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# The Enforceability of Forum Selection Clauses: Missouri Finally Joins the Majority

*High Life Sales Co. v. Brown-Forman Corp.*<sup>1</sup>

## I. INTRODUCTION

When parties enter into contracts, they want their rights and duties to be as certain and predictable as possible. One way to achieve such predictability is to include a provision in a contract which stipulates that all disputes arising out of that contract will be resolved in a particular court, state, or country. Such a provision is known as a forum selection clause.<sup>2</sup> Historically, the courts of the United States have not favored such clauses.<sup>3</sup> However, a trend has developed in which courts will enforce forum selection clauses unless enforcement is unfair or unreasonable.<sup>4</sup> In *High Life Sales Co. v. Brown-Forman Corp.*, the Missouri Supreme Court followed this trend and made forum selection clauses prima facie enforceable.<sup>5</sup> This Note will discuss how the *High Life* decision has resolved the confusion which previously existed among Missouri state and federal courts. In addition, this Note examines how parties to contractual agreements will benefit from Missouri's adoption of the majority rule.

## II. FACTS AND HOLDING

High Life Sales Co. (High Life), engages in the distribution of alcoholic beverages in Jackson County, Missouri.<sup>6</sup> In 1983, High Life began distributing a wine cooler known as "California Cooler" under an oral agreement with California Cooler, Inc.<sup>7</sup> On July 15, 1985, High Life and California Cooler entered into a written distributorship agreement which provided that any termination had to comply with sections 407.405 and 407.413 of the *Missouri Revised Statutes*.<sup>8</sup> The agreement also contained a forum selection clause, which provided that any action relating to payment for goods passed to the buyer and any other action on the contract must be brought in the state

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1. 823 S.W.2d 493 (Mo. 1992) (en banc).

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

3. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

4. *Id.* at 10; see *infra* notes 84-87 and accompanying text.

5. *High Life*, 823 S.W.2d at 497.

6. *Id.* at 494.

7. *Id.*

8. *Id.*; see MO. REV. STAT. §§ 407.405, 407.413 (1986). Section 407.405 requires a 90 day notice for the termination of a franchise. Section 407.413.2 provides "[n]otwithstanding the terms, provision, and conditions of any franchise, no supplier shall unilaterally terminate . . . any franchise with the wholesaler unless the supplier has first established good cause for such termination . . . ." Good cause is defined in § 407.413.5.

containing the defendant's principal place of business.<sup>9</sup> Later in 1985, California Cooler assigned the distributorship agreement to Defendant Brown-Forman, whose principal place of business is in Louisville, Kentucky.<sup>10</sup>

In September 1987, Brown-Forman gave ninety days written notice of termination to High Life.<sup>11</sup> On November 3, 1987, High Life sued Brown-Forman in the Circuit Court of Jackson County, Missouri, claiming that the termination violated section 407.413 and seeking damages and injunctive relief.<sup>12</sup> High Life moved for summary judgment on the issue of liability.<sup>13</sup> Brown-Forman moved for dismissal, arguing that section 407.413 was inapplicable and that the forum selection clause required the suit to be brought in Kentucky.<sup>14</sup>

The trial court granted High Life's motion for summary judgment and overruled Brown-Forman's motion.<sup>15</sup> The issue of damages was tried by a jury in February of 1990, and the jury returned a verdict for High Life for \$91,000.<sup>16</sup> Brown-Forman appealed, primarily asserting that the forum selection clause should be enforceable.<sup>17</sup>

The Missouri Court of Appeals, Western District, affirmed the trial court's ruling, holding that "forum selection clauses which purport to prevent courts within the State of Missouri from exercising their jurisdiction to hear actions brought by Missouri citizens are void as against the Missouri public policy of providing Missouri citizens with access to courts within the State of Missouri."<sup>18</sup>

On appeal, the Missouri Supreme Court held that a forum selection clause should be enforced unless it is unfair or unreasonable to do so.<sup>19</sup> However, the court affirmed the trial court's decision because "it would be unreasonable to require this particular case to be brought in Kentucky pursuant to the forum selection clause."<sup>20</sup>

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9. *High Life*, 823 S.W.2d at 494.

