ATLANTIC MARINE V. J-CREW: THE FUTURE OF FORUM-SELECTION CLAUSES IN FEDERAL COURTS

SARAH SHERIDAN*

I. INTRODUCTION

Forum-selection clauses are routinely included in contracts to designate the location of future disputes.[1] They benefit parties by allowing them to agree in advance on a neutral and convenient forum in which to litigate should the need arise.[2] Companies that do business in more than one state or country frequently rely on forum-selection clauses to avoid lawsuits in multiple forums.[3] Despite the benefits of forum-selection clauses, however, parties often choose to violate the express conditions of their contracts and sue in forums other than the one contractually specified.[4]

Courts disagree on the appropriate procedural mechanism by which to enforce forum-selection clauses when parties have contractually agreed to a specified forum, but a party to that contract files suit in a different forum. The circuit courts have taken three different approaches.[5] First, the majority of circuits treat forum-

* J.D. Candidate, Duke University School of Law, 2015. I thank Professor Stephen Sachs, Jonathan Rash, Tara McGrath, Judea Davis, Stephanie Peral, Tori Bennette, and Ryan Marcus, all of whom provided great advice and edits.

1. *See* Lee R. Hardee, *Enforcing Forum-Selection Clauses: The Federal Court Dilemma and the Arbitration Clause Alternative*, J. DISP. RESOL. 401, 401 (1990) (noting that although forum-selection clauses have become "standard," their validity has come into question because the Supreme Court has done "little to define more clearly how forum-selection clauses are to be enforced").

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 970–73 (8th Cir. 2012) (holding that a forum-selection clause mandating a federal forum can be enforced through a motion to dismiss or transfer based on improper venue); Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009) (holding that courts in the First Circuit should treat a motion to dismiss based on a forum-selection clause as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877–78 (3d Cir. 1995) (holding that a forum-selection clause allowing for an alternative federal

selection clauses as rendering any other venue "improper," which results in the case being dismissed under Federal Rule of Civil Procedure 12(b)(3).[6] Second, some circuits perform a discretionary balancing-of-conveniences test by weighing various public and private interest factors to decide if a case should be transferred to the contractually selected forum.[7] Finally, one circuit treats motions to dismiss premised on forum-selection clauses as Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted.[8]

In *Atlantic Marine Construction Co., Inc. v. J-Crew Management, Inc.*,[9] the Supreme Court of the United States will resolve the circuit split by deciding which procedure should govern the enforcement of forum-selection clauses. The Court will also identify which party carries the burden of proof in forum-selection clause disputes. Although the issue presented before the Court is purely procedural, the Court's decision will have significant public policy implications. Due to the many businesses that heavily rely on the enforcement of forum-selection clauses, the Court should adopt a procedure that favors strict enforcement of the clauses.

II. FACTUAL AND PROCEDURAL BACKGROUND

In April 2009, the United States Army Corps of Engineers contracted with petitioner Atlantic Marine Construction (Atlantic) to construct the Fort Hood Child Development Center in Fort Hood, Texas.[10] Atlantic is a Virginia corporation with its principal place of business in Virginia Beach, Virginia,[11] but it performs work throughout the country.[12] Atlantic then entered into a Subcontract

---

forum does not render the venue improper and should instead be evaluated under § 1404(a) which allows a case to be transferred to a more convenient forum).

6. *Union Elec. Co.*, 689 F.3d at 970–73; TradeComet LLC.com v. Google, Inc., 647 F.3d 472, 478 (2d Cir. 2011); Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1332–33 (11th Cir. 2011); Hillis v. Heineman, 626 F.3d 1014, 1016–17 (9th Cir. 2010); Muzumdar v. Wellness Int'l Network Ltd., 438 F.3d 759, 760–62 (7th Cir. 2006).

7. Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002); *Jumara*, 55 F.3d at 877–78

8. *Rivera*, 575 F.3d at 15.

9. 133 S. Ct. 1748 (2013).

10. *In re* Atl. Marine Constr. Co., Inc., 701 F.3d 736, 737 (5th Cir. 2012).

11. United States *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Const. Co., Inc., A-12-CV-228-LY, 2012 WL 8499879, at *1 (W.D. Tex. Aug. 6, 2012).

12. Brief of Amicus Curiae American Subcontractors Association in Support of Respondent J-Crew Management, Inc. Seeking Affirmation of the Court of Appeals for the Fifth Circuit at 29, Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W.D. Tex., No. 12-929 (U.S.

