1990

Enforcing Forum-Selection Clauses: The Federal Court Dilemma and the Arbitration Clause Alternative

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COMMENT

ENFORCING FORUM-SELECTION CLAUSES: THE FEDERAL COURT DILEMMA AND THE ARBITRATION CLAUSE ALTERNATIVE

I. INTRODUCTION

The inclusion of forum-selection and arbitration clauses has become standard in commercial contracts throughout the United States. Parties choose to include these clauses for a variety of reasons: to provide a neutral or convenient forum, to reduce the risk of being sued in multiple forums where a party does business in many states, and in the case of arbitration clauses to avoid the high cost of litigation.

Many times, however, one of the parties to the contract will bring suit in a forum not stipulated by the arbitration or forum-selection clause, thus violating an express provision of the contract. This action raises the issue of whether or not the court, finding itself the forum in violation of the express terms of the contract, should exercise jurisdiction over the claim(s) or dismiss the claim(s) based on a contractual forum-selection or arbitration clause. If the court chooses to exercise its jurisdiction finding the clause invalid, it will be ignoring the stated intent of the parties at the time of contracting.

In 1972, the United States Supreme Court, in Bremen v. Zapata Off-Shore Oil Co., recognized for the first time the general validity of forum-selection clauses. However, since the Bremen decision was handed down, the Supreme Court has done little to define more clearly how forum-selection clauses are to be enforced.

2. Id.
4. Id. (where the court said that arbitration clauses are merely specialized forum-selection clauses).
Recent Supreme Court decisions dealing with forum-selection clauses have not diminished the uncertainties parties face in enforcement of these clauses. In fact, these decisions add to the uncertainty parties face, especially in federal court.

A majority of state courts appear to generally recognize the enforceability of forum-selection clauses, and several states have enacted legislation to recognize the validity of such clauses. A common problem arises where parties are in different states and the party seeking to avoid the forum-selection clause brings suit in federal court under diversity of citizenship jurisdiction.

Parties relying on a forum-selection clause in a contract run the risk of being sued in federal court with diversity jurisdiction and having the validity of their forum-selection clauses determined by federal law, not the state law under which they thought they were contracting. The determination of a forum-selection clause's validity may turn on where the suit is brought. Bringing suits in states other than where the contract was negotiated and signed will lead to inconsistent interpretation and enforcement, as well as uncertainty in future contract negotiations.

When parties are negotiating and relying on forum-selection clauses in their personal and business activities, they need to ensure that their contractual right to select a forum will be given validity and effect. Without federal legislation or a definitive Supreme Court ruling, parties negotiating contractual forum-selection clauses cannot be certain that their contract rights will be enforced.

In contrast to the uncertain enforceability of forum-selection clauses, arbitration clauses have a congressional mandate of enforceability. The United States Supreme Court has held that Congress, through its power under the Commerce Clause of the Constitution, mandated the enforcement of arbitration agreements. Congress, in enacting Section 2 of the Federal Arbitration Act (FAA) has declared a national policy favoring the arbitration process. The FAA pre-empts any state law that conflicts with Section 2 of the FAA.

Furthermore, any decision in a state court finding that an arbitration clause is non-enforceable on the basis of state law, statute, or policy is immediately appealable to the United States Supreme Court. Thus, if one party to a contract seeks to avoid the contract to arbitrate by seeking relief in the courts, the party

10. See ALASKA L., supra note 8, at 185.
11. Id., at 186-89.
14. See ALASKA L., supra note 8, at 195.
16. Id.
17. Id. at 17.
18. Id. at 16.
19. Id. at 6-8.
seeking arbitration can avoid protracted litigation until the validity of the arbitration clause is ruled upon.\textsuperscript{20}

This Comment will review the validity of forum-selection clauses in contracts, focusing on the problem of uncertain federal court enforcement.\textsuperscript{21} Further, it will suggest that the inclusion of an arbitration clause, rather than a forum-selection clause, will give parties to commercial contracts a more certain footing in selecting a forum in which to settle their disputes.