10. *Id.* High Life had knowledge of and consented to this assignment. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 495.

14. *Id.* at 494-95.

15. *Id.* at 495.

16. *Id.*

17. *Id.*

18. *High Life Sales Co. v. Brown-Forman Corp.*, WD No. 43234, 1990 Mo. App. LEXIS 1795, at \*11 (Mo. Ct. App. Dec. 18, 1990) (quoting *Medicine Shoppe Int'l, Inc. v. Browne*, 683 F. Supp. 731, 732 (E.D. Mo. 1988)).

19. *High Life*, 823 S.W.2d at 494.

20. *Id.* The court also affirmed the trial court's substantive decision that § 407.413 prohibits the termination of the distributorship agreement. *Id.*

### III. LEGAL BACKGROUND

#### A. Missouri Law

*Reichard v. Manhattan Life Insurance Co.*,<sup>21</sup> decided in 1862, was the first case in which the Missouri Supreme Court addressed the law of forum selection clauses. *Reichard* involved a life insurance policy made by the defendant, a New York corporation.<sup>22</sup> The policy contained the following provision: "I hereby expressly waive all right to bring any action for any claim whatever arising under any policy issued to me on this application and declaration except in the courts of New York."<sup>23</sup> The court held that this forum selection clause was invalid for two reasons: (1) it sought to oust Missouri courts of their jurisdiction, which was against Missouri's public policy, and (2) it directly contravened a Missouri statute that regulated foreign insurance companies.<sup>24</sup> Missouri courts followed the holding in *Reichard*, but largely ignored the court's statutory ground for invalidating the forum selection clause.<sup>25</sup>

The next case concerning forum selection clauses was decided 119 years later. In *State ex rel. Gooseneck Trailer Manufacturing Co. v. Barker*,<sup>26</sup> a provision in a franchise agreement required that any lawsuit arising out of the contract be brought in Texas.<sup>27</sup> The court, noting the existence of a United States Supreme Court decision and several federal court decisions to the contrary,<sup>28</sup> held that "[t]he agreement to waive the right to sue in [Missouri] courts is void, as against public policy."<sup>29</sup>

After the *Gooseneck* decision, a curious anomaly developed in Missouri courts' treatment of forum selection clauses. In *State ex rel. Marlo v. Hess*,<sup>30</sup> the Missouri Court of Appeals, Eastern District, distinguished an "outbound forum selection clause" from an "inbound forum selection clause." The distinction between the two was best summarized by a federal court applying Missouri law:

Missouri law on the enforceability of forum selection clauses is clear: forum selection clauses which purport to prevent courts within the State of

21. 31 Mo. 518 (1862).

22. *Id.* at 518.

23. *Id.*

24. *Id.* at 521. The state statute, passed in 1855, states that in order to do business in Missouri, foreign insurance companies must submit to the jurisdiction of Missouri courts for any claim arising out of a policy bought by a Missouri resident. *Id.*

25. Russell W. Piraino, *Forum Selection Clauses in Missouri Courts*, 47 J. Mo. B. 130, 134 n.3 (1991).

26. 619 S.W.2d 928 (Mo. Ct. App. 1981).

27. *Id.* at 929.

28. *Id.* at 930. For a discussion of these decisions, see *infra* notes 32-38 and accompanying text.

29. *Gooseneck*, 619 S.W.2d at 930 (quoting *Reichard*, 31 Mo. at 521).

30. 669 S.W.2d 291 (Mo. Ct. App. 1984).

Missouri from exercising their jurisdiction to hear actions brought by Missouri citizens are void as against the Missouri public policy of providing Missouri citizens with access to courts within the State of Missouri. In contrast, forum selection clauses which designate the State of Missouri or a particular court within the State of Missouri as the exclusive forum in which to bring actions are enforceable so long as the clauses are not unfair and are not unreasonable.<sup>31</sup>

State law concerning forum selection clauses therefore seems clear, until one examines Missouri federal court decisions.

