FINANCIAL HARDSHIP AND FORUM SELECTION CLAUSES*

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The U.S. Supreme Court has long held that a forum selection clause should not be enforced when a trial in the chosen forum would be "so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court." The financial status of the plaintiff is obviously a factor that is relevant to this inquiry. Large corporations can usually afford to litigate a case in a distant court. Individual plaintiffs frequently lack the resources to do so. Nevertheless, the lower federal courts have repeatedly held that the plaintiff's financial circumstances are not relevant to the question of whether a forum selection clause should be enforced.

The unsurprising result is a trail of abandoned lawsuits. In case after case, plaintiffs have been forced to relinquish their claims because they could not afford to litigate in the chosen forum. This outcome is particularly common when the forum selection clause selects a court in a foreign country. It is expensive to hire a foreign lawyer, arrange for foreign travel, transport witnesses and documents to a foreign nation, and translate materials into a foreign language. The accumulated weight of these difficulties, inevitably, will lead many plaintiffs to abandon their suits. In such cases, the forum selection clause does not serve to redirect the lawsuit to the courts of the chosen jurisdiction. It serves to immunize the defendant from all liability.

This Article urges courts to reimagine the role that financial hardship plays in the enforceability inquiry. It argues that U.S. judges can and should consider the financial resources available to plaintiffs in assessing whether they will be deprived of their day in court. If a plaintiff cannot afford to hire an attorney in the chosen jurisdiction, for example, then the forum selection clause should not be enforced. Although forum selection clauses serve a useful purpose, they should not operate to shield a defendant from liability for claims brought by

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I would like to thank Pam Bookman, Gralf-Peter Calliess, Harlan Cohen, Bill Dodge, Robin Effron, Kate Elengold, Maggie Garner, Ethan Lieb, Aaron Simowitz, Kathleen Thomas, Chris Whytock, participants in the 2023 Summer Private International Law Workshop at Fordham Law School, and the faculty of the University of North Carolina School of Law for their comments on an earlier draft of this paper. Thanks to Weston Barker for his excellent research assistance.

impoverished plaintiffs. Under the current legal regime, they often do precisely that.

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INTRODUCTION

In 2012, Alfred Zaklit and Mokhtar Farag were hired by Global Linguist Solutions, LLC ("GLS") and deployed to Kuwait to work as Arabic translators for the U.S. Army.[1] Zaklit and Farag were both California residents.[2] GLS was headquartered in Virginia.[3] The terms of their employment agreements required GLS to provide them with hardship pay, thirty days of vacation, and a completion bonus.[4] After their arrival in Kuwait, each man was required to sign a new employment agreement.[5] These new agreements did not provide for hardship pay, made no mention of a completion bonus, and reduced the number of vacation days to five.[6] The new agreements also contained forum selection clauses mandating that all disputes be resolved in Virginia.

1. Zaklit v. Glob. Linguist Sols., LLC, No. CV 13-08654, 2014 WL 12521725, at *53–54 (C.D. Cal. Mar. 24, 2014).
2. *Id.* at *5.
3. *Id.* at *4.
4. *Id.* at *11.
5. *Id.* at *8.
6. *Id.*

In late 2013, Zaklit and Farag were terminated by GLS.[7] They brought a lawsuit against the company in federal court in California.[8] GLS moved to transfer the case to Virginia based on the forum selection clause.[9] Zaklit and Farag opposed the motion.[10] They informed the court that they were "currently unemployed" and had "no income."[11] They further stated that they could not "afford the finances and time to travel to Virginia to hold GLS responsible for its actions."[12] The court sided with GLS.[13] It noted that the two men had not alleged that "they have no savings, that members of their family cannot assist financially, or that they are unlikely to find a job in the near future that would allow them to travel to Virginia."[14] Accordingly, the court held that the plaintiffs had not met their heavy burden of proving the chosen forum was so inconvenient as to render the forum selection clause unenforceable.[15] The case was transferred to Virginia.[16]

* * *

In 2003, Ally Baker, a seventeen-year-old tennis player domiciled in North Carolina, signed an endorsement agreement with Adidas International Marketing BV ("Adidas International"), a company headquartered in the Netherlands.[17] Baker agreed to wear Adidas shoes and apparel in exchange for a total payment of $65,000 over three years.[18] The contract contained a forum selection clause stating that any lawsuit initiated by Baker had to be brought in Amsterdam.[19]

After signing the contract, Baker dealt exclusively with Adidas International's U.S. subsidiary, Adidas America, Inc. ("Adidas America"), a Delaware corporation headquartered in Portland, Oregon.[20] When a foot injury ended her tennis career, Baker sued Adidas America in federal court in North Carolina.[21] She alleged that her injury was caused by the shoes negligently selected and provided by Adidas America.[22] Adidas America moved to dismiss

7. *Id.* at *11.
8. *Id.* at *1.
9. *Id.* at *3.
10. *Id.* at *4.
11. *Id.* at *11.
12. *Id.*
13. *Id.* at *64.
14. *Id.* at *54.
15. *Id.*
16. *Id.* at *64.
17. Baker v. Adidas Am., Inc., 335 F. App'x 356, 361 (4th Cir. 2009).
18. *Id.* at 358.
19. *Id.* at 357–58. The clause imposed no restrictions on Adidas International's ability to initiate a lawsuit against Baker. *Id.*
20. *Id.* at 357.
21. *Id.* at 358.
22. *Id.*

the case based on the forum selection clause in the contract between Baker and Adidas International.[23] The plaintiff argued that the clause was unenforceable because she had been a minor when she first signed the contract and was financially unable to pursue her claims in Amsterdam.[24] She pointed out that, at the time of the lawsuit, she was "a college student . . . with no source of income."[25] She averred that she could not "afford the extraordinary expense of traveling to Amsterdam and paying for attorneys there to prosecute these claims."[26] The court was unmoved. It held that the financial burdens of litigating in Amsterdam were foreseeable to the plaintiff at the time of contracting and that she had not adequately demonstrated that enforcing the clause would be unjust.[27] The case was dismissed.[28]

* * *

In 2017, Patrick and Kim Parks, both residents of Virginia, purchased a motorhome manufactured by the Newmar Corporation ("Newmar"), a company headquartered in Indiana.[29] Soon after the purchase, the Parkses noticed an alarming number of defects in the vehicle.[30] Although a local dealer performed repairs, the problems persisted to the point where the motorhome was so unsafe that it could not be driven.[31]

The Parkses sued Newmar in federal court in Virginia.[32] Newmar promptly moved to transfer the claim to Indiana based on a forum selection clause in the sales agreement.[33] The Parkses argued that the clause was unenforceable because it "unfairly forces the Plaintiffs, their witnesses and experts, to travel just under 1,400 miles round-trip, at great personal expense and inconvenience."[34] Patrick Parks testified that it would be a "financial burden on him and his family to litigate the case in Indiana because he would have to pay to travel to Indiana while taking additional time off work to travel."[35] The court rejected these arguments. It acknowledged that litigating in Indiana would

23. U.S. courts have consistently held that corporate affiliates may take advantage of forum selection clauses in contracts to which they are not party so long as they are so "closely related" to the contract signatory that it was "foreseeable" that they would be bound by the contract. *See* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 198–205 (2021). That appears to be what happened here.

24. *Baker*, 335 F. App'x at 359.

25. *Id.*

26. *Id.* at 361.

27. *Id.*

28. *Id.*

29. Parks v. Newmar Corp., No. 3:19-cv-352, 2020 WL 265870, at *1 (E.D. Va. Jan. 17, 2020).

30. *Id.* at *2.

31. *Id.*

32. *Id.* at *1.

33. *Id.*

34. *Id.* at *3.

35. *Id.*

be "inconvenient and likely more expensive" for the Parkses.[36] It concluded, however, that this sort of inconvenience is the sort that is "normally associated with litigating a claim."[37] The case was transferred to Indiana.[38]

* * *

More than fifty years ago, the U.S. Supreme Court held that a forum selection clause is unenforceable when "trial in the contractual forum will be so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court."[39] This legal standard is somewhat unusual in that it requires the court to predict the future. Will enforcing the clause lead the plaintiff to abandon his suit, thereby depriving him of his day in court? If so, the clause is unenforceable.[40] Or will enforcing the clause lead the plaintiff to refile the suit in the chosen jurisdiction? If so, the clause should be given effect.

In the cases above, the judges went two for three on their predictions. In the first case, involving the translators working in Kuwait, the court accurately predicted that enforcing the Virginia forum selection clause would not deprive the plaintiffs of their day in court. After the case was transferred, the litigation continued apace in Virginia.[41] In the third case, involving the motorhome, the court was also correct. After the case was transferred, the litigation proceeded in Indiana.[42] In these cases, the courts correctly intuited that, the plaintiffs' protestations of inconvenience and financial hardship notwithstanding, enforcing the forum selection clause would not deprive them of their day in court.

In the second case, involving the suit by Ally Baker against Adidas, the court got it wrong. The suit was never refiled in the Netherlands. When I contacted Baker's attorney to ask why, I was told that Baker simply lacked the financial resources to continue the legal battle in the Dutch courts.[43] If the court

36. *Id.* at *4.

37. *Id.*

38. *Id.*

39. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

40. Jeffrey A. Liesemer, *Carnival's Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine After* Carnival Cruise Lines v. Shute, 53 U. PITT. L. REV. 1025, 1045 ("In the context of forum clauses, the 'evil outcome' would occur if one party is unable to bring the case in a distant contractual forum and therefore must abandon the claim.").

41. *See* Zaklit v. Glob. Linguist Sols., LLC, No. 1:14cv314, 2014 WL 3109804, at *5 (E.D. Va. July 8, 2014); Zaklit v. Glob. Linguist Sols., LLC, 53 F. Supp. 3d 835, 842 (E.D. Va. 2014); Zaklit v. Glob. Linguist Sols., LLC, No. 1:14cv314, 2014 WL 4161981, at *4 (E.D. Va. Aug. 19, 2014); Zaklit v. Glob. Linguist Sols., LLC, No. 1:14cv314, 2014 WL 4925780, at *2 (E.D. Va. Sept. 30, 2014).