Agreement with J-Crew Management (J-Crew) for construction labor and materials.[13] J-Crew has only five employees and conducts all of its business in Texas.[14] The Subcontract Agreement was a form contract[15] that contained a mandatory forum-selection clause in paragraph 12(b):

> The Subcontractor agrees that all other disputes not included in subparagraph (a) above, shall be litigated in the Circuit Court for the City of Norfolk Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.[16]

Shortly after the construction project was complete, J-Crew filed suit alleging that Atlantic failed to pay J-Crew for the labor and materials it furnished.[17] Despite agreeing that all suits would be brought in Virginia, J-Crew filed suit against Atlantic in the Austin Division of the Western District of Texas.[18]

Atlantic moved to dismiss J-Crew's suit under Federal Rule of Civil Procedure 12(b)(3)[19] and 28 U.S.C. § 1406,[20] arguing that the forum-selection clause in the Subcontract Agreement required J-Crew to bring suit in Virginia.[21] Alternatively, Atlantic moved to transfer the case to the Eastern District of Virginia under 28 U.S.C. § 1404(a).[22] The district court denied both motions.[23] In denying the motion to dismiss, the district court reasoned that when a forum-selection clause allows the parties to file suit in a federal forum, §

Aug. 23, 2013) [hereinafter Brief of Amicus Curiae American Subcontractors Association] (emphasizing that Atlantic is a national corporation with gross sales of $40 million).

13. *J-Crew Mgmt., Inc.,* 2012 WL 8499879, at *1.

14. Brief of Amicus Curiae American Subcontractors Association, *supra* note 12, at 29.

15. *Id.* (noting that Atlantic provided J-Crew with a form-contract).

16. *J-Crew Mgmt., Inc.*, 2012 WL 8499879, at *1.

17. *Id.*

18. *In re* Atl. Marine Constr. Co., Inc., 701 F.3d 736, 738 (5th Cir. 2012).

19. Rule 12(b)(3) provides that "[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (3) improper venue." FED. R. CIV. P. 12(b)(3).

20. Section 1406(a) provides that "[t]he 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." 28 U.S.C.A. § 1406 (West 2013).

21. *Atl. Marine Constr. Co., Inc.*, 2012 WL 8499879, at *1.

22. *Id.* Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C.A. § 1404(a).

23. *Atl. Marine Constr. Co., Inc.*, 2012 WL 8499879, at *9.

1404(a) is the proper procedural mechanism by which to enforce the forum-selection clause, not Rule 12(b)(3) or § 1406.[24] Applying § 1404(a), the district court weighed four private interest factors and three public interest factors for and against transfer, and placed the burden on Atlantic to establish the propriety of a transfer.[25]

Under the first private interest factor, the court considered which forum provided the most readily available sources of proof.[26] Atlantic indicated that the key evidence in the case would be the accounting records, invoices, bank statements, and the contract proposal, all of which were located in Virginia.[27] However, the district court reasoned that the "inconvenience of transporting such records to this [Texas] forum [would be] minimal compared to the significant problems that would result from the transfer of this case."[28]

In applying the second private interest factor, the court evaluated the legal system's ability to secure the attendance of witnesses at trial.[29] If the case were transferred to Virginia, the court's ability to subpoena witnesses from Texas for deposition and trial would have been subject to motions to quash.[30] Therefore, this factor weighed against transfer.[31]

For the third private interest factor, the court focused on the cost of attendance for willing witnesses.[32] Atlantic had the burden to "specifically identify the key witnesses and outline their testimony" to show why transfer should be granted.[33] J-Crew insisted that the dispute would likely involve the quality of the work performed on the Child Development Center, and all of the contractors, painters, flooring specialists, woodworkers, and other employees who worked on the construction of the Center resided in Texas.[34] The court noted

---

24. *Id.*
25. *See id.* at *5–8.
26. *See id.* at *6.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at *7 (citing *In re* Volkswagen of Am., Inc. (*Volkswagen II*), 545 F.3d 304, 316 (5th Cir. 2008)).
31. *Id.*
32. *Id*. at *6.
33. *See id.* at *6–7 (quoting Mid-Continent Cas. Co. v. Petroleum Solutions, Inc., 629 F. Supp. 2d 759, 763 n.3 (S.D. Tex. 2009)).
34. *Id.* Atlantic argued that it is headquartered in Virginia and that Atlantic's project-management team and two defendants live in Virginia. However, the court found that Atlantic's employees located in Texas would be more familiar with J-Crew's performance on the Childhood Development Center than those managing the project "from afar." *Id.*

that even though some of Atlantic's management team is located in Virginia, transferring the case would present a grave inconvenience to nonparty witnesses located in Texas.[35] The interest in not inconveniencing such witnesses trumped Atlantic's interest in enforcing the forum-selection clause.[36] Finally, the court noted that the forum-selection clause itself did weigh in favor of transfer to Virginia, but it was not entitled to dispositive weight.[37]

