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Ghosts Have Rights Too! A New Era in Contractual Rights: Third-Party Invocation in Forum Selection Clauses

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GHOSTS HAVE RIGHTS TOO! A NEW ERA IN CONTRACTUAL RIGHTS: THIRD-PARTY INVOCATION IN FORUM SELECTION CLAUSES

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I. THE LEGEND OF THE GHOST PARTY

Imagine for a moment that you own a business that operates as a normal business would; regularly developing relationships and conducting business with other businesses that, in turn, conduct additional business with other outside parties. Suppose further that you have representatives, employees, sub-contractual workers, umbrella corporations, or simply general business affiliates that represent or do business with your overall organization, signing separate contracts with outside entities on occasion and potentially putting your business in the crossfires of future contractual litigation.[1] Would you think to review these separate contracts to ensure

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1. *See* Holland Am. Line, Inc. v. Wärtsilä N. Am., Inc., 485 F.3d 450, 454 (9th Cir. 2007) (affirming the non-signatory's request to dismiss for lack of venue and personal jurisdiction); Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd., 364 F.3d 884, 886, 889–90 (7th Cir. 2004) (analyzing the question of whether an insurance agency specializing in liability insurance for roofing contractors could be held to the forum selection clause of the contract between the reinsurers—affiliates to the agency—and the agency's customers when the clause asserted Bermuda as the proper forum for litigation); Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753, 757–58 (8th Cir. 2001) (affirming the trial court's enforcement of a forum selection clause against all plaintiffs named in the suit—including those that were not parties to the contract—and dismissing the case); Hugel v. Corp. of Lloyd's, 999 F.2d 206, 207 (7th Cir. 1993) (upholding the forum selection clause asserting England as the choice forum in a suit between an insurance underwriter and insurance companies alleging a breach of confidentiality and loss of business due to the breach); Manetti–Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 510 (9th Cir. 1988) (upholding a forum selection clause in a contract when the suit was filed by a distributor against a perfumery and other non-signatory parties regarding a tort claim); *Ex parte* Procom Servs., Inc., 884 So.2d 827, 834–35 (Ala. 2003) (dismissing case based on the non-signatory invocation of the forum selection clause when the plaintiff was an employee who filed suit against the former employer and two Texas residents, the non-signatories, and noting that "[i]f a nonsignatory's claims are 'intertwined with' and 'related to' the contract, arbitration can be enforced."). *But see* Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1297–98 (3d Cir. 1996) (refusing to enforce a forum selection clause by one party to the contract against the other party's

that you and your business would not be subject to a lawsuit in a random jurisdiction[2] due to a forum selection clause[3] within *their* contract?

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corporate parents merely because of their "corporate relationship"); Weygandt v. Weco, LLC, No. 4056-VCS, 2009 Del. Ch. LEXIS 87, at *1–3 (Del. Ch. 2009) (failing to enforce a forum selection clause between defendant sellers-lessors and plaintiff buyers-lessees because the leased building was a subsidiary of the sellers). In *Holland*, a cruise ship company filed suit against two French companies when the cruise ship sank due to a fire while at sea. *Holland*, 485 F.3d at 453–54. The Finnish parties, who were named as defendants in the suit, filed a motion to dismiss for lack of personal jurisdiction, even though they were not a party to the contract in dispute. *Id.* at 454. In *Marano*, Leon Marano was a shareholder, officer, and director of Marano Enterprises, the party to the agreements. *Marano*, 254 F.3d at 757. Leon Marano, along with Marano Enterprises and Bruce Marano filed suit against Z-Teca under the contracts. *Id.* at 757–58. The court concluded that Marano was a voluntary plaintiff in the suit and was closely related enough to the disputes arising out of the contractual agreements to properly bind him to the forum selection clause. *Id.* at 758. The contract in *Manetti–Farrow* containing a forum selection clause asserting Florence, Italy as the choice forum was exclusively between the perfumery and distributor. *Manetti–Farrow*, 858 F.2d at 511. The perfumery terminated the agreement while bringing suit against the distributor in Italy. *Id.* The distributor, Manetti–Farrow, then filed suit in U.S. District Court alleging the forum selection clause did not apply to tort claims; however, the district court did not agree. *Id.* at 511–12. To the contrary, in *Weygandt*, the forum selection clause was found within an asset purchase agreement. *Weygandt*, 2009 Del. Ch. LEXIS 87, at *3. A lease agreement signed by the parties was attached as an exhibit to the asset purchase agreement. *Id.* at *3-4. However, the lease agreement did not contain a forum selection clause like the asset purchase agreement. *Id.* at *4. An issue arose where the buyers claimed that the sellers made misrepresentations regarding the finances of the purchased business. *Id.* at *7–8. Approximately one year after the sale, a federal investigation was done, alleging a FAA regulations violation. *Id.* at *6. When the buyers-lessees failed to cooperate, the sellers-lessors filed suit for breach of contract. *Id.* at *6–7. The buyers-lessees brought a counterclaim and third-party action asserting various claims and seeking rescission of both agreements. *Id.* at *7–8. The sellers-lessors filed a motion to dismiss on grounds of personal jurisdiction due to the forum selection clause in the asset purchase agreement. *Id.* at *8. The court referred to the additional leasing agreement, signed by the subsidiary company and lacking the forum selection clause. *Id.* at *21–22. The court found that the forum selection clause was unenforceable against the parties, however, equitable estoppel would in fact apply allowing the lawsuit to continue in the Delaware court. *Id.* at *22.

2. *See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 2.1, at 55 (5th ed. 2001) (stipulating that rules of jurisdiction are constitutional rules; for example subject matter jurisdiction is set out specifically in the United States Constitution and the Due Process Clause establishes limitations on the jurisdiction of state courts).

3. *See* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 55 (1992) (explaining that forum selection clauses guarantee efficiency in commercial transactions and decrease litigation costs); Friedrich K. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49, 49–50 (1972) (providing an example of a forum selection clause in a contract); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 973 (2008) (discussing the uncertainty in federal courts surrounding federal judicial treatment of forum selection clauses). A forum selection clause is an agreement that "is part of a larger agreement." *Borchers*, *supra* at 56 n.1. These clauses are "often cited as the paradigmatic example of 'contract procedure,' or [rather the] efforts by the parties to control procedural issues [through the] contract." Marcus,

On the opposite end of the hypothetical, suppose you are an average consumer that entered into a contractual relationship with a business and for whatever reason you have been damaged and you are attempting to file suit against the business for relief. You would not think that a non-contracting party who has been included in the suit would be able to step into the shoes of an actual contracting party and assert certain rights against you under the contract. Thus, the ultimate question is whether a party who has not agreed to the terms of a contract can actually enforce or be bound to those terms.

The Court of Appeals in *Adams v. Raintree Vacation Exchange LLC*,[4] found itself at the cusp of this hybrid question in contract and procedural law,[5] as the court affirmed the trial court in support of a determination asserting that a non-party to a contract in dispute may potentially be bound by the contract's forum selection clause, and in addition, may bind other applicable parties to these clauses as well.[6] The Illinois district court set the stage[7] and Seventh Circuit Court of Appeals Judge Richard Posner[8]

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supra at 973. Forum selection clauses have also been introduced interchangeably as "*forum clause*," "*forum selection agreement*," "*forum agreement*," "*choice of forum clause*," "*choice of forum agreement*," and "*choice of court clause*." *Borchers, supra* at 56 n.1.

4. Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436 (7th Cir. 2012), *rehearing denied*, 705 F.3d 673 (7th Cir. 2013), *cert. denied*, 133 S. Ct. 2862 (2013).

5. *Id.* at 439; *see* Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (deeming a forum selection clause binding against a third–party beneficiary); Stephens v. Entre Computer Ctrs., Inc., 696 F. Supp. 636, 638–39 (N.D. Ga. 1988) (noting that "enforcement of forum selection clauses promotes stable and dependable trade relations, and . . . carving out a third-party beneficiary exception would be inconsistent with that rationale") (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)); Clinton v. Janger, 583 F. Supp. 284, 290 (N.D. Ill. 1984) (asserting that "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses" and third-party beneficiary status is not required). *Compare* Medtronic, Inc. v. Endologix, Inc., 530 F. Supp. 2d 1054, 1056 (D. Minn. 2008) ("[A] third party may be bound by a forum-selection clause where it is 'closely related to the *dispute* such that it becomes foreseeable that it will be bound.'") (emphasis added) *with* Hugel, 999 F.2d at 209 (allowing a non-party to the contract to be bound to or benefit from the forum selection clause if the party is "closely related" to the *contract*, so much that the inclusion would be "foreseeable"). Third–party invocation is not a new concept per se, however, courts have been split as to how best to tackle enforcement of forum selection clauses for and against these non-signatories to the contract. *See Coastal Steel Corp.*, 709 F.2d at 201.

6. *See* Raintree, 702 F.3d at 442–44.

7. *See* Adams v. Raintree Vacation Exch., LLC, No. 10C3264, 2011 U.S. Dist. LEXIS 45761 at *19 (N.D. Ill., Apr. 28, 2011) ("To bind a [non-signatory] to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound.") (citing Hugel, 999 F.2d at 209).

8. *See Hon. Richard Posner: U.S. Court of Appeals, Seventh Circuit*, THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, www.fed-soc.org/publications/author/richard-posner, [http://perma.cc/FUD6-P6XE] (last visited May13, 2014); *Richard A. Posner*, UNIVERSITY OF CHICAGO LAW SCHOOL, www.law.uchicago.edu/faculty/posner-r, [http://perma.cc/C4P2-CPC

later agreed that the application of the clause to non-parties may very well be possible.[9] These two courts do not appear to be the only ones asserting this determination.[10] *Raintree*[11] has officially brought to light the numerous unanswered questions concerning subrogation[12] in forum selection clauses that have gone unanswered in the past.[13]

The *Raintree* plaintiffs had purchased a timeshare unit in Mexico.[14] The Adams bought the timeshare from a Mexican company named Desarollos Turisticos Regina ("DTR"), which became an affiliate of Raintree Vacation Exchange ("Raintree").[15] The contracts involving the purchase of the timeshares included a forum selection clause requiring any litigation take place in Mexico City federal district courts.[16] The plaintiffs alleged that Starwood Vacation Ownership ("Starwood")[17] and Raintree conspired to defraud them using a fake Mexican subsidiary to accept their money even though they did not intend to build a timeshare resort as

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A] (last visited May 13, 2014); *see also* Cory L. Andrews, *Judge Posner, 7th Circuit, Take on Lawyers Behaving Badly*, FORBES, http://www.forbes.com/sites/wlf/2013/04/12/judge-posner-7th-circuit-take-on-lawyers-behaving-badly/, [http://perma.cc/PLK5-6LEW] (last visited May 13, 2014).