42. *See* Complaint, Parks v. Newmar Corp., No. 3:20-cv-00070 (N.D. Ind. Jan. 23, 2020); *see also* Parks v. Newmar Corp., No. 3:19-cv-352, 2020 WL 265870, at *4 (E.D. Va. Jan 17, 2020) (granting the motion to transfer venues to the Northern District of Indiana).

43. Telephone Interview with Counsel for Plaintiff (Dec. 16, 2022) (notes on file with author).

had been able to foresee this outcome, it may well have decided not to enforce the clause. But predicting the future is a tricky business. Sometimes the team with the higher draft pick selects Sam Bowie.[44] Sometimes it selects Peyton Manning.[45] In the immortal words of Yogi Berra: "It's tough to make predictions, especially about the future."[46]

The mere fact that predicting the future is difficult, however, does not mean that all methods of prediction are equally reliable. If one is planning an outdoor wedding and wants to know whether it is likely to rain on a particular date in May, for example, one could try to answer this question in any number of ways. One possibility would be to visit a fortune teller who specializes in tyromancy—the art of divining the future by interpreting omens found in cheese—and ask for a forecast.[47] Another would be to review the weather reports for the past fifty years to learn how frequently it has rained on that date. There is no guarantee that either prediction will prove accurate. On the whole, however, the weather reports are probably more reliable than the fortune teller.

Unfortunately, courts in the United States have a curious tendency to ignore weather reports in cases involving forum selection clauses. In particular, these courts routinely decline to take the plaintiff's financial resources into account even though history clearly shows that these resources are relevant to the inquiry.[48] When a wealthy corporation is directed to litigate in a distant forum, it will typically have the resources to do so. Enforcing the clause is unlikely to deprive that corporation of its day in court. When an ordinary person is directed to litigate in a distant forum, that person will in many cases lack the necessary resources to bring the suit there. In these cases, enforcing the clause will effectively deprive the plaintiff of his day in court. This fact notwithstanding, courts in the United States have consistently held that the

44. The Portland Trailblazers famously selected Sam Bowie ahead of Michael Jordan in the 1984 NBA Draft. Jeremy Brener, *Looking Back at Drafting Sam Bowie*, BLAZER'S EDGE (May 15, 2022, 1:37 PM), https://www.blazersedge.com/2022/5/15/23074098/portland-trail-blazers-nba-draft-history-lottery-sam-bowie-michael-jordan-hakeem-olajuwon [https://perma.cc/32YM-NJW2]. Bowie went on to have a middling career marred by injuries. *Id.* Jordan went on to be Jordan. *Id.*

45. The Indianapolis Colts famously selected Peyton Manning ahead of Ryan Leaf in the 1998 NFL Draft. Bob Kravitz, *Peyton Manning and Ryan Leaf: The QBs, the Myths, the Legends of the 1998 NFL Draft*, N.Y. TIMES: THE ATHLETIC, https://www.nytimes.com/athletic/4453358/2023/04/27/peyton-manning-ryan-leaf-nfl-draft/ [https://perma.cc/R6S9-JXHK (staff-uploaded, dark archive)] (last updated Apr. 29, 2023). Manning was selected as the Most Valuable Player in the NFL in five different seasons. *Id.* Leaf had a career record of 4 wins and 21 losses as a starting quarterback. *Id.*

46. *Quote Origin: It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), https://quoteinvestigator.com/2013/10/20/no-predict [https://perma.cc/9KJ7-3CN7].

47. *Tyromancy*, OCCULTOPEDIA, https://www.occultopedia.com/t/tyromancy.htm [https://perma.cc/LF8T-LFGD].

48. *See infra* Part II.

plaintiff's financial resources should not be considered as part of the enforceability inquiry.[49]

The unsurprising result is a trail of abandoned lawsuits. In case after case, plaintiffs like Ally Baker have relinquished their claims because they could not afford to litigate in the chosen forum.[50] This trend is especially pronounced when the clause selects the courts in a foreign country. It is expensive to hire a foreign lawyer, arrange for foreign travel, transport witnesses and documents to another nation, and translate materials into another language. The accumulated weight of these difficulties will, inevitably, prompt some plaintiffs to drop their suits. In these cases, enforcing the forum selection clause does not result in the lawsuit continuing in the courts of the chosen jurisdiction; it results in the abandonment of the lawsuit, thereby immunizing the defendant from all liability.[51]

This Article argues that this outcome is both doctrinally incorrect and deeply unfair. It argues that U.S. courts can and should consider the financial resources of the plaintiff as part of the enforcement inquiry and that they should pay particularly close attention to whether the plaintiff can realistically afford to hire a lawyer in the chosen jurisdiction. To do otherwise is to ignore the Supreme Court's admonition that a forum selection clause should not be enforced when a trial in the chosen jurisdiction "will be so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court."[52]

The Article proceeds as follows. Part I reviews the trilogy of Supreme Court cases that discuss the relationship between clause enforceability and inconvenience: *The Bremen v. Zapata Off-Shore Co*,[53] *Carnival Cruise Lines v.*

49. *Id.*

50. For a list of recent cases where a plaintiff did not refile the suit in the foreign forum after the suit was dismissed, see Lewis v. Liberty Mut. Ins. Co., 953 F.3d 1160, 1168 (9th Cir. 2020); Du Quenoy v. Am. Univ. of Beirut, 828 F. App'x 769, 771 (2d Cir. 2020); Aimsley Enters. v. Merryman, No. 19-cv-02101, 2020 WL 1677330, at *18 (N.D. Cal. Apr. 6, 2020); Sheehan v. Viking River Cruises, Inc., No. 20-cv-0753, 2020 WL 6586231, at *10 (D. Minn. Nov. 10, 2020); White Knight Yacht, LLC v. Certain Lloyds at Lloyd's London, 407 F. Supp. 3d 931, 945 (S.D. Cal. 2019); Keenan v. Berger, No. CIV-18-584-R, 2019 WL 1590589, at *15 (W.D. Okla. Apr. 12, 2019); Gordon v. Sandals Resorts Int'l, Ltd., 418 F. Supp. 3d 1132, 1141 (S.D. Fla. 2019); McCoy v. Sandals Resorts, Ltd., No. 19-cv-22462, 2019 WL 6130444, at *46 (S.D. Fla. Nov. 18, 2019); Robb v. Island Hotel Co., No. 18-cv-60544, 2018 WL 11466939, at *21 (S.D. Fla. Oct. 31, 2018).

51. *Cf.* Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. REV. 959, 974 (2007) ("Data, such as they are, suggest that forum non conveniens dismissals are equivalent to outright defense victories. One survey of eighty-five cases dismissed under that doctrine in favor of a foreign tribunal demonstrated that every one was abandoned or settled for paltry amounts. And in *Piper*, as we saw, no lawyer found it worthwhile to pursue litigation in the United Kingdom. In practice, then, granting forum non conveniens is often tantamount to granting substantive dismissal, without the presentation of one shred of evidence on the merits.").

52. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

53. 407 U.S. 1 (1972).

Shute,[54] and *Atlantic Marine Construction Company v. United States District Court*.[55] It shows that the test for enforceability originally laid down in *The Bremen* continues to provide the relevant legal standard against which to evaluate claims that the plaintiff lacks the financial resources to litigate in the chosen jurisdiction.

Part II explores how the lower federal courts apply this standard in practice. It shows that they have consistently held over several decades that the financial resources available to the plaintiff are for the most part irrelevant to whether a forum selection clause should be deemed enforceable.

Part III considers some of the reasons why the courts have gone down this path. It argues that the lower federal courts have misread the relevant Supreme Court precedents and blindly assumed that enforcement always represents good policy. It further argues that the collective weight of the rationales proffered by the courts is not enough to justify the status quo.

Part IV aspires to give courts better information on which to base their decisions when a plaintiff invokes financial hardship as a basis for nonenforcement. Drawing upon interviews with several dozen lawyers with first-hand experience litigating these cases, it argues that plaintiffs are much more likely to abandon a case due to a lack of resources when the clause calls for litigation in a foreign country. Accordingly, the Article concludes by arguing that the courts should generally refuse to enforce foreign forum selection clauses in the face of credible claims of financial hardship.

I. THE TRILOGY

To understand the role that inconvenience and financial hardship play in determining whether a forum selection clause should be enforced, one must begin with the trilogy of Supreme Court cases that address forum selection clauses. These are *The Bremen*, *Carnival Cruise*, and *Atlantic Marine*.

A. The Bremen

In late 1967, a Texas-based company ("Zapata") contracted with a German company ("Unterweser") to tow an oil rig from the Gulf of Mexico to the Adriatic Sea.[56] The contract contained a forum selection clause which provided that "[a]ny dispute arising must be treated before the London Court of Justice."[57] In early 1968, the Bremen—a deep-sea tug owned by Unterweser—departed from Louisiana with the rig in tow.[58] After the rig was damaged in a

54. 499 U.S. 585 (1991).
55. 571 U.S. 49 (2013).
56. *Bremen*, 407 U.S. at 2.
57. *Id.*
58. *Id.* at 3.

storm, the Bremen diverted to the nearest port of refuge: Tampa, Florida.[59] Zapata brought an action in admiralty against Unterweser in the federal court located in Tampa.[60] Unterweser moved to dismiss based on the London forum selection clause.[61]

Up to this point in U.S. legal history, most courts had held that forum selection clauses were unenforceable because they purported to "oust" the courts of jurisdiction.[62] They also expressed concerns that such clauses, if given effect, might be used to divert litigation to a forum where the defendant's personal, social, or political standing could affect the outcome of the case.[63] Against this backdrop, the trial court hearing the dispute between Zapata and Unterweser held that the clause was unenforceable and denied Unterweser's motion to dismiss.[64] This decision was affirmed on appeal to the Fifth Circuit.[65] When the case came before the U.S. Supreme Court, however, that Court cast aside more than a century of precedent and held that forum selection clauses should generally be given effect.[66] In so doing, it articulated a general test for determining whether a clause is enforceable that federal courts continue to apply today.