II. FORUM-SELECTION CLAUSES: A HISTORICAL OVERVIEW

Traditionally, courts in the United States have held forum-selection clauses invalid on the grounds that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."\textsuperscript{22} Under this common-law "Ouster Rule," forum-selection clauses were considered to relate to a remedy established by law.\textsuperscript{23} Therefore, under traditional thinking, the parties could not control their own remedy by contract and oust the courts of jurisdiction.

From the common-law adoption of the "Ouster Rule" until the early 1970's, numerous state and federal decisions questioned the legal reasoning of the rule.\textsuperscript{24} Legal scholars and judges, including Judge Benjamin Cardozo and Judge Learned Hand, have questioned the doctrine.\textsuperscript{25} Representative of this transition is the holding in \textit{William H. Muller Co. v. Swedish American Line Ltd.}\textsuperscript{26} In that case, the Second Circuit Court of Appeals held that a contractual clause selecting Sweden as the forum for all disputes was valid because it was not unreasonable: a contract freely entered into should be given validity and effect.\textsuperscript{27} The United States Supreme Court later adopted the reasonableness standard in \textit{Mullery} in the landmark decision of \textit{Bremen v. Zapata Off-Shore Co.}\textsuperscript{28}

\textsuperscript{20} \textit{Id.}
\textsuperscript{21} Where a suit is brought in state court, and the enforceability of a forum-selection clause is at issue, the dispute will be limited to questions of the relevant state law, statute, or public policy. When the parties to a contract are both located within one state, it is more likely that the dispute will be litigated in that state's courts. Thus, the expectations of the parties in having their contract interpreted according to that particular state's law are more likely. On the other hand, where the parties are residents of different states, there is a greater chance that one party will resort to federal court to resolve the dispute. This Comment will only briefly discuss state law treatment of forum-selection clauses. \textit{See also ALASKA L, supra} note 8, at 184-189.
\textsuperscript{22} \textit{Bremen,} 407 U.S. at 6; \textit{see} E. S\textit{COALES} & P. HAY, \textit{CONFLICTS OF LAW} 353 (1982 & Supp. 1986) [hereinafter \textit{S\textit{COALES}}].
\textsuperscript{23} \textit{S\textit{COALES}, supra} note 22, at 353 (and cases cited therein); \textit{see generally ALASKA L, supra} note 8, at 175-78 (for an extensive analysis of the evolution of the law in this area).
\textsuperscript{24} \textit{See ALASKA L, supra} note 8, at 178.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} 224 F.2d 806, 808 (2d Cir. 1955), \textit{cert. denied}, 350 U.S. 903 (1955); \textit{see also Indussa Corp. v. S.S. Ranborg,} 377 F.2d 200 (2d Cir. 1967).
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Bremen,} 407 U.S. at 1.
III. FORUM-SELECTION CLAUSES: THE MODERN VIEW

In 1972, the Supreme Court in *Bremen v. Zapata Off-Shore Co.* recognized the general validity of forum-selection clauses. The Court found that the traditional rationales American courts used to reject the validity of forum-selection clauses were contrary to public policy and ousted the courts of jurisdiction. Further, these rationales were unsound in light of the realities of the modern business world and rested on "vestigial legal fiction." The *Bremen* court held that forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." The Court concluded that "the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting."

The *Bremen* Court focused on four factors in determining the validity of forum-selection clauses. In holding that such clauses are prima facie valid, the Court mandated that they be specifically enforced unless the party challenging enforcement could show one of the four factors.