### *B. Federal Court Decisions*

The foundation for federal enforcement of forum selection clauses was laid by the United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*<sup>32</sup> *Bremen* involved a contract between an American corporation and a German corporation to tow a barge from Louisiana to Italy.<sup>33</sup> The contract required any dispute arising from the contract to be brought in London courts.<sup>34</sup> The Court held that while many state and federal courts decline to enforce such clauses on public policy grounds, the better-reasoned approach is that such clauses are prima facie valid and should be enforced unless unfair or unreasonable.<sup>35</sup> The Court stated:

The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.<sup>36</sup>

The Court limited the applicability of its holding to federal district courts hearing admiralty cases.<sup>37</sup> Where a federal court is addressing a federal question, therefore, *Bremen* applies, and forum selection clauses are valid unless "enforcement would be unreasonable or unjust, the clause was inserted in the contract through fraud or overreaching or 'enforcement would contravene a strong public policy of the forum."<sup>38</sup>

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31. *Medicine Shoppe Int'l, Inc. v. Browne*, 683 F. Supp. 731, 732 (E.D. Mo. 1988) (citations omitted). For a discussion of what makes a clause unfair or unreasonable, see *infra* notes 56-71 and accompanying text.

32. 407 U.S. 1 (1972).

33. *Id.* at 2.

34. *Id.*

35. *Id.* at 10.

36. *Id.* at 12.

37. *Id.* at 10.

38. *Benge v. Software Galeria, Inc.*, 608 F. Supp. 601, 607 (E.D. Mo. 1985) (quoting *Bremen*, 407 U.S. at 15.).

The analysis becomes complicated, however, when federal courts are sitting in diversity. According to the *Erie* doctrine,<sup>39</sup> federal courts sitting in diversity must apply federal law to procedural issues.<sup>40</sup> With respect to substantive matters, however, a federal court must apply the law of the state in which it sits.<sup>41</sup> Whether an outbound forum selection clause will be enforced, therefore, depends on whether it is considered substantive or procedural.<sup>42</sup>

Until 1986, the federal district courts of Missouri uniformly applied federal law, finding forum selection clauses to be procedural.<sup>43</sup> In *Sun World Lines, Ltd. v. March Shipping Corp.*,<sup>44</sup> the Eighth Circuit Court of Appeals affirmed this position, holding that forum selection clauses are matters of procedure and "support[ing] a policy of uniformity of venue rules within the federal system, as well as the policies underlying *The Bremen*."<sup>45</sup> However, the court reversed its position three months later in *Farmland Industries v. Frazier-Parrott Commodities*.<sup>46</sup> The court claimed that the holding in *Sun World* was not essential to the outcome of the case because *Sun World* involved an admiralty issue and *Bremen*, therefore, controlled.<sup>47</sup> The court in *Farmland* did not hold that forum selection clauses were substantive per se, but rather "[b]ecause of the close relationship between substance and procedure in this case we believe that consideration should have been given to the public policy of Missouri."<sup>48</sup>

Subsequent district court decisions vary, with some following *Sun World* and others following *Farmland*.<sup>49</sup> For example, in *Midwest Mechanical Contractors, Inc. v. Tampa Constructors, Inc.*,<sup>50</sup> the Western District held that while the holding in *Sun World* was not essential to the outcome, the logic of the court was persuasive, and federal law therefore controlled.<sup>51</sup> According to this court, Missouri's public policy was irrelevant.<sup>52</sup> On the other hand, in *Medicine Shoppe International, Inc. v. Browne*,<sup>53</sup> the Eastern

39. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

40. *Id.*

41. *Id.* at 78.

42. Piraino, *supra* note 25, at 132.

43. *Id.*; see, e.g., *Benge v. Software Galeria, Inc.*, 608 F. Supp. 601, 607 (E.D. Mo. 1985); *Dick Proctor Imports, Inc. v. Sumitomo Corp.*, 486 F. Supp. 815, 818 (E.D. Mo. 1980).