In *The Bremen*, the Supreme Court first held that forum selection clauses were *prima facie* enforceable.[67] The party resisting enforcement bore a "heavy burden" of proof in establishing that the clause should not be given effect.[68] There were, however, at least two scenarios where a clause should not be enforced. First, the Court held that a clause "should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[69] Second, the Court held that a clause should not be given effect if it was "unfair, unjust, or unreasonable."[70]

The Court specifically observed that a clause might be "unreasonable" if the chosen forum was located in an inconvenient location.[71] The Court set a high bar, however, for invalidating clauses on this basis. It held that it was "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*

59. *Id.*
60. *Id.* at 3–4.
61. *Id.* at 4.
62. Home Ins. Co. v. Morse, 87 U.S. (20 Wall) 445, 451 (1874).
63. Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184 (1856).
64. *In re* Unterweser Reederei, 296 F. Supp. 733, 733 (M.D. Fla. 1969).
65. *In re* Unterweser Reederei, 428 F.2d 888, 895 (5th Cir. 1970).
66. *Bremen*, 407 U.S. at 10.
67. *Id.*
68. *Id.* at 17.
69. *Id.* at 15.
70. *Id.* at 18.
71. *Id.*

practical purposes be deprived of his day in court."[72] The fact that it might be "far more inconvenient for Zapata to litigate in London" than "for Unterweser to litigate in Tampa" was not dispositive.[73] The question, the Court stressed, was whether litigating in London "will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court."[74]

The Court then went on to identify an addendum to this rule. When two Americans agree to resolve an "essentially local dispute" in a "remote alien forum," it held, then "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause."[75] If a California-based plaintiff and a California-based defendant agreed to litigate their dispute in Tokyo, Japan, in short, the courts should take a harder look at whether the clause was unenforceable on the basis of inconvenience. This exception was not relevant on the facts presented in *The Bremen*, however, because the towing contract was not between two American companies. Instead, the Court framed the parties' choice of the London courts as "a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation."[76]

It is important to emphasize that the test for inconvenience adopted by the Court in *The Bremen* is tailored to the individual circumstances of the specific plaintiff resisting enforcement. It is not an objective test. A clause is unenforceable if the resisting party "will *for all practical purposes* be deprived of his day in court"[77] or if the resisting party will be "*effectively* deprived of its day in court."[78] The Court ultimately remanded the case for the lower court to decide whether "a London trial will be so manifestly and gravely inconvenient *to Zapata* that it will be effectively deprived of a meaningful day in court."[79] The question wasn't whether a hypothetical plaintiff would be able to refile the suit in London. The question was whether this particular plaintiff could do so.

B. Carnival Cruise

In *Carnival Cruise Lines v. Shute*, decided in 1991, the Supreme Court heard another admiralty case involving a forum selection clause.[80] This clause was not written into a commercial contract between two sophisticated corporations. Instead, it was written into a contract of adhesion between a cruise company

72. *Id.* (emphasis added).
73. *Id.* at 19.
74. *Id.*
75. *Id.* at 17.
76. *Id.*
77. *Id.* (emphasis added).
78. *Id.* at 18 (emphasis added).
79. *Id.* at 19 (emphasis added).
80. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 585 (1991).

and one of its passengers.[81] The Court's decision in this case marks the only time it has ever had occasion to apply the "deprived of his day in court" standard first articulated in *The Bremen*.

The plaintiff in *Carnival Cruise* was a woman, Eulala Shute, who lived in Washington.[82] She and her husband purchased a ticket for a cruise ship traveling between Los Angeles, California, and Puerto Vallarta, Mexico.[83] The ship was operated by Carnival Cruise, a Panamanian company headquartered in Miami, Florida.[84] While touring the galley of the ship, the plaintiff fell and was injured.[85] After returning home, she brought a negligence suit against Carnival Cruise in federal district court in Washington.[86] The company moved to dismiss on two grounds. First, it argued that the court lacked personal jurisdiction over it.[87] Second, it argued that the forum selection clause in the ticket required the case to be tried in Miami, Florida.[88]

The district court dismissed the case for lack of personal jurisdiction.[89] It did not address the enforceability of the Florida forum selection clause.[90] On appeal, the Ninth Circuit reversed the district court on the issue of personal jurisdiction.[91] It then went on to consider whether the forum selection clause was enforceable under the test laid down in *The Bremen*. In concluding that the clause was not enforceable, the Ninth Circuit noted the presence of "evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida."[92] Accordingly, the court held that "enforcement of the clause in this case would be so gravely difficult and inconvenient that the plaintiffs would for all practical purposes be deprived of [their] day in court."[93]

The Supreme Court reversed.[94] The Court observed that "the District Court made no finding regarding the physical and financial impediments to the Shutes' pursuing their case in Florida."[95] It also noted that the Ninth Circuit's

81. *Id.* at 590.

82. *Id.* at 587.

83. *Id.* at 588.

84. *Id.* at 604 n.6.

85. *Id.* at 589.

86. *Id.* at 588.

87. *Id.*

88. *Id.* at 588–89.

89. Shute v. Carnival Cruise Lines, 1988 Am. Mar. Cases 591, 593 (W.D. Wash. 1987). For the convoluted procedural history of the case recounted in great detail, see Linda S. Mullinex, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 332–41 (1992).

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

91. Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990).

92. *Id.*

93. *Id.*

94. 499 U.S. at 597.

95. *Id.* at 594.

"conclusory reference to the record provides no basis for this Court to validate the finding of inconvenience."[96] The Court pointed out that "Florida is not a 'remote alien forum,' nor—given the fact that Mrs. Shute's accident occurred off the coast of Mexico—is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida."[97] The Court ultimately held that the plaintiffs "ha[d] not satisfied the 'heavy burden of proof' required to set aside the clause on grounds of inconvenience."[98]

While the Court's decision in *Carnival Cruise* has attracted considerable criticism, that criticism has overwhelmingly focused on the fact that the clause was enforced notwithstanding the fact that it was written into a consumer contract of adhesion.[99] On the issue of inconvenience, the Court's reasoning is defensible. The only evidence that the plaintiff submitted relating to inconvenience consisted of the following declaration by Eulala Shute: "The expense of proceeding with this lawsuit against Carnival Cruise Lines in Florida, including the transportation of witnesses thereto, would be prohibitively burdensome both financially and physically. I doubt that I would be able to pursue my lawsuit if it were transferred to Florida."[100] This statement was plainly insufficient for the plaintiff to carry her "heavy" burden of showing that she would be "deprived of [her] day in court" if the clause were enforced.[101]

The Supreme Court's skepticism of this statement was, moreover, validated by future events. After the Court held that the clause was enforceable, Eulala Shute sued Carnival Cruise in Florida.[102]

C. Atlantic Marine

The final case in the trilogy is *Atlantic Marine Construction Company v. United States District Court*.[103] Atlantic Marine Construction Company ("Atlantic Marine"), a company headquartered and incorporated in Virginia, entered into a contract with J-Crew Management, Inc. ("J-Crew"), a Texas

96. *Id.*

97. *Id.* (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).

98. *Id.* at 595 (quoting *Bremen*, 407 U.S. at 17).

99. *See, e.g.*, Mullenix, *supra* note 89, at 325–26; Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 61–68 (1995); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 736–37 (1992); Charles L. Knapp, *Contract Law Walks the Plank:* Carnival Cruise Lines, Inc. v. Shute, 12 NEV. L.J. 553, 558–59 (2012).

100. Joint Appendix at 11–12, *Carnival*, 499 U.S. 585 (No. 89-1647).

101. Walker v. Carnival Cruise Lines, 107 F. Supp. 2d 1135, 1139 (N.D. Cal. 2000) (quoting *Bremen*, 407 U.S. at 18); *id.* at 1140 (citing *Carnival*, 499 U.S. at 594) ("Although the *Carnival* Court rejected the Ninth Circuit's reliance upon [the serious inconvenience] exception, the Court did so based upon the district court's failure to provide a sufficient factual basis to support a finding that the Shutes were economically incapable of pursuing the litigation in Florida, not upon any categorical rejection of the premise that incapability—financial or otherwise—could amount to fundamental unfairness.").

102. Shute v. Carnival Cruise Lines, Inc., 804 F. Supp. 1525, 1526 (S.D. Fla. 1992).

103. 571 U.S. 49 (2013).

company, to assist with a federal construction project at Fort Hood in Texas.[104] After a dispute arose between the parties, J-Crew sued Atlantic Marine in the United States District Court for the Western District of Texas.[105] Atlantic Marine moved to transfer the suit to Virginia on the basis of an exclusive forum selection clause selecting the courts in that state.[106]

The district court denied the motion.[107] It first considered a lengthy and nonexhaustive list of public- and private-interest factors to determine whether it should grant the motion to transfer.[108] The court held that the forum selection clause was "only one such factor" to consider among many others.[109] The court ultimately concluded that, forum selection clause notwithstanding, the transfer motion should be denied because "compulsory process will not be available for the majority of J-Crew's witnesses" and there would be "significant expense for those willing witnesses."[110] This decision was affirmed on appeal to the Fifth Circuit.[111]

The Supreme Court granted certiorari and reversed.[112] It first explained that the procedural mechanism for enforcing a forum selection clause varies depending on the identity of the court named in the clause. When a clause chooses a federal forum, the defendant should move to transfer under 28 U.S.C. § 1404(a).[113] When the clause chooses a state or foreign forum, the defendant should move to dismiss under forum non conveniens.[114] The Court further observed that because section 1404(a) and forum non conveniens doctrine "entail the same balancing-of-interests standard, courts should evaluate a

104. *Id.* at 53.