First, a clause will not be enforceable if its enforcement is unreasonable and unjust. Second, a clause is not enforceable if there is fraud, undue influence, or overweening bargaining power. Fraud was later defined to mean fraud in the inducement of the forum-selection clause itself, not simply any fraud related to the contract. Therefore, a forum-selection clause can remain valid and enforceable even in the face of fraudulent conduct. Third, enforcement cannot contravene a strong public policy of the forum in which suit is brought. A party seeking to void the forum-selection clause could bring suit in federal court in a state that has a public policy against the enforcement of forum-selection clauses. By selecting a favorable forum, a party could nullify the effect of a forum-selection clause. However, a motion to transfer venue pursuant to 28

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29. *Id.*
30. *Id.*
31. *Id.* at 12.
32. *Id.* at 10.
33. *Id.* at 13-14.
34. *Id.* at 15.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 12-13 (in n.14, the court noted that the fact that the parties had altered other provisions of the contract and that the contract was not a form contract with "boilerplate" language was evidence that there was no overbearing bargaining power, even in the absence of negotiations on the forum selection clause itself).
U.S.C.A. Section 1404(a) could offset this apparent advantage. Fourth, trial in the contractually chosen forum must not be "so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of his day in court."

Language in the *Bremen* decision seems to indicate that its holding is intended to apply only to situations involving federal courts sitting in admiralty. However, there seems little doubt today that the *Bremen* decision has been extended to apply to forum-selection clauses in general.

IV. POST-*Bremen* DEVELOPMENTS

A. Enforceability in State Courts

Since the *Bremen* decision, state courts have moved to embrace the premise that forum-selection clauses are generally enforceable. A majority of state courts now recognize the validity of forum-selection clauses. The Restatement (Second) of Conflict of Laws Section 80 also supports this trend. Several states have enacted legislation specifically recognizing the validity of such clauses. New York and California enacted similar statutes regarding the enforceability of forum-selection clauses. Some statutes set out specific requirements. For example, the New York General Obligations Law, Section 5-1402, is very specific in its application. The New York statute has three main requirements: (1) that there is a forum-selection clause in the contract; (2) that the amount of the contract exceeds one million dollars; and (3) that the contract specifies that New York law will govern any dispute arising under the contract.

Where a party finds itself in state court litigating over a contractual dispute, the majority of states will recognize the general validity of forum-selection clauses by either statute or case law. However, when a party finds itself in federal court, the predictability of enforcement greatly diminishes.
B. Enforceability in Federal Courts:  
Impact of Stewart\textsuperscript{54} and Chasser\textsuperscript{55}

In 1988, the Supreme Court considered the case of \textit{Stewart Organization, Inc. v. Ricoh Corp.}\textsuperscript{56} The issue in \textit{Stewart} is whether a federal court sitting in diversity should apply state or federal law in ruling on a motion to transfer venue based on a forum-selection clause in a contract.\textsuperscript{57} The \textit{Stewart} case involved a dispute over a dealership agreement between an Alabama copy machine dealer and a New Jersey manufacturer.\textsuperscript{58} The contract contained a clause directing that any dispute resulting from the contract would be litigated only in Manhattan in New York City.\textsuperscript{59} The Alabama corporation filed a diversity action against the manufacturer in federal district court in Alabama alleging breach of contract, breach of warranty, fraud, and federal anti-trust violations.\textsuperscript{60}

The New York manufacturer moved for a transfer of venue to federal district court in New York. The manufacturer based its motion on 28 U.S.C.A. Section 1404(a), which provides that "for the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."\textsuperscript{61}

The trial court denied the motion, but the Eleventh Circuit Court of Appeals reversed and ordered the case remanded for further proceedings.\textsuperscript{62} The Eleventh Circuit held that the trial court should focus its inquiry on whether the forum-selection clause was enforceable under the standards announced in \textit{Bremen}.\textsuperscript{63}

Upon a grant of certiorari, the United States Supreme Court agreed with the court of appeals that "the \textit{Bremen} case may prove 'instructive' in resolving the parties' dispute."\textsuperscript{64} However, it disagreed with the lower court's conclusion that the relevant inquiry was "whether the forum-selection clause in this case is enforceable under the standards set in \textit{Bremen}."\textsuperscript{65} The Court held that Section 1404(a)\textsuperscript{66} was "sufficiently broad" to control the issue presented to the court, which was "[w]hether to transfer the case to a court in Manhattan in accordance with the forum-selection clause."\textsuperscript{67} The court found that Section 1404(a) calls

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\textsuperscript{54} \textit{Stewart}, 487 U.S. 22.  
\textsuperscript{55} \textit{Chasser}, 490 U.S. 495.  
\textsuperscript{56} \textit{Stewart}, 487 U.S. at 22.  
\textsuperscript{57} \textit{Id.} at 24.  
\textsuperscript{58} \textit{Id.}  
\textsuperscript{59} \textit{Id.}  
\textsuperscript{60} \textit{Id.}  
\textsuperscript{61} \textit{Id.} at 29.  
\textsuperscript{62} \textit{Id.} at 22.  
\textsuperscript{63} \textit{Id.} at 22-23.  
\textsuperscript{64} \textit{Id.} at 27.  
\textsuperscript{65} \textit{Id.} at 28.  
\textsuperscript{67} \textit{Stewart}, 487 U.S. at 32.
for the district court to consider motions to transfer by weighing the factors presented on a case-by-case basis.68

The Stewart Court directed the district court, in resolving this Section 1404(a) motion to transfer, to consider factors such as (1) the convenience of the Manhattan forum given the parties' expressed preference, (2) fairness of transfer in light of the forum-selection clause, (3) the parties' relative bargaining power, (4) the convenience of the witnesses, and (5) public interest factors such as "systemic integrity and fairness . . . under the heading of the interest of justice."69 The Stewart court found that Section 1404(a) allows for a "flexible and individualized analysis that takes into consideration the parties' private expressions of their venue preferences."70

The argument was raised in Stewart that, since Alabama refused to give validity to forum-selection clauses on public policy grounds, the district court should weigh this factor in making its determination of a Section 1404(a) ruling.71 The Court flatly rejected this argument, finding that a Section 1404(a) motion is governed by federal law. The Court specifically held that Section 1404(a) governs the dispute and that an inquiry into the contrary law or public policy of the state in which the federal district court sits in diversity would have no bearing on this determination of federal law.72 However, the Court in Stewart recognized that "it is conceivable in a particular case, for example, that because of these factors a District Court, acting under Section 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, whereas the coordinate state rule might dictate the opposite result."73

After Stewart, if there is no Section 1404(a) motion to transfer in federal court, the court should consider state law and public policy in determining the validity of a forum-selection clause, as directed by Bremen. However, if there is a motion to transfer pursuant to Section 1404(a), the court is forbidden from considering state law or policy.

The Stewart holding sets the stage for inconsistent determinations of the validity of forum-selection clauses between cases involving Section 1404(a) motions and those that do not. However, the Stewart decision does seem to promote some degree of procedural uniformity in federal courts. The real effect of the Stewart decision, unfortunately, seems to be continued inconsistent enforcement of forum-selection clauses, leading to continued uncertainty for those attempting to rely on them. At least one commentator has criticized the Supreme Court's holding in Stewart for not resolving more post-Bremen issues, specifically for not dealing with the motion to dismiss issue.74 In the recent decision of

68. Id. at 29.
69. Id. at 30.
70. Id.
71. Id.
72. Id.
73. Id.
74. See ALASKA L. REV., supra note 8, at 189-97.
Lauro Lines, S.R.I. v. Chasser, the Supreme Court partially addressed the motion to dismiss issue. In Chasser, the Court granted certiorari to consider the issue of "whether an interlocutory order of a United States District Court denying a defendant's motion to dismiss a damages action on the basis of a contractual forum-selection clause is immediately appealable under 28 U.S.C. Section 1291 as a collateral final order." Respondents in Chasser were passengers on the Achille Lauro cruise ship when it was hijacked by Arab terrorists in 1985. Suit was filed in federal district court in the Southern District of New York for injuries received during the hijacking and for the wrongful death of passenger Leon Klinghoffer.

The district court denied defendant Lauro Lines' motion to dismiss based on a forum-selection clause printed on each passengers' ticket. The clause called for any suit to be instituted in Italy and renounced the right to sue anywhere else. The district court found that the clause on the ticket did not give the passengers reasonable notice that they were waiving the opportunity to sue in a domestic forum.

The court of appeals dismissed the appeal on the grounds that the motion to dismiss, based on the forum-selection clause, was interlocutory and therefore not appealable under Section 1291. The Supreme Court granted certiorari to settle a split in decisions at the appellate level.

Under 28 U.S.C. Section 1291, an appeal can only be had from "final decisions of the district courts of the United States." The Supreme Court states that "for purposes of Section 1291, a final judgment is generally regarded as a 'decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'". Therefore, an appeal under Section 1291 would be permitted upon denial of a motion to dismiss based on a forum-selection clause if it falls within the exception to the final judgment rule known as the collateral order doctrine.

The collateral order doctrine exception fits into a class of pre-judgment orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, [and that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be differed

75. 490 U.S. 495.
76. Id. at 1977.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id. at 1977-78.
86. Id. at 1978 (citing Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989)).
until the whole case is adjudicated." To fall within this exception, the order must: (1) conclusively determine the question in dispute, (2) resolve an important issue that is completely separate from the merits of the action, and (3) be effectively unreviewable on an appeal from final judgment.

The Supreme Court declined to review the district court's order under the first two factors set out above. However, it did hold that the order denying a motion to dismiss based on a contractual forum-selection clause failed to satisfy the third requirement: that the order be effectively unreviewable on appeal from final judgment.

The Court held that an order is unreviewable only where the order at issue involves "an asserted right to the legal and practical value of which would be destroyed if it were not vindicated before trial." The Court further held that the costs associated with unnecessary litigation based on the possibility of an erroneous pretrial ruling, while lessening the value of the contractual right to forum-selection, will not be sufficient to warrant an immediate appeal. The Court reasoned that a petitioner's claim that it may only be sued in a particular forum, "while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage—surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant—and hence does not fall within the third prong of the collateral order doctrine."

Thus, since the Bremen decision in 1972, the Supreme Court has done little to define the parameters of the "prima facie validity of forum-selection clauses." Some commentators suggest that the Bremen decision is limited to admiralty cases. However, this argument appears to have little validity in light of the Supreme Court's application and discussion of the Bremen standards in non-admiralty cases.

After the Supreme Court rulings in Stewart and Chasser, procedural matters relating to the validity of forum-selection clauses have arguably been more clearly defined. However, these decisions have done nothing to encourage the enforceability of forum-selection clauses. In fact, the Chasser and Stewart decisions are troubling because they almost encourage a party to seek to avoid a forum-selection clause.

When a party in federal court files a transfer of venue motion under Section 1404(a), the Stewart holding directs the court to merely consider the forum-selection clause as a factor that might favor its enforceability. Although, after Stewart, the forum-selection clause will not conclusively determine the transfer

87. Id.
88. Id.
89. Id.
90. Id. (citing Midland 489 U.S. 794, at 1498.)
91. Id. at 1978-79.
92. Id. at 1979-80.
93. See ALASKA L. REV., supra note 8, at 182-83.
94. See DENVER U. L. REV., supra note 6, at 839.
issue, contrary state law or policy will not prevent enforcement of a forum-selection clause when a Section 1404(a) motion is pursued. This should discourage forum shopping.

The *Chasser* decision also can deprive the party seeking to enforce the forum-selection clause of his contract rights. At the direction of the *Chasser* Court, the Section 1291 motion to dismiss will cause the federal district court to review the forum-selection clause under the *Bremen* standard. Thus, if the suit was brought in a state that has a public policy preventing enforcement, *Bremen* will dictate that the motion to dismiss be denied because the clause is unenforceable.

The Section 1291 motion, if denied, will also be unreviewable until the case is fully litigated. Thus, the party seeking enforcement will be forced to fully litigate the case before it can appeal a decision ruling the clause invalid. This result will encourage parties seeking to avoid enforcement of the clause to file suit in a forum that has a public policy or statute that prevents the enforcement of forum-selection clauses.

In federal court, a party seeking enforcement of a forum-selection clause faces many obstacles. The recent Supreme Court rulings on procedural issues favor the party seeking to avoid enforcement. In the aftermath of *Stewart* and *Chasser*, when a party is sued in federal court in contravention of the express provisions of a forum-selection clause, it should file both a Section 1404(a) motion to transfer venue and a motion to dismiss under Section 1291. The pursuit of a Section 1404(a) motion to transfer venue will force the court to disregard the public policy making the clause unenforceable. While this is not a perfect solution, it offers hope where a Section 1291 motion to dismiss will probably be doomed to failure because a federal court, sitting in diversity, is in a state with law or public policy contrary to the enforcement of forum-selection clauses.

V. THE ARBITRATION ALTERNATIVE

In recent years there has been increased interest in alternative methods to litigation. When parties choose to arbitrate their disputes rather than litigate them, they select a neutral third party to decide the issues presented. By selecting an arbitration forum, parties can tailor the arbitration proceeding to fit their own unique needs. Using arbitration as the forum for resolving disputes has the "potential to be less formal, faster and less expensive than the judicial process." Putting arbitration clauses in contracts is one way for parties to choose a dispute resolution device rather than litigate.

95. *Dispute Resolution*, supra note 5, at 1.
96. *Id.* at 3.
97. *Id.*
98. *Id.*
Prior to enactment of the Federal Arbitration Act (FAA), arbitration clauses were traditionally viewed with disfavor. Arbitration agreements, like forum-selection clauses, were perceived as depriving the courts of jurisdiction. In recent years there has been an emerging trend in the United States to embrace and specifically enforce agreements to arbitrate.

Congress, in Section 2 of the Federal Arbitration Act, declared a national policy favoring arbitration. The United States Supreme Court has held that Congress, through its power under the Commerce Clause of the Constitution, mandated the enforcement of arbitration agreements. Section 2 of the Act provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

Prior to the Supreme Court’s ruling in *Southland Corp. v. Keating*, some states either refused to enforce arbitration agreements or limited their applicability. Before the decision in *Keating*, parties were able to engage in forum shopping and seek a judicial determination of their contract. *Keating* made arbitration agreements equally enforceable in any state by declaring that the Federal Arbitration Act preempts any state law which is contrary to the Act.

In *Keating*, the Court held that a state statute invalidating arbitration agreements covered by the Federal Arbitration Act violated the Supremacy Clause of the United States Constitution. In *Keating*, several convenience store franchisees brought suit in a California Superior Court against a franchisor alleging

101. Id.
102. Id. at 193.
107. Federal Preemption, supra note 100, at 195 (and cases cited therein).
108. Id.
110. Id. at 16.
inter alia, fraud, misrepresentation, breach of contract, and violation of the disclosure requirements of the California Franchise Investment Law.\textsuperscript{111} The franchisor moved to compel arbitration under the provisions of the arbitration clauses in the contracts with the franchisees.\textsuperscript{112} The trial court granted the franchisor’s motion to compel arbitration on all claims except those based on the Franchise Investment Law.\textsuperscript{113} The California Court of Appeal reversed, interpreting the Franchise Investment Law as not invalidating agreements to arbitrate.\textsuperscript{114} The appellate court alternatively found that if the Franchise Investment Law did render the arbitration agreements invalid, it would conflict with Section 2 of the Federal Arbitration Act\textsuperscript{115} and be invalid under the Supremacy Clause.\textsuperscript{116} The California Supreme Court reversed the appellate court ruling and held that the Franchise Investment Law required judicial determination of claims brought under the act, and that the statute did not run afoul of the FAA.\textsuperscript{117}

The Supreme Court entertained jurisdiction for this case under 28 U.S.C. Section 1257(2), which states that a final judgment or decree that finally decides a federal issue is immediately appealable when reversal of the state court on any federal issue would preclude further litigation on the cause of action.\textsuperscript{118} The Keating Court stated:

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. In \textit{Bremen v. Zapata Off-Shore Co.},\textsuperscript{119} we noted that the contract fixing a particular forum for resolution of all disputes ‘was made in an arm’s-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and the courts.’ The \textit{Zapata} court also noted that ‘the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.’ For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court

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\textsuperscript{111} \textit{Id.} at 4. The California Franchise Investment Law is \textsc{Cal. Corp. Code} §§ 31000 -31500. \\
\textsuperscript{112} \textit{Keating}, 465 U.S. at 4. \\
\textsuperscript{113} \textit{Id.} \\
\textsuperscript{114} \textit{Keating v. Superior Court of Alameda County}, 167 Cal. Rptr. 481 (1980). \\
\textsuperscript{115} 9 U.S.C. § 2 (1982). \\
\textsuperscript{116} \textit{Keating v. Superior Court}, 167 Cal. Rptr. at 493-94. \\
\textsuperscript{117} \textit{Keating v. Superior Court of Alameda County}, 31 Cal. 3d 584, 604, 645 P.2d 1192, 1203-04 (1982). \\
\textsuperscript{118} \textit{Keating}, 465 U.S. at 9 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83 (1975)). \\
\textsuperscript{119} 407 U.S. 1.
\end{flushleft}
litigation has run its course would defeat the core purpose of a contract to arbitrate.120

The Supreme Court in Keating went on to decide whether or not the FAA pre-empts Section 31512 of the California Franchise Investment Law.121 Section 31512 provides that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."122 The California Supreme Court interpreted Section 31512 as requiring a court to review all claims brought under the state statute and thus refused to enforce the contract to arbitrate.123 The United States Supreme Court held that the California Supreme Court’s interpretation of Section 31512 directly conflicted with Section 2 of the FAA and violated the Supremacy Clause of the Constitution.124

The Keating Court reaffirmed a view espoused earlier by the Court that the FAA "creates a body of federal substantive law" and that this substantive law created by the Act was applicable in both federal and state courts.125 "In creating a substantive rule applicable in state as well as federal courts Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."126 The Court held that the FAA pre-empts a state law that "withdraws the power to enforce arbitration agreements . . . ."127

In Keating, the Court was concerned about forum shopping between state and federal courts.128 It believed that if the FAA was not applicable to state courts, parties would be encouraged to forum shop.129 The Court held that Congress clearly intended to pre-empt state law on the issue of enforceability of arbitration clauses.130 However, after Keating, the question of whether state law applies to procedural issues that arise in enforcing arbitration clauses remained.131

The Supreme Court resolved this issue in Volt Information Sciences v. Stanford University.132 In Volt, the Court considered whether a California state statute allowing the stay of arbitration, where the parties contracted that their arbitration agreement would be governed by California law, was pre-empted by

120. Keating, 465 U.S. at 10 (citation and footnote omitted).
121. Id.
122. CAL. CORP. CODE. § 31512 (West 1977).
124. Id.
125. Id. at 13 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 nn.25 & 32 (1982)).
126. Id. at 15 (footnote omitted).
127. Id. at 15 n.10.
130. Id. at 15-16.
131. Federal Preemption, supra note 100, at 196.
the Federal Arbitration Act. The dispute arose out of a construction contract concerning "extra work." The construction firm made a formal demand for arbitration. The university moved to compel arbitration. The university moved to stay arbitration under a California procedural statute that allowed a court to stay any arbitration pending the determination of related litigation between a party to an arbitration agreement and any third parties who would not be bound by the arbitration agreement, where there was a possibility of conflicting rulings on a common issue of law or fact. The motion to compel arbitration was denied, and the motion to stay under the statute was granted. The Sixth District Court of Appeals affirmed the trial court's ruling, and the California Supreme Court denied any further review. The United States Supreme Court then agreed to hear the case.

The Volt Court first dealt with the argument that the application of the California statute allowing a stay of arbitration violated the rule that contracts to arbitrate must be resolved with a "healthy regard" for the federal policy favoring arbitration. The Court held that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." The Court stated:

Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in Moses Cone, nor does it offend any other policy embodied in the FAA.

The Volt Court also considered the question of whether or not Congress, in the FAA, intended to pre-empt the entire field of arbitration. The Court answered this question in the negative, but noted that state law could still be pre-empted, even when Congress did not completely pre-empt the field, to the extent that state law actually conflicts with federal law. Further, the Volt Court recognized that the FAA does not prevent parties from excluding certain claims from their

133. Id. at __, 109 S.Ct. at 1254.
134. Id. at __, 109 S.Ct. at 1251.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id. at __, 109 S.Ct. at 1251-52.
141. Id. at __, 109 S.Ct. at 1253.
142. Id. at __, 109 S.Ct. at 1254.
143. Id. (footnote omitted).
144. Id. at __, 109 S.Ct. at 1255.
arbitration agreements. The Act requires that courts enforce agreements to arbitrate, like any other contract. "Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit." The Volt decision allows parties to specify by contract any rules by which their arbitration agreement will be conducted.

Thus, after Keating and Volt, the Supreme Court has clearly defined the scope of the enforceability of arbitration clauses in contracts. The Federal Arbitration Act preempts state law that would be applicable to the enforcement of contracts to arbitrate as mandated by Keating. The FAA does not prevent the application of state law on procedural aspects of arbitration and allows the parties, pursuant to their contract, to chose the forum for their arbitration and also the rules by which it will be governed. By using an arbitration clause instead of a forum-selection clause, there will be no question regarding the validity of the underlying arbitration clause based on state law or public policy.

"A majority of states have enacted statutes authorizing court enforcement of agreements to arbitrate both existing and future disputes." Parties to arbitration contracts should, after Keating and Volt, be able to clearly define their contractual rights and expectations pursuant to an arbitration clause. The Supreme Court has stated that, "[b]y permitting the courts to 'rigorously enforce' such agreements according to their terms... we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind (sic) the FAA."

Thus, by including an arbitration clause in a contract, parties can effectively choose the forum in which to resolve their disputes. Preventing litigation in multiple forums, a goal of many forum-selection clauses, can be achieved through an arbitration clause. The arbitration alternative is a more expeditious form of dispute resolution than litigation and can also reduce the high costs of resolving disputes through litigation.

VI. CONCLUSION

Until the United States Supreme Court or Congress acts to more clearly define the enforceability of forum-selection clauses, their enforceability will continue to be in question, especially in the federal courts. Parties who rely on such clauses in their contracts may find themselves litigating in distant forums in violation of their express contractual agreement. The Supreme Court’s rulings since Bremen have not clarified the enforceability of forum-selection clauses and

145. Id. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1984)).
146. Id.
147. Id.
148. Id.
149. DISPUTE RESOLUTION, supra note 5, at 129.
have, in fact, encouraged parties to forum shop in order to avoid enforcement of an express forum-selection clause.

In contrast to a forum-selection clause, arbitration clauses in contracts can stand on the Congressional mandate in the Federal Arbitration Act that they be enforced according to their terms. By careful drafting and selection of applicable state law and rules, parties can be fairly certain that their agreements to arbitrate will receive equal enforcement in any state or federal court.

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