NOTE

THE ENFORCEABILITY OF FORUM-SELECTION CLAUSES AFTER STEWART ORGANIZATION, INC. V. RICOH CORPORATION

The legislators in Alaska and any other state considering statutorily validating contractual forum-selection clauses must take into account the 1988 United States Supreme Court decision in Stewart Organization, Inc. v. Ricoh Corporation.

In Stewart the Court held that when a suit is brought in federal court on the basis of diversity jurisdiction, the balancing test of section 1404(a) of the Judicial Code must be applied to determine whether the contractual forum-selection clause will be honored to transfer a case to another jurisdiction. Thus, the issue in Stewart was determined to be procedural; and the federal courts were given broad discretion in determining whether or not to enforce a given forum-selection clause.

This note presents an overview of the historical treatment of forum-selection clauses by the courts in the United States and examines the implications of the Stewart decision for both the future enforceability of the clauses and the effectiveness of state legislation validating the clauses. The author calls for federal legislation to ensure the enforceability of forum-selection clauses between sophisticated business parties.

I. INTRODUCTION

To trade or not to trade is a question not seriously pondered by many state legislatures. Expanding trade is an essential component of Alaska's and most other states' strategy to improve the wealth and well-being of their body politic. It is, therefore, not surprising that legislators search for methods to manipulate the law to the end of encouraging trade. New York's statute validating contractual choice of

1. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney Supp. 1988). This law validates a contractual clause choosing New York as the forum state where the contract is for not less than one million dollars and where there is a choice-of-law provision designating New York law as the governing law.

175
forum clauses is in large part an example of such maneuvering. By allowing the parties to choose in advance the forum where disputes will be resolved, forum-selection clauses are seen by many as promoting certainty and predictability in contractual relationships. In drafting General Obligations Law section 5-1402, New York's legislature was calculating that what was good for contractual relationships was good for trade. Hence, the statute was considered to be unquestionably justified.

The purpose of this note is to analyze the effect of the United States Supreme Court decision in Stewart Organization, Inc. v. Ricoh Corp. on the enforceability of contractual choice-of-forum clauses and on the potency of statutes which attempt to validate such clauses. Stewart has implications for Alaska and any other states considering the adoption of forum-selection legislation similar to New York's. The Court in Stewart declared that forum-selection clauses present issues of federal procedural law, not issues of state law. The holding in Stewart makes it clear that, when a suit is brought in federal court on the basis of diversity jurisdiction, the balancing test of section 1404(a) of the Judicial Code must be applied to determine whether the contractual choice-of-forum clause will be honored to transfer a case to another jurisdiction. Thus, state legislation to legalize forum-selection clauses will influence the enforcement of the clauses only in state courts. It will take federal legislation if sophisticated commercial parties want to be assured of uniform federal court enforcement of forum-selection clauses.

2. E.g., The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972) ("The elimination of all ... uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."). For the facts of this case, see infra note 10 and accompanying text.


4. See infra notes 66, 73-75, and accompanying text for references to other states' legislative action with regard to forum-selection clauses.


6. Id. at --, 108 S. Ct. at 2243. See infra notes 89-91 and accompanying text.

7. 28 U.S.C. § 1404(a) (1982) ("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.") For a discussion of the requisite balancing test, see infra note 97 and accompanying text.

8. Stewart, 487 U.S. at --, 108 S. Ct. at 2244. See infra note 91 and accompanying text.
Nonetheless, Alaska and other states may find that there is enough state court litigation involving choice-of-forum clauses to warrant their legislatively validating such clauses as New York has done. For despite its lack of effectiveness at the federal court level, New York's General Obligations Law section 5-1402 does ensure that forum-selection clauses are expeditiously and uniformly enforced in state courts. Legislation by Alaska and other states to validate forum-selection clauses at the state level would both promote judicial efficiency and provide a secure contractual environment for commercial activities.9

II. THE EVOLVING RESPECTABILITY OF FORUM-SELECTION CLAUSES IN THE COURTS

The turning point for the acceptance of forum-selection clauses by the American judiciary came with the 1972 Supreme Court decision in *The Bremen v. Zapata Off-Shore Co.*10 In *Zapata*, Chief Justice Burger, writing for the Court, stated that "the correct doctrine to be followed by federal district courts sitting in admiralty" is that forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."11 Thus, the Court held that where an American corporation and a German towing firm had contracted to bring all disputes before the London Court of Justice, that forum-selection clause should be enforced "specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."12 *Zapata* therefore established a reasonableness test which courts must apply to determine the enforceability of forum-selection clauses. In addition, the Court delegated the burden of proof to the party trying to void the forum-selection clause.