44. 801 F.2d 1066 (8th Cir. 1986).

45. *Id.* at 1069.

46. 806 F.2d 848 (8th Cir. 1986).

47. *Id.* at 852 (citing *Bremen*, 407 U.S. at 10). *But see* Piraino, *supra* note 25, at 134 n.19 (arguing that, since neither federal nor state law would have enforced the clause which was tainted by fraud, the court's holding was no more essential to the outcome than that in *Sun World*).

48. *Farmland*, 806 F.2d at 852.

49. Piraino, *supra* note 25, at 132-33.

50. 659 F. Supp. 526 (W.D. Mo. 1987).

51. *Id.* at 530.

52. *Id.* at 531.

53. 683 F. Supp. 731 (E.D. Mo. 1988).

District followed *Farmland*, holding that consideration must be given to Missouri's public policy on the matter.<sup>54</sup>

If a forum selection clause is either valid or invalid under both state and federal law, the outcome is clear. Prior to *High Life*, confusion would arise, for example, when a forum selection clause was neither unreasonable nor fraudulent, but purported to select a non-Missouri forum. Such a clause would be valid under federal law, but invalid under Missouri law. One commentator wrote that, "[i]ronically, resolution of this conflict may depend upon whether the case arises in the Eastern or Western District [of Missouri]."<sup>55</sup>

### C. Limitations Articulated in Bremen

The *Bremen* Court held that forum selection clauses in contracts would be enforced "unless [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."<sup>56</sup> The Court in *Bremen* suggested six circumstances under which courts should refuse to enforce a forum selection clause.

Such circumstances have been found in (1) fraud, (2) the nature of the relationship between the parties to the agreement, (3) the nature of the contractual forum, (4) the public policy of the excluded forum in which litigation was commenced, (5) statutory restrictions on forum-selection clauses, and (6) the fact that the contractual forum is inconvenient.<sup>57</sup>

First, the Court in *Bremen* held that a forum selection clause contained in a contract affected by fraud is invalid.<sup>58</sup> The Court clarified this exception in *Scherk v. Alberto-Culver Co.*<sup>59</sup> when it held:

This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that . . . [a] forum selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.<sup>60</sup>

Second, the Court in *Bremen* discussed the bargaining relationship between the parties.<sup>61</sup> The Court held that a forum selection clause which has been freely entered into between two competent parties will be en-

54. *Id.* at 732.

55. Piraino, *supra* note 25, at 133. Piraino urged either the Supreme Court of Missouri or the Eighth Circuit Court of Appeals to make a definitive ruling to clear the ambiguities. *Id.*

56. *Bremen*, 407 U.S. at 15.

57. Gruson, *supra* note 2, at 164.

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

59. 417 U.S. 506 (1974).

60. *Id.* at 519 n.14.

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

forced.<sup>62</sup> On the other hand, "[i]f the agreement containing the forum-selection clause is a contract of adhesion, the clause would not be enforceable."<sup>63</sup>

Third, the Court in *Bremen* examined the nature and quality of the contractual forum. The Court held that the courts of the selected forum were adequately neutral.<sup>64</sup> This factor is generally only considered in international disputes. The neutrality requirement will be met if "the courts of the selected country are impartial, independent, free from prejudice against foreigners, and not subject to influence by one of the parties or the local government."<sup>65</sup> It is probably safe to assume that the courts of this nation would satisfy this standard.

The fourth and fifth factors are generally discussed together as the public policy requirement. The *Bremen* Court stated that a forum selection clause would be unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."<sup>66</sup> This concept is commonly applied when the issue is one of statutory interpretation, best left to the court more familiar with the statute.<sup>67</sup>