105. *Id.*

106. *Id.*

107. *Id.*

108. At no point did J-Crew argue that the forum selection clause itself was unenforceable on the basis of inconvenience. *See* United States *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co., No. A-12-CV-228, 2012 WL 8499879, at *2–3 (W.D. Tex. Aug. 6, 2012), *rev'd on other grounds*, Atl. Marine Constr. Co. v. U.S. Dist. Ct. W. Dist. Tex., 571 U.S. 49, 68 (2013). It merely argued that inconvenience should be considered as part of the balancing inquiry pursuant to the transfer motion. *See id.* at *7. J-Crew did argue that the clause was invalid on public policy grounds by operation of a Texas statute that gave the resisting party the power to void any forum selection clause written into "a construction contract concerning real property located in this state." TEX. BUS. & COM. CODE ANN. § 272.001; *see also J-Crew Mgmt.*, 2012 WL 8499879, at *2–3. The district court rejected this argument because the construction work was to be performed entirely within a federal enclave. *J-Crew Mgmt.*, 2012 WL 8499879, at *2–3. Since the lower court's decision on this issue of clause enforceability was never appealed, neither the Fifth Circuit nor the Supreme Court was asked to weigh in on whether the forum selection clause was enforceable. *See Atl. Marine*, 571 U.S. at 54–55

109. *J-Crew*, 2012 WL 8499879, at *5.

110. *Id.* at *7.

111. *In re* Atl. Marine Constr. Co., 701 F.3d 736, 741 (5th Cir. 2012), *rev'd on other grounds*, *Atl. Marine*, 571 U.S. at 68.

112. *Atl. Marine*, 571 U.S. at 68.

113. *Id.* at 59.

114. *Id.* at 60.

forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum."[115]

The Court then went on to explain that when the parties have agreed to litigate their dispute in a particular court via "a contractually valid forum-selection clause," the usual balancing-of-interests standard must be adjusted.[116] In particular, the Court held that the private-interest factors considered as part of this analysis "weigh entirely in favor" of the chosen forum.[117] In agreeing to a valid forum selection clause, in other words, the resisting party "waive[s] the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses."[118] The Court also stated that when the defendant moves to transfer a case under section 1404(a) on the basis of a valid forum selection clause, "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer."[119]

At first blush, this language from *Atlantic Marine* relating to inconvenience might seem to supplant the "deprived of his day in court" standard. A careful reading of the opinion, however, reveals that this is not the case. The Court stated in a footnote that its "analysis presupposes a contractually valid forum-selection clause."[120] The Court presumed, in other words, that the clause in question was enforceable under the test laid down in *The Bremen* and *Carnival Cruise*. The effect of this footnote is to preserve the longstanding rule that a clause should not be given effect if litigating in the chosen forum would be so difficult and inconvenient as to deprive the plaintiff of his day in court. The Supreme Court "does not normally overturn . . . earlier authority *sub silentio*."[121] It did not do so here.

In a post-*Atlantic Marine* world, therefore, a court asked to dismiss or transfer a case on the basis of a forum selection clause must first determine as a threshold issue whether the clause is contractually valid.[122] There are many reasons why a clause might fail this test. A clause might not be contractually valid because the resisting party never signed the agreement.[123] Or because the clause was procured by fraud.[124] Or because the clause is nonexclusive.[125] Or

115. *Id.* at 61 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37 (1988) (Scalia, J., dissenting)).

116. *Id.* at 62–65, 62 n.5.

117. *Id.* at 64.

118. *Id.*

119. *Id.* at 52.

120. *Id.* at 62 n.5.

121. Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000).

122. John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 134–60 (2022).

123. *Id.* at 134.

124. *Id.* at 135.

125. *Id.* at 140.

because the clause is drafted too narrowly to cover the claims asserted.[126] Or because the clause is contrary to public policy.[127] Or because the clause was not reasonably communicated to the resisting party.[128] Alternatively, a forum selection clause might not be contractually valid because enforcing it will for all practical purposes deprive the resisting party of its day in court.[129]

In summary, when the lower federal courts are called upon to decide whether a forum selection clause is unenforceable on the basis of grave inconvenience, they should look to the test established in *The Bremen* and applied in *Carnival Cruise*. While *Atlantic Marine* outlines the *consequences* that flow from a judicial determination that a clause is enforceable, it provides no guidance as to how the courts should *make* that determination in the first instance.

II. INCONVENIENCE

A dead phone battery at the end of a long day. A food delivery order that arrives an hour late. Spotty internet service. Life is full of little annoyances. These annoyances are not, however, the sort of inconveniences that the Supreme Court had in mind when it decided *The Bremen*. The Court held that a forum selection clause should only go unenforced when trial in the selected forum would be "so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court."[130] This test contemplates a far graver inconvenience than a dead phone battery. Being trapped at the bottom of a well, perhaps. Or mired in quicksand. Or abandoned on a deserted island.

In establishing a high bar for invalidating a clause on the basis of inconvenience, the Supreme Court was well aware that challenges on this basis were likely to be frequent. The plaintiff almost always suffers *some* inconvenience when the court holds that a suit must be brought in a forum other than the one the plaintiff originally chose. The Court recognized, however, that forum selection clauses are not like other contract clauses.[131] If litigating in the chosen court is so inconvenient that the plaintiff cannot bring a lawsuit there, then enforcing the clause might make it impossible for the plaintiff to obtain any relief at all. Under this scenario, the Court reasoned, the clause should not be enforced.[132]

126. *Id.* at 141.
127. *Id.* at 145–55.
128. *Id.* at 158.
129. *Id.* at 159.
130. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).
131. *See* Peter Hay, *Forum Selection Clauses—Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law*, 35 EMORY INT'L L. REV. 1, 13 (2021).
132. *Bremen*, 407 U.S. at 18.

The challenge, of course, lies in predicting when a plaintiff will abandon a suit if the clause is enforced. To answer this question, it is useful to compile a list of some of the practical problems that may arise when a clause selecting a distant forum is enforced.[133] First, it may be difficult for the plaintiff to hire a lawyer in the chosen jurisdiction.[134] Second, it may prove challenging for the plaintiff to travel to the chosen jurisdiction due to family commitments, work obligations, poor health, or lack of financial resources. Third, it may be expensive to transport witnesses and documents to the chosen jurisdiction. Fourth, when the chosen jurisdiction is located in a non-English-speaking jurisdiction, the need to translate testimony and documents may arise. The accumulated weight of these difficulties will, in at least some cases, make litigating in the chosen jurisdiction so inconvenient that the plaintiff will abandon the suit.[135]

It is important—indeed, it is essential—to recognize that the inconveniences listed above will impact different plaintiffs differently. If a court orders a billionaire to litigate a dispute in Bolivia, that billionaire will have little trouble hiring local lawyers, traveling back and forth to Bolivia, translating documents, and arranging for the transportation of witnesses and documents.[136] If that same court orders a person of modest means to litigate a dispute in Bolivia, the plaintiff is likely to abandon the suit. If inconvenience is the

133. This Article is concerned with the *financial* inconvenience associated with litigating in a distant forum. There are, to be sure, other reasons why a court may conclude that the chosen forum is inconvenient. If the courts of the chosen forum do not provide due process, for example, or if there is reason to believe that the plaintiff will not receive a fair hearing in those courts, then litigating there may also be so gravely difficult as to deprive the plaintiff of his day in court. *Cf.* Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1081–82 (2010). Similarly, if litigating in the chosen forum could put the plaintiff at risk of physical harm, then litigating there may prove so gravely inconvenient as to deprive him of his day in court. *See* Reed Int'l, Inc. v. Afg. Int'l Bank, 657 F. Supp. 3d 287, 310 (S.D.N.Y. 2023). These issues are beyond the scope of this Article.

134. Christopher A. Whytock, *Transnational Access to Justice*, 38 BERKELEY J. INT'L L. 154, 163 (2020) ("It may be especially difficult for a foreign party to identify a lawyer who is appropriately licensed and qualified to represent the party in the forum State, due to possible language differences, unfamiliarity with the forum State's legal profession, and lack of connections to lawyer referral networks in the forum State.").

135. As Joel Samuels has observed in the forum non conveniens context:

> The question remains as to how severe the plaintiff's financial predicament must be to justify a finding of no [adequate alternative forum] on that basis alone. Certainly, courts should be given discretion to decide whether the financial impediments . . . will truly render that forum unavailable or will simply make the forum less attractive to the plaintiff.

Samuels, *supra* note 133, at 1099.

136. Pelican Ventures, LLC v. Azimut S.p.A., No. 03-62119-CV, 2004 WL 3142550, at *8 (S.D. Fla. July 28, 2004) (observing that the plaintiff was not financially incapable of pursuing the litigation in Italy in light of the fact that he had "purchased a pleasure yacht for almost $5,000,000 and ha[d] used it to cruise the Caribbean" and that there was therefore "no reason to believe that Plaintiff will be so seriously inconvenienced that it will be deprived of its day in court if it must litigate in Italy").

problem, then money can usually provide a solution.[137] And some plaintiffs have vastly more money than others.

Viewed through a purely practical lens, therefore, it is impossible to determine whether enforcing a forum selection clause will deprive a plaintiff of his day in court in the abstract. The court must consider the plaintiff's individual financial circumstances. This proposition is so obvious that it should go without saying. And yet the proposition has been forcefully rejected by U.S. courts.[138] In case after case, decided in decade after decade, the courts have held that there is no need to consider the plaintiff's financial resources or the availability of alternative sources of litigation funding when deciding whether enforcement will deprive the plaintiff of his day in court.

A. *Financial Hardship*

As a rule, federal courts in the United States do not consider the financial situation of the plaintiff in deciding whether to enforce a forum selection clause. Even when the plaintiff's financial status makes it impossible for him to sue in the chosen forum, the court will enforce the clause.[139]

137. Jill Schlesinger, *Money Can Buy You Something: Convenience*, CHI. TRIB. (Sept. 9, 2021), https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=7db43856-25f1-42b7-b0fe-f7434f607995 [https://perma.cc/E9AM-JB4N].