The decision in *Zapata* is significant because American courts historically had looked upon forum-selection clauses with disdain and

---

9. The focus of this note is on forum-selection clauses in contracts between sophisticated business parties, and the conclusions are not meant to apply to clauses in other contractual situations.
10. 407 U.S. 1 (1972). The case involved a suit brought in Florida by Zapata Off-Shore Company, the American owner of a drilling rig, against the tug, The Bremen, and Underweser Reederei GMBH, the German firm hired to tow the rig from Louisiana to Italy. The drilling rig was damaged in international water during a storm. The question of the enforceability of the forum-selection clause arose when Unterweser argued that the case should be heard in the contractually chosen forum, London.
11. *Id.* at 10 (footnote omitted).
12. *Id.* at 15.
had refused to enforce them. In general, the rationale given by the courts for their refusal to honor forum-selection clauses was that the parties could not contractually “oust appropriate courts of their jurisdiction.” It was also often broadly stated that forum-selection clauses were “against public policy,” but the true origins of the courts’ antagonism towards forum-selection clauses are not entirely clear. The non-ouster argument, however, has been countered with the reasoning that the courts are not being ousted by a forum-selection clause; the courts are merely being asked to exercise their discretion and not hear the case so that it can be heard in the contractually chosen forum. In addition, the claim that forum-selection clauses are “against public policy” has been largely recognized as conclusory.

Perhaps it is precisely because the arguments against forum-selection clauses were not founded in solid legal reasoning that exceptions to the rule developed gradually during the first half of this century. In fact, in 1903, the same Massachusetts court which was the source of the non-ouster rule enforced a contractual forum-selection clause, sending two foreigners to their chosen forum of Italy to have their case heard. In subsequent cases, dicta from Judges Benjamin Cardozo and Learned Hand also questioned whether forum-selection clauses should be considered invalid in every instance. Judge Cardozo wrote in 1914 that “[t]here may conceivably be exceptional circumstances where resort to the courts of another state is so obviously convenient


16. Explanations of the origins of the non-ouster rule vary, including: that the courts transferred their disdain for arbitration clauses to a similar rejection of forum-selection clauses, see A. Ehrenzweig, supra note 13, at 148; or that the judges were being paid by the case and for pecuniary reasons were unwilling to transfer cases to the contractual forum, Reese, The Contractual Forum: Situation in the United States, 13 Am. J. Comp. L. 187, 189 (1964).

17. Restatement (Second) of Conflict of Laws § 80 comment a (rev. 1986).

18. See, e.g., Gilbert, supra note 13, at 8.

19. See id. at 12-15 and Lenhoff, supra note 13, at 433-34 for the development of the exceptions to the common law rule.

and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction." Judge Hand gave a more strongly stated endorsement of forum-selection clauses, although again only in dictum: "I do not believe that, today at least, there is an absolute taboo against such contracts at all . . . they are invalid only when unreasonable." Thus, exceptions to the general disfavor of forum-selection clauses have a significant history in state and federal courts.

Finally, in the 1955 case of Wm. H. Muller & Co. v. Swedish American Line Ltd., the United States Court of Appeals for the Second Circuit formulated the reasonableness test which was eventually adopted by the Supreme Court in Zapata. Muller was overruled, however, when the Second Circuit determined that a federal statute prevented enforcement of the forum-selection clause in that case. Nonetheless, Judge Wisdom, dissenting in the court of appeals decision leading to Zapata, contended that where that federal statute does not apply, "Muller's 'general principles of contract law' still lead to Muller's result." In Zapata, the Supreme Court agreed with Judge Wisdom and found the not unreasonable forum-selection clause enforceable.

The Supreme Court granted certiorari in Zapata because the federal appellate courts were split in their treatment of forum-selection

---

23. Muller was a case involving an American corporation trying to bring its suit in the United States despite a contractual clause citing Sweden as the selected forum for disputes. The Second Circuit concluded that "the jurisdictional agreement was not unreasonable and that the adherence of the parties to that agreement, which for aught that appears was freely given, should be given effect." Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 808 (2d Cir.), cert. denied, 350 U.S. 903 (1955), overruled on other grounds, Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967).
When Chief Justice Burger announced that the reasonableness test should be applied and that the burden of proof would be delegated to the party contesting the forum-selection clause, he addressed a number of the issues affected by the decision. It appeared that the matter of forum-selection clauses might be settled once and for all.

The Chief Justice dismissed the traditional non-ouster argument as a "vestigial legal fiction," and he explained that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."

The opinion also detailed the logical components of the Court's justification for its decision. Chief Justice Burger pointed out that the Court had already stated that "it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ."

He also referred to several authorities which vindicated implementation of the reasonableness test:

This approach is substantially that followed in other common-law countries including England. It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world.

As though common law precedent and contractual responsibility were not justification enough for the Court's decision, Chief Justice Burger also enumerated the policy rationales: "There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."

Examples of such "compelling reasons" for implementing the reasonableness test included the uncertainty and possible inconvenience of not contractually establishing a predetermined forum for adjudication. Chief Justice Burger maintained that "[t]he
elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”35 The Zapata Court was clearly encouraging the American legal community to face the realities of the need for certainty in international transactions in order that America might continue to benefit from world trade.

The Zapata decision also provides considerable insight into the appropriate criteria for administering a reasonableness test. The Court noted that in the Zapata case, the forum-selection clause had been included in the contract as the result of arm’s-length negotiations and that there had been no showing of fraud or overreaching in the process.36 There were two other criteria of reasonableness cited by the Court: that enforcement of the clause would not “contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision;”37 and that the chosen forum not be “seriously inconvenient.”38 As an example of a strong public policy which would lead to a finding of unreasonableness, the Court pointed to a case where a forum-selection clause conflicted with the provisions of a federal statute.39 The Court also qualified the grounds on which a forum-selection clause could be found “seriously” inconvenient by explaining that if inconvenience were foreseeable at the time of contracting,

it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.40

The focus of the Court’s examination of the reasonableness of a forum-selection clause is clearly on maintaining the integrity of contractual relationships. The same emphasis on the sanctity of the contract is seen in the Court’s allocation of the burden of proof on the party attempting to invalidate the forum-selection clause. In finding that “the forum clause should control absent a strong showing that it should be set aside,”41 the Court was consistently pursuing the Zapata theme: the American judiciary should respect the intentions of the parties to a freely negotiated contract.

35. Id. at 13-14 (emphasis added).
36. See supra text accompanying note 12.
38. Id. at 16 (emphasis in the original).
39. Id. at 15. The case cited by the Court was Boyd v. Grand Trunk W.R.R. Co., 338 U.S. 263 (1949), where a forum-selection clause was found void because it conflicted with a provision of the Federal Employers’ Liability Act.
41. Id. at 15.
III. POST-ZAPATA CONTROVERSIES

Despite the apparent thoroughness of the Court's decision in Zapata, post-Zapata cases have not been uniform in their holdings with regard to forum-selection clauses. Questions left unanswered in Zapata have led to divergent interpretations of the Court's intentions and to scattered state legislative action that attempts to settle uncertainties surrounding forum-selection clauses.42

The main controversy which has surfaced in post-Zapata cases is whether the holding in Zapata should be narrowly restricted to admiralty decisions or broadly applied to all cases involving the enforceability of forum-selection clauses. This issue most often arises as a question of whether substantive state contract law or federal procedural law43 should be used to determine the enforceability of forum-selection clauses in non-admiralty cases in federal courts. The main distinction between the two approaches is that under contract law, a state's public policy for or against forum-selection clauses can determine the outcome of the decision, while under federal law, the Zapata reasonableness test will be applied.

The best starting place for examining the origins of this controversy is the Court's decision in Zapata, where Chief Justice Burger wrote for the Court that "such [forum-selection] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty."44 In addition to specifying that the Court was focusing on an admiralty decision, Chief Justice Burger's justification for the Court's holding also emphasized the link between forum-selection clauses and certainty in international transactions.45 At least one commentator read Zapata to mean that the Court intended the reasonableness test to be applied solely to admiralty cases, while "[i]n the area of general commercial law where state law has control the decision in Zapata is not of direct assistance."46

On the other hand, the Zapata Court categorically referred to the non-ouster argument as "hardly more than a vestigial legal fiction"47 and mentioned a broad reliance on "ancient concepts of freedom of

42. See infra text accompanying notes 65-81.
44. Zapata, 407 U.S. at 10 (footnote omitted).
45. See supra text accompanying note 35.
47. Zapata, 407 U.S. at 12.
contract" as reason to enforce forum-selection clauses. Such generalizations led one commentator to write of Zapata that "[t]his decision should henceforth be controlling in all areas governed by federal law; it should also be of persuasive influence in situations where state-law [sic] controls." The authorities could hardly be further apart in their interpretations of Zapata.

It is in the courts, however, that one sees the consequences of the controversy over Zapata's implications for the enforceability of forum-selection clauses. Just as the commentators have differed over what Zapata means for forum-selection clauses, so too have the federal courts been split. Since the 1972 Zapata decision, most of the courts of appeals have addressed the issue of the enforceability of forum-selection clauses. The suits are typically brought before a federal court on the basis of diversity jurisdiction, by a party unwilling to take the case to the contractually chosen forum. The defendant then moves to dismiss or transfer the case in reliance on the forum-selection clause.

It has not gone unnoticed by the courts that "[w]hether a contractual forum selection clause is substantive or procedural is a difficult question. On the one hand the clause determines venue and can be considered procedural, but on the other, choice of forum is an important contractual right of the parties." That statement by the Eighth Circuit in Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc. was followed by its conclusion that "[b]ecause of the close relationship between substance and procedure in this case we believe that consideration should have been given to the public policy of Missouri." Thus, if forum-selection clauses are a state law issue, the state's public policy can guide the federal courts in their determination.

48. Id. at 11.
51. Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 852 (8th Cir. 1986).
52. Id. at 852.
of the enforceability of the clauses.\textsuperscript{53} The \textit{Farmland} court cites with approval a Third Circuit case, \textit{General Engineering Corp. v. Martin Marietta Alumina, Inc.},\textsuperscript{54} which had been decided earlier that same year.

In \textit{General Engineering}, the court declared that “[w]e must correct the assumption that federal courts are bound as a matter of federal common law to apply [the \textit{Zapata}] standard to forum selection clauses. The construction of contracts is usually a matter of state, not federal, common law.”\textsuperscript{55} Unlike the Eighth Circuit which proceeded to apply state law in \textit{Farmland},\textsuperscript{56} the Third Circuit in \textit{General Engineering} applied the \textit{Zapata} reasonableness test, because of “the absence of Maryland precedents on the enforceability of a forum-selection clause.”\textsuperscript{57} Nonetheless, had there been state law to apply, it appears that the Third Circuit would have done so.

The analysis of the courts in \textit{Farmland} and \textit{General Engineering} is in direct contradiction to the approach used in other federal appellate courts. The Ninth Circuit, for example, has concluded that “[a]lthough [\textit{Zapata}] involved an international forum selection question, and the Court emphasized the commercial realities of international trade, we see no reason why the principles announced in [\textit{Zapata}] are not equally applicable to the domestic context.”\textsuperscript{58} The Second and Eleventh Circuits have used precisely the same argument that nothing precludes application of \textit{Zapata} to cases involving forum-

\begin{itemize}
    \item \textsuperscript{53} The argument that the determination of the enforceability of forum-selection clauses is a state-law contracts question is also set out in Gruson, \textit{Forum-Selection Clauses in International and Interstate Commercial Agreements}, 1982 U. ILL. L. REV. 133, 155 (“The interpretation and enforceability of a forum-selection clause in a contract arguably should not depend on whether the plaintiff happens to commence action in a state court or, on the basis of diversity jurisdiction, in a federal court.”).
    \item \textsuperscript{54} 783 F.2d 352 (3d Cir. 1986).
    \item \textsuperscript{55} \textit{Id.} at 356 (cited with approval in Snider v. Lone Star Art Trading Co., 672 F. Supp. 977, 981 (E.D. Mich. 1987), aff’d, 838 F.2d 1215 (6th Cir. 1988)). In \textit{General Engineering}, the Third Circuit was in effect reversing its earlier statement that “[t]he Supreme Court in [\textit{Zapata}] . . . appears to have assumed without saying so that in a federal forum the enforceability of a forum selection clause is determined by a generally applicable federal law.” Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 201 (3d Cir.), cert. denied, 464 U.S. 938 (1983).
    \item \textsuperscript{56} \textit{Farmland}, 806 F.2d at 852. Snider v. Lone Star Art Trading Co., 672 F.Supp. 977, 982 (E.D. Mich. 1987), also applied state law to determine the enforceability of the forum-selection clause.
    \item \textsuperscript{57} \textit{General Engineering v. Martin Marietta}, 783 F.2d at 358.
    \item \textsuperscript{58} \textit{Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.}, 741 F.2d 273, 279 (9th Cir. 1984). The Ninth Circuit cites cases from five other federal appellate courts in support of its reliance on \textit{Zapata} to enforce a forum-selection clause in a domestic situation. \textit{Id.}.
\end{itemize}
selection clauses even where there are no international implications. Federal appellate courts relying on Zapata have given effect to forum-selection clauses in situations where the chosen forum was another federal court, a state court, or a court overseas. In addition to their relying reciprocally on each other's decisions, these courts are also supported in their view by the Restatement (Second) Conflict of Laws section 80, which states that "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." Thus, there is at least a certain sector of the American legal community which has progressed from the nineteenth-century abhorrence of forum-selection clauses to a current general acceptance thereof.


60. Stewart, 810 F.2d at 1066.

61. Pelleport, 741 F.2d at 273.


63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). Section 80 of the Restatement is often cited by federal appellate courts looking for justification for enforcing a forum-selection clause. See, e.g., Pelleport, 741 F.2d at 279. It should be noted that in the 1986 revisions of the Restatement, the non-ouster language has been dropped from section 80, although the comment still explains that "[p]rivate individuals may not by their contract oust a state of any jurisdiction it would otherwise possess." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 comment a (rev. 1986).

IV. THE LEGISLATIVE RESPONSE TO POST-ZAPATA UNCERTAINTIES

Due to the courts’ divergent treatments of forum-selection clauses, such clauses can hardly instill a contracting party with any sense of certainty. Whether or not a forum-selection clause ultimately will be enforced may well depend on where the party contesting the clause brings suit. It is, therefore, not surprising that there has been legislative action attempting to validate forum-selection clauses and ensure their enforcement. In the era between Zapata and Stewart, however, the effect state laws validating forum-selection clauses would have in suits brought to federal courts in diversity remained unclear.

A now defunct Model Choice of Forum Act was adopted by three states before its withdrawal by the Commissioners on Uniform State Laws in 1975. The Model Choice of Forum Act essentially sought to validate properly obtained forum-selection clauses unless to do so would be unreasonable, substantially inconvenient, against some other statutory provision, or depriving the plaintiff of all effective remedies. The Model Choice of Forum Act was withdrawn by the Commissioners on Uniform State Laws because of the dearth of adopting states, and because “an agreement valid under the Act may be subject to constitutional question under D.H. Overmeyer Co. v. Frick Co.”


67. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 142, 142 (1975).


69. Id.
In *Overmeyer*, the issue was the constitutionality of the enforcement of a cognovit note which had been negotiated between two sophisticated corporate parties, and the Supreme Court found that a "cognovit clause is not, per se, violative of Fourteenth Amendment due process." The Court did, however, explain that cognovit clauses could violate due process in certain fact situations, such as where there was a contract of adhesion, greatly unequal bargaining power, or lack of consideration. Apparently, the Commissioners on Uniform State Laws were concerned that the Model Choice of Forum Act was so broadly applicable that eventually it would be found unconstitutionally to endorse depriving unsuspecting and unsophisticated contracting parties of their procedural rights.

In contrast to the unpalatably broad reach of the Model Choice of Forum Act, New York's General Obligations Law section 5-1402 permits bringing a foreign corporation or nonresident into court only where: (1) there is a contractual forum-selection clause; (2) the contract is for not less than one million dollars; and (3) the contract has a provision designating New York law as the governing law. Thus far, California appears to be the only state with a statute like New York's, limiting the law's effect to large commercial contracts, and linking contractual choice-of-law and choice-of-forum requirements.

---

71. Id. at 187.
72. Id. at 188.
73. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney Supp. 1988). See supra note 1 and accompanying text. The relevant substantive subsection of § 5-1402 states:

1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or proceeding against a foreign corporation, nonresident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or nonresident agrees to submit to the jurisdiction of the courts of this state.

Id.

74. Id.
75. The California statute is the same as New York's without the prefatory references to other New York Laws. CAL. CIV. PROC. CODE § 410.40 (West Supp. 1988). Legislation validating forum-selection clauses should not be confused with statutory approval of parties agreeing to a certain venue. The former implies an agreement to submit to the jurisdiction of the chosen forum; the latter does not.
These statutes in New York and California are obviously controlling in their state courts, but it has been unclear whether federal courts need to pay any heed to the state legislation. If forum-selection clauses raise procedural issues, then federal law will guide the federal courts in their determination of the enforceability of the clauses, and it is possible that the state legislation will be ignored by the federal courts.

On the other hand, if federal courts apply the Zapata standard, and the forum-selection clauses are held to be valid unless unreasonable, the reasonableness of the contract clauses would be supported by the existence of state legislation such as New York's General Obligations Law section 5-1402. Sophisticated parties can be assumed to have known about the New York legislation when they chose New York as a forum and New York's law as governing law. There would have to be a strong showing of fraud or undue influence for such a forum-selection clause to be found to be unreasonable.

Even if a federal court taking a case in diversity decides to rely on the state's public policy to determine the enforceability of a forum-selection clause, it could be argued that the legislation is a strong indication of the state's policy of enforcing the clauses. Alternatively, the point can be made that, in the interest of uniformity of contract interpretation, the state statutes should govern the decision of a federal court sitting in diversity. In each of the cases there will be a contractual choice-of-law provision which is generally enforced. To refuse to enforce the forum-selection clause would be to defy the contractual expectations of the parties. As one author has put it:

If a state court enforces a forum-selection clause which chooses another jurisdiction and therefore dismisses an action, why should a federal court sitting in the excluded jurisdiction and having jurisdiction on the basis of diversity of citizenship reach a different result, entertain the action and apply the laws of the excluded jurisdiction?

76. See, e.g., Credit Francais Int'l, S.A. v. Sociedad Financiera de Comercio, C.A., 128 Misc. 2d 564, 572, 490 N.Y.S.2d 670, 678 (N.Y. Sup. Ct. 1985) ("[P]ublic policy favors New York courts retaining lawsuits where New York is the designated forum. The center of world banking, trade, finance and other activities should, and indeed, with the enactment of General Obligations Law Sec. 5-1402, must extend itself to treat with [sic] such controversies.") (emphasis added).

77. See infra text accompanying notes 36-37.

78. See E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 18.1, 18.2, at 632-36 (1982 & Supp. 1986) (citing the Restatement (Second) of Conflict of Laws § 187 (1971), the Uniform Commercial Code § 1-105, and cases supporting the proposition that a contractual choice of law clause will be enforced, although "ordinarily the chosen law must bear some reasonable relationship to the parties or the transaction. . . .")

Thus, in the post-Zapata period, with or without the presence of state legislation, the disparity in the methodology used to determine the enforceability of forum-selection clauses meant that, as legal instruments which were supposed to enhance certainty and predictability in contractual relationships, the clauses were failures. In 1988, sixteen years after the decision in Zapata, the Supreme Court again addressed the issue of forum-selection clauses when it decided Stewart Organization, Inc. v. Ricoh Corp. Stewart, however, can hardly be said to have resolved all of the ambiguities surrounding forum-selection clauses.

V. Stewart Settles Only One Post-Zapata Controversy

Hearing Stewart gave the Supreme Court the opportunity to clear away some of the confusion surrounding the enforceability of forum-selection clauses. It is not at all certain, however, that the Court's decision in Stewart has resolved anything beyond the one question of how a federal court sitting in diversity should deal with a motion to transfer a case which involves a contractual forum-selection clause. In deciding that such a motion to transfer was a procedural issue controlled by section 1404(a) of the Judicial Code, the Court abstained from making a policy statement about the validity of forum-selection clauses. Stewart has done little to enhance the predictability of the outcome when a forum-selection clause is at issue in a federal court.

The Stewart facts and procedural history are fairly representative of cases involving controversies over forum-selection clauses. An Alabama firm, the Stewart Organization, brought essentially a breach of contract suit in the United States District Court for the Northern District of Alabama against Ricoh Corporation, a New Jersey corporation which conducts a considerable portion of its business in New York.

80. In the years intervening between Zapata and Stewart, the one case the Supreme Court decided with reference to forum-selection clauses was Scherk v. Alberto-Culver Company, 417 U.S. 506 (1974). In Scherk, the Supreme Court stated that "[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause..." and held that "the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act." Scherk, 417 U.S. at 519-20. Scherk is generally viewed as a narrow decision mandating the enforcement of forum-selection clauses where there is federal legislation to that regard. See, e.g., General Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 357 (3d Cir. 1986).


82. 28 U.S.C. § 1404(a) (1982) is the federal authorization for transfer on the basis of convenience and justice. See infra note 90 and accompanying text.

83. Stewart, 487 U.S. at --, 108 S. Ct. at 2241 ("The core of the complaint was an allegation that respondent had breached the dealership agreement, but petitioner also included claims for breach of warranty, fraud, and antitrust violations.").
The contract between the Stewart Organization and Ricoh Corporation contained clauses designating courts in New York City as the chosen forum and New York law as the governing law. Ricoh Corporation moved that the case be transferred or dismissed in order to enforce the forum-selection clause. The district court denied the motions to transfer or dismiss, finding that the question was controlled by Alabama law and that Alabama law holds forum-selection clauses to be against public policy. The Eleventh Circuit Court of Appeals, after vacating a decision to enforce the forum-selection clause, decided en banc that federal law was applicable to this procedural question and that the forum-selection clause was enforceable under the standards of Zapata.

In its decision, the Supreme Court specifically narrowed the focus of the inquiry, determining that “[t]his case presents the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue provided in a contractual forum-selection clause.” Although the Supreme Court affirmed the court of appeals’ holding that the district court was wrong in applying state law, the Court explicitly distanced itself from the methodology used by the Eleventh Circuit. More specifically, the Court’s decision states:

[W]e disagree with the [court of appeals’] articulation of the relevant inquiry as “whether the forum selection clause in this case is unenforceable under the standards set forth in [Zapata].” Rather, the first question for consideration should have been whether section 1404(a) itself controls the respondent’s request to give effect to the parties’ contractual choice of venue and transfer this case to a Manhattan court.

The Supreme Court easily concluded that section 1404(a) of the Judicial Code, the federal authorization of transfer on the basis of convenience and justice, was broad enough to control the district court’s decision. After explaining that implementation of section 1404(a) requires the district court to conduct a balancing test taking into consideration the facts of each case, the Court stated that “[t]he flexible

85. Stewart, 487 U.S. at —, 108 S. Ct. at 2241.
86. Stewart, 810 F.2d at 1068-71.
88. Id. at —, 108 S. Ct. at 2243.
89. Id.
90. 28 U.S.C. § 1404(a) (1982) (“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.”).
and individualized analysis Congress prescribed in section 1404(a) thus encompasses consideration of the parties’ private expression of their venue preferences.”92 In Stewart, therefore, it is neither state law nor federal law according to Zapata which controls the enforceability of the forum-selection clause. In such a suit in federal court on the basis of diversity jurisdiction, where there is a motion to transfer in order to enforce a forum-selection clause, the issue is governed by federal law under section 1404(a).

VI. ENFORCEABILITY REMAINS UNPREDICTABLE AFTER STEWART93

In Stewart, the Supreme Court reinforced procedural uniformity without commenting on any need for consistency of contract interpretation. The balancing test applied under a section 1404(a) transfer motion will not guarantee the enforcement of a contractual forum-selection clause no matter how reasonable it may be. The overall validity of the clauses is further weakened because the burden of proof under Stewart is on the party trying to enforce the forum-selection clause. In addition, Stewart addressed only the narrow issue of dealing with a motion to transfer based on a forum-selection clause; little guidance is provided in Stewart on how a forum-selection clause should influence a decision when the motion is for dismissal rather than transfer.94 In the absence of such guidance from the Supreme Court, the lower courts are left to continue their polemics over whether the enforcement of a forum-selection clause is a contract issue governed by state law or a federal procedural issue to which the Zapata reasonableness test applies. Altogether, under Stewart, contracts become equivocal and the contracting parties lose predictability and certainty in their relationship.

92. Id. at —, 108 S. Ct. at 2244.
94. The only direction provided by the Court is found in a footnote indicating that a motion to dismiss for improper venue under 28 U.S.C. § 1404(a) should be denied where venue is proper, as it usually is in cases protesting implementation of forum-selection clauses. The Court says nothing about motions to dismiss based on other grounds. Stewart, 487 U.S. at —, 108 S. Ct. at 2243 n.8.
Four months after the *Stewart* decision, the Second Circuit had already concluded that "[p]ost the Supreme Court's pronouncement in *Stewart*, it is clear that a district court has even broader discretion to decide transfer motions under § 1404(a) than was provided by [*Zapata*]." 95 Whereas in *Zapata* the Supreme Court gave fairly specific guidelines for the determination of the "reasonableness" of a forum-selection clause, 96 it is widely acknowledged that "[t]he three factors mentioned in [section 1404(a)], convenience of parties and witnesses and the interest of justice, are broad generalities that take on a variety of meanings in specific cases." 97 In *Stewart*, the Court did explain that "[t]he presence of a forum-selection clause . . . will be a significant factor that figures centrally in the District Court's calculus;" 98 however, the Court's acknowledgement of the importance of enforcing a contractual commitment could have been stronger, as it was in *Zapata*. 99

The post-*Stewart* federal court decisions which have looked at forum-selection clauses indicate that contracting parties cannot rely on the enforceability of the clauses. The broadened discretion of the district court is one reason for this uncertainty with regard to the enforcement of the clauses. The Ninth Circuit, for example, in *Sparling v. Hoffman Construction Co., Inc.*, 100 has deemed it appropriate for the district court to have transferred a case to a forum other than the one which was contractually chosen. In *Sparling*, the district court in Washington transferred the suit to Anchorage, Alaska, even though

---


96. See supra text accompanying notes 35-38 for a discussion of *Zapata*'s three factors for determining reasonableness: arm's-length negotiations absent a showing of fraud or overreaching; no contravention of a strong public policy of the forum; and no showing that the chosen forum would be "seriously" inconvenient. See also D'Antuono v. CCH Computax Sys., Inc., 570 F. Supp. 708, 712 (D.R.I. 1983) for an enumeration of nine factors applied by federal courts to determine the enforceability of forum-selection clauses.

97. 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3847 (1986). For comparison's sake, it should be noted that the district court's discretionary power under § 1404(a) is considered to be greater than that under a *forum non conveniens* decision. See Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).


99. Justice Kennedy, in his concurring opinion, was more willing than the rest of the Court to give greater weight to a forum-selection clause in a § 1404(a) balancing test. *Id.* at —, 108 S. Ct. at 2250 (Kennedy, J., concurring, joined by O'Connor, J.) ("[T]he authority and prerogative of the federal courts to determine the issue, as Congress has directed by § 1404(a), should be exercised so that a valid forum selection clause is given controlling weight in all but the most exceptional cases.") (quoting *Zapata*, 407 U.S. 1, 10 (1972)).

100. 864 F.2d 635 (9th Cir. 1988).
Kenai, Alaska, was the contractually chosen forum. The Ninth Circuit did not cite *Stewart*, but it relied on section 1404(a) of the Judicial Code for its allocation of discretion to the district court.\(^\text{101}\) When the case of *Stewart Organization, Inc. v. Ricoh Corp.* came before the District Court for the Northern District of Alabama on remand,\(^\text{102}\) that court denied Ricoh Corporation's motion to transfer the suit to the Southern District of New York. After considering what it found to be the relevant factors of convenience and justice as required under section 1404(a) of the Judicial Code, the district court stated:

> Not only because of the presumption favoring a plaintiff's choice of forum and Ricoh's failure here to present evidence sufficient to rebut that presumption, but because both the private and public interests militate against a transfer to Manhattan, this court concludes that the Northern District of Alabama is an entirely appropriate forum for trying this action.\(^\text{103}\)

Although the district court admitted that "[i]n this case, the forum-selection clause facially indicates a meeting of the minds to the effect that New York is the proper forum,"\(^\text{104}\) it was the court's opinion that "[t]he north slope [of Alaska] contains as many witnesses and documents and contacts bearing on this controversy as Manhattan does."\(^\text{105}\) The Eleventh Circuit Court of Appeals must now decide whether it was within the district court’s discretion under section 1404(a) to determine that factors of the convenience of the plaintiff's chosen forum outweighed the factors of contractual justice.

The district court’s analysis in *Stewart* on remand brings to the fore another result of the Supreme Court’s *Stewart* decision. In *Stewart*, not only did the Supreme Court signal that the district courts have broader discretion than under the *Zapata* reasonableness test, but the burden of proof was shifted. The party trying to enforce the forum-selection clause bears the burden of proof under *Stewart*, whereas in cases governed by *Zapata* that burden is on the party contesting the enforceability of the forum-selection clause. Such burden-shifting considerably undermines the validity of all forum-selection clauses and sends a signal of the unreliability of the clauses to all contracting parties.

Finally, the Supreme Court's narrow focus on motions to transfer in *Stewart* means that the lower courts are still without direction in

\(^\text{101. Id. at 14.}\)  
\(^\text{102. 696 F. Supp. 583 (N.D. Ala. 1988).}\)  
\(^\text{103. Id. at 591.}\)  
\(^\text{104. Id. at 590.}\)  
\(^\text{105. Id.}\)
cases where a forum-selection clause is the basis for a motion to dismiss. In a footnote, the Supreme Court did provide a general reminder of how to deal with cases which do not fall under the *Stewart* holding:

If no federal statute or Rule covers the point in dispute, the District Court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws . . . ." If application of federal judge-made law would disserve these two policies, the District Court should apply state law.106

The lower courts, however, have not found the Supreme Court's instructions particularly helpful in determining whether state law or federal law governs their decision about a motion to dismiss a suit in order that a forum-selection clause might be enforced.107 In a post-*Stewart* case dealing with just such a motion to dismiss, the Third Circuit acknowledged the Supreme Court's reference to meeting *Erie*'s twin aims.108 Rather than determine exactly how to apply the Supreme Court's advice, the Third Circuit found that: "Fortunately, we need not resolve this unanswered question of whether federal law, the law of the forum state, the law of Canada, or one of its provinces applies. All of these jurisdictions look favorably on forum selection clauses."109 On the other hand, in a case before it on a motion to dismiss, the Ninth Circuit has emphatically concluded that "the federal procedural issues raised by forum selection clauses significantly outweigh the state interests, and the federal rule announced in *Zapata* controls enforcement of forum clauses in diversity cases."110

In short, most of the post-*Zapata* controversies have reappeared in a post-*Stewart* guise, and the reliability of contractual forum-selection clauses remains questionable.

---

107. See supra text accompanying notes 42-64.
109. *Id.* (footnote omitted). On a motion to dismiss in order to enforce a forum-selection clause, the Seventh Circuit has also avoided the problem of deciding whether state or federal law applies by finding the result would be the same in either case. Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal, 859 F.2d 1302, 1309 (7th Cir. 1988).
110. Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988). The Ninth Circuit relies in part on Justice Kennedy's statement in his concurring opinion in *Stewart* that forum-selection clauses should be "given controlling weight in all but the most exceptional cases." See supra note 99.
VII. Conclusion

The similarities between the post-Zapata and post-Stewart controversies over the enforcement of forum-selection clauses in federal courts indicate that the Supreme Court does not feel competent to legislate in this area. The Zapata Court had the authority to create the reasonableness rule because of the federal courts’ role as significant lawmakers with regard to admiralty questions; however, in the Stewart decision, the Supreme Court refused to accept such a role in non-admiralty diversity cases. Yet without legislation in this field, forum-selection clauses are unreliable to an extent probably not fully appreciated by most contracting parties.

Alaska and other states may find legislation such as that in New York useful if their state courts frequently have to deal with the question of the enforceability of forum-selection clauses in commercial contracts. The effectiveness of such state statutes, however, is limited to litigation in the state courts. If the Supreme Court will not squarely address the issue at the federal court level, then congressional legislation is required, just as it was to legitimize arbitration clauses. The Zapata Court’s determination of the need to promote trade and ensure certainty and predictability in contractual relationships applies equally to non-admiralty commerce. When sophisticated commercial parties contractually agree ahead of time to a forum for the settlement of their disputes, there is no rational substantive justification for not holding them to that agreement.

Phoebe Kornfeld

Postscript

As this note went to press, the Eleventh Circuit Court of Appeals announced its decision on the petition which had been filed by Ricoh Corporation seeking a writ of mandamus to compel transfer to New York of the case of Stewart Organization, Inc. v. Ricoh Corp. The court of appeals issued the writ, thereby granting enforcement of the forum-selection clause in the contract between Stewart Organization and Ricoh Corporation.

In its per curiam decision, the court of appeals relied on both the Supreme Court’s holding in Stewart Organization, Inc. v. Ricoh

112. The comparison between arbitration clauses and forum-selection clauses is not new. See supra note 16. In the immediate post-Zapata period there was recognition that, as had been the case with arbitration clauses, the ultimate assurance for the enforceability of forum-selection clauses would depend on federal legislation. See Nadelmann, supra note 46, at 135.
and on Justice Kennedy's concurring opinion in that case. The court of appeals first determined that when a motion to transfer under section 1404(a) of the Judicial Code involves an attempt to enforce a forum-selection clause, the burden of persuasion is on the party trying to prevent transfer to the contractually chosen forum. Thus, the district court was found to be incorrect when it deferred to Stewart Organization's choice of forum in Alabama, because doing so would "only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system."

The court of appeals also found that the district court had not properly followed the Supreme Court's instructions for analyzing the 1404(a) convenience question. Whereas the district court had deliberated whether the plaintiff's chosen forum, Alabama, was a convenient forum, the court of appeals pointed out that the Supreme Court directed the district court to consider "the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum selection clause and the parties' relative bargaining power."

In addition, the court of appeals emphasized the Supreme Court's acknowledgment that a "choice of forum clause is 'a significant factor that figures centrally in the District Court's calculus.'" Finding that in the facts there was no "'exceptional' situation in which judicial enforcement of a contractual choice of forum clause would be improper," the court of appeals concluded that the district court had abused its discretion when it refused to transfer the case to the contractually chosen forum.

The discrepancy between the holdings of the District Court for the Northern District of Alabama and the Eleventh Circuit Court of Appeals subsequent to the Supreme Court's Stewart decision epitomizes the problems which will continue to plague parties trying to enforce forum-selection clauses. As discussed above in Section VI, not all of the courts of appeals will be as willing as the Eleventh Circuit to rely so heavily on the strong presumption in favor of enforcing

115. Id. at ----, 108 S. Ct. at 2249-50 (Kennedy, J., concurring, joined by O'Connor, J.).
117. Id. (citing Stewart, 487 U.S. at ----, 108 S. Ct. at 2249).
118. Stewart, 487 U.S. at ----, 108 S. Ct. at 2244 (quoted in In re Ricoh Corp., No. 88-7694 at 4-5) (emphasis added by the court of appeals in In re Ricoh Corp.).
119. In re Ricoh Corp., No. 88-7694 at 5 (quoting Stewart, 487 U.S. at ----, 108 S. Ct. at 2244) (emphasis added by the court of appeals in In re Ricoh Corp.).
120. Id. at 6 (citing Stewart, 487 U.S. at ----, 108 S. Ct. at 2250 (Kennedy, J., concurring)).
121. See supra text accompanying notes 95-110 for a discussion of the post-Stewart debate as it has already manifested itself in the federal courts.
forum-selection clauses that was expressed by only two Justices in the concurring opinion in *Stewart*.\(^{122}\) In the absence of any federal legislation on the issue, it cannot be long before the Supreme Court is once again asked to settle some of these controversies; however, there is little indication that the Supreme Court will focus on the substantive issue and support the principle of the enforcement of contractual obligations.

---

\(^{122}\) *Stewart*, 487 U.S. at —, 108 S. Ct. at 2249-50 (Kennedy, J., concurring, joined by O'Connor, J.).