Finally, the Court in *Bremen* held that a forum selection clause, otherwise enforceable, may be unreasonable if the contractual forum is "seriously inconvenient for the trial of the action."<sup>68</sup> Assuming the parties freely negotiated the clause and were aware of possible inconvenience, the party claiming unenforceability bears a heavy burden to show that a trial in the contractual forum will be so "gravely difficult and inconvenient" that the party would effectively be deprived of a day in court.<sup>69</sup> Absent such a showing, the party should be held to its bargain.<sup>70</sup> According to one commentator, "[u]nder *Bremen*, the defense of inconvenience against the enforcement of a forum-selection clause has become a substantially more difficult defense to prove than under prior cases which permitted a defeat of the forum-selection

62. *Id.*

63. Gruson, *supra* note 2, at 166 (footnote omitted); see, e.g., *Midwest Mechanical Contractors, Inc. v. Tampa Constructors, Inc.*, 659 F. Supp. 526, 530-31 (W.D. Mo. 1987); *Colonial Leasing Co. of New England v. Best*, 552 F. Supp. 605, 606-07 (D. Or. 1982); *Chase Third Century Leasing v. Williams*, 782 S.W.2d 408 (Mo. Ct. App. 1989).

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

65. Gruson, *supra* note 2, at 169 (footnote omitted).

66. *Bremen*, 407 U.S. at 15.

67. See, e.g., *Electrical & Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660, 662 (8th Cir. 1991) (Missouri's 90-day notice requirement for cancellation of franchise agreement is fundamental policy best left to Missouri courts); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908 (E.D. Wis. 1981) (Wisconsin court better equipped than Ohio court to consider case under Wisconsin Fair Dealership Law); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F. Supp. 318, 321 (E.D. Wis. 1980) (Wisconsin Franchise Investment Law best dealt with by Wisconsin courts).

68. *Bremen*, 407 U.S. at 16.

69. *Id.* at 17-18.

70. *Id.* at 18.



clause on the basis of arguments derived from the doctrine of *forum non conveniens*.<sup>71</sup>

#### IV. THE INSTANT DECISION

In the instant case, the Missouri Supreme Court held that forum selection clauses will be enforced unless it is unfair or unreasonable to do so.<sup>72</sup> The court first noted the present state of Missouri law concerning forum selection clauses.<sup>73</sup> The court found that up to the present time, outbound forum selection clauses—those providing for trial outside of Missouri—were per se invalid, as against Missouri public policy.<sup>74</sup> In contrast, inbound clauses—those providing for trial in Missouri—were enforceable if fair and reasonable.<sup>75</sup>

The court then held that Missouri courts should no longer treat outbound forum selection clauses as per se unenforceable.<sup>76</sup> The court gave four reasons for its holding. First, the court noted that the decision in *Reichard* was based not only on the public policy aspect for which it is commonly cited, but also on a Missouri statute requiring foreign insurance companies doing business in Missouri to consent to be sued in Missouri courts.<sup>77</sup> Therefore, *Reichard's* precedential value on policy grounds alone was doubtful.<sup>78</sup>

Second, the court balanced the competing public policies affecting the enforceability of forum selection clauses.<sup>79</sup> The court reasoned that the public policy of allowing and encouraging freedom of contract through enforcement of fair and reasonable agreements outweighed any public policy which ensured Missouri citizens access to Missouri courts, even when they contracted otherwise.<sup>80</sup>

Third, the court considered the inbound-outbound distinction which first appeared in *State ex rel. Marlo v. Hess*.<sup>81</sup> The court said that this one-way practice of Missouri courts "must be premised on the assumption that the Missouri courts have a corner on fair and just trials. We are proud of the Missouri courts but not so much as to override a valid agreement entered into by our citizens to litigate elsewhere."<sup>82</sup> Finally, the court noted that this one-

71. Gruson, *supra* note 2, at 182-83. For a discussion of additional factors often used by some courts to determine enforceability, see *id.* at 183-85.

72. *High Life*, 823 S.W.2d at 494.

73. *Id.* at 495-96.

74. *Id.* at 496.

75. *Id.* at 495-96 (citing *Medicine Shoppe Int'l, Inc. v. Browne*, 683 F. Supp. 731, 732 (E.D. Mo. 1988)).

76. *Id.* at 496.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 669 S.W.2d 291 (Mo. Ct. App. 1984). See *supra* notes 30-31 and accompanying text for a discussion of the inbound/outbound distinction.