138. *See generally* Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992) (surveying the multitude of reasons why plaintiffs may not refile in the chosen foreign court after a case is dismissed on the basis of forum non conveniens).

139. *See, e.g.*, Starkey v. G Adventures, Inc., 796 F.3d 193, 198 (2d Cir. 2015) (describing "the time and expense involved in traveling and the difficulty of ensuring that witnesses will testify on her behalf" as "'the obvious concomitants of litigation abroad' rather than circumstances 'that would prevent [a plaintiff] from bringing suit'" (quoting Phillips v. Audio Active Ltd., 494 F.3d 378, 393 (2d Cir. 2007))); P & S Bus. Machs., Inc. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003) ("The financial difficulty that a party might have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause." (citing Bonny v. Socy's of Lloyd's, 3 F.3d 156, 160 n.11 (7th Cir. 1993))); *Bonny*, 3 F.3d at 160 n.11 ("Although Mr. Bonny's current financial situation is quite bleak, a party's financial status at any given time in the course of litigation cannot be the basis for enforcing or not enforcing a valid forum selection clause."); *In re* Diaz Contracting, Inc., 817 F.2d 1047, 1053 (3d Cir. 1987) ("Mere inconvenience or additional expense is not the test of unreasonableness, since it may be assumed that the plaintiff received under the contract consideration for these things." (quoting Deolalikar v. Murlas Commodities, Inc., 602 F. Supp. 12, 15 (E.D. Pa. 1984))); Rogalski v. Laureate Educ., Inc., No. 20-11747, 2022 U.S. WL 19410319, at *7 (D.N.J. Sept. 29, 2022) ("Courts have rarely refused to enforce a contractual forum-selection clause even under difficult circumstances. For example, courts have consistently rejected arguments wherein the respondent argued that they were unable to 'finance additional litigation' in another forum." (quoting *In re Diaz*, 817 F.2d at 1052)); Horne v. Ace Ltd., No. 2:12-CV-1142, 2014 WL 12788989, at *2 (D. Nev. Mar. 13, 2014) (enforcing clause requiring litigation to proceed in Argentina notwithstanding fact that "plaintiff describes his monthly household income as $3,800, with his bills exceeding $4,000 monthly" and that "plaintiff addresses his physical limitations including a hernia, '24/7 pain in [his] feet,' and difficulty sleeping"); Manrique v. Fabbri, 493 So. 2d 437, 440 n.4 (Fla. 1986) ("[T]he 'test

Consider the case of *Dearborn Industrial Manufacturing Company v. Soudronic Finanz AG*,[140] in which a federal district court in Illinois was called upon to determine whether to enforce a Swiss forum selection clause.[141] The court recognized that the plaintiff's financial situation was dire. Indeed, the court acknowledged that its financial situation was so dire that it "w[ould] lose its day in court if forced to litigate in Switzerland."[142] The court nevertheless enforced the clause and dismissed the plaintiff's claims.[143] In support of its decision, it explained that the Seventh Circuit had previously "rejected the claim that financial distress is a relevant factor in determining unreasonableness."[144]

In theory, one could draw a distinction between financial hardship on the part of for-profit corporations—the plaintiff in *Dearborn* was a corporation—and financial hardship on the part of natural persons who enter into commercial contracts.[145] To date, however, the courts have declined to draw such a distinction.

In *Keenan v. Berger*,[146] Robert Keenan, an architect who lived in Oklahoma, was hired by Louis Berger, an engineering firm headquartered in New Jersey that specializes in large construction projects in Africa, Asia, and Eastern Europe, to assist with a rail transportation infrastructure project in Qatar.[147] The employment agreement signed by Keenan stipulated that all disputes had to be resolved in Qatar.[148] After working in Qatar for just four months, Keenan

of unreasonableness' is not 'mere inconvenience or additional expense.'" (quoting Societe Jean Nicolas et Fils v. Mousseux, 597 P.2d 541, 543 (1979))). *But see* John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1129 (2021) ("[O]n a few occasions, state courts have shown themselves to be sympathetic to claims that the amount of money at stake is too small to make it economical for the plaintiff to bring a claim in the chosen forum.").

140. No. 95 C 4414, 1997 WL 156589 (N.D. Ill. Apr. 1, 1997).

141. *Id.* at *6.

142. *Id.* at *7 ("The court is satisfied, based on the factual materials presented, that Dearborn will lose its day in court if forced to litigate in Switzerland.").

143. *Id.* at *10.

144. *Id.* at *7 (citing *Bonny*, 3 F.3d at 160 n.11); *see also* Waypoint Yachts v. Azimut-Benetti, S.P.A., No. 05cv1923, 2006 WL 8455420, at *7 (S.D. Cal. Feb. 24, 2006) ("Plaintiff next argues that the forum-selection clause is unreasonable and should not be enforced because to do so would essentially deprive it of a meaningful day in court. In support of its argument, Plaintiff contends that: (1) it 'simply cannot afford to litigate its claim against [Defendant] in Italy. To force it to do so would in practical effect deprive [Plaintiff] of any opportunity to assert its claims in any court at all;' and (2) it would be unreasonable and unjust to insist that Plaintiff, which has no capability in the Italian language, no contact with legal counsel in Italy and absolutely no knowledge of the Italian legal system, be required to assert its claim in an Italian Court. The problem with Plaintiff's arguments, however, is that under *Bremen* and subsequent Ninth Circuit caselaw, financial hardship and the inconvenience of litigating in a foreign forum are insufficient to render an otherwise valid forum-selection clause unenforceable.").

145. *Dearborn Indus. Mfg. Co.*, 1997 WL 156589, at *1.

146. No. CIV-18-584-R, 2019 WL 1590589 (W.D. Okla. Apr. 12, 2019).

147. *See id.* at *1–2.

148. *See id.* at *2.

resigned.[149] He later sued Louis Berger for breach of contract in the Western District of Oklahoma.[150] Louis Berger invoked the forum selection clause and asked the court to dismiss the case in favor of the courts of Qatar.[151] Keenan argued that the clause was unenforceable because he could not afford to hire counsel in Qatar or to travel back and forth to that country.[152] The court rejected these arguments.[153] The case was dismissed in favor of the courts of Qatar.[154] The suit was thereafter abandoned.[155]

In principle, one could also draw a distinction between cases where the clause is written into a consumer contract rather than a commercial contract.[156] Again, the courts have declined to draw such a distinction.

In *Robb v. Island Hotel Company*,[157] a plaintiff domiciled in Ohio named Rita Robb brought a negligence suit in the Southern District of Florida against the Atlantis Resort.[158] The Bahamian company moved to dismiss on the basis of a forum selection clause selecting the courts of the Bahamas.[159] The plaintiff argued that she "[could not] afford to prosecute this case in [t]he Bahamas" and that her "discretionary income varie[d] between $120.00 and $200.00 per month."[160] The court enforced the clause over her objections.[161] In so doing, it pointed out that there were attorneys in the Bahamas who charged as little as $250 per hour and suggested that these attorneys could be persuaded to negotiate their rates.[162] Even if the least-expensive lawyer in the Bahamas were to cut his rates in half, by the court's own math, the plaintiff would only be able

149. *See id.* at *1.
150. *Id.*
151. *Id.*
152. *See id.* at *3.
153. *Id.* (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991)).
154. *Id.* at *6.
155. Telephone Interview with Counsel for Plaintiff (Aug. 4, 2022) (notes on file with author).
156. Goldman, *supra* note 99, at 713 ("Consumer contract actions, unlike tort cases, often involve relatively small sums and attorney fee obligations not contingent on recovery. Arguably, then, forum selection clauses are more likely to effectively deprive plaintiffs of their day in court in contract actions than in tort cases."); *id.* at 722 ("For many consumers, however, the additional costs of litigation—including their own and their witnesses' airfares to attend a distant trial and the increased attorney fees mandated by the need for local counsel—will impose serious burdens. These costs often will constitute a significant share of the consumer's disposable income. For some, the hardships of suit in a foreign forum will be prohibitive.").
157. No. 18-cv-60544, 2018 WL 11466939 (S.D. Fla. Oct. 31, 2018).
158. *Id.* at *1.
159. The clause appeared in a release that the plaintiff was required to sign when she checked into the hotel. *Id.* at *1–2.
160. *Id.* at *2, 5.
161. *Id.* at *5.
162. *Id.*; *see also* Get in Shape Franchise, Inc. v. TFL Fishers, LLC, 167 F. Supp. 3d 173, 204–05, 204 n.9 (D. Mass. 2016) (enforcing clause notwithstanding the fact that the plaintiff "had an annual income of $24,500 in 2014 and $36,000 in 2013. She also has approximately $45,000 in unspecified 'debts,' 'no liquid assets other than a minor amount in a checking account,' and 'does not own a home.'" (citations omitted)).

to purchase an hour of his time every month. It seems unlikely that such an arrangement would be financially viable, and, in fact, it was not. The plaintiff ultimately abandoned the suit.[163] The case was never refiled in the Bahamas.[164]

The plaintiffs in *Sharani v. Salviati & Santori, Inc.*,[165] suffered a similar fate.[166] Jay and Catherine Sharani paid $3,600 to a shipping company to transport their household goods from the United Arab Emirates to California.[167] When the Sharanis finally received the goods, they were so damaged as to be unusable.[168] The Sharanis filed a lawsuit, pro se, in federal district court in California.[169] The defendant moved to dismiss based on a forum selection clause in the shipping agreement requiring all lawsuits to be brought in London.[170] The plaintiffs argued that the clause should not be enforced because they could not afford to hire counsel in the United Kingdom.[171] The court rejected this argument.[172] It reasoned that the plaintiffs had not explained "why counsel in this country would be less expensive than in England or why, as pro se plaintiffs, they have greater familiarity with the U.S. legal system."[173] The court also held that "this record does not demonstrate that plaintiffs would be denied their day in court if the forum selection clause is enforced."[174] The case was never refiled in England.[175]

There are, to be sure, a few cases where a court concluded that a combination of financial hardship and poor health meant that enforcing the clause would deprive the plaintiff of a day in court. The Ninth Circuit once held that a disabled Oregon truck driver living on $2,000 a month was not required to litigate in Wisconsin.[176] And a federal court in New Jersey once

163. Email from Plaintiff's Counsel to author (Aug. 8, 2022) (on file with author).

164. *Id.*

165. No. C 08-03854, 2008 WL 5411501 (N.D. Cal. Dec. 29, 2008).

166. *Id.* at *4.