The court also weighed three public interest factors to decide whether to transfer the case under § 1404(a).[38] The court first considered how efficiently the dispute could be resolved by looking to administrative difficulties resulting from court congestion.[39] Atlantic argued that Virginia was a more efficient forum in which to resolve the dispute, claiming the Eastern District of Virginia disposes of civil cases an average of 2.3 months faster than the District Court of Texas.[40] However, the district court found the "difference to be negligible."[41]

Under the second public interest factor, the court considered which forum was more familiar with the law that would govern the case.[42] If the case were transferred to Virginia, § 1404(a) would require the Virginia court to apply Texas state law.[43] As a district court in Texas is more familiar with Texas contract law than a Virginia court, this factor also weighed in favor of denying transfer.[44]

Applying the third public interest factor, the court looked to the local community interest in having the dispute decided at home.[45] The court decided that a dispute involving a Texas Child Development

35. *Id.*

36. *Id.* at *6. The district court noted that the inconvenience and expense of requiring witnesses to travel from Texas to Virginia would be significant in light of the 100-mile rule established in *Volkswagen II*, 545 F.3d 304, 317 (5th Cir. 2008). *Volkswagen II* states that the level of inconvenience to witnesses increases with the distance they would be forced to travel. If the case were transferred to Virginia, the witnesses from Texas would face the inconvenience of travelling much more than 100 miles. *Atl. Marine Constr. Co., Inc.*, 2012 WL 8499879, at *7.

37. *Atl. Marine Constr. Co., Inc.*, at *7 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 (1988)).

38. *Id.* at *7–8.

39. *See id.* at *7.

40. *Id.*

41. *Id*.

42. *See id.* at *8.

43. *See id.* (noting that a § 1404(a) change of venue is "but a change of courtrooms" (citing Van Dusen v. Barrack, 376 U.S. 612, 639 (1964)).

44. *Id.*

45. *See id.*

Center was of "far greater significance to the people of this [Texas] district than residents of Virginia."[46]

After weighing the competing factors, the district court concluded that Atlantic failed to meet its burden to show that a transfer to Virginia would be in the interest of justice or increase the convenience to the parties and their witnesses.[47] Thus, the court denied Atlantic's motion to transfer.[48]

Atlantic then filed for a Petition for Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit.[49] Unable to find that the district court had "clearly abused its discretion," the Fifth Circuit unanimously denied Atlantic's petition.[50] The Fifth Circuit relied on the *Stewart Organization, Inc. v. Ricoh Corporation*[51] instruction that "federal law, specifically § 1404(a), not state law, governs a motion to transfer to another federal court pursuant to a forum-selection clause."[52] The Fifth Circuit read *Stewart* as implicitly holding that "a forum selection clause does not render the venue of an otherwise properly venued claim improper" because "Section 1404(a) is the proper procedural tool for transferring a case only when venue is proper in the chosen district; if venue is improper, Section 1406(a) is used to transfer venue."[53] The Fifth Circuit noted that *Stewart* "strongly implies that Congress's determination of where venue lies cannot be trumped by private contract, and that, therefore, a forum-selection clause cannot render venue improper in a district if venue is proper in that district under federal law."[54]

46. *Id.*
47. *Id.*
48. *Id.*
49. *In re* Atl. Marine Constr. Co., Inc., 701 F.3d 736, 738 (5th Cir. 2012).
50. *Id.* at 743.
51. 487 U.S. 22 (1988).
52. *Atl. Marine Constr. Co., Inc.*, 701 F.3d. at 739–40.
53. *Id.* at 740 (quoting 14D CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2013)) (internal quotation marks omitted).
54. *Id.* (citation omitted) (internal quotation marks omitted).