82. *High Life*, 823 S.W.2d at 496.

way enforcement of forum selection clauses may contribute to overcrowding of Missouri courts, even when parties have indicated their willingness or preference to litigate elsewhere.<sup>83</sup>

Next, the court discussed the public policy argument supporting per se invalidity: the "ouster of jurisdiction" theory.<sup>84</sup> The court reasoned that the *Bremen* decision justified this argument by holding that enforcement of forum selection clauses "does not deprive the non-designated state of jurisdiction except to the extent that in its discretion it determines that the enforcement of the clause is neither unfair nor unreasonable."<sup>85</sup>

The court looked at the majority of jurisdictions that have adopted the *Bremen* rule, which makes such clauses enforceable when the agreement is not unreasonable.<sup>86</sup> It further noted that only five states in addition to Missouri continue to treat forum selection clauses as per se unenforceable.<sup>87</sup> Acknowledging suggestions that Missouri should join the majority,<sup>88</sup> the court decided to "join the better-reasoned majority rule and . . . enforce such clauses, so long as doing so is neither unfair nor unreasonable."<sup>89</sup>

The court then considered whether enforcing the forum selection clause in the instant case would be either unfair or unreasonable.<sup>90</sup> The court first addressed the fairness of enforcement. The court noted that many courts refuse to enforce forum selection clauses if the contract entered into is one of adhesion.<sup>91</sup> As this contract was an agreement between two successful companies, both represented by counsel, and entered into following substantial negotiations, the court held that the contract was not made under circumstances that would render it adhesive.<sup>92</sup>

With respect to the fairness of enforcement, the court also stressed the neutral and reciprocal nature of the forum selection clause.<sup>93</sup> The clause provides that all suits concerning the contract shall be brought in the defendant's principal place of business.<sup>94</sup> Because the clause therefore

83. *Id.*

84. *Id.* This theory posits that "the agreement of parties should not operate to deprive a court of jurisdiction over parties and issues otherwise properly before that court." *Id.*

85. *Id.* (citing *Bremen*, 407 U.S. at 12).

86. See cases cited *id.* at 496 n.2; see also *Eads v. Woodmen of the World Life Ins. Soc.*, 785 P.2d 328 (Okla. Ct. App. 1989).

87. *High Life*, 823 S.W.2d at 497; see, e.g., cases cited *id.* at 497 n.3.

88. *High Life*, 823 S.W.2d at 497 (citing Piraino, *supra* note 25, at 133-34).

89. *Id.*

90. *Id.*

91. *Id.* (citing *Colonial Leasing Co. of New England, Inc. v. Best*, 552 F. Supp. 605 (D. Or. 1982)). The court defined an adhesion contract as one in which the parties have unequal bargaining power, often involving "take-it-or-leave-it" provisions. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

discourages hasty litigation, the court held that public policy favors such a clause.<sup>95</sup>

Having decided that it would be fair to enforce the forum selection clause, the court next discussed whether enforcement would be reasonable.<sup>96</sup> Liquor distribution has traditionally been regulated by the states, and such regulations vary greatly from state to state.<sup>97</sup> Each state, therefore, has a strong interest in construing and applying its own liquor distribution laws.<sup>98</sup> The court next looked at the statute to be applied and found that it serves to protect Missouri-licensed liquor distributors from unwarranted franchise terminations.<sup>99</sup> The paternalistic nature of the legislation indicates that it incorporates a fundamental policy of the state of Missouri—so fundamental that parties should not be able to waive it by contract.<sup>100</sup> Enforcement of the forum selection clause, therefore, would be unreasonable on the ground of public policy.<sup>101</sup>

The court also discussed several other factors which render enforcement of the forum selection clause unreasonable. First, since section 407.413 has never been interpreted in Missouri, there would be no guidelines for a Kentucky court to use in deciding whether the statute applied, and if so, how to apply it.<sup>102</sup> Second, Kentucky does not have a statute similar to the one in question.<sup>103</sup> The court found that the failure to have such a statute may indicate that Kentucky's public policy is contrary to that of Missouri.<sup>104</sup> The court, therefore, affirmed the trial court's decision that the clause was unenforceable because under the new rule, the circumstances of this case made enforcement unreasonable.<sup>105</sup>

## V. COMMENT

In deciding to adopt the *prima facie* enforcement rule used by the majority of American jurisdictions, the Missouri Supreme Court had to look at two competing state policies: (1) the policy of providing Missouri citizens with access to Missouri courts; and (2) the policy of allowing and encouraging freedom of contract and enforcing parties' agreements.<sup>106</sup> While the court

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95. *Id.*

96. *Id.*

97. *Id.* at 498.

98. *Id.*

99. *Id.* See *supra* note 8 for a description of the Missouri liquor distribution statutes.

100. *High Life*, 823 S.W.2d at 498 (quoting *Electrical & Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660, 664 (8th Cir. 1991)).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 500. The court then considered the substantive issues of the lawsuit which are beyond the scope of this Note. See *id.* at 502-04.

106. *Id.* at 496.

held that the latter policy clearly outweighed the former,<sup>107</sup> in reality, both policies will be adequately served by the new rule.

The new rule allows sophisticated persons and businesses to enter into binding agreements with enhanced certainty that such agreements will be enforced.<sup>108</sup> It also ensures that Missouri courts will retain the power to extend protection and guarantee a forum to those relatively unsophisticated parties who can prove their need for such protection.<sup>109</sup>

The *Restatement (Second) of Conflicts* advocates this approach to forum selection clauses: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."<sup>110</sup> The comment to the *Restatement* illustrates how Missouri courts, under the new rule, will retain jurisdiction so that the competing public policies of Missouri will best be served:

[T]he fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain this action. Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action. On the other hand, the provision will be given effect, and the action dismissed, if to do so would be fair and reasonable.<sup>111</sup>

The adoption of the new rule by the Supreme Court of Missouri cleared up the confusion which previously existed among state and federal courts of Missouri regarding the treatment of forum selection clauses.<sup>112</sup> Now forum selection clauses will be treated the same in Missouri state and federal courts. This approach will bring increased certainty and predictability at the contracting stage.<sup>113</sup>

The new rule will benefit both the courts of Missouri and parties who enter into contractual agreements. In most commercial contract situations, "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations."<sup>114</sup> The new rule allows Missouri courts, in such situations, to honor the intent of the parties. Thus the

107. *Id.*

108. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *In re Unterweser Reederei*, 428 F.2d 888, 905-06 (5th Cir. 1970) (Wisdom, J., dissenting), *aff'd*, 446 F.2d 907 (5th Cir. 1971) (en banc).

109. *High Life*, 823 S.W.2d at 496. "The validity of this observation is best evidenced by the ultimate decision [the court made] in this case to refuse to enforce the forum selection clause . . . ." *Id.*

110. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

111. *Id.* § 80 cmt. a.

112. *See Piraino, supra* note 25, at 132-33.

113. *Id.* at 133.

114. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 (1972).

new rule "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world."<sup>115</sup>

Missouri courts will also benefit from the adoption of the new rule. Many cases they were once obligated to hear due to the per se invalidity of outbound forum selection clauses can now be delegated to the contractually selected forum. Overcrowding of Missouri courts, therefore, can be alleviated in circumstances where the parties have indicated a willingness to litigate in another state.<sup>116</sup> In addition, when the courts of Missouri look at a forum selection clause to determine if its enforcement is fair and reasonable, they can look for guidance to the wealth of case law from the majority of jurisdictions that have previously adopted the rule.<sup>117</sup>

What remains to be seen is how the Missouri courts will apply the *High Life* rule. They may choose to wholeheartedly accept the majority view and enforce forum selection clauses unless they fall under the limitations articulated in *Bremen*.<sup>118</sup> On the other hand, they may choose to attach broad interpretation to the phrase "unfair or unreasonable" and in effect continue applying the old rule while using *High Life* language. It appears that the courts of Missouri will take the former route.

Even in *Gooseneck*,<sup>119</sup> the first Missouri case on the issue since 1862, the court apparently felt constrained to follow Missouri precedent, although a concurring opinion stated that contrary U.S. Supreme Court and federal district court holdings were preferable.<sup>120</sup> In his concurring opinion, Judge Greene wrote:

I know of no valid reason why a person who is of legal age and in his right mind should not be allowed to agree with the other contracting party as to where venue should lie in the event of any dispute over the contract. However I recognize that the Supreme Court[] of Missouri . . . seem[s] to think otherwise, and agree that judges should follow the law of the forum on state related questions, rather than make it.<sup>121</sup>

Judge Greene felt that the federal rule on forum selection clauses represented common sense and was superior to the outdated Missouri rule.<sup>122</sup>

The Missouri Court of Appeals, Eastern District, did not feel so constrained in *Marlo*.<sup>123</sup> The court distinguished that case from *Gooseneck*, stating that the inbound selection clause really was a matter of venue rather

115. *Id.* at 11.

116. *High Life*, 823 S.W.2d at 496.

117. *See id.* at 496 n.2.

118. *See supra* part III.C.

119. *State ex rel. Gooseneck Trailer Mfg. Co. v. Barker*, 619 S.W.2d 928 (Mo. Ct. App. 1981).

120. *Id.* at 930; *see also* Piraino, *supra* note 25, at 131.

121. *Gooseneck*, 619 S.W.2d at 931 (Greene, J., concurring).

122. *Id.* at 930-31.

123. *State ex rel. Marlo v. Hess*, 669 S.W.2d 291 (Mo. Ct. App. 1984).

than jurisdiction.<sup>124</sup> Therefore, the court was able to circumvent precedent and follow the rule it preferred—that inbound forum selection clauses are enforceable unless unfair or unreasonable.<sup>125</sup> Although Missouri case law on this issue is scant, it does not appear that Missouri courts were overly attached to the old rule. They will most likely discard it eagerly.<sup>126</sup>

The courts will probably fully embrace the majority rule, including the six situations under which courts should refuse to enforce a forum selection clause as articulated in *Bremen*.<sup>127</sup> In fact, the courts have already accepted several of those limitations. In *Marlo*, the court of appeals held that an inbound forum selection clause could not be enforced if it would result "in undue hardship, such as a necessity to travel or transport witnesses such a distance that expenses would render access to the courts impractical[.]" or if it was the product of superior bargaining power of one party.<sup>128</sup> This corresponds with the second and sixth *Bremen* factors.<sup>129</sup> In *High Life*, the court similarly cited inconvenience and adhesion as reasons not to uphold forum selection clauses, but also added the public policy exception, representing acceptance of the fourth and fifth *Bremen* factors.<sup>130</sup> The two remaining *Bremen* factors, fraud and nature of the contractual forum, would undoubtedly create no difficult issues for a Missouri court.<sup>131</sup> It appears likely, therefore, that Missouri courts will give the new rule some bite and interpret it in accordance with federal and sister states' case law.

## VI. CONCLUSION

The new rule appears to benefit all involved. Parties are free to include forum selection clauses in their contracts, and courts are free to either enforce the clauses or invalidate them depending on the fairness and reasonableness of enforcement under the circumstances. The parties who need the court's protection will get it, and those who do not will be bound by their agreements. The Missouri Supreme Court's decision to join the majority is a wise one which will adequately serve all competing public policies.

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124. *Id.* at 293.

125. *Id.* at 294.

126. Note that *High Life* was a unanimous decision by the Missouri Supreme Court sitting en banc.

127. See *supra* note 57 and accompanying text.

128. *Marlo*, 669 S.W.2d at 294.

129. See *supra* notes 61-63, 68-71 and accompanying text.

130. *High Life*, 823 S.W.2d at 497-98; see *supra* notes 66-67 and accompanying text.

131. See *supra* notes 58-60, 64-65 and accompanying text.