167. *Id.* at *1.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at *2.

172. *Id.* at *3.

173. *Id.*

174. *Id.*

175. Email from Catherine Sharani to author (Nov. 30, 2023) (on file with author).

176. Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1142–43 (9th Cir. 2004); *see also* Madoff v. Bold Earth Teen Adventures, No. 12-00470, 2013 WL 1337337, at *7 (D. Haw. Mar. 28, 2013) ("The term 'deprivation of a meaningful day in court' is not precisely defined in controlling cases. However, the Ninth Circuit provides guidance in saying that a deprivation occurs when a complaining party is *physically and financially unable to litigate in the forum designated by contract*." (emphasis added)); Flores v. Tri Marine Fish Co., No. CV 18-02891, 2018 WL 6133652, at *3–4 (C.D. Cal. June 11, 2018) (concluding that physical injury plus financial hardship rendered the clause unenforceable). *But see* Skoglund v. PetroSaudi Oil Servs., No. 18-386, 2018 WL 6112946, at *1, 6 (E.D. La. Nov. 20, 2018) (enforcing English clause against U.S. citizen who had suffered the loss of several toes, a traumatic

declined to enforce a clause that would have required a young mother with stage four cancer to litigate her claim against a cruise line in Florida.[177] These cases are, however, atypical. It is far more common for plaintiffs who plead financial hardship to be told that they must litigate their disputes in the forum named in the clause even when there is compelling evidence that enforcing the clause will lead the plaintiff to abandon the lawsuit.[178]

B. *Contingency Fees*

A plaintiff's individual financial situation obviously matters less when the chosen jurisdiction allows for lawyers to be paid via contingency fee. In a contingency fee agreement, the lawyer assumes the costs of bringing the suit in exchange for a percentage of any recovery.[179] These arrangements make it possible for plaintiffs of modest means to assert legal claims that they could never afford to finance on their own. The purpose of contingency fees, as Stephan Landsman once explained, is to "guarantee that both rich *and* poor will have access to the courts and will be assured an opportunity to avail themselves

brain injury, a brain bleed, and legal blindness as a result of an accident on a drillship off the coast of Venezuela).

177. *In re* Lieberman v. Carnival Cruise Lines, No. Civ. A 13-4716, 2014 WL 3906066, at *13–14 (D.N.J. Aug. 7, 2014); *see also* Vidal v. Tom Lange Co. Int'l, Inc., No. Civ.A 1:21-CV-01286, 2021 WL 4963276, at *10–11 (D.N.J. Oct. 26, 2021) (citing the defendant's poor health as a reason for refusing to enforce a forum selection clause selecting the courts in Illinois). *But see* Sheehan v. Viking River Cruises, Inc., No. 20-cv-0753, 2020 WL 6586231, at *7 (D. Minn. Nov. 10, 2020) ("Plaintiffs observe that Swiss courts require the parties to be physically present, but Timothy Sheehan's physician opined that he cannot travel internationally for the foreseeable future. . . . Plaintiff's argument is unavailing."); Matthews v. Tidewater, Inc., 108 F.4th 361, 386 (5th Cir. 2024) (enforcing English clause against U.S. permanent resident undergoing treatment three times a week for prostate and bone cancer).

178. Even in cases where a litigant has the financial means to transport *herself* to the chosen forum, she must also grapple with the costs of transporting *witnesses and evidence* to that same forum. Plaintiffs regularly argue that these costs make it impossible for them to bring suit in the chosen forum, and the courts regularly reject these arguments; virtually every court to have considered the issue has held that the "inconvenience of witnesses does not warrant invalidating a forum selection clause." Tinoco v. Kern Int'l, Inc., No. CIV-05-0752-PHX-MHM, 2005 U.S. Dist. LEXIS 22301, at *5 (D. Ariz. Sept. 29, 2005); Giammattei v. Bertram Yacht, Inc., No. 3:09-CV-399, 2010 WL 2593612, at *4 (W.D.N.C. June 23, 2010); *see also* Davis Media Grp., Inc. v. Best W. Int'l, Inc., 302 F. Supp. 2d 464, 469 (D. Md. 2004) (rejecting argument that clause was unenforceable because witnesses would have to travel from Arizona to Maryland); Lien Ho Hsing Steel Enter. Co. v. Weihtag, 738 F.2d 1455, 1462 (9th Cir. 1984) (enforcing clause even though U.S. witnesses would have to travel to the Netherlands). These courts have also stated that the "difficulty and inconvenience" associated with transferring evidence to the chosen forum is not a valid basis for nonenforcement. Performance Chevrolet, Inc. v. ADP Dealer Servs., No. 2:14-cv-02738, 2015 WL 13157998, at *6–7 (E.D. Cal. June 18, 2015); *see also* Intermetals Corp. v. Hanover Int'l Aktiengesellschaft Fur Industrieversicherungen, 188 F. Supp. 2d 454, 459 (D.N.J. 2001) (enforcing clause selecting courts of Austria even though evidence was located in the United States); Turfworthy, LLC v. Dr. Karl Wetekam & Co. KG, 26 F. Supp. 3d 496, 509 (M.D.N.C. 2014) (enforcing clause selecting courts of Germany even though evidence was located in the United States).

179. *Contingent Fee*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court.").

of the assistance of counsel."[180] Contingency fee agreements are permitted under the laws of every U.S. state.[181] These fee arrangements are, however, forbidden in many foreign countries.[182]

If a forum selection clause chooses the courts of a jurisdiction that does not permit contingency fees, then a plaintiff with limited financial resources may find it impossible to hire a lawyer in that jurisdiction.[183] Indeed, plaintiffs of modest means routinely argue that foreign forum selection clauses should not be enforced because the chosen jurisdiction bans contingency fees.[184] U.S. courts just as routinely reject this argument.[185] They have consistently held that the unavailability of contingency fee arrangements in the chosen jurisdiction is irrelevant to the enforceability inquiry because "cost and inconvenience are

180. Stephen Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 262 (1998).

181. Steve P. Calandrillo, Chryssa V. Deliganis & Neela Brocato, *Contingency Fee Conflicts: Attorneys Opt for Quick-Kill Settlements When Their Clients Would Be Better Off Going to Trial*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 9 (2023).

182. Robert A. Weninger, *The VW Emissions Scandal and the Spanish Class Action*, 23 COLUM. J. EUR. L. 91, 125 (2016) ("Contingent fee arrangements are prohibited or restricted in many jurisdictions outside the United States, and they vary considerably in the jurisdictions that have adopted them. Their common feature is that if the plaintiff-class loses the case, its unsuccessful lawyer receives no fee. They provide greater access to courts because they permit lawyers to act as lenders to clients who are financially unable to pursue litigation.").

183. In some cases, the courts seem willfully blind to the role played by contingency fees in allowing impoverished litigants access to court. In *Castro v. Pullmantur, S.A.*, 220 So. 3d 531 (Fla. Dist. Ct. App. 2017), for example, the Florida court made the following observation in enforcing a Malta forum selection clause:

> [The plaintiff] argues that Malta is no forum at all for him because he lives in a poor, rural community in Honduras. He is unemployed, has no savings, and has barely enough money to support his family. Malta, Castro contends, is one thousand miles away from Honduras, and he does not have the money to hire an attorney, or to pay for airfare and hotel expenses to litigate his case. . . . Castro does not explain why, on the one hand, he is able to afford to bring this case in one foreign jurisdiction (Miami) and, on the other hand, he cannot afford to litigate the same claim in a different foreign jurisdiction (Malta). There is nothing in the record to suggest that Florida is any less expensive than Malta. If our state circuit court is not an unreasonable forum for a Honduran national, than neither is the Maltese courts.

Id. at 535, 537. The reason why the plaintiff could afford to bring the claim in Miami but not in Malta is straightforward. Florida allows contingency fees. *See* FLA. STAT. § 16.0155 (2013). Malta does not. *See* Carl Grech & Daniel Buttigieg, *Litigation Dispute Resolution Comparative Guide*, MONDAQ (June 10, 2024), https://www.mondaq.com/litigation-mediation-arbitration/1076512/litigation-dispute-resolution-comparative-guide?msg=15 [https://perma.cc/4GKD-7JB2] ("Maltese law strictly prohibits success fees or contingency fees arrangements with respect to judicial or litigious matters.").

184. *See supra* note 183 and accompanying text.