III. LEGAL BACKGROUND

In 1972, in *M/S Bremen v. Zapata Off-Shore Co.*,[55] the Supreme Court held that forum-selection clauses are "prima facie valid" and should be enforced unless the party seeking to settle the dispute in another forum can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[56] In subsequent cases, the Court confirmed that parties have a contractual right to have the forum-selection clause enforced by federal courts and to limit trial to a particular forum.[57]

The right to contractually agree to litigate in a particular forum is well established. However, the *Bremen* holding—that forum-selection clauses are to be strictly enforced absent a showing that enforcement would be unjust or unreasonable—has gradually eroded since the Court's 1988 decision in *Stewart*. In *Stewart*, the Court appeared to endorse a more discretionary, balance-of-conveniences approach. It suggested that forum-selection clauses that require diversity cases to be settled in a federal venue should be evaluated under 28 U.S.C. § 1404(a).[58] As a result of the seemingly inconsistent Supreme Court opinions in *Bremen* and *Stewart*, a division has developed among the circuits regarding the proper procedural mechanism to review and enforce forum-selection clauses when one party tries to avoid the clause.

The circuits disagree on whether a forum-selection clause makes venue improper in any place other than the contractually selected forum. The majority view, followed by the Courts of Appeals for the Second, Seventh, Eighth, Ninth, and Eleventh Circuits, allows parties to avoid the § 1404(a) evaluation by holding that forum-selection clauses render venue improper in every venue except the venue selected in the contract.[59] Instead of evaluating forum-selection

55. 407 U.S. 1 (1972).

56. *Id.* at 15.

57. Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863, 874 (1994); Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 501 (1989).

58. *See* Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988). Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C.A. § 1404(a) (West 2013).

59. *See* Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 970–73 (8th Cir. 2012); TradeComet LLC.com v. Google, Inc., 647 F.3d 472, 478 (2d Cir. 2011); Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1332–33 (11th Cir. 2011); Hillis v. Heineman, 626 F.3d 1014, 1016–17 (9th Cir. 2010); Muzumdar v. Wellness Int'l Network Ltd., 438 F.3d 759, 760–62 (7th

clauses under § 1404(a), these courts look to Federal Rule of Civil Procedure 12(b)(3) or § 1406 and dismiss cases filed in the non-specified venue.[60] Rule 12(b)(3) allows a party to move to dismiss on the basis of improper venue,[61] whereas § 1406 allows a district court to dismiss a case or transfer the case to a district where it could have been brought if brought in the wrong venue.[62]

The Fifth Circuit recently joined the Third and Sixth Circuits in one minority view that forum-selection clauses do not make other venues wrong or improper, thus requiring the court to analyze venue under § 1404(a).[63] Section 1404(a) allows a court to transfer a case to another district where it could have been brought or to any district to which all parties have consented "for the convenience of parties and witnesses" and "in the interest of justice."[64] When performing a balancing-of-conveniences analysis under § 1404(a), the court must weigh the competing private and public interest factors in order to decide whether a case should be transferred.[65] The private interest factors typically considered by a court in the Fifth Circuit in deciding venue include but are not limited to: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make a trial easy, expeditious, and inexpensive.[66] The public interest factors include: (1) the administrative difficulties flowing from court congestion; (2) the familiarity of the forum with the law that will govern the case; (3) the local interest in having localized interests decided at home; and (4) avoidance of unnecessary problems of conflicts of law or in the application of foreign law.[67]

Cir. 2006).

60. *See Union Elec. Co.*, 689 F.3d at 970–73 (holding that a forum-selection clause mandating a federal forum can be enforced through a motion to dismiss or transfer based on improper venue). *Compare* 28 U.S.C.A. § 1404(a) (stating that a "district court *may* transfer *any* civil action" to another appropriate venue (emphasis added)), *with* 28 U.S.C.A. § 1406(a) (stating that the district court "*shall* dismiss" a suit "laying venue in the wrong division or district" (emphasis added)).

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

62. 28 U.S.C.A. § 1406.

63. *See* Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877–78 (3d Cir. 1995).

64. 28 U.S.C.A. § 1404(a).

65. U.S. *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Const. Co., Inc., A-12-CV-228-LY, 2012 WL 8499879, at *5 (W.D. Tex. Aug. 6, 2012).

66. *In re* TS Tech USA Corp., 551 F.3d 1315, 1319 (Fed. Cir. 2008).

67. *Id.*

Another minority view, followed by the First Circuit, mandates that a motion to dismiss based on a forum-selection clause be treated as a 12(b)(6) motion.[68] The district court accepts as true the well-pleaded factual allegations in the complaint, draws all reasonable inferences in favor of the plaintiff, and decides whether the facts in the complaint are sufficient to justify recovery under any cognizable theory.[69] Thus, if the forum-selection clause is valid and enforceable, the party seeking to avoid the clause is deemed to have waived its right to sue in an alternative forum, which provides the other party with an affirmative defense to the motion to dismiss.[70]

The procedural mechanism by which a case is transferred has important choice of law implications that could lead to forum-shopping. Forum-shopping occurs when a party brings suit in a jurisdiction that is likely to treat its claims favorably. When a case is transferred for improper venue under § 1406, the law does not transfer with the case.[71] For example, if a case is initially brought in State A, and is then transferred to State B for improper venue under § 1406, the law of State B would control. However, when a case is transferred for convenience purposes under §1404(a), the applicable law transfers with the case.[72] Therefore, if a case is initially brought in State A, and is then transferred to State B for inconvenience purposes under § 1404(a), the law of State A would have to be enforced by State B's courts. Thus, there are incentives for a party to forum-shop by bringing suit in a venue with favorable laws and then having the case transferred to a more convenient location under § 1404.

68. *See* Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009).

69. *Id.*

70. Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 12, Atl. Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc., No. 12-929 (U.S. June 24, 2013) [hereinafter Brief of Professor Sachs] (citing Wood v. Milyard, 132 S. Ct. 1826, 1835 (2012)).

71. Petition for Writ of Certiorari at 21, Atl. Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc., No. 12-929 (U.S. Jan. 25, 2013) [hereinafter Petition for Writ of Certiorari] (citing Wisland v. Admiral Beverage Corp., 119 F.3d 733, 735–36 (8th Cir. 1997); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 992 (11th Cir. 1982); Ellis v. Great Sw. Corp., 646 F.2d 1099, 1110 (5th Cir. 1981); Martin v. Stokes, 623 F.2d 469, 473 (6th Cir. 1980)).

72. *Id.* at 20–21 (citing Ferens v. John Deere Co., 494 U.S. 516, 524–25 (1990)).

IV. ARGUMENTS

A. Petitioner's Argument

Atlantic adopts the position of the majority of circuits and argues that forum-selection clauses render any venue other than the one selected in the contract "improper" under Rule 12(b)(3) and "wrong" under § 1406.[73] Atlantic urges the Supreme Court to resolve the circuit split in favor of enforcing forum-selection clauses as written, reasoning that beginning with *Bremen*, the Court has favored forum-selection clauses and has set a high standard for parties seeking to resist the enforcement of their contractually-selected forum.[74] To bolster the already established presumption in favor of enforcing forum-selection clauses, Atlantic points out that during contract negotiations, parties often make concessions, such as reduced pricing terms, in exchange for a more preferable venue to resolve disputes.[75] When the alleged inconvenience of the chosen forum is apparent at the time of contracting, the party resisting the clause should have to show the "contractual forum will be so gravely difficult and inconvenient that he will be for all practical purposes deprived of his day in court."[76]

Atlantic also criticizes the approach followed by the Fifth Circuit because it encourages forum-shopping due to diverging choice of law rules under § 1406 and § 1404.[77] If the case had been transferred to Virginia under § 1406, the contract law of Virginia would control.[78] But if the case were instead transferred from Texas to Virginia under § 1404, Virginia courts would have to enforce Texas contract law.[79] Assuming that a transfer is warranted for convenience purposes under § 1404, Atlantic argues that the Fifth Circuit's approach creates

73. *See id.* at 18.
74. *Id.* at 12.
75. *Id.* at 12–13.
76. *Id.* at 13 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)). Atlantic also argues that the minority view followed by the Fifth Circuit is "fundamentally flawed" because it "leaves the enforcement of forum-selection clauses to the discretion of the district courts, but only with respect to forum-selection clauses allowing for an alternative *federal* forum." If the contract selects a non-federal forum, such as a state, arbitral, or foreign court, the court would be required to dismiss if the court determines that the forum-selection clause is enforceable. According to Atlantic, the Fifth Circuit's approach is unsound because the answer to whether venue is proper or improper should not depend upon the type of forum that was selected. *Id.* at 19.
77. *Id.* at 20.
78. *See id.* at 21.
79. *See id.* at 20.

incentives for parties to breach their contracts, because the party who breaches is rewarded with the ability to retain the benefits of the law of the forum in which the suit is filed, instead of the law of the forum the parties contractually selected.[80]

According to Atlantic, the Fifth Circuit created another circuit split on the issue of which party—the party trying to enforce the forum-selection clause or the party resisting the clause—bears the burden of proving that transfer is appropriate under § 1404(a).[81] Atlantic argues that the Supreme Court should support the majority view that a forum-selection clause shifts the burden of proof under the § 1404(a) analysis, requiring the party seeking to avoid the clause to bear the burden.[82] Here, placing the burden on the movant allowed J-Crew to escape its contractual obligations without meeting any burden at all.[83]

B. Respondent's Argument

J-Crew agrees with the minority view followed by the Third, Fifth, and Sixth Circuits that forum-selection clauses should be evaluated under § 1404(a).[84] J-Crew maintains Atlantic is incorrect in asserting that private parties can render venue improper or wrong merely by creating a forum-selection clause.[85] Instead, J-Crew argues the power to make a venue improper rests with Congress.[86] The fact that courts have discretion under § 1404(a) to decide whether to transfer a case even in light of a forum-selection clause proves that parties are limited in their ability to contractually decide where a suit must be brought.[87]

J-Crew maintains that the holding in *Stewart* provides the simple answer: Private parties do not have the exclusive right to contract for venue.[88] According to J-Crew, under *Stewart* district courts must perform the § 1404 analysis by weighing the conveniences for the

80. Brief for Petitioner at 20, Atl. Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc., No. 12-929 (U.S. June 17, 2013) [hereinafter Brief for Petitioner].
81. Petition for Writ of Certiorari, *supra* note 71, at 21.
82. *Id.* at 22.
83. Brief for Petitioner, *supra* note 80, at 27.
84. Brief for Respondent at 13, Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W.D. Tex., No. 12-929 (U.S. Aug. 16, 2013) [hereinafter Brief for Respondent].
85. *Id.* at 10.
86. *Id.*
87. *Id.* at 11.
88. *Id.* at 13.

witnesses along with the public and private interest concerns.[89] Most tellingly, *Stewart* states, "it is conceivable . . . that because of these factors a district court acting under § 1404(a) would refuse to transfer a case *notwithstanding the counterweight of a forum-selection clause*."[90] J-Crew highlights that Atlantic's position—that a forum-selection clause renders venue improper in any venue other than the contractually-selected venue—would effectively overrule *Stewart*.[91]

J-Crew asserts that not only did the district court choose the correct procedural mechanism by which to evaluate the forum-selection clause, but the district court also properly performed the balancing under § 1404(a) in determining that the factors weighed in favor of retaining venue in the Western District of Texas.[92] According to *Stewart*, a forum-selection clause should be a significant factor in the court's weighing, but it should not be given dispositive weight.[93] In J-Crew's opinion, the district court engaged in a "reasonable and balanced analysis" and gave proper weight to the forum-selection clause as required by § 1404(a) and *Stewart*.[94]

Finally, J-Crew contends that the district court properly placed the burden on the movant, Atlantic, to show transfer was necessary under § 1404(a),[95] following Supreme Court precedent from *Hoffman v. Blaski*.[96] Placing the burden on Atlantic did not prevent the district court from giving the forum-selection clause significant weight.[97] J-Crew asserts that Texas would still be the proper venue regardless of who carried the burden.[98]

---

89. *Id.*

90. *Id.* at 14 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30–31 (1988)) (emphasis added).

91. *See id.* at 15.

92. *Id.* at 21.

93. *Id.* at 22 (quoting *Stewart*, 487 U.S. at 29–31).

94. *Id.* at 21. J-Crew argues that this case presents an exceptional set of circumstances because all the witnesses and physical evidence are located in Texas, which weighed heavily toward keeping the case in Texas. However, in most other cases, where not all the evidence and witnesses are located in one state, a forum-selection clause will likely prevail under the § 1404 analysis. According to J-Crew, Atlantic fails to acknowledge that this is an exceptional case in which aside from the forum-selection clause, every other private and public interest factor weighs in favor of *not* transferring the case from the Western District of Texas. *Id.* at 24, 36.

95. *Id.* at 26.

96. 363 U.S. 335, 366 (1960) ("[U]nder [§] 1404(a) the defendant must satisfy a very substantial burden of demonstrating where 'justice' and 'convenience' lie, in order to have his objection to a forum of hardship, in the particular situation, respected.").

97. Brief for Respondent, *supra* note 84, at 27.

98. *Id.* at 28. J-Crew also disputes Atlantic's assertion that applying § 1404 will encourage forum-shopping. In fact, J-Crew argues that applying § 1404(a) will actually reduce forum-shopping because parties will be forced to consider public interests when drafting the clause,

V. ANALYSIS

A. Competing Public Policy Concerns

Atlantic Marine raises a procedural issue that has important policy implications. The Court may not address the policy concerns directly if it decides the case on statutory construction grounds, but the competing public policy issues surrounding the enforcement of forum-selection clauses may still influence the Court's analysis. On the one hand, forum-selection clauses can sometimes result in cases being litigated in a remote state where none of the witnesses or evidence is located. On the other hand, parties who include a forum-selection clause in their contract often bargain for the venue at the expense of other interests and rely on these clauses. Although forum-selection clauses can sometimes result in inconvenient situations, the extensive degree to which they are negotiated for and relied upon by corporations and other parties warrants their enforcement. Therefore, the Court should adopt an approach that favors the enforcement of forum-selection clauses if the clause is valid and enforceable.

The Court's decision will have a major impact on how future forum-selection clauses are drafted and how much reliance parties place on them. Admittedly, there are advantages and disadvantages to approaches advocated by the parties. If the Court adopts the approach followed by the First Circuit, forum-selection clauses will almost always be enforced. Likewise, if the Court adopts the majority approach advocated by Atlantic, parties drafting forum-selection clauses will enjoy more assurance that these clauses will be enforced. Yet, one negative implication is that parties will be incentivized to insert boilerplate forum-selection clauses into form contracts without concern that the selected forum may be inconvenient for the other party.

However, if the Court adopts the view supported by J-Crew, there will be less predictability surrounding the enforcement of forum-selection clauses, and parties may find themselves litigating in distant forums in violation of their contractual agreement. Parties seeking to avoid this outcome would be forced to select a non-federal forum in their future contracts, which may be almost as inconvenient.[99]

---

which in turn will "reduce efforts by parties to leverage their private bargaining power to undermine the interests of justice." *Id.* at 32–33.

99. When parties contract for a non-federal forum, such as a state forum, a court in the Fifth Circuit must dismiss the case if it is brought in a forum other than the one contractually

The Court's analysis may be colored by the fact that the contract at issue is a construction contract.[100] In many construction disputes, the majority of the witnesses, documents, and third parties are located in the state in which the construction took place.[101] Further, subcontractors are often at a disadvantage because the general contractor routinely dictates the terms of the subcontract.[102] For these reasons, eighteen states void construction contracts that include a forum-selection clause requiring disputes to be litigated in a state other than where the construction project is located.[103] If the Court is concerned with where the equities lie in this case, it may read the forum-selection clause as unenforceable due to these concerns.[104] Given that Atlantic is a major corporation that used its form contract, which included the forum-selection clause, with J-Crew, a local company with only five employees, the Court may find that the agreement was contrary to public policy.[105] However, despite these concerns, the Court should not allow J-Crew to avoid its contractual agreement merely because it is a small company. Instead, the Court should acknowledge that both parties were sophisticated and operating at arm's length and should therefore be held to their contractual obligations.

B. Effect on Businesses

The Court's holding in this case will most strongly affect businesses and other parties who routinely rely on forum-selection clauses in their contracts. A holding in favor of enforcing forum-selection clauses will be especially helpful to businesses that are looking to expand by allowing them to eliminate uncertainties about

---

selected. In other words, non-federal forums are not subject to § 1404 weighing, and therefore the forum-selection clauses in these forums will always be enforced unless there is fraud or other blatant overreaching present. *See In re* Atl. Marine. Const. Co., Inc., 701 F.3d 736, 740 (5th Cir. 2012) ("When a forum selection clause designates an arbitral, foreign, or state court forum, a district court does not have the option of transferring the case to the designated forum because § 1404(a) and § 1406 only allow for transfer within the federal system.").

100. Brief of Amicus Curiae American Subcontractors Association, *supra* note 12, at 25.

101. *Id.*

102. *Id.* at 27–28 (noting that the selected forum is "inevitably" the "home court of the general contractor" (citation omitted) (internal quotation marks omitted)).

103. *Id.* at 14–16 (citing ARIZ. REV. STAT. ANN. § 32-1129.05 (West 2013)).

104. *See* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983) ("As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy . . . . If the contract as interpreted by [the court] violates some explicit public policy, we are obliged to refrain from enforcing it." (citations omitted)).

105. Brief of Amicus Curiae American Subcontractors Association, *supra* note 12, at 29.

where a potential dispute will be litigated and avoid forums that are costly or inconvenient.[106] The amicus brief submitted by the Chamber of Commerce in support of Atlantic urges the Court to resolve forum-selection clause disputes under § 1406 and the *Bremen* standard instead of § 1404.[107] The Chamber of Commerce argues that forum-selection clauses should be "enforced as written, not treated as mere factors that are weighed as part of a free-wheeling and inherently unpredictable balancing test."[108] Given the predictability that forum-selection clauses offer, businesses rely on the enforcement of their forum-selection clauses. If forum-selection clauses go unenforced, there will be a negative impact on the economy because "commercial certainty is destabilized when judicial enforcement is lacking or unreliable, such that parties have no way of knowing whether their forum agreement will have binding effect."[109]

C. First Circuit Approach

Both Atlantic and J-Crew fail to seriously consider the approach adopted by the First Circuit. Under this approach, if the forum-selection clause is valid and enforceable, it is treated as an affirmative defense, which means Atlantic should have dismissed the Texas suit by making a pre-answer Rule 12(b)(6) motion to dismiss, or a post-answer Rule 12(c) motion for judgment on the pleadings.[110] This approach would enforce forum-selection clauses as an affirmative defense to liability, rather than as a matter of venue.[111]

Professor Stephen Sachs urges the Supreme Court to adopt the approach followed by the First Circuit, because forum-selection clauses have no effect on venue.[112] Venue is defined by statute and cannot be destroyed by contractual agreement.[113] Just as parties cannot "strip" courts of jurisdiction by contract, they cannot contractually select a venue controlled by statute.[114] Sachs astutely notes that the procedural rules are practical because they allow

106. Brief for The Chamber of Commerce of the United States of American as Amici Curiae Supporting Petitioner at 10, Atl. Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc., No. 12-929 (U.S. Feb. 25, 2013).
107. *Id.* at 4.
108. *Id.*
109. *Id.* at 12.
110. Brief of Professor Sachs, *supra* note 70, at 2.
111. *See id.*
112. *Id.* at 2, 18 n.10.
113. *Id.*
114. *Id.* at 11.

parties to quickly enforce a forum-selection clause and do not require courts to misapply the Federal Rules of Civil Procedure by treating forum-selection clauses as if they affect venue.[115] Sachs correctly points out that both the district court and the Fifth Circuit erroneously resorted to § 1404 as the sole available remedy.[116]

D. Improper Weighing

Alternatively, and perhaps less likely, the Court may identify § 1404 as the proper procedural mechanism to decide whether to enforce a forum-selection clause, but decide that the lower court did not properly weigh the forum-selection clause in its § 1404(a) analysis.[117] Regrettably, the balancing approach of § 1404(a) could render unpredictable results depending on how much weight is given to the clause itself. The amicus brief submitted by the New England Legal Foundation argues the lower courts erroneously "misinterpreted *Stewart* which clearly stated that a valid forum selection clause should 'figure centrally' in a district court's determination under § 1404(a)."[118] However, even if the Court does note that the forum-selection clause deserved more weight in the district court's § 1404(a) analysis, it is unlikely the Court will decide that the forum-selection clause renders Virginia the proper forum given the other public and private interest factors that heavily weighed in favor of a Texas venue.

VI. CONCLUSION

The Supreme Court's decision in *Atlantic Marine Construction* will almost certainly clarify the three-way circuit split regarding the enforcement of forum-selection clauses. The Court should adopt either the approach followed by the First Circuit or the majority approach advocated by Atlantic. Both of these procedures ensure that

115. *Id.* at 2–3.

116. *Id.* at 3. Both J-Crew and Atlantic too quickly reject the approach followed by the First Circuit. J-Crew responds that the First Circuit's approach is "untenable" because the precedent set by *Stewart* mandates that § 1404(a) governs the enforceability of forum-selection clauses. Brief for Respondent, *supra* note 84, at 34. Atlantic argues that the First Circuit's approach would be less efficient and effective than using Rule 12(b)(3) and § 1406 when dealing with a forum-selection clause. Reply Brief for Petitioner at 6, Atl. Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc., No. 12-929 (U.S. Sept. 16, 2013).

117. Brief of Amici Curiae New England Legal Foundation and Associated Industries of Massachusetts in Support of Petitioner at 4, Atl. Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc., No. 12-929 (U.S. June 24, 2013).

118. *Id.* (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)).

forum-selection clauses will almost always be enforced. Although there are competing public policy concerns that weigh in favor of judicial scrutiny of these clauses, courts should uphold forum-selection clauses because contracts should be enforced as written. Given the significant potential impact on businesses and other parties who routinely rely on forum-selection clauses, the Court should adopt an approach that favors strict enforcement of forum-selection clauses and places a high burden on the party attempting to avoid the clause.