9. *See Raintree*, 702 F.3d at 439–41. Judge Posner addresses the question as "whether an alleged conspirator can invoke the forum selection clause contained in a contract, signed by his alleged co-conspirator, that created or advanced the conspiracy." *Id.* at 442. The court of appeals determined it was in fact possible for this third-party subrogation to occur. *See Id.* at 443. However, the court also determined that this analysis should not necessarily apply to all cases involving third-parties in forum selection clauses. *See Id.* at 440–41. The determining factor in this instance was that the lawsuit accused Raintree and Starwood of "being secret principals of DTR, their agent in dealing with the timeshare buyers and thus in executing the fraud." *Id.* at 442.

10. *See Raintree*, 2011 U.S. Dist. LEXIS 45761, at *10–13, 15–16 (denying the defendant's motion to dismiss based on lack of personal jurisdiction, yet initiating an evidentiary hearing to determine whether the defendants could enforce the forum selection clause against the plaintiffs through a motion to dismiss based on improper venue, specifically when the defendants were not parties to the contract at dispute).

11. *See Raintree*, 702 F.3d at 436.

12. DAN B. DOBBS, LAW OF REMEDIES § 4.3 at 251 (2d ed. 1993). "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert his rights." *Id.*

13. *See Raintree*, 702 F.3d at 437.

14. *Id.* at 437–38; *Raintree*, 2011 U.S. Dist. LEXIS 45761, at *5–6; Neil Guthrie, *Canada: Enforceability of Forum Selection Clause By Non-Parties to Contract*, MONDAQ BUSINESS BRIEFING (March 15, 2013), http://www.mondaq.com/canada/x/227122/Contract+Law/Ontario+Lawyers+To+Be+Able+To+Use+Electronic+Devices+In+Court, [http://perma.cc/4N8R-LJ3L].

15. *Raintree*, 702 F.3d at 438; *Raintree*, 2011 U.S. Dist. LEXIS 45761, at *6–7; Guthrie, *supra* note 14.

16. *Raintree*, 702 F.3d at 438; *Raintree*, 2011 U.S. Dist. LEXIS 45761, at *6–7; Guthrie, *supra* note 14.

17. *See Raintree*, 702 F.3d at 438. Starwood is an owner and operator of various hotels and resorts, those of which include the well–known Westin hotel chain. *Id.*

promised.[18] Raintree and Starwood filed a motion to dismiss due to the existence of the forum selection clause.[19] On appeal, the plaintiffs argued that the defendants were not afforded the use of the forum selection clause because neither party was a signatory to the contract that the plaintiffs had signed with DTR.[20] Judge Posner noted that the plaintiffs were unable to point to any authority to support their claim that "litigants who are not parties to a contract cannot rely on such a contract's choice of forum provision" thus he "trudged on" in search of a determinative test to apply to non-signatories in similar circumstances.[21]

In the wake of non-party adhesion becoming an increasingly large problem for the federal and state courts, this comment proposes a modification to the test set forth by Judge Posner in *Raintree*. This comment also makes a call to the Supreme Court for action in determining a ceiling standard for non-party invocation of forum selection clauses. Part II of this comment considers the direction of the Supreme Court in past decisions on forum selection clauses in general and the implications of these decisions on the future of the clauses.[22] Part III discusses the relatively new question surrounding forum selection clauses with respect to non-party invocation of the clause and the issues it creates in general.[23] Part IV discusses the test created by Judge Posner and the *Raintree* court, which suggests a compartmentalized approach to the issue.[24] Part V further considers the *Raintree* test as a portion of a more cumulative test that breaks the analysis down to consider parties that have a relationship to the actual contract itself versus those with a relationship to the signatory parties of the contract.[25] Part VI provides final conclusive thoughts and a call to the Supreme Court to take action and create a ceiling standard for non-party invocation that may be followed by the lower courts.[26]

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18. *Raintree*, 702 F.3d at 438; *Raintree*, 2011 U.S. Dist. LEXIS 45761, at *7–8; Guthrie, *supra* note 14.

19. *Raintree*, 702 F.3d at 439; Guthrie, *supra* note 14.

20. *Raintree*, 702 F.3d at 439; Guthrie, *supra* note 14.

21. Jeremy Telman, *Judge Posner on Third–Party Invocation of Forum Selection Clauses*, LAW PROFESSOR BLOG (Dec. 31, 2012), http://lawprofessors.typepad.com/contractsprof_blog/2012/12/judge-posner-on-forum-selection-clauses.html (summarizing the details surrounding *Raintree*); *see generally Raintree*, 702 F.3d at 439–43 (providing a thorough analysis on how to address non-signatories in situations where there is a forum-selection clause).

22. *See* discussion *infra* Part II.

23. *See* discussion *infra* Part III.

24. *See* discussion *infra* Part IV.

25. *See* discussion *infra* Part V.

26. *See* discussion *infra* Part VI

II. WE DID NOT EVEN KNOW THEY WERE AMONG US: THE EVOLUTION OF CONTRACTUAL RIGHTS TO FORUM SELECTION CLAUSES

"There is a sacred realm of privacy for every man and woman where he makes his choices and decisions—a realm of his own essential rights and liberties into which the law, generally speaking, must not intrude."[27] Even though the forum selection clause as we know it today is a very broad concept, potentially encompassing even non-parties to a contract at this point, the rise of these clauses has been rather disheartening through the years, and oftentimes splintered in its application in a number of ways. The lack of consistency seen through the main Supreme Court decisions on forum selection clauses has left enforcement of such clauses uncertain and confusing for lower courts.

A. INITIAL RESISTANCE TO FORUM SELECTION CLAUSES BY UNITED STATES COURTS

The United States only recently changed its attitude towards forum selection clauses by finally beginning to accept these clauses.[28] In the

27. SEARCHQUOTES.COM, http://www.searchquotes.com/quotation/There_is_a_sacred_realm_of_privacy_for_every_man_and_woman_where_he_makes_his_choices_and_decisions-/27414/, [http://perma.cc/X78C-PKLT] (quoting Geoffrey Fisher) (last visited May 14, 2014).

28. *E.g.*, Cent. Contracting Co. v. Md. Cas. Co., 367 F.2d 341, 344–45 (3d Cir. 1966); WM. H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d Cir. 1955), *overruled on other grounds in* Indussa Corp. v. SS Ranborg, 377 F.2d 200 (2d Cir. 1967); Cerro de Pasco Copper Corp. v. Knut Knutsen O.A.S., 187 F.2d 990, 991 (2d Cir. 1951); Geiger v. Keilani, 270 F. Supp. 761, 766 (E.D. Mich. 1967); Amicale Indus., Inc. v. S.S. Rantum, 259 F. Supp. 534, 537–538 (D. S.C. 1966); Hernandez v. Koninklijke Nederlandsche Stoomboot Maatschappij N.V., 252 F. Supp. 652, 654–55 (S.D. N.Y. 1965); Mittenthal v. Mascagni, 66 N.E. 425, 425–27 (Mass. 1903); Hernandez v. Cali. Inc., 301 N.Y.S.2d 397, 401 (N.Y. App. Div. 1969); Exp. Ins. Co. v. Mitsui Steamship Co., 274 N.Y.S.2d 977, 981 (N.Y. App. Div. 1966); Cent. Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d 810, 816 (Pa. 1965); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971); *see also* Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L. L.J. 51, 55 (1992) (discussing the evolution of the "fairness and reasonableness" test ultimately adopted by the Supreme Court as being "gauged primarily by whether contractual particulars were met, and whether the chosen forum would seriously impair one party's ability to pursue a cause of action"); *cf.* Monrosa v. Carbon Black Exp. Co., 359 U.S. 180, 182 (1959) (determining that forum selection clauses should not be interpreted to limit an action *in rem*). *But cf.* Kreger v. Pa. R.R. Co., 174 F.2d 556, 557–59 (2d Cir. 1949) (referring to the Federal Employers' Liability Act, 45 U.S.C.S. § 55, the court reasoned that any contract that enabled a common carrier to exempt itself from liability under the Act and that defendant sought to contract away its liability to be sued in certain states was prohibited by the Act). The Restatement (Second) of Conflict of Laws discusses the priority placed on the convenience of the parties:

> The courts have shown themselves reluctant to dismiss an action on the ground that it was brought in a state other than the one selected by the parties in their contract.

Nineteenth Century, unlike other courts around the world,[29] United States courts had uniformly refused to enforce forum selection clauses,[30] particularly because the clauses arose from a private agreement between the parties that ultimately imposed a "characterization" problem for the courts.[31] The clauses appeared to limit a party's constitutional objection to

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> Actions have been dismissed, however, in situations where the contractual provision was deemed reasonable and serving the convenience of the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* (citations omitted). Solimine asserted that the majority's overall acceptance of forum selection clauses came with Supreme Court decisions made in the last two decades. Solimine, *supra* at 52.

29. *See* Arturo J. Aballi, *Comparative Developments in the Law of Choice of Forum*, 1 N.Y.U. J. INT'L L. & POL. 178, 205 (1968) (asserting a long-standing tradition of party autonomy to enforce forum selection clauses); M. Richard Cutler, *Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum*, 20 TEX. INT'L L.J. 97, 113, 122 (1985) (sharing historical perspective of the French and English acceptance of forum-selection clauses); Ingrid M. Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 8 INT'L LAW. 83, 90 (1974) (asserting the concept of party rights to contract have led to the general acceptance of forum-selection clauses as part of those rights); Arthur Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements"*, 15 RUTGERS L. REV. 414, 414 (1960–1961) (noting legal acceptance of forum selection agreements); Joseph M. Perillo, *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L., 162, 165 (1964) (asserting that Western Europe had widespread acceptance of forum selection clauses). *But see* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 309 (1988) (noting that enforcement of forum selection clauses is not universally granted).

30. Borchers, *supra* note 3, at 56–57; Maxwell J. Wright, Note, *Enforcing Forum—Selection Clauses: An Examination of the Current Disarray of Federal Forum—Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1628 (2011); *e.g.*, Home Ins. Co. v. Morse, 87 U.S. 445, 450 (1874) ("There is no sound principle upon which such agreements can be specifically enforced.").