185. *See infra* notes 186–90.

insufficient grounds" for invalidating a forum selection clause.[186] In *Rubens v. UBS AG*,[187] for example, a court in New York observed that:

> Plaintiff contends that the unavailability of contingency fee agreements . . . in Switzerland make clear that trial there would be so prejudicial as to deny him the opportunity to pursue his claims. However, Plaintiff cites to no case law—nor could the Court locate any—in which a court disregarded a forum selection clause on the basis that the forum chosen by the parties did not allow for contingency fees.[188]

This decision accurately describes the relevant case law.[189] The fact that contingency fees are not available in the chosen jurisdiction is generally deemed irrelevant by U.S. courts called upon to decide whether a plaintiff who lacks substantial resources may be compelled to bring suit in a foreign jurisdiction by operation of a forum selection clause.[190]

The logic of these decisions is difficult to understand. If a plaintiff is only able to obtain a lawyer in the United States by relying on a contingency fee, and if the jurisdiction named in the forum selection clause bans contingency fees, then it is a near certainty that the plaintiff will abandon the suit if the clause is enforced. The courts have recognized this fact in several forum non conveniens cases not involving forum selection clauses. The Eighth Circuit has, for example, observed that "[t]he absence of a contingent fee system for attorneys in Jamaica also should be taken into account when considering the practical problems for the plaintiff."[191] In cases involving forum selection

186. K&V Sci. Co. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW"), 164 F. Supp. 2d 1260, 1271 (D.N.M. 2001), *rev'd*, 314 F.3d 494 (10th Cir. 2002); *see also* Baker v. Adidas Am., Inc., 335 F. App'x 356, 361 (4th Cir. 2009) (enforcing clause notwithstanding plaintiff's argument that "Amsterdam does not permit contingency fee arrangements"); Corsec, S.L. v. VMC Int'l Franchising, LLC, 909 So. 2d 945, 946–47 (Fla. Dist. Ct. App. 2005) ("VMC successfully avoided enforcement of this mandatory forum selection clause by arguing below that . . . the difficulties involved in procuring Spanish counsel to represent it on a contingency fee basis made this provision unreasonable and unjust and thus unenforceable. We disagree."); Doe #1 v. Marriott Int'l, Inc., No. 3:22-CV-468-KHJ-MTP, 2023 WL 4683043, at *6 (S.D. Miss. June 23, 2023) ("Plaintiffs argue they will be deprived of their day in court because of the grave inconvenience or unfairness of litigating in The Bahamas. They maintain they . . . cannot retain or afford Bahamian attorneys because The Bahamas does not allow contingency agreements. . . . As to Plaintiffs' first argument, a court should not refuse to enforce an FSC just because 'there is evidence in the record to indicate that the [plaintiffs] are physically and financially incapable of pursuing . . . litigation [in a foreign forum].'").

187. No. 654383/2012 (N.Y. Sup. Ct. Nov. 12, 2013).

188. *Id.*, slip op. at 9.

189. Cleveland v. Kerzner Int'l Resorts, Inc., 657 F. App'x 924, 927 (11th Cir. 2016) ("[T]he lack of a contingency fee system is a 'particularly weak' basis for denying a motion to dismiss.").

190. *Id.*

191. Reid-Walen v. Hansen, 933 F.2d 1390, 1399 (8th Cir. 1991); *see also* Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 345 (8th Cir. 1983) ("We find the district court failed to consider fully the practical results of its decision to dispatch Lehman to the Cayman Islands to litigate her dispute

clauses, however, U.S. courts have consistently held that the nonavailability of contingency fees in the chosen jurisdiction is neither here nor there when it comes to the issue of enforceability.[192]

These decisions are especially perplexing in light of the fact that the courts have sometimes held that a plaintiff will *not* be deprived of his day in court because the chosen jurisdiction *permits* contingency fees. In one case, a federal court in Illinois rejected the plaintiffs' arguments that a North Carolina forum selection clause was unenforceable due to inconvenience.[193] The court observed that if the Illinois-based plaintiffs lacked the resources to hire an attorney in North Carolina, they "may be able to secure counsel on a contingency fee basis."[194] In another case, a federal court in Pennsylvania rejected the plaintiff's argument that a New York forum selection clause should not be enforced because it would be "difficult and costly to obtain counsel and to litigate in New York."[195] The court observed that "[t]ens of thousands of lawyers practice in the Southern District of New York, at least some of whom presumably charge fees not appreciably higher than counsel in this district and some of whom routinely

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[on forum non conveniens grounds]. Attorneys in the Cayman Islands apparently do not accept cases on a contingent fee basis, and Lehman states that she is financially unable to pay the retainer fee that a Cayman Island attorney would require."); *In re* Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 228 F. Supp. 2d 348, 366 (S.D.N.Y. 2002) (observing that the "almost certain unavailability of contingency fees [in a foreign country] weighs against dismissal" based on forum non conveniens); Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 132–33 (E.D.N.Y. 2000) (declining to dismiss based on forum non conveniens partly based on plaintiff's representations that "there would be financial difficulty in obtaining French legal representation to commence an action in France because contingent fee arrangements are unavailable there"); McKrell v. Penta Hotels (France), S.A., 703 F. Supp. 13, 14 (S.D.N.Y. 1989) ("Due to plaintiff's financial inability to conduct litigation in the foreign forum and the absence of a contingency fee system in that forum, the Magistrate determined that the proposed alternative forum is, in fact, no forum at all."); *cf.* Iragorri v. Int'l Elevator, Inc., 203 F.3d 8, 17 (1st Cir. 2000) ("[A]t the second stage of a forum non conveniens analysis, financial hardships may be relevant."); OMI Holdings v. Royal Ins. Co. of Can., 149 F.3d 1086, 1097 (10th Cir. 1998) (holding that it is appropriate for courts to consider whether forcing plaintiff to litigate in a foreign forum "may be so overwhelming as to practically foreclose pursuit of the lawsuit" as part of the forum non conveniens analysis); Doe v. Hyatt Hotels Corp., 196 N.E.3d 1065, 1073 (Ill. App. Ct. 2021) ("To pursue her claims against Hyatt in Turkey, Doe would have to bear the travel costs from the United States to Turkey for all witnesses whose testimony she wants. She may even have to travel multiple times . . . The trial court's private interest factor analysis may have reasonably weighed the parties' and witnesses' relative travel costs in this light."). *But see* Harp v. Airblue Ltd., 879 F. Supp. 2d 1069, 1075 (C.D. Cal. 2012) ("The unavailability of contingency fees in Pakistan does not render it an inadequate forum."); *In re* Air Crash over Taiwan Straits on May 25, 2002, 331 F. Supp. 2d 1176, 1188–89 (C.D. Cal. 2004) (holding that a plaintiff's inability to pay legal fees does not bear on the adequacy of an alternative forum).

192. *See supra* notes 186–90.

193. Derrick v. Frank Found. Child Assistance Int'l, Inc., No. 03 C 5737, 2004 WL 1197249, at *2 (N.D. Ill. May 28, 2004).

194. *Id.*

195. Beck v. CIT Grp./Credit Fin., No. CIV.A. 94-5513, 1995 WL 394067, at *7 (E.D. Pa. June 29, 1995).

take cases perceived to have merit on a contingency fee basis."[196] In still another case, a federal court in Texas enforced an Oklahoma forum selection clause after concluding that the plaintiff had not "demonstrated his inability to obtain legal representation in Oklahoma on a contingent fee basis or for a percentage of his recovery."[197]

This "heads I win, tails you lose" reasoning is impossible to defend.[198] The availability of contingency fee arrangements is routinely cited as a basis for enforcing a forum selection clause choosing a jurisdiction where these fees are permitted.[199] The nonavailability of these same fee arrangements is then deemed irrelevant when the clause chooses a jurisdiction where they are not allowed.[200]

III. EXPLAINING THE BEHAVIOR

U.S. judges, as a rule, are not prone to ignoring relevant facts. It is therefore useful to pause, take a step back, and ask why these judges are so resolute in their refusal to consider the plaintiff's financial status as part of the inquiry into whether a forum selection clause is enforceable. This part identifies six possible explanations for this behavior.

First, it suggests that some of these decisions may be attributable to courts misreading the Supreme Court's seminal decisions in *The Bremen*, *Carnival Cruise*, and *Atlantic Marine*. Second, it argues that courts have gone overboard in support of a policy that favors enforcement. Third, it hypothesizes that some courts may be overly worried about exaggerated claims of inconvenience. Fourth, it posits that some judges have adopted this approach as a means of avoiding the time-consuming task of examining the financial circumstances of each litigant who comes before them. Fifth, it weighs the possibility that technological advances have fundamentally altered the inquiry into inconvenience. Finally, it considers whether the plaintiffs making this argument consistently come forward with evidence sufficient to carry their heavy burden of proof.

It is important to note at the outset that only the last two of these explanations—technological advance and insufficient evidence—provide even

196. *Id.*

197. Trevino v. Cooley Constructors, Inc., No. 5:13-CV-00924, 2014 WL 2611823, at *4 (W.D. Tex. June 9, 2014).

198. *See* Abramson v. Am. Online, Inc., 393 F. Supp. 2d 438, 442–43 (N.D. Tex. 2005) ("Abramson's assertion that she may not be able to afford to retain counsel in Virginia is also insufficient to demonstrate the unfairness or grave inconvenience of the Virginia courts. This Court notes no evidence that Plaintiff cannot obtain counsel in Virginia on a contingent fee basis.").

199. *See supra* notes 193–97.

200. *See supra* notes 183–90.

partially valid justifications for the practices identified in Part II. The others are all flatly inconsistent with the test laid in *The Bremen*.

A. *Misreading the Trilogy*

One possible explanation as to why the courts consistently ignore the financial status of plaintiffs in these cases is that they have misinterpreted the trilogy of Supreme Court decisions relating to forum selection clauses discussed in Part I.

Let us begin with *The Bremen*. A number of judges have interpreted a passage in that case to stand for the proposition that a forum selection clause should be enforced when the prospect of litigation in the chosen forum was "foreseeable" to the plaintiff at the time of contracting.[201] The Fifth Circuit has observed, for example, that "if at the time of contracting, the parties were aware of the inconvenience of the chosen forum, that inconvenience will not render the forum-selection clause unenforceable."[202] This statement misreads *The Bremen*. Here is the relevant passage:

> Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances 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.[203]

The Court did not hold that foreseeability was an independent basis for concluding that a forum selection clause was enforceable. If it had, then every clause would be enforceable because it is always foreseeable that one may be required to litigate in the forum named in the clause. Instead, the Court invoked the concept of foreseeability as a justification for adopting a stringent standard for invalidating a clause on the basis of inconvenience.[204] Since any inconvenience is foreseeable at the time of contracting, the Court reasoned, the plaintiff seeking to invalidate the clause must show that "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical

201. Long v. Dart Int'l, Inc., 173 F. Supp. 2d 774, 778 (W.D. Tenn. 2001) ("Even if traveling were a serious inconvenience, the existence of the forum selection clause demonstrates that the parties clearly contemplated this expense when they entered into the contract. The terms of this contract suggest that the parties intended to shift the burden of travel on Plaintiff.").

202. Hartash Constr. v. Drury Ins., 252 F.3d 436, 436 (5th Cir. 2001); *see also* Calanca v. D & S Mfg. Co., 510 N.E.2d 21, 23 (Ill. App. Ct. 1987) ("[E]ven when one party claims inconvenience, if both parties freely entered the agreement contemplating such inconvenience should there be a dispute, one party cannot successfully argue inconvenience as a reason for rendering the forum clause unenforceable.").

203. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17–18 (1972).

204. *See id.*

purposes be deprived of his day in court."[205] In this manner, the concept of foreseeability is baked into the general test for enforceability; it is not a freestanding legal argument dictating that the clause not be given effect.

Courts have also consistently misinterpreted the Supreme Court's decision in *Carnival Cruise*. In that case, it will be recalled, the Supreme Court held that a Florida forum selection clause should be given effect over the objections of a Washington plaintiff that she was "financially incapable" of bringing the suit in Florida.[206] Significantly, the plaintiff in *Carnival Cruise* introduced virtually no evidence proving that she would be deprived of her day in court if the suit were to proceed in Florida.[207] She merely submitted a declaration stating that litigating in Florida would be "prohibitively burdensome both financially and physically."[208] Although the Court held that the plaintiff had failed to carry her burden of proof on this issue, it did not hold that physical and financial impediments were irrelevant to the enforcement inquiry.[209]

Nevertheless, a number of courts have cited *Carnival Cruise* for precisely this proposition.[210] In one case, a federal district court in Tennessee stated that "the Supreme Court has rejected the view inconvenience of a party could invalidate a forum selection clause."[211] In another case, a federal bankruptcy court in New Jersey observed that "the [C]ourt determined that a forum selection clause was enforceable even in the face of such grave inconvenience that one party could not litigate in the forum because the forum was too remote."[212] In still another case, a federal district court in Texas held that "a party's inconvenience of trying a case in one state versus another is insufficient to invalidate a forum-selection clause."[213] Each of these statements about inconvenience and hardship is flatly inconsistent with the holding in *Carnival Cruise*.

205. *Id.*

206. *See supra* notes 80–102 and accompanying text.

207. *See supra* notes 94–98 and accompanying text.

208. *See supra* notes 100–02 and accompanying text.

209. *See supra* notes 101–02 and accompanying text.

210. *See, e.g.*, BTC-USA Corp. v. Novacare, No. 07-3998, 2008 WL 2465814, at *12 (D. Minn. June 16, 2008) ("[T]here is no support for the proposition that financial hardship by itself warrants a finding that the forum selection clause is unreasonable.") (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594–95 (1991)); Barbuto v. Med. Shoppe Int'l., Inc., 166 F. Supp. 2d 341, 348 (W.D. Pa. 2001) ("The United States Supreme Court has made it clear that a plaintiff's financial hardship alone is not dispositive in determining questions of venue." (citing *Carnival Cruise Lines*, 499 U.S. at 594)).

211. Sneed v. Wellmark Blue Cross & Blue Shield of Iowa, No. 1:07-CV-292, 2008 WL 1929985, at *3 (E.D. Tenn. Apr. 30, 2008).

212. *In re* Norvergence, Inc., 424 B.R. 663, 710 (Bankr. D.N.J. 2010).

213. Parish v. Carnival Corp., No. G–12–132, 2013 WL 12134053, at *6 (S.D. Tex. 2013).

Finally, some courts have read *Atlantic Marine* to stand for the proposition that the convenience of the litigants is irrelevant to the enforceability inquiry.[214] A federal district court in California, for example, observed that:

> Some courts have found, in the context of discussing the *Bremen* exceptions, that a plaintiff's financial ability to bear the costs and inconvenience of litigation in [another state] are factors that the Supreme Court in *Atlantic Marine* deemed private interests that the Court may not consider. Accordingly, the Court does not find the forum selection clause unenforceable on this basis[215]

The problem with this reading of *Atlantic Marine* is that it overlooks the language in footnote 5 of that opinion. That footnote, it will be recalled, states that the Court's analysis presumes a "contractually valid forum selection clause," which means that that analysis only applies to clauses that are enforceable under the test set forth in *The Bremen*.[216] At the end of the day, *Atlantic Marine* merely outlines the consequences that flow from a judicial determination that a clause is contractually valid. It does not purport to provide any guidance as to how the courts should make that determination in the first instance.

B. *Enforcement as Good Policy*

A second possible explanation—not inconsistent with the first—is that the federal courts believe that enforcing forum selection clauses constitutes sound policy. In *Stewart Organization, Inc. v. Ricoh Corporation*,[217] decided in 1988, Justice Kennedy authored a short concurring opinion in which he resoundingly endorsed this proposition:

> [E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. . . . The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses. Though state policies should

214. *See, e.g.*, Sheehan v. Viking River Cruises, Inc., No. 20-cv-0753, 2020 WL 6586231, at *3 (D. Minn. Nov. 10, 2020); Quality Off. Furnishing v. Allsteel, Inc., No. SA CV 17-0724, 2017 WL 11662670, at *5–*6 (C.D. Cal. June 23, 2017); Burke v. Sterling Tr. Co., Civil Action No. 13–cv–03046, 2014 WL 1409423, at *3 (D. Colo. Apr. 11, 2014); *see also* Monastiero v. appMobi, Inc., No. C 13–05711, 2014 WL 1991564, at *5 (N.D. Cal. May 15, 2014).

215. *Quality Off. Furnishing*, 2017 WL 11662670, at *5–6 (internal quotation marks and citations omitted).

216. *See supra* notes 120–21 and accompanying text.

217. 487 U.S. 22 (1988).

> be weighed in the balance, the 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*.[218]

The italicized language in this passage was extensively quoted by the Court in its decision in *Atlantic Marine*. In a world where the U.S. Supreme Court has twice endorsed the notion that enforcing forum selection clauses represents good policy, it is not altogether surprising that the lower federal courts have chosen to sideline one basis for invalidating these clauses—difficulty or inconvenience stemming from the plaintiff's financial hardship—that could lead to a significant number of clauses being struck down.

This explanation derives support from the arguments proffered by some courts in their discussion of contingency fees. If the unavailability of such fees in the chosen forum was considered as part of the enforcement inquiry, one federal court in Florida explained, "then a case could almost never be dismissed because contingency fees are not allowed in most foreign forums."[219] In light of this fact, the court concluded that it was irrelevant whether the chosen jurisdiction prohibited contingency fees.[220] This line of reasoning is revealing. It invokes the policy outcome preferred by the court—enforce the forum selection clause—and then reasons backward to justify the conclusion that the unavailability of contingency fees in the chosen forum should not be considered. If the court were to begin with the rule laid down in *The Bremen*—do not enforce if litigating in the chosen forum would be so difficult and inconvenient as to deprive the plaintiff of her day in court—then the lack of contingency fees in the chosen jurisdiction would result in the clause being invalidated.

C. *Exaggerated Claims*

Another reason why courts may be reluctant to invalidate clauses on the basis of inconvenience stemming from financial hardship is that they suspect that plaintiffs are exaggerating the costs of litigating in the chosen forum.[221] Recall that the plaintiffs in two of the cases discussed at the outset of this Article—one involving translators, the other involving a motorhome—argued that it would be extraordinarily difficult for them to litigate in Virginia and

218. *Id.* at 33 (emphasis added).

219. Miyoung Son v. Kerzner Int'l Resorts, Inc., No. 07-61171-CIV, 2008 WL 4186979, at *6 (S.D. Fla. Sept. 5, 2008) (citing Coakes v. Arabian Am. Oil Co., 831 F.2d 572, 576 (5th Cir. 1987)); *see also* McCoy v. Sandals Resorts Int'l, Ltd., No. 19-cv-22462, 2019 WL 6130444, at *8 (S.D. Fla. Nov. 18, 2019).

220. *Miyoung Son*, 2008 WL 4186979, at *6.

221. K.K.D. Imps., Inc. v. Karl Heinz Dietrich GmbH & Co., 36 F. Supp. 2d 200, 202 (S.D.N.Y. 1999) (observing that the plaintiff had "exaggerated the difficulties" of litigating in Germany "quite substantially").

Indiana, respectively.[222] Also recall that the plaintiff in *Carnival Cruise* argued that it would be "prohibitively burdensome both financially and physically" for her to litigate in Florida.[223] These protestations of inconvenience notwithstanding, the lawsuits in each of these cases continued in the chosen forum after the clause was enforced.[224]

Nor are these the only examples of this phenomenon. In *LeBlanc v. C.R. England, Inc.*,[225] a Texas plaintiff sued a Utah-based trucking company in federal court in Texas.[226] The company moved to transfer the case to Utah on the basis of a Utah forum selection clause in the plaintiff's employment agreement.[227] The plaintiff informed the court that her financial situation made it "impossible" for her to bring her claim in Utah.[228] She stated that she "currently has income of $1,000 per month" and could not "afford to travel to Utah" or to "pay for a hotel while in Utah for trial."[229] The court held that the plaintiff had "fail[ed]to specifically describe why travel to Utah would be impossible" and enforced the clause.[230] When I read this case for the first time, I was troubled by the court's decision. When I researched its subsequent history, however, I discovered that the litigation had, in fact, continued after the case was transferred to Utah.[231] Enforcing the clause did not deprive the plaintiff of her day in court.

In a similar vein, the plaintiff in *Cycles U.S., LLC v. