201. *Id.*

202. See Mullenix, *supra* note 142, at S12. ("Apart from the justices, are there any consumers naive enough to buy the reduced fare theory?"); Official Transcript at 46. *Carnival Cruise Lines, Inc. v. Eulala Shute*, 111 S. Ct. 1522 (1991) (No. 89-1647). This reduced fare theory comes at a time when international travel has become increasingly expensive. For instance, international air carriers have increased fares significantly in response to the Persian Gulf crisis. See Agis Salpukas, *Higher Fares on Foreign Flights Due*, N.Y. TIMES, Sept. 5, 1990, at D1.

203. *Carnival*, 111 S. Ct. at 1530 n.4.

204. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972).

205. *Id.* at 18.

206. *Carnival*, 111 S. Ct. at 1527.

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

very likely to be deterred.<sup>208</sup> Indeed, only the most financially well-off passenger would be able to overcome the hurdles of high costs and inability to secure witnesses in a distant forum.<sup>209</sup>

This is not to imply that all forum selection clauses in form ticket contracts should be ruled invalid. A court must still assess the reasonableness of the clause in the context of each case.<sup>210</sup> In *Carnival*, Florida's only connection to the transaction is that Carnival Cruise Lines is headquartered there.<sup>211</sup> The *Tropicale* sailed from California and returned there.<sup>212</sup> Additionally, none of the witnesses lived in or near Florida when the action was commenced.<sup>213</sup> Almost all of the lay and medical witnesses live in Washington.<sup>214</sup> Thus, based on the facts of this case, Florida is an inconvenient and unfair forum.

However, *The Bremen* Court stressed that inconvenience is not a sufficient defense against the enforcement of a forum clause if such inconvenience was foreseeable at the time of contracting.<sup>215</sup> The *Carnival* Court found the forum clause was communicated to the Shutes and, thus, the presumption is that the Shutes should get what they bargained for.<sup>216</sup> Of course, the forum selection clause was communicated to the Shutes "as much as three pages of fine print can be communicated."<sup>217</sup> In *Carnival*, there was no bargaining. The *Carnival* ticket amounted to

208. *Yoder v. Heinhold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986).

209. It would be a mistake to assume that only the well-to-do are cruise ship passengers and, therefore, can afford distant litigation. For example, many people save for years to go on a cruise line vacation.

210. See *Everett v. Carnival Cruise Lines, Inc.*, 677 F. Supp. 269 (M.D. Pa. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985) (Both cases upheld forum selection clauses where there was no serious inconvenience to plaintiffs resulting from a lawsuit in Florida.).

211. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1524 (1991).

212. *Id.*

213. Respondent's Brief at 34, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (No. 89-1647).

214. *Id.*

215. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972). See also Gruson, *supra* note 2, at 180.

216. *Carnival*, 111 S. Ct. at 1525; see Gilbert, *supra* note 4, at 32.

217. *Carnival*, 111 S. Ct. at 1525.

A later district court case found the Supreme Court's presumption that the Shutes had actual notice of the forum selection clause to be dispositive. In *Berman v. Cunard Line, Ltd.*, 771 F. Supp. 1175 (S.D. Fla. 1991), the United States District Court for the Southern District of Florida denied a Motion to Transfer that was grounded upon a forum selection clause. The district court stated that *Carnival* is not controlling where the plaintiff had never read the cruise ticket nor was aware of the venue provision requiring suit to be brought in New York.

an adhesion contract<sup>218</sup> offered on a take-it-or-leave-it basis.<sup>219</sup> Thus, the forum selection clause presented the Shutes with "an unreasonable disadvantage and thereby subvert[ed] the interests of justice."<sup>220</sup>

*D. Carnival: The Court's Green Light for the Selection of Foreign Contractual Venues*

*Carnival* has extended an invitation to foreign corporations involved in international travel. It invites such corporations to select a foreign jurisdiction as the contractual forum, thereby potentially lessening their liability. The travel industry is a big business, ranking second only to petroleum as an item of world trade.<sup>221</sup> The greatest percentage of tourism expenditures was spent for vacation and personal reasons.<sup>222</sup> The extension of *The Bremen* precedent to consumers could lead to abuse and to a dramatic lessening of liability for foreign travel-related businesses. For example, because Carnival Cruise Lines is incorporated in Panama,<sup>223</sup> Carnival could theoretically select Panama as the contractual forum. Indeed, Panama is no more connected to the Shutes' claim than is Florida. Moreover, Panamanian law permits forum selection clauses by statute.<sup>224</sup> Although the Court did not explicitly address foreign forum clauses, under the court's reasoning, all of the same considerations apply to foreign jurisdictions. As long as the clause is "reasonably communicated" to the passenger, the clause will be enforced.<sup>225</sup>

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218. Almost by definition, an adhesion contract is a standardized contract offered by an offeror who possesses superior economic bargaining power. See Gilbert, *supra* note 4, at 36.

219. *Carnival*, 111 S. Ct. at 1530 (Stevens, J., dissenting).

220. *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 345 (3d Cir. 1966); see also *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953 (3d Cir. 1978) (where all records and witnesses were located in the U.S., a forum selection clause selecting German courts as the chosen forum is unreasonable and unenforceable).

Furthermore, the *Carnival* decision is inconsistent with the Restatement (Second) of Conflicts of Law. The Restatement suggests that courts should invalidate forum selection clauses when the transaction is unfair or unreasonable. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 80 (1971); see also Gruson, *supra* note 2, at 173.

221. William J. Knudsen, Jr., *Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment*, 1983 B.Y.U. L. REV. 101.

222. *Id.*

223. *Carnival*, 111 S. Ct. at 1533 n.6.

224. Panamanian Judiciary Code art. 237; see also Gilbert, *supra* note 4, at 23.

225. The reasonable communicativeness test was first adopted by the Second Circuit in *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968) (a limiting provision in a contract that is reasonably communicated to the passen-

A survey of international law reveals that most countries will permit clauses which assign exclusive jurisdiction to their own courts. This will be particularly true where the selected foreign jurisdiction favors forum selection clauses. For example, the general rule in England is that forum clauses are *prima facie* valid.<sup>226</sup> English courts accept submission by parties to hear disputes in England,<sup>227</sup> because it is England's view that respect should be given to the party's choice.<sup>228</sup> Likewise, Spain and Italy both favor prorogation clauses.<sup>229</sup> Other countries, such as Mexico and Cuba, favor these clauses as well.<sup>230</sup> Additionally, Belgium and Germany enforce forum selection clauses where the parties have no link to the country.<sup>231</sup> Consequently, many foreign courts will confer jurisdiction based solely on a freely-negotiated forum clause.

It is worthy to note, however, that some foreign courts will place limitations on forum selection clauses. For instance, the Supreme Court of the Netherlands, in deciding an admiralty dispute, has ruled that a forum selection clause will not be enforced where parties totally unconnected to the Netherlands have selected Dutch courts as the contractual forum.<sup>232</sup> This case stands in contrast to *The Bremen*, where an American corporation and a German corporation, both unconnected to England, chose the London Court of Justice as the contractual forum.<sup>233</sup> Had the parties in *The Bremen* chosen the Netherlands to settle their

ger is binding). The First, Third, Fifth, and Sixth Circuits have all adopted the reasonable communicativeness test. *See, e.g.,* *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir. 1987); *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11 (5th Cir. 1979); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983).

226. *See* Gilbert, *supra* note 4, at 20. However, the courts of England treat jurisdiction clauses ousting their jurisdiction with no clear pattern. *See* *The Fehrman*, [1958] 1 All E.R. 333 (English courts ought not be ousted of jurisdiction by a jurisdiction clause in a bill of lading); *The "Star of Luxor"*, [1981] 1 Lloyd's Rep. 139 (upholding clause requiring arbitration in Egypt); *The "Panseptos"*, [1981] 1 Lloyd's Rep. 152 (Ethiopian forum clause invalidated, English court proceeded).

227. *Transocean Towage Co. Ltd. v. Hyundai Construction Co. Ltd., Hoge Raad der Nederlanden*, [1987] ECC 282.

228. *Id.*

229. Joseph M. Perillo, Jr., *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L. 163 (1964).

230. *Id.*

231. *Id.*

232. *Transocean Towage Co. Ltd. v. Hyundai Construction Co. Ltd., Hoge Raad der Nederlanden*, [1987] ECC 282.

233. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

disputes, a Dutch court would have found the clause to be insufficient to establish jurisdiction.

The likelihood that foreign travel-related companies will select foreign jurisdictions as the contractual forum is supported by a string of opinions dating back to *The Bremen*.<sup>234</sup> These opinions express a strict adherence to validating forum selection clauses.<sup>235</sup> In addition, lower federal courts have taken a more hospitable attitude toward forum selection clauses, applying the holding of *The Bremen* to a broad spectrum of commercial and non-commercial cases set in both domestic and foreign fora.<sup>236</sup> Pervasive foreign enforcement of forum selection clauses, coupled with federal encouragement of such clauses, points to the inevitable widespread incorporation of foreign jurisdictions as contractual forums in passenger ticket contracts.

Finally, following *Carnival*, the strength of the COGSA decisions is called into question.<sup>237</sup> The Supreme Court ignored Congress' liberal intent in the Limitation of Liability Act, thus creating doubt as to the statutory underpinnings of COGSA. However, since *Carnival*, the United States District Court for Puerto Rico stated that the rationale behind the COGSA case law denying enforcement of forum selection clauses has not been eroded.<sup>238</sup> In *Lloyd's of London v. The M/V Steir*,<sup>239</sup> a dispute between an English insurer and a French carrier, the Puerto Rico district court found that *Carnival* did not overrule prior COGSA decisions. The court held that the forum selection clause requiring disputes to be brought in France was not enforceable.<sup>240</sup> Moreover, the district court emphasized that *Carnival* "represents a recurring fantasy of shipowners and cargo defense lawyers."<sup>241</sup> This "fantasy" may come true by allowing corporations to select such distant forums as "Timbuktu or By-

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234. See *supra* note 7 and accompanying text.

235. Some federal courts also afford the travel industry preferential treatment. See Knudsen, *supra* note 221, at 101.

236. For extensive citation of federal expansion of *The Bremen*, see Mullenix, *supra* note 26, at 294 n.7.

237. See Edelman, *supra* note 166, at 9. See also Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992) (*Carnival* "makes clear that COGSA is no longer an obstacle to the enforcement of forum selection agreements.").

238. *Lloyd's of London v. The M/V Steir*, 773 F. Supp. 523, 525 (D.P.R. 1991).

239. *Id.* at 525.

240. *Id.* at 527.

241. *Id.* at 527 n.1.



elorussia" as the contractual forum.<sup>242</sup> The court maintained that clauses which required litigation in far-off forums would render lawsuits economically unfeasible.<sup>243</sup>

*E. Alternative Analysis: A Return to the Traditional Notions of Fair Play*

Whether *Carnival's* extension of *The Bremen* to encompass commercial consumer forum contracts will apply to foreign jurisdiction provisions is not yet known. Courts asked to decide such disputes will be faced with interesting problems. This Comment suggests that future courts should analyze foreign forum clause problems by employing traditional jurisdictional doctrine rather than contractual principles.<sup>244</sup> By employing "traditional notions of fair play,"<sup>245</sup> a jurisdictional analysis will protect both parties and will prevent the commercial travel business from insulating itself from suit.

Under *Carnival*, forum selection clauses are evaluated by a reasonableness test based on contract principles. These contract principles do not adequately protect the consumer. Instead, courts faced with foreign forum clause disputes might protect the consumer against the burden of overseas litigation by invoking jurisdictional principles.<sup>246</sup> The distinction between applying contractual principles and jurisdictional principles may be seen by examining the two systems at work. Under the *Carnival* test, no mention is made of the reasonableness of the forum. Under jurisdictional principles, in contrast, the forum clause must bear a reasonable relationship to the transaction.<sup>247</sup> For example, in

242. *Id.* at 527.

243. *Id.* (In *The M/V Steir*, the claim was for \$82,639.44. The court stated that if the plaintiff was forced to litigate in France, the contractual forum, much of that award would be spent on attorney's fees, witness fees, and travel expenses.)

244. See Mullenix, *supra* note 26, at 372.

245. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

246. While many expected the Supreme Court to address jurisdictional issues in *Carnival*, see Mullenix, *supra* note 67, the Court declined to do so. The Court found the forum selection clause issue to be dispositive in determining whether the Court of Appeals erred in allowing the district court to hear the Shutes' claim. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1525 (1991).

247. See *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 215 (W.D. Tenn. 1985) (choice-of-law provision is valid absent a showing that the forum does not bear a reasonable relationship to the transaction); additionally, both the U.C.C. and the Restatement (Second) of Conflict of Laws require some kind of "reasonable relationship" or "substantial relationship" to the forum in order to be enforced. See U.C.C. § 1-105 (1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

*Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*,<sup>248</sup> the Court of Appeals for the Third Circuit enforced a forum selection clause that provided Italy as the contracted forum. In *Hodes*, passengers of the cruise ship *Achille Lauro* brought claims arising out of the infamous terrorist hijacking in the Mediterranean Sea.<sup>249</sup> The cruise ship sailed under the Italian flag and the voyage began and ended in Italy.<sup>250</sup> Clearly, Italy bore a substantial relationship to the complained-of transaction and would satisfy a jurisdictional reasonableness test. In *Carnival*, the cruise began and ended in California and Mrs. Shute's accident occurred off the coast of Mexico. Florida, the contractual forum, did not bear a relationship to the complained of transaction; thus, the forum clause would not be enforced under a jurisdictional test. As illustrated by this example, a jurisdictional analysis would not reflexively invalidate foreign jurisdictional provisions. Instead, to satisfy the jurisdictional test, the chosen forum would have to be reasonably related to the transaction.

Dating back to the seminal jurisdiction case, *International Shoe, Inc. v. Washington*,<sup>251</sup> the Supreme Court has extolled the value of fairness in jurisdictional disputes. *International Shoe* and its progeny have analyzed jurisdictional disputes pursuant to a reasonableness theorem. For example, at issue in *World-Wide Volkswagen Corp. v. Woodson*<sup>252</sup> was whether an Oklahoma federal court possessed personal jurisdiction over a New York automobile dealer when an automobile sold by the defendant in New York became involved in an accident in Oklahoma.<sup>253</sup> The Supreme Court denied the Oklahoma court jurisdiction. The Court doubted whether the New York automobile dealer could "reasonably [have] anticipated" being subject to a lawsuit in Oklahoma.<sup>254</sup> The same type of question should be asked in evaluating the reasonableness of a forum selection clause in a consumer form contract. Namely, the court should determine whether the consumer reasonably could have anticipated a foreign venue as the exclusive cite for litigation. The actual notice given to the consumer, as well as the relationship be-

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248. 858 F.2d 905 (3d Cir. 1988).

249. *Id.*

250. *Id.* at 906.

251. 326 U.S. 310 (1945).

252. 444 U.S. 286 (1980).

253. *Id.*

254. *Id.* at 297.

tween the forum and the transaction, must be closely examined by the courts to protect the interests of both parties.

Furthermore, a jurisdictionally-based approach can be utilized without offending *Carnival's* redefined reasonableness test. The four factors that led the Supreme Court to enforce *Carnival's* forum selection clause can be addressed and reconciled under this Comment's alternate analysis. The first two factors cited by the Court, limiting the fora where a cruise line may be sued and adding certainty to a transaction, are fatally flawed under contract principles. Under contractual doctrine, the only party whose interests are being served is the corporate defendant. In contrast, both concerns can be addressed rationally and equitably under jurisdictional doctrine. First, by selecting a forum that has substantial factual contacts with the transaction, a cruise line can limit the fora where it will be amenable to suit and thereby satisfy a jurisdictional test. For instance, had *Carnival* selected Los Angeles, the port of departure, the restriction of suit would have been reasonably foreseeable to passengers like the Shutes and would have also served to limit the forum in order to serve *Carnival's* interests.<sup>255</sup> Second, a jurisdictional test also serves to promote a greater degree of foreseeability as to where a dispute might be litigated. In the case of a form ticket contract containing small-print clauses, the only party who will likely be aware of the situs of litigation will be the corporate defendant.<sup>256</sup> Fairness principles underlying a jurisdictional approach demand that such a clause select a reasonable forum. While the consumer might still not be aware of the contractual forum, she would still be able to reasonably foresee the forum's selection. Thus, under a jurisdictional regime, a cruise line could limit its amenability to suit while still selecting a forum that would be fair and foreseeable to the consumer.

The third factor identified by the Court reasoned that forum selection clauses eliminate the need for courts to entertain jurisdictional disputes, thereby preserving judicial resources. The Supreme Court designed *Carnival* to clear up forum selection clause issues and spare United States courts the time and effort necessary to decide jurisdictional conflicts. However, one commentator suggests that *Carnival* has only clouded forum se-

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255. Presumably, the now much-heralded voyage transported passengers from many states. Hence, the selection of Los Angeles as the contractual forum would limit the fora where *Carnival* would be subject to suit.

256. See Mullenix, *supra* note 142, at S12.

lection clause issues by emasculating *The Bremen* reasonableness test and leaving many issues unresolved.<sup>257</sup> In the case of a forum selection clause where a foreign venue is the "agreed-upon" forum, fairness dictates that a jurisdictional standard be applied. Undoubtedly, a jurisdictional approach will force courts to entertain litigation in contravention of the third justification provided in *Carnival*. But, simply put, the balancing of unfairness to the consumer versus judicial economy tips in favor of the consumer. In addition, it seems that *Carnival* itself has not extinguished forum clause litigation. Several cases have been heard in federal courts interpreting and analyzing *Carnival*.<sup>258</sup> Perhaps *Carnival* is already failing to meet its goal of providing judicial economy. A foreign forum clause cannot be wholly dispositive. Indeed, courts must analyze the foreign choice of forum with an eye toward equity.

Further, this Comment suggests that a jurisdictional analysis will obviate the need for judicial resolution more quickly than the application of contract principles. By requiring corporations to select reasonably related forums rather than granting a presumption of prima facie validity, corporations will fall in line and provide consumers with fair, albeit limited, choices for litigation. Initially, foreign forum selection clause disputes will be decided on a case-by-case basis in conflict with the goals of *Carnival*. In the long run, however, jurisdictional analysis will promote economic fairness rather than foster economic burden.

The fourth rationale offered by the Court was based on the presumption that by limiting the fora where a cruise line would be amenable to suit, a cruise line could offer consumers reduced fares. Putting aside the Court's faulty assumption that cruise lines will indeed reduce their fares in exchange for contractual limitations on the plaintiff's choice of forum,<sup>259</sup> a jurisdictional approach could serve the Court's theory just as well as a contractual approach. As stated previously, cruise lines can still limit the fora where they may be sued and utilize their savings

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257. See Borchers, *supra* note 237, at 97. (Professor Borchers maintains that legislative reform, rather than judicial doctrine, would better resolve the unsettled issues left after *Carnival*.)

258. See, e.g., *Milanovich v. Costa Crociere S.P.A.*, 954 F.2d 763 (D.D.C. 1992); *Berman v. Cunard Line, Ltd.*, 771 F. Supp. 1175 (S.D. Fla. 1991).

259. See Borchers, *supra* note 237, at 94 ("... to ask a consumer to make a reasoned judgment as to the economic benefits and burdens of competing forum selection clauses strains reality."); see also Mullenix, *supra* note 142, at S12.

to offer reduced fares.

This Comment does not argue for, nor will it try to formulate, an explicit standard for determining jurisdictional reasonableness. Fairness cannot be codified. It is an imprecise concept that must be applied on a case-by-case basis. However, in light of the rise in international business transactions and subsequent increased employment of forum selection clauses, courts must endeavor to more effectively protect the unknowing consumer.

## V. CONCLUSION

In *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court has unjustifiably enforced a forum selection clause in a consumer adhesion contract, thereby equating consumers with experienced business persons in terms of both bargaining power and financial resources. This new application of contract doctrine by the Court burdens the economically disadvantaged consumer without taking into account reasonableness or fairness. In so holding, the Court has ignored federal statute and prior case law and has failed to give deference to the plaintiff's choice of forum.

More particularly, the Supreme Court in *Carnival* failed to adequately examine the circumstances surrounding the passage of the Limitation of Liability Act, thereby misconstruing the statute's broad intent. Additionally, the Court ignored case law construing COGSA, a statute comparable to the Limitation of Liability Act in text and purpose. The COGSA cases have consistently invalidated forum selection clauses due to concern that such clauses would limit a vessel owner's liability in conflict with the statute. The conspicuous similarities seen in the texts of COGSA and the Limitation of Liability Act should lead courts to follow COGSA precedent and invalidate forum clauses contained in passenger ticket contracts.

Further, the Court extended *The Bremen* precedent so as to equate freely negotiated commercial contracts with standardized contracts which were the product of little, if any, negotiation. Given the preference other countries have shown toward forum clause enforcement and the strict adherence to forum clause enforcement expressed by the Supreme Court, the American consumer may now be forced to overcome high hurdles to bring litigation in alien fora. Thus, *Carnival* presents the travel industry with a muscular ability to designate a foreign forum in advance of litigation. Hence, *Carnival* will be a boon to the travel indus-

try and a handicap to consumers.

This Comment suggests that forum clauses selecting foreign jurisdictions should be analyzed under traditional jurisdictional doctrine. Under a jurisdictional reasonableness test, both parties to a contract, rather than just the corporate defendant, will have their interests protected. While the need for contractual certainty offered by forum clauses is great, as the Supreme Court in *Carnival* suggests, the need to protect the consumer from unfair practices is equally great. A jurisdictional reasonableness test recognizes that the goals of contractual certainty and consumer protection are equally worthy of preservation in the forum selection clause context.

*Edward P. Gilbert*