31. *See* Mullenix, *supra* note 29, at 322; *see also* James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 5–6 (1976) (providing a comprehensive overview of the characterization issues facing the Supreme Court); Michael Gruson, *Forum—Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 154 (1982) (asserting that forum selection clauses involve state law enforcement issues in addition to federal common law procedural issues). *See generally* Lenhoff, *supra* note 29, at 415–19 (providing a comprehensive discussion of prorogation in terms of forum selection). Mullenix describes the issues encountered by the lower federal courts stating:

> The lower federal courts have encountered three major characterization difficulties in construing forum-selection clauses. First, the courts have not amicably come to terms with whether forum-selection clauses are a matter of jurisdiction, venue, transfer or *forum non conveniens*. Second, the courts rather randomly apply an array of possible remedies—a confusion arising from the failure to solve the first problem. Third, the courts have paid virtually no attention to the civil law distinction between prorogation and derogation clauses, which has directly contributed to the prevalence of the first two problems. The reluctance to struggle with the theoretical has induced courts to embrace the pragmatic and permitted contract principles to triumph over fundamental adjudicatory rights, such as choice of forum and choice of law.

Mullenix, *supra*. "Under a derogation clause, the parties have chosen not to allow action in a jurisdiction, while under a prorogation clause, the parties grant or accept a given jurisdiction." *Id.* at 298 n.17.

personal jurisdiction[32] while attempting to "oust the courts of [their] jurisdiction."[33] This became known as the "ouster doctrine," as it has been

32. *See* Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 428 (1991) (asserting that such clauses potentially waive not only a party's personal jurisdiction objection, but also "access to certain courts with subject matter jurisdiction, specify a particular venue within a court system, or offer a reason relevant to *forum non conveniens* analysis to favor the contractual forum over other possible forums"); *see also* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–19 (1972) (failing to specify whether lack of jurisdiction or *forum non conveniens* application was appropriate for the defendant's motion to dismiss); Keaty v. Freeport Indon., Inc., 503 F.2d 955, 956–57 (5th Cir. 1974) (holding the language of the forum selection clause to be ambiguous as to exclusivity and ultimately unenforceable: "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York."). "Forum-selection clauses have historically not been favored by American courts." *Bremen*, 407 U.S. at 9.

33. *Home Ins. Co.*, 87 U.S. at 451 (asserting that agreements to "oust the courts of the jurisdiction [were] illegal and void"), *superseded by statute as stated in*, Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908, 910–11 (Del. 1989); *see* Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942 (2d Cir. 1930) (affirming prior decisions determining a forum selection clause was invalid and therefore, in this case, a contractual intention to confine any litigation over the contract to a French court); Gen. Acceptance Corp. v. Robinson, 207 Cal. 285, 286 (Cal. 1929) (opposing the City of San Francisco as the agreed upon jurisdiction through the contract's forum selection clause); Kyler v. U.S. Trotting Ass'n., 210 N.Y. S.2d 25, 26–27 (N.Y. App. Div. 1961) (determining that the parties were not bound by a forum selection clause asserting suits be brought in Columbus, Ohio, where the Association's principal office was, and therefore New York had jurisdiction to decide the case.); Parker v. Krauss Co., Ltd., 157 Misc. 667, 669 (N.Y. Sup. Ct. 1935) (refusing to enforce a clause agreed to by the parties stating that all actions be brought in the state of the purchaser's domicile because it "oust[ed] other courts of jurisdiction" and was "contrary to public policy"); Smith v. Hartt & Cole, 13 S.W.2d 408, 409 (Tex. Civ. Ct. App. 1929) ("Venue is fixed by law, and any contract whereby it is agreed to change the law with reference to venue, is void."); *see also* RESTATEMENT (FIRST) OF CONTRACTS § 558 (1932) (providing evidence of the courts' hesitancy in putting limitations on jurisdictional rights, noting such limitations were illegal); Juenger, *supra* note 3, at 51 (noting that both the state and federal courts shared the same view historically: "United States courts have . . . frequently refused to dismiss actions brought in violation of [forum selection] clauses on the ground that a private contract cannot take away jurisdiction from a court"); Otero v. Banco de Sonora, 225 P. 112, 1113 (Ariz. 1924) (stating that "[t]hose who seek the protection of our flag to carry on their business should not object to the jurisdiction of our courts to settle the differences arising in the course of such business"); Matt v. Iowa Mut. Aid Ass'n., 46 N.W. 857, 857 (Iowa 1890) (asserting the contract provided that a suit could only be brought in a particular county); Nashua River Paper Co. v. Hammermill Paper Co., 111 N.E. 678, 681 (Mass. 1916) (asserting "[t]he same rule [of ouster] prevails generally in all states where the question has arisen"); Reichard v. Manhattan Life Ins. Co., 31 Mo. 518, 520–21 (Mo. 1862) (refusing to enforce a forum selection clause to a contract stipulating all suits must be brought in New York, where the insurance company was chartered); Benson v. E. Bldg. & Loan Ass'n., 66 N.E. 627, 628 (N.Y. 1903) ("[N]othing is better settled than that agreements of the character mentioned are void."); Healy v. E. Bldg. & Loan Ass'n., 17 Pa. Super. 385, 392, 394 (Pa. Super. Ct. 1901) (holding that the agreement between the parties was not enforceable as to forum; however, enforcing the contractually selected forum of New York specifically because the contract was determined to be a New York contract, irrelevant of the forum selection clause); Savage v. People's Bldg., Loan & Sav. Ass'n., 31 S.E. 991, 993 (W. Va. 1898) (stipulating that "jurisdiction cannot be taken away

referred to by commentators,[34] and was imposed for a host of various reasons by courts across the country.[35] However, a complete change occurred during the second half of the Twentieth Century[36] as courts finally began to acknowledge the wishes and rights of contracting parties to determine in advance where a dispute may be litigated.[37] As forum selection clauses became more widely accepted, courts continuously emphasized the importance of using proper terminology within the clause, as incorrect ambiguous language could potentially render a contract unenforceable. Unfortunately, the simplistic language of forum selection clauses has proven to be anything but simplistic and has thus prompted the Court to provide much needed guidance on the matter.[38]

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by consent"); Int'l. Travelers' Ass'n. v. Branum, 212 S.W. 630, 630 (Tex. 1919) (holding that the contractual provision requiring all suits be brought in the county of the insurer's residence did not control).

34. *See, e.g.*, Juenger, *supra* note 3, at 51 (suggesting that "[t]he origins of [this] doctrine are shrouded in history"); Lederman, *supra* note 32, at 428 ("The terminology used to describe forum-selection clauses is important because it may affect the analysis of enforceability. Historically, almost all American courts treated forum-selection clauses as unenforceable attempts to 'oust [their] jurisdiction.'"); Robert A. Leflar, *The Bremen and the Model Choice of Forum Act*, 6 VAND. J. TRANSNAT'L L. 375, 376, 384 (1973) (listing ouster as among the "traditional thought-precluding sets of senseless words," yet recognizing the practical origin of the word during times when judges were paid on a case by case basis); Marcus, *supra* note 3, at 989, 995 (asserting that courts receive their jurisdiction from law; the ouster doctrine was formed on the belief that should a forum selection clause be enforced, it "would strip all but the designated court of jurisdiction").

35. *See* Juenger, *supra* note 3, at 52 (noting that the outer doctrine was used by the courts in "almost boring unanimity"); Lederman, *supra* note 32, at 428 (discussing the historical lack of enforcement of forum selection clauses because they were said to attempt "to 'oust [their] jurisdiction'"). Lederman noted that courts refused to enforce forum selection clauses for pecuniary reasons and also because of an initial rejection of arbitration clauses. Lederman, *supra* note 32, at 428 n. 40.

36. Wright, *supra* note 30, at 1628; *see* Borchers, *supra* note 3, at 57 (recognizing *M/S Bermen v. Zapata Off-Shore Co.* as the seminal case that recognized "a circumscribed right to enter into 'reasonable' exclusive forum agreements").

37. John McKinley Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888, 888 (1992); *see also* Wright, *supra* note 30, at 1628 (noting the change toward acceptance of forum selection clauses through "courts' efforts to maintain parties' contract expectations"). The Supreme Court then backed up the movement toward forum selection clause enforcement when it voted in favor of the contractual rights of the parties in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). Wright, *supra* note 30, at 1628.

38. David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 786 (1993); *see* Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y. 579, 596 (2007); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 483–84 (1993); *see, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Marcus, *supra* note 3, at 991. Under *Bremen*, the Supreme Court required that forum selection clauses be "specifically" enforced as a general rule, with the exception for enforcement being

B. THE SUPREME COURT WEIGHS IN

In the 1964 United States Supreme Court case, *National Equipment Rental, Limited v. Szukhent*,[39] the Court approved the use of forum selection clauses, particularly recognizing the rights of parties to enter into "non-exclusive" forum selection clauses,[40] holding "that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ."[41] Since *Szukhent*, the Court has addressed forum selection clauses on three other occasions.

i. M/S Bremen v. Zapata Off-Shore Company

The first time the Court weighed in about forum selection clauses was in 1972 in *M/S Bremen v. Zapata Off-Shore Company*,[42] where rights to enter into "reasonable" and "negotiated" forum selection clauses were given by the Court, thus following an international trend towards enforcement.[43] This holding reversed the American courts' longstanding complete rejection of enforcement of such clauses.[44] Thus, since 1972 forum selection clauses have been widely and unanimously accepted in federal courts.[45]

Bremen was an admiralty case arising from an international towage contract between the parties.[46] Zapata, a Texas corporation, contracted

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when 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." *Bremen*, 407 U.S. 1 at 15. Several commentators suggest that *Bremen* was the beginning of contract procedure. *See* Marcus, *supra* note 3, at 991.

39. Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

40. *Id.* at 316; *see also* Borchers, *supra* note 3, at 62 (discussing the holding and effects of *Szukhent*); Wright, *supra* note 30, at 1628 (asserting the Supreme Court's endorsement of the "increasing trend of enforcing forum selection clauses").

41. *Nat'l Equip. Rental*, 375 U.S. at 316.

42. *Bremen*, 407 U.S. at 1–2.

43. *See generally* Perillo, *supra* note 29, at 162.

44. *See* Taylor, *supra* note 38, at 785 (suggesting that the intention of enforcement of forum selection clauses in U.S. courts was originally "to reduce litigation costs and conserve judicial resources").

45. Marcus, *supra* note 3, at 988 (suggesting that since the *Bremen* decision in 1972, most courts have decided to enforce forum selection clauses, with the exception of those courts governed by the outcome in *Stewart Organization, Incorporated v. Ricoh*); *see also* Willis L.M. Reese, *The Supreme Court Supports Enforcement of Choice of Forum Clauses*, 7 INT'L LAW. 530, 530, 534–35 (1973) (discussing the relationship between England and the United States with regard to forum selection clauses); Taylor, *supra* note 38 (suggesting misapplication or intentional disregard of *Stewart* by commentators). However, federal courts presiding over admiralty cases have uniformly adhered to forum selection clauses since the eighteenth century. Marcus, *supra* note 3, at 988.

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

with Unterweser, a German corporation, to tow Zapata's ocean drilling rig—the Chaparral—from the Gulf of Mexico to a location off the coast of Italy, where Zapata planned to drill wells.[47] The contract contained a forum selection clause providing that "[a]ny dispute arising must be treated before the London Court of Justice."[48] In January 1968, Unterweser's deep-sea tugboat—the Bremen—departed the Gulf of Mexico intending to tow the Chaparral to the agreed location.[49] Due to a severe storm while in international waters, the Chaparral suffered substantial damage and did not reach its intended destination.[50] Zapata instructed the Bremen to tow the damaged rig to the nearest port of refuge in Tampa, Florida.[51]

In an effort to seek relief for the damage sustained to the rig, Zapata filed suit in a Florida district court ignoring the forum selection clause requiring litigation in London.[52] Unterweser invoked the forum selection clause and moved for dismissal due to lack of jurisdiction or on *forum non conveniens*[53] grounds in the alternative, while initiating an identical action in the forum agreed to within the contract.[54]

After the district court and appellate court denied both motions, the Court reversed and—for the first time—recognized the rights of contracting parties to enter into reasonable "exclusive" forum selection clauses.[55] The

47. *Id.*

48. *Id.*

49. *Id.* at 3; *see* Marcus, *supra* note 3, at 1016.

50. *Bremen*, 407 U.S. at 3; *see* Marcus, *supra* note 3, at 1016.

51. *Bremen*, 407 U.S. at 3; *see* Marcus, *supra* note 3, at 1016.

52. *Bremen*, 407 U.S. at 3–4.

53. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.17, at 92 (4th ed. 2005). A balancing test has been adopted to determine convenience to each party:

> Forum non conveniens allows a court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring plaintiff's forum choice. However, dismissal on the basis of *forum non conveniens* also requires that there be an alternative forum in which the suit can be prosecuted . . . . It must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient court. Further, in at least some states, it has been held that the doctrine cannot be successfully invoked when the plaintiff is resident of the forum state since, effectively, one of the functions of the state courts is to provide a tribunal in which their residents can obtain an adjudication of their grievances. But in most instances a balancing of the convenience to all the parties will be considered and no one factor will preclude a *forum -non* [*conveniens*] dismissal, as long as another forum is available.

Id.

54. *Bremen*, 407 U.S. at 4.

55. *Id.* at 10; *see also* Borchers, *supra* note 3, at 57 (asserting the Supreme Court first began to recognize non-exclusive forum selection clauses in *Nat'l Equipment Rental Ltd v. Szukhent* and "reasonable" exclusive forum selection clauses in *M/S Bremen v. Zapata Off-Shore Company*); Wright, *supra* note 30 at 1629–30 (noting the Supreme Court's requirement from *M/S Bremen v. Zapata Off-Shore Company* for the resisting party to show the forum selection clause is "'unreasonable' under the circumstances" due to "fraud, undue influence, or overweening

Court held that forum selection clauses were *prima facie* valid and should be enforced unless the resisting party can show the clause is "unreasonable under the circumstances" for reasons involving "fraud, undue influence, or overweening bargaining power."[56] The Court ultimately vacated the Court of Appeals' judgment and remanded the case for further consideration to determine whether enforcing the forum selection clause was unreasonable under the circumstances pursuant to these new standards.[57] The days of the ouster doctrine officially came to an end in the federal courts as the doctrine was considered a "vestigial legal fiction."[58] Post *Bremen*, most state courts, with the exception of a few state courts that remained holdouts,[59] followed suit applying these new standards.[60] Additionally, the *Bremen* court referred to the reasoning of other countries[61] by establishing a general rule determining "overweening bargaining power" of one party is not a defense to enforcement of a forum selection clause.[62] Aside from establishing a much needed beginning standard of enforcement however, the *Bremen* court left open the question of what constituted a reasonable agreement between the parties, thus creating confusion and uneven application of these clauses within the lower courts.[63]

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bargaining power" in order to invalidate the clause).

56. *Bremen*, 407 U.S. at 10, 12–13; *see* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) (asserting the standard used by courts in determining the existence of unconscionability).

> Traditionally, a bargain was said to be unconscionable in an action at law if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other," damages were then limited to those to which the aggrieved party was "equitably" entitled. Even though a contract was fully enforceable in an action for damages, equitable remedies such as specific performance were refused where "the sum total of its provisions drives too hard a bargain for a court of conscience to assist." Modern procedural reforms have blurred the distinction between remedies at law and in equity. For contracts for the sale of goods, Uniform Commercial Code § 2-302 states the rule of this Section without distinction between law and equity. Comment 1 to that section adds "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

RESTATEMENT (SECOND) OF CONTRACTS, *supra* (citations omitted).

57. *Bremen*, 407 U.S. at 15, 20.

58. *Id.* at 12.

59. Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1096, n.31 (1989) (attesting to 12 states that refused to validate forum selection clauses through a rule of presumptive invalidity).

60. Freer, *supra* note 59 at 1095 (asserting that a clear majority of states do, in fact, follow *Bremen* as state law); *see also* Francis M. Dougherty, *Validity of a Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4TH 404, § 4[a] (1984) (suggesting that the majority of state courts embrace a "reasonableness" approach).

61. *See generally* Perillo, *supra* note 29, at 162–65 (discussing how other countries approach forum selection clauses).

62. *Bremen*, 407 U.S. at 12–13.

63. *Id.* at 15; Borchers, *supra* note 3, at 89 (noting that many courts provided dicta, "but few holdings suggest that forum [selection clauses] obtained by fraud or duress are unenforceable");

see, e.g., Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974) (concluding that within the arbitration context, fraud or duress *must* be shown as to the forum agreement itself); Commerce Consultants Int'l. Inc. v. Vetrerie Riunite, S.p.A., 867 F.2d 697, 700 (D.C. Cir. 1989) (holding Italy as an adequate alternative forum); Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 291 (5th Cir. 1989) (holding Saudi administrative tribunal as an adequate alternative forum); Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 636–37 (9th Cir. 1988) (dismissing the claim because the contract contained an arbitration agreement); Farmland Indus., Inc. v. Frazier–Parrott Commodities, Inc., 806 F.2d 848, 851–52 (8th Cir. 1986) (transferring the requirement of a show of fraud or duress as to the clause specifically from an arbitration context to the traditional forum selection clause context); Sun World Lines, Ltd. v. March Shipping Corp., 801 F.2d 1066, 1068 (8th Cir. 1986) (holding West Germany as a reasonably adequate alternative forum); AVC Nederland B.V. v. Atrium Inv. P'ship., 740 F.2d 148, 155–58 (2d Cir. 1984) (transferring the requirement of a show of fraud or duress as to the clause specifically from an arbitration context to the traditional forum selection clause context); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 281 (9th Cir. 1984) (holding California as a reasonable forum withstanding the location of the witnesses on the East Coast); Crown Beverage Co., Inc. v. Cerveceria Moctezuma, S.A., 663 F.2d 886, 888–89 (9th Cir. 1981) (holding Mexico as an acceptable alternative forum); Republic Int'l Corp. v. Amco Eng'rs., Inc., 516 F.2d 161, 168 (9th Cir. 1975) (holding Uruguay as a reasonable alternative forum); Damigos v. Flanders Compania Naviera, S.A.–Panama, 716 F. Supp. 104, 107, 109 (S.D.N.Y. 1989) (holding Greece as an acceptable alternative forum); Ernst v. Ernst, 722 F. Supp. 61, 68 (S.D.N.Y. 1989) (holding France as a reasonable alternative forum); Ritchie v. Carvel Corp., 714 F. Supp. 700, 702–03 (S.D.N.Y. 1989) (transferring the requirement of a show of fraud or duress as to the clause specifically from an arbitration context to the traditional forum selection clause context); Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik GMBH, 718 F. Supp. 886, 892 (M.D. Ala. 1989) (concluding that because the forum selection clause was not unreasonable or ambiguous, the claim should be litigated in West Germany); Stephens v. Entre Computers Ctrs., Inc., 696 F. Supp. 636, 639–641 (N.D. Ga. 1988) (transferring the requirement of a show of fraud or duress as to the clause specifically from an arbitration context to the traditional forum selection clause context); Tisdale v. Shell Oil Co., 723 F. Supp. 653, 659 (M.D. Ala. 1987) (holding Labor Commission of Saudi Arabia as a reasonable alternative forum); Ronar, Inc. v. Wallace, 649 F. Supp. 310, 314–15 (S.D.N.Y. 1986) (holding West Germany as an adequate forum); Warner & Swasey Co. v. Salvagnini Transferica S.p.A., 633 F. Supp. 1209, 1213–14 (W.D.N.Y. 1986) (holding Italy as a reasonable alternative forum for a patent action); Santamauro v. Taito do Brasil Industria E. Comercia Ltda., 587 F. Supp. 1312, 1319 (E.D. La. 1984) (holding Brazil as a reasonable alternative forum); *cf.* Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377–78 (7th Cir. 1990) (holding that a party has a duty to read the contract he intends to sign and ignorance of the forum selection clause if it is visibly contained in the writing is no defense to the clause); McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 345–46 (8th Cir. 1985) (rendering forum selection clause as unenforceable due to unforeseeable changed circumstances in Iran because it would make it impossible for McDonnell Douglas to litigate). *Compare* Rockwell Int'l Sys., Inc. v. Citibank, N.A., 719 F.2d 583, 587–88 (2d Cir. 1983) (asserting changes in circumstances in Iran made the clause unenforceable) *with* Nat'l. Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 333 (5th Cir. 1987), *cert. denied*, 484 U.S. 943 (1987) (asserting no change in the clause because impossibilities of American participation in Iran proceedings was foreseeable when the 1979 contract was signed by the parties). *But see* Karlberg European Tanspa., Inc. v. JK-Josef Kratz Vertriebsgeselischaft MbH, 699 F. Supp. 669, 671–72 (N.D. Ill. 1988) (holding West Germany to be an unreasonable forum because German courts would not be as effective in enforcing United States anti-trust laws such as Sherman Act claims); Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474, 488 (D.C. N.J. 1977) (stating in dicta the necessity of a selected forum to be reasonable and noting, specifically, that Nationalist China was unreasonable as an alternative forum); Copperweld Steel Co. v. Demag-Mannesmann-

ii. Stewart Organization, Incorporated v. Ricoh Corporation

In 1988, the Court reviewed the topic of forum selection clauses for the second time, allowing for the opportunity to clear up any remaining ambiguity. However, the Court merely made a larger mess by confusing forum selection clauses with choice-of-law clauses, creating even more unanswered questions.[64] In *Stewart Organization, Incorporated v. Ricoh Corporation*,[65] the dispute stemmed from a dealership contract obligating Stewart Organization ("Stewart"), an Alabama corporation, to market copier products manufactured by Ricoh Corporation ("Ricoh"), a national manufacturer with its principal place of business located in New Jersey.[66] The forum selection clause within the contract determined Manhattan, New York as the agreed upon forum for any dispute resolution.[67] After the business relationship between the parties soured, Stewart disregarded the forum selection clause and filed suit against Ricoh for breach of contract in an Alabama district court.[68] Referring to the forum selection clause, Ricoh moved to transfer the case to a district court in New York pursuant to

Boehler, 347 F. Supp. 53, 54–55 (W.D. Pa. 1972) (asserting impracticability of litigating in Germany). The Court in *Scherk* set the precedent that an allegation of invalidity due to fraud or duress as to the entire agreement containing the forum selection clause, would not act as a defense to the forum selection clause alone without a showing that the actual clause itself was a product of fraud or duress. *Scherk*, 417 U.S. at 519 n.14. In other words, to avoid enforcement of the forum selection clause, the party disputing the clause must provide a "strong showing" that enforcement of such a clause is "unreasonable and unjust." Borchers, *supra*, at 64. The Court in *Nw. Natl Ins. Co.* stipulated that "[t]he print is small, but it is not fine; it is large enough that even the pale copies in the appendix on appeal can be read comfortably by the author of this opinion, with his heavily corrected middle-aged eyesight." *Nw. Nat'l Ins. Co.*, 916 F.2d at 377. Aside from the fact the "inconvenience" of the parties argument has been raised in lower federal courts several times, it has been routinely rejected, with courts approving a wide spectrum of domestic and foreign forums. Borchers, *supra*, at 91. A common problem with determining enforceability of forum selection clauses is when the forum is agreed upon by the parties and then the circumstances change so severely to render the forum selection clause unenforceable. *Id.* at 92. For example, contracts negotiated prior to the Iranian revolution in 1979 to bind litigation to the Iranian courts were generally rendered unenforceable and the parties were relinquished of their duties under the clause. *Id.*

64. Borchers, *supra* note 3, at 59; *see* Mullenix, *supra* note 29, at 334–55 (noting that "[i]nstead of asking the threshold question, whether the dispute involved contract law or venue law, the Court instead asked whether a federal statute covered the point in dispute").

65. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

66. *Id.* at 24.

67. *Id.* The contract's forum selection clause stated:

> Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

Id. at 24 n.1.

68. *Id.* at 24.

section 1404(a) of Title 28 U.S.C.,[69] or section 1406(a)[70] in the alternative.[71]

The motions were ultimately denied by the district court.[72] However, the Eleventh Circuit Court of Appeals reversed the district court's decision, holding the forum selection clause to be enforceable and noting that questions of venue as they apply to diversity cases were to be governed by federal law.[73] The Court affirmed the Eleventh Circuit's enforcement of the clause, but on separate grounds.[74] The Court explained its disagreement with the court of appeals' "articulation of the relevant inquiry as 'whether the forum selection clause in this case [was] unenforceable under the standards set forth in [] *Bremen*.'"[75] The Court further noted past cases determining that the "federal common law developed under admiralty jurisdiction [is] not freely transferable to [agreements in] diversity [cases]," further complicating the matter.[76] The Court considered the question of whether section 1404(a) controlled Ricoh's request to enforce the forum selection clause and transfer the case to a court in the pre-selected forum.[77]

The Court ultimately held that federal law, including section 1404(a), governed the district court's decision of whether to validate the forum selection clause and transfer the case to a court in the agreed forum.[78] The Court explained that a motion to transfer under section 1404(a) requires the district court to balance certain factors on a case-by-case basis, reasoning that "[t]he presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus."[79] The Court further explained that "[t]he forum selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as [Ricoh] might have [had] it) nor no consideration . . . ."[80]

69. 28 U.S.C. §1404(a) (2012) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

70. 28 U.S.C. §1406(a) (2012) ("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.").

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

72. *Id.*

73. *Id.* at 25.

74. *Id.*

75. *Id.* at 28–29

76. *Id.* at 28.

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

78. *Id.* at 32.

79. *Id.* at 29.

80. *Id.* at 31.

iii. Carnival Cruise Lines, Incorporated v. Shute

The third and final instance the Supreme Court spoke on forum selection clauses was in 1991 in *Carnival Cruise Lines, Incorporated v. Shute*,[81] where the Court completely reversed the direction set by *Bremen* when it enforced a forum selection agreement that would have been found to be void as adhesive by the *Bremen* Court, as well as the laws of other countries that had historically favored forum selection clauses.[82] The Shutes had purchased two tickets from an Arlington, Washington travel agent for a seven-day cruise on Carnival Cruise Lines' ("Carnival") ship, the Tropicale.[83] The Shutes paid the travel agent for the tickets, who in turn forwarded the payment to Carnival's headquarters in Miami, Florida.[84] Carnival then sent the tickets to the Shutes in Washington State.[85] Each physical ticket contained the following forum selection clause:

> 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.[86]

Once the Shutes filed suit in a Washington court, Carnival moved for dismissal or transfer pursuant to § 1406(a),[87] arguing that venue was improper in Washington because the forum selection clause required the suit to be litigated in Florida,[88] "to the exclusion of the courts of any other

81. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

82. Borchers, *supra* note 3, at 59; *see, e.g.*, N.Y. GEN. OBLIG. LAW § 5–1402 (2013) (asserting enforcement of clauses where the transaction is more than one million dollars); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 15, 15 O.J. EUR. COMM. (No. L. 299) 32 (1972), *reprinted in* 8 I.L.M. 229 (1969), *amended by* The Convention on Accession to the Convention on Jurisdiction and the Enforcement on Judgments in Civil and Commercial Matters, Oct. 9, 1978, 21 O.J. EUR. COMM. (No. L. 304) (1978), *reprinted in* 18 I.L.M. 8 (1979) [hereinafter Brussels Convention] (rendering forum selection clauses unenforceable in consumer contracts); Perillo, *supra* note 29, at 165 (asserting that the Italian civil code did not allow enforcement of exclusive forum selection clauses in a contract of adhesion without separate acknowledgement of the clause by the parties); Reese, *supra* note 45, at 534–35 (noting a general refusal to enforce adhesive forum selection agreements by U.S. courts); Michael A. Schwind, *Derogation Clauses in Latin-American Law*, 13 AM. J. COMP. L. 167, 169 (1964) (noting lack of enforcement of forum selection clauses contained in relatively small-value contracts by Brazilian courts that selected a forum that was a long distance from the economically weaker party, noting the clause to be "oppressive").

83. *Carnival Cruise Lines*, 499 U.S. at 587.

84. *Id.*

85. *Id.*

86. *Id.* at 587–88.

87. Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 387 (9th Cir. 1990).

88. *Id.*

state or country."[89] In the alternative, Carnival also demanded dismissal on the grounds that the Washington district court lacked personal jurisdiction because Carnival's contacts with the state were insufficient to establish jurisdiction alone.[90] The district court had originally granted the petitioner's motion to dismiss based on this argument.[91] However, the court of appeals reversed, finding that Carnival did, in fact, have sufficient contacts with the forum state.[92] Additionally, relying on *Bremen*, the Court of Appeals held the forum selection clause to be unenforceable because the parties did not freely bargain over choice of forum.[93]

The Court ultimately reversed the Ninth Circuit's decision and found the forum selection clause to be enforceable.[94] The Court distinguished this case from *Bremen*, explaining that aside from the fact that *Bremen* was between two sophisticated companies as opposed to individual consumers, the passage contract at issue here "was purely routine and doubtless nearly identical to every commercial passage contract issued by [Carnival] and most other cruise lines," and was most likely a benefit to passengers, allowing for reduced fees due to the foreseeability and lower litigation costs afforded to the cruise line with regard to future litigation.[95] The Court then reconstructed its analysis of forum selection clauses "to account for the realities of form passage contracts."[96] In rejecting the Court of Appeals' holding that a non-negotiated forum selection clause that is not bargained by the parties is never enforceable,[97] the Court held that a reasonable forum selection clause in a form contract is in fact permissible.[98]

89. *Carnival Cruise* Lines, 499 U.S. at 588.

90. *Id.* at 588. The Court noted that it need not consider the petitioner's personal jurisdiction argument as it would be addressed through analysis of the forum selection clause issue. *Id.* at 589.

91. *Id.* at 588.

92. *Id.* The court of appeals reasoned that had it not been "'but for' petitioner's solicitation of business in Washington, respondents would not have taken the cruise and Mrs. Shute would not have been injured . . . ." *Id.*

93. *Id.* at 589. In addition to overweening bargaining power by Carnival, the appellate court also stated as further "independent justification" for refusing enforcement of the forum selection clause concerned evidence in the record indicating that "'the Shutes are physically and financially incapable of pursuing this litigation in Florida' and that the enforcement of the clause would operate to deprive them of their day in court . . . ." *Id.*

94. *Id.* at 597.

95. *Carnival Cruise Lines,* 499 U.S. at 593–94. The Court made note of the court of appeal's application of "'reasonableness' factors" in determining that the forum selection clause was unenforceable specifically because—unlike the contracting parties in *Bremen*—the respondents were not sophisticated business persons and did not negotiate with Carnival over the terms of the forum selection clause. *Id.* at 592.

96. *Id.* at 593.

97. *Id.*

98. *Id.* at 593 (noting several reasons as to why a forum selection clause in a form contract

However, the Court was quick to stipulate that these clauses are subject to judicial scrutiny for fundamental fairness.[99] The Court placed a "heavy burden of proof" on the party attempting to avoid the clause for reasons of inconvenience, which the Shutes failed to satisfy.[100]

C. OVERALL INTERPRETATION OF SUPREME COURT DECISIONS

On the whole, Supreme Court decisions on forum selection clauses have only added to the confusion surrounding forum selection clauses. Lower courts have found themselves split as to how to interpret these cases collectively with respect to proper application of forum selection clauses to cases involving diversity jurisdiction.[101] Further, issues still remain as to which procedural mechanisms should be used to enforce such clauses.[102]

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may be permissible). The Court stated that "a cruise line has a special interest in limiting the [forums] in which it potentially could be subject to [litigation]." *Id.* Further, establishing the forum ahead of time "dispel[s] any confusion about where suits arising from the contract must be [litigated]," which in turn, saves time and expenses for all parties. *Id.* at 593–94.

99. *Id.* at 595.

100. *Id.* at 594–95. In light of determining the validity of forum selection clauses in form contracts, the Court noted "the respondents did not claim lack of notice," and thus "[did] not satisfy the 'heavy burden of proof' required to [invalidate] the clause on grounds of inconvenience." *Id.*

101. Wright, *supra* note 30, at 1634; *see also* Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Court*, 62 VAND. L. REV. 1913, 1926–29 (2009) (finding a second split amongst the circuits with regard to whether state law or federal law should apply to a motion to dismiss in diversity cases).

102. *See* Holt, *supra* note 101, at 1918–19 (noting that currently there is no uniform approach among the federal courts for enforcing forum selection clauses); *see also* Wong v. Party Gaming Ltd., 589 F.3d 821, 833–34 (6th Cir. 2009) (affirming a *forum non conveniens* motion to dismiss due to an exclusive forum selection clause); Sucampo Pharm. Inc. v. Astellas Pharma., Inc., 471 F.3d 544, 550 (4th Cir. 2006) (allowing a Rule 12(b)(3) motion to dismiss for improper venue due to the enforcement of the forum selection clause); LFC Lessors, Inc. v. Pac. Sewer Maint., Corp., 739 F.2d 4, 7 (1st Cir. 1984) (holding a motion to dismiss due to an exclusive forum selection clause should have been filed under F.R.C.P. 12(b)(6) "for failure to state a claim upon which relief can be granted" (citation omitted)); *cf.* Baker v. Adidas Am., Inc., 335 Fed. App'x 356, 359 (4th Cir. 2009) ("The validity of a forum selection clause is properly analyzed under Fed. Rule of Civil Procedure 12(b)(3) . . .." (citation omitted)); Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009) ("A motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to Rule 12(b)(3) . . .." (citation omitted)); Auto. Mech. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc., 502 F.3d 740, 746 (7th Cir. 2007) (finding that although it is unclear "whether a motion [to dismiss] based on forum selection . . . is better conceptualized as an objection to venue . . . or as a failure to state a claim, . . . 'most of the decided cases use [Rule 12(b)(3)] as the basis' for deciding such a motion. This court has followed the majority rule." (citations omitted)); Trafigura Beheer B.V. v. M/T Probo Elk, 266 F. App'x 309, 311 (5th Cir. 2007) (dismissing the case based on an exclusive forum selection clause that provided for exclusive venue in certain foreign courts because the United States was an improper forum); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290 (11th Cir. 1998) ("[W]e hold that motions to dismiss upon the basis of choice-of-forum . . . clauses are

III. SUMMONING THE UNSEEN: A NEW CONUNDRUM FACING FORUM SELECTION CLAUSES AND THE BIG PICTURE FOR CONTRACTUAL RIGHTS

In the midst of all the confusion surrounding forum selection clauses, the general unspoken rule has been that only those in privity of the contract may invoke or be bound by the forum selection clause.[103] The emerging issue of whether non-parties may be bound to the clause has only further complicated matters.[104] As Posner suggested in his opinion in *Raintree*, too literal of an approach to interpreting forum selection clauses against non-parties would ultimately result in "evasive tactics and undermine

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properly brought pursuant to Fed. R. Civ. P. 12(b)(3) as motions to dismiss for improper venue."). *See generally* K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW"), 314 F.3d 494, 497 (10th Cir. 2002) (noting a motion to dismiss for improper venue under F.R.C.P. 12(b)(3) is a frequently used vehicle for dismissing based on a forum selection clause (citation omitted)); Commerce Consultants Int'l., Inc. v. Vetrerie Riunite, S.p.A., 867 F.2d 697, 698, 700 (D.C. Cir. 1989) (affirming the district court's dismissal based on an exclusive forum selection clause under F.R.C.P. 12(b)(3)); Cfirstclass Corp. v. Silverjet PLC, 560 F. Supp. 2d 324, 327–29 (S.D.N.Y. 2008) (analyzing a motion to dismiss on the basis of a forum selection clause under F.R.C.P. 12(b)(1) for a lack of subject matter jurisdiction); Wright, *supra* note 30 at 1639–40 (noting courts that address forum selection clauses through a motion to dismiss under F.R.C.P. 12(b)(3) for lack of venue implicitly make venue improper in all forums except those stated within the clause). "The federal courts are especially divided regarding which motions to dismiss are appropriate for enforcing exclusive forum-selection clauses. One approach is to treat these motions under Federal Rule of Civil Procedure 12(b)(3) . . . as motions to dismiss for improper venue." Wright, *supra*, at 1639.

> Conversely, the courts that denounce the 12(b)(3) approach generally hold that exclusive forum-selection clauses do not make venue improper in an otherwise proper forum. Courts that subscribe to this latter principle have analyzed motions to dismiss based on exclusive forum-selection clauses under Federal Rules of Civil Procedure 12(b)(1) . . . 12(b)(6), and the federal common law doctrine of *forum non conveniens*. Currently, it appears that the majority of federal courts analyze motions to dismiss based on exclusive forum-selection clauses under 12(b)(3) as motions to dismiss for improper venue. The Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all endorsed this approach.

Id. at 1640.

103. *See generally* Carnival, 499 U.S. at 593–95 (showing how the forum selection clause in a form contract was binding upon the purchasers of Carnival's cruise tickets); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29–32 (1988) (explaining that the forum selection clause in the contract is an important factor used to determine the forum where litigation should occur); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 14–18 (1972) (elucidating that the choice of forum made by the parties to the contract should be enforceable by the courts and honored by the parties).

104. *See* Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 441–42 (7th Cir. 2012) (explaining the pros and cons of the two different approaches of interpretation of forum selection clauses); Guthrie, *supra* note 14 (asserting the *Raintree* court created only a "vague standard" when they discussed parties that were "'closely related' to the lawsuit"); Telman, *supra* note 21 (discussing the breakdown of the parties by Judge Posner into two groups of "'affiliation'" and "'mutuality'").

commercial certainty."[105] On one end, the literal approach does in fact provide certainty as to who can invoke or be bound to the forum selection clause, yet on the other end, it creates different uncertainties as to the particular forum chosen.[106] This is so because it creates the possibility of a signatory in a contract to avoid being held to the forum selection clause merely by "manipulating affiliate relationships."[107] After considering this potential issue, the *Raintree* court concluded that it might be "better [just] to let the [signatories] decide in the contract whether to limit the [invocation of the] forum selection clause to the named entities" or to include outside parties.[108] Allowing the courts free reign over who might invoke the forum selection clause could greatly complicate the negotiation process of these clauses as it would require serious lawyering to ensure that no loopholes within the contract remained for interpretation.[109]

IV. SETTING TRAPS: CREATING STRUCTURE AND SETTING A NEW STANDARD IN DETERMINING NON-PARTY INVOCATION IN FUTURE FORUM SELECTION CLAUSES

Even though the *Raintree* court was not the first court to address non-party invocation of the clauses,[110] it did attempt to further define the rather

105. Guthrie, *supra* note 14; *see Raintree*, 702 F.3d at 440–42 (explaining different hypothetical situations which show how non-parties can evade being bound to the clause under a literal approach of interpreting forum selection clauses).

106. *Raintree*, 702 F.3d at 442; *see* Guthrie, *supra* note 14 (noting how commercial certainty would be undermined under this approach). *But see* Jeffrey Gross, *When Can Non-Signatories Enforce Forum Selection Clauses in New York*, JDSUPRA BUS. ADVISOR (March 16, 2011), http://www.jdsupra.com/legalnews/when-can-non-signatories-enforce-forum-s-61963/, [http://perma.cc/TA9M-Y8SR] (asserting the importance of forum selection clauses in dictating the place in which disputes related to the contract may be litigated, specifically with respect to citizens of different states or countries).

107. *Raintree*, 702 F.3d at 442.

108. *Id.*

109. *Id.*

110. *See* Holland Am. Line, Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 456 (9th Cir. 2007) (stating forum selection clauses applied to two non-parties because transactions between these entities took part in the larger transactional agreement); Marano Enters. v. Z-Teca Rests., L.P., 254 F.3d 753, 757–58 (8th Cir. 2001) (enforcing a forum selection clause on a "closely related" party to the dispute when the individual was a shareholder, officer, and director of the business); Hugel v. Corp. of Lloyd's, 999 F.2d 206, 209 (7th Cir. 1993) (discussing how non-parties can be bound by a forum selection clause only if they are closely related to the dispute to the point where enforcement would be foreseeable); Manetti–Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514–15 (9th Cir. 1988) (noting that tort claims against a party to the suit were closely related enough "to 'the central conflict over the interpretation' of the contract" to be "within the scope of the forum selection clause" and thus, enforceable against the party); Weygant v. Weco, LLC, No. 4056-VCS, 2009 WL 1351808, at *4–6 (Del. Ch. May 14, 2009) (binding non-parties to forum selection clause of an interdependent contract when one contract had no forum selection clause); Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 346–48 (W. Va. 2009) (analyzing previous

vague standard of requiring a non-party to be "directly related" to the lawsuit at hand and in particular, the contracting parties.[111] In establishing this direct relation test, Posner looked to various cases that had previously held a non-party to a contract to be "closely related" to the lawsuit arising from the contract, thus enforcing the forum selection clause.[112] For the first time in the history of non-party invocation, the *Raintree* court presented a test to determine the exact understanding of what constituted "directly related," thus dividing the concept into two "reasonably precise principles"[113] of affiliation and mutuality.[114]

A. THE AFFILIATION THEORY TO FORUM SELECTION CLAUSE AND NON-PARTY INVOCATION

Prior to *Raintree*, various courts had determined that a forum selection clause may *possibly* be enforced under an affiliation principle by a company under common ownership with the company named in the

court decisions to conclude that there is "a range of transaction participants, signatories and non-signatories, [that] may benefit from and be subject to a forum selection clause").

111. *See Raintree*, 702 F.3d at 439–40; Gross, *supra* note 106 ("Potential non-signatory litigants may include brokers or agents of the parties, competitors whose rights may have been affected by the contract, creditors of the signatories, or former employees or agents of the parties."); Telman, *supra* note 21 (noting Judge Posner's decision to "trudge on" to determine which parties could invoke the clause).

112. *Raintree*, 702 F.3d at 439–40; Guthrie, *supra* note 14; *see, e.g.*, CD Partners, LLC v. Grizzle, 424 F.3d 795, 799, 801 (8th Cir. 2005) (allowing non-signatories of a contract containing an arbitration clause to invoke the clause because the tort allegations against them "arise out of their conduct while acting as officers of [the business]" and the allegations against them "rely upon, refer to, and presume the existence of the written agreement between the two corporations"); JLM Indus., Inc. v. Stolt–Nielsen SA, 387 F.3d 163, 178 (2d Cir. 2004) (noting the "intertwin[ing]" of the issues in dispute with the "allegedly inflated price terms" of the contract); E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 199 (3d Cir. 2001) (holding a "close relationship between the entities" and the "intertwin[ing of the issues] with the underlying contract obligations"); Grigson v. Creative Artists Agency, LLC, 210 F.3d 524, 527–28 (5th Cir. 2000) (holding an arbitration clause enforceable against the parties, signatories and non-signatories, on the basis of equity and fairness); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995) (holding that a party is not bound to an arbitration agreement even though his subsidiary is bound); JJ Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320 (4th Cir. 1988) (noting arbitration is enforceable because the matters "arose out of the performance of the distribution contracts and their implementing agreements").

113. *Raintree*, 702 F.3d at 439; Guthrie, *supra* note 14.

114. *Raintree*, 702 F.3d at 439 (asserting that affiliation was applicable towards Raintree and mutuality against Starwood); Telman, *supra* note 21.

contract, such as a parent company and subsidiary.[115] However, the court was quick to suggest that this was not always the case.[116]

The court suggested the willingness of certain courts to enforce forum selection clauses against affiliates of signatories in appropriate circumstances deterred evasion of such clauses by the parties.[117] The court provided examples of what might result if affiliates were held to the clause in appropriate circumstances, noting that a party to a contract containing a forum selection clause may have motivation to shift the business named in the contract to a different corporate affiliate—"perhaps one created for the very purpose of providing a new home for the business"—thus causing the clause to be null and void as it pertains to the new entity.[118] Further, a party to the contract who wanted to enforce the clause may be apt not to shift his business to a corporate affiliate, even though the shift might be fiscally beneficial for the party.[119]

However, it is not enough to just be a mere affiliate of a contracting party. There must be a reason to hold them to the designated forum.[120] The court determined that a reason does in fact exist when a subsidiary company is a party to the contract containing the clause and the other signatory sues the parent company rather than the subsidiary.[121] The parent company should then be able to invoke the forum selection clause on the suing party.[122] Posner broke it down like this:

> Suppose *A* is the parent of *B*, and *B* has agreed with *C* in a contract (to which *A* is not a party) that any suit between *B* and *C* arising out of the

115. *Raintree*, 702 F.3d at 439–40; *see* Am. Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd., 364 F.3d 884, 889 (7th Cir. 2004) ("Nor is a forum selection clause to be defeated by suing an affiliate or affiliates of the party to the contract in which the clause appears, or employees of the affiliates."); Manetti–Farrow, 858 F.2d at 514 ("[B]ecause the tort causes of action alleged by [the plaintiff] relate to the 'central conflict over the interpretation' of the contract, they are within the scope of the forum selection clause."). *But see Holland*, 485 F.3d at 459 ("It is well established that, as a general rule, where a parent and a subsidiary are separate and distinct corporate entities, the presence of one . . . in a forum [selection clause] may not be attributed to the other . . ..").

116. *Raintree*, 702 F.3d at 440; *see* Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1296 (3d Cir. 1996) (refusing to enforce the forum selection clause against corporate parents of a party to the contract). The court in *Dayhoff* relied on the authority in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), refusing to enforce an arbitration clause against the owners of Kaplan because they did not sign the agreement and likely did not intend to give up their rights to judicial litigation in exchange for arbitration. *Dayoff*, 86 F.3d at 1296.

117. *Raintree*, 702 F.3d at 441.

118. *Id.*

119. *Id.*

120. *Id.* at 440 (noting that the reason must be more than just "the mere fact of affiliation").

121. *Id.*

122. *Id.*

> contract must be brought in a French court. Such a dispute arises—*C* accuses *B* of a breach of contract and has reason to think that *A*, *B's* parent, bears some legal responsibility for *B's* breach; maybe *A* ordered *B* to break the contract, without justification, thus committing the tort of intentional interference with contract. *C*, though committed to litigate in the French court with *B*, decides to sue *A* in the United States. If *A* prefers to litigate in France, it should be allowed to invoke the forum selection clause, though it is not a party to the contract, and thus make *C* litigate its claim against *A* in France rather than in the United States so that the two closely related cases are not split between different courts in different countries. *C* had already committed to having to litigate over the contract in France, so it shouldn't be heard to complain that France is an inconvenient forum when *A* seeks to defend a suit, based on the same contract there as well.
>
> But suppose instead that *A* and *B* have unrelated disputes with *C*. *A* and *B* are still "closely related"—they are parent and subsidiary—but there is now no reason to allow *A* to thwart *C's* choice of forum by invoking a contract to which *A* is not a party. Nor could *A*, the parent, be forced to litigate in France just because *B*, its subsidiary, had agreed to litigate any dispute with *C* there. *A* had not signed the contract and thus had not committed itself to litigate in France. *C* had, and that is why *C* couldn't complain if *A* insists that *C's* suit against *A* be litigated there.[123]

Courts that have taken this approach with regard to arbitration clauses at times used the corporate law doctrine of "piercing the corporate veil."[124]

In *Raintree*, Judge Posner suggested that the use of this affiliation doctrine in the instant case was straightforward, binding DTR to the forum selection clause:

> Raintree is the parent of DTR's successor, CR Resorts Holding, and can therefore enforce the forum selection clause in DTR's contracts with the plaintiffs since the effect is merely to substitute one party for

123. *Raintree*, 702 F.3d at 440–41.

124. *Id.* at 441; *see, e.g.*, Invista S.A.R.L. v. Rhodia, S.A., 625 F.3d 75, 85 n. 6 (3d Cir. 2010) ("When this occurs, in essence, a non-signatory voluntarily pierces its own veil to [agree to a particular forum] against a signatory that [is] derivative of its corporate-subsidiary's claims against the same signatory.") (*citing* Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000)); E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 201–02 (3d Cir. 2001) (using the "piercing" doctrine against a signatory by a non-signatory subsidiary for claims against the signatory). However, Posner went on to say that this analogy is not complete as the phrase "means disregarding the limited liability of a corporation's owner or owners (whether corporate or individual), and thus merging the owner's assets . . . with those of the subsidiary" when the assets were intended to be insulated under a corporate entity. *Raintree*, 702 F.3d at 441. The difference here is allowing enforcement of the forum selection clause between the parties merely determines what jurisdiction the owner will have to litigate in. *Id.*

> another (that is, for DTR) *bound by the forum selection clause to which the plaintiffs had agreed.*[125]

The court considered that *Raintree* was not trying to change the forum agreed on in the clause merely by substituting itself for DTR, thus making the facts in this case identical to Posner's first *A*, *B*, *C* hypothetical.[126]

In light of these circumstances, the court reasoned as to why it might matter that DTR could no longer sue or be sued under its original corporate name due to what the court termed as "its corporate metamorphosis."[127] The plaintiffs contended further that Raintree might not necessarily be the parent company but more so the great-grandparent of DTR considering the intermediate subsidiaries, however, the court did not put too much weight on this argument suggesting the outcome would be the same either way.[128]

B. THE MUTUALITY THEORY TO FORUM SELECTION CLAUSES AND NON-PARTY INVOCATION

After concluding Raintree's position as an affiliate to the signatory DTR, the court further analyzed the extent of Starwood's involvement and its ability to invoke or be bound to the forum selection clause.[129] Starwood was not in the ownership chain that included CR Resorts Holding, however, it had purchased a significant amount of the resort property assets where DTR had allegedly intended to develop the timeshares.[130] The court ultimately determined that Starwood could in fact invoke (or be bound to) the forum selection clause, but on a different theory than affiliation—that of mutuality.[131]

Under the theory of mutuality, a contract made between the agent of a secret principal and a third party can be enforced by the third party against the secret principal if the third party so chooses.[132] Further, the third party

125. *Raintree*, 702 F.3d at 442; *see* Guthrie, *supra* note 14 ("RVE and DTR were sufficiently closely related to make the substitution of the one for the other unproblematic from the perspective of contract enforcement.").

126. *Raintree*, 702 F.3d at 442.

127. *Id.*

128. *Id.*

129. *Id.* at 442–43.

130. *Id.* at 442.

131. *Id.*

132. RESTATEMENT (THIRD) OF AGENCY §§ 6.03, 6.03 cmt. b, 6.11(4) (2006); *see also Raintree*, 702 F.3d at 442–43 (noting the it is the option of the third party to enforce the clause or rescind); SFH, Inc. v. Millard Refrigerated Servs., Inc., 339 F.3d 738, 745 (8th Cir. 2003) (analyzing the relationship of an undisclosed principal on a lease); Frietsch v. Refco, Inc., 56 F.3d 825, 828 (7th Cir. 1995) (analyzing the "mutuality" relationship of an undisclosed principal on investment contracts).

can choose not to enforce the forum selection clause of the contract at all through rescinding—getting out of the contract—should they prefer.[133] Additionally, the court noted that forum selection clauses were equally applicable to tort claims arising from the contract.[134]

The plaintiffs in *Raintree* alleged in their complaint that Starwood (along with Raintree) controlled DTR and together, the companies conspired to defraud the timeshare purchasers by using the timeshare profits to pay off debt as opposed to developing the properties as contracted.[135] Thus, the court presented the question of "whether an alleged conspirator can invoke the forum selection clause contained in a contract, signed by his alleged co-conspirator, that created or advanced the conspiracy."[136] The court answered this question in the affirmative, but also stipulated that this was not *always* the case.[137]

In *Raintree*, the court did however apply this portion of the test to the relationship between Starwood and Raintree, suggesting the two entities were "secret principals" of DTR—their agent—in coordinating with buyers and ultimately executing the alleged fraud.[138] Posner asserted that it made sense to allow Starwood to rely on the forum selection clause, specifically because of the allegations asserted against it.[139] Thus, it was only fair to allow Starwood to utilize the forum selection clause as well and sue in the contracted forum of Mexico.[140] Without this determination and the

133. RESTATEMENT (THIRD) OF AGENCY §§ 6.03, 6.03 cmt. b, 6.11(4) (2006); *see also Raintree*, 702 F.3d at 442–43; *SFH, Inc.* 339 F.3d at 745; *Frietsch*, 56 F.3d at 828.

134. *See, e.g.*, Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir. 1988) (noting that the tort claims could not be fully analyzed without reviewing "whether the parties were in compliance with the contract" as well); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3rd Cir. 1983) (stipulating that—for reasons of public policy—forum selection clauses should not be defeated merely because of "artful pleading of claims such as negligent design, breach of implied warranty or misrepresentation"); Weidner Commc'ns, Inc. v. Faisal, 671 F. Supp. 531, 537 (N.D. Ill. 1987) (determining that "[t]he entire case whether pleaded in contract or tort hinges upon breach of the agreements between the parties"); Berrett v. Life Ins. Co. of the SW, 623 F. Supp. 946, 948–49 (D. Utah 1985) ("Whether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case."); Clinton v. Janger, 583 F. Supp. 284, 287–88 (N.D. Ill. 1984) (applying the forum selection clause, whether the claim hinged on tort or contract law). Determining whether a forum selection clause applies to a tort claim as well depends on whether the resolution of the tort claim relates in any way to the interpretation of the contract at dispute. *Weidner Commc'n*, 671 F. Supp. at 537; *Berrett*, 623 F. Supp. at 948–49; *Clinton*, 583 F. Supp. at 288.

135. *Raintree*, 702 F.3d at 438, 442.

136. *Id.* at 442.

137. *Id.*

138. *Id.* at 442.

139. *Id.* at 443.

140. *Id.*

principle of mutuality, the plaintiffs would have been able to bind Starwood to the forum selection clause, without the same right being afforded to Starwood.[141] Additionally, because Raintree allegedly held the status of secret principle to DTR with Starwood, it too could enforce the forum selection clause for the same reasons as Starwood, while enforcing the clause under the separate "affiliation theory" as well.[142]

V. FURTHER EXPANSION OF THE *RAINTREE* TEST

John F. Kennedy once said, "[h]istory is a relentless master. It has no present, only the past rushing into the future. To try to hold fast is to be swept aside."[143] In creating a test to determine what constitutes a "directly related" non-party to a contract sufficient enough to enforce the included forum selection clause, the *Raintree* court appropriately looked to the past, present, and future. From a practical standpoint, the court concluded that the matters before them "should be litigated as one case in one court in one country, and not as two cases in two courts in two countries."[144] As the Supreme Court stipulated in *Bremen*, and the Ninth Circuit Court of Appeals reinforced in *Manetti–Farrow*, "[f]orum selection clauses are *prima facie* valid, and are enforceable absent a strong showing by the party that opposes the clause that 'enforcement would be unreasonable or unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.'"[145] The burden is on the party opposing the forum "to show that trial in the contractual forum [would] be so gravely difficult and inconvenient that [the

141. *Raintree*, 702 F.3d at 443; Guthrie, *supra* note 14. The *Raintree* court concluded:

> All [Starwood] is doing in invoking the forum selection clause to which it is not a party is accepting one of the premises of the plaintiff's suit—that [DTR is] indeed simply [a] cat's paw of [Starwood]—and pointing out that the implication is that the [timeshare] contracts, including the forum selection clause, are really between the plaintiffs and [Starwood].

Raintree, 702 F.3d at 443.

142. *Raintree*, 702 F.3d at 443.

143. BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/j/johnfkenn101519.html, [http://perma.cc/S8SV-5EAZ] (quoting John F. Kennedy, Jr.) (last visited May 15, 2014).

144. *Raintree*, 702 F.3d at 443; *see generally* Aguas Lenders Recovery Group, LLC v. Suez, S.A., 585 F.3d 696, 701 (2d Cir. 2009) ("[I]t 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 figured prominently in their calculations.") (quoting M/S Bremen, 407 U.S. at 14); U.S.O. Corp. v. Mizuho Holding Co., 547 F.3d 749, 750 (7th Cir. 2008) (stipulating that "[t]here is no reason for identical suits to be proceeding in different courts in different countries thousands of miles apart").

145. Manetti–Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514–15 (9th Cir. 1988) (quoting M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 15 (1972)); *see also* Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279 (9th Cir. 1984); Crown Beverage Co. v. Cerveceria Moctezuma, S.A., 663 F.2d 886, 888 (9th Cir. 1981); Republic Int'l Corp. v. Amco Eng'rs., Inc., 516 F.2d 161, 168 (9th Cir. 1975).

parties] will for all practical purposes be deprived of [their] day in court."[146] Through it's holding, the *Raintree* court reinforced this rule and its expansion to include non-parties to the contract.[147] Thus, a flexible standard—such as the one presented in *Raintree*—to determining who may invoke a forum selection clause provides more certainty specifically in international commercial transactions, as well as it prevents any manipulation of corporate parties and their affiliates to avoid such clauses.[148]

The purpose of this comment is to call to action the Court in affirming the *Raintree*[149] test as a ceiling standard for all lower courts when determining invocation of non-signatories with some modifications to the test. As opposed to determining that non-signatories should fit into the two categories of affiliation and mutuality with respect to their relationship to the actual signatories of the contract, non-signatories should be further considered with respect to their relationship with the contract itself as well. Under this test, the non-signatories should be further broken down into three distinct groups in an effort to simplify the question of whether those non-signatories are sufficiently related to the contract or to the parties involved in the suit to invoke (or be bound to) the clause. In general, the non-signatories should be divided into: (1) third-party beneficiaries to the contract; (2) parties to multiple contracts relating to the suit at hand; and (3) non-signatories that are "closely related" specifically to the parties at the heart of the dispute, to which the *Raintree*[150] test would then apply.

A. THIRD-PARTY BENEFICIARIES

The first group of non-signatories are those parties having an obvious stake in the outcome of the contract and thus, having rights that are ingrained in contract law, such as intended beneficiaries to the contract.[151] Any party asserting rights under this standard may have a difficult time proving their rights as they would need to provide evidence that they are "more than [just] incidental beneficiar[ies]" to the contract.[152]

146. *M/S Bremen*, 407 U.S. at 18; *Manetti-Farrow*, 858 F.2d at 515.
147. *See Raintree*, 702 F.3d at 443–44.
148. Kimberly Robinson, *Some Nonparties to Timeshare Contract Can Invoke Forum Selection Clause*, 81 U.S.L.W. 907 (Jan. 1, 2013).
149. *See Raintree*, 702 F.3d at 439.
150. *Id.*
151. *See* Gross, *supra* note 106.
152. *Id.*

B. PARTIES TO MULTIPLE CONTRACTS RELATING TO THE SUIT AT HAND

The second group of non-signatories to the contract that may assert rights are those that are in fact signatories to *additional* contracts relating to the contract in dispute. Courts in New York have applied this test specifically to parties relating to global transactions and including multiple agreements between both the parties to the disputed contract where the parties that may not necessarily be signatories to the disputed contract but rather signatories to other contracts that relate to the same transaction.[153] The court in *PT. Bank Mizuho Indonesia v. PT. Indah Kiat Pulp & Paper Corporation*[154] held that in order for a party to assert rights under this standard, the party claiming the rights must have signed at least one of the relating agreements, must show the agreements were executed simultaneously, and must show the agreements were executed by identical—or similar parties at the least—or were signed in collaboration to execute the same overall purpose.[155]

C. CLOSELY RELATED PARTIES TO THE CONTRACT

Under the final group of non-signatories that may invoke or be bound to the forum selection clause, the *Raintree*[156] standard of affiliation and mutuality would then apply specifically with regard to the relationship to the signatories of the contract.[157] The *Raintree* court left open the determination of whether the "directly related" test applies to the relationship of the non-signatories to the contract or to the parties involved. In applying this revised test, a distinction is created between a non-signatory's relationship to the parties versus their relationship to the contract—a rather large distinction at that. In addition to determining affiliation and mutuality, the element of "foreseeability" must be present and strongly analyzed in order to bind a non-signatory to the clause or to allow the non-signatory to bind others. This application requires the courts to look beyond the four corners of the contract and not only determine that the invocation is foreseeable to the non-signatory, but to all parties involved in the suit. The test presented by the court in *Raintree* is unconsciously centered around the necessary element of foreseeability by

153. *Id.*

154. PT. Bank Mizuho Indon. v. PT. Indah Kiat Pulp & Paper Corp., 808 N.Y.S. 2d 72 (N.Y. App. Div. 2006).

155. *See id.* at 73.

156. Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436 (7th Cir. 2012).

157. *Id.* at 439; *see also* Gross, *supra* note 106 (explaining that a non-signatory may sue if "closely related to a signatory").

all parties involved in the dispute—it is intertwined in determining whether a party is an affiliate to another party to the agreement, as well as whether a party is mutually relevant to the dispute. This is where many courts have struggled with determining whether a close relationship between the disputing parties exists and the point in which the *Raintree* test should be adopted and applied.[158]

VI. CONCLUSION

Considering the fact that allowing invocation of forum selection clauses by non-signatories to the contract might change the circumstances of a disputed suit to a large degree, the standard for determining this invocation should be a relatively high standard, particularly with respect to the element of foreseeability, a cornerstone to contracting rights. It must not be a surprise to the parties involved in the dispute when a non-signatory asserts rights under the clause. As some courts have taken a broad approach to this standard,[159] it is even more important that the Court come to a conclusion and set a flexible ceiling standard for invocation as expressed within this comment, while allowing the lower courts to establish jurisdictional tests that may minimize the set standard but may not go further and expand the standard.

158. *See infra* Part VI.

159. *See* Gross, *supra* note 106; *see, e.g.*, Manetti–Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 n.5 (9th Cir. 1988) ("[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.") (*citing* Clinton v. Janger, 583 F. Supp. 284, 290 (N.D. Ill. 1984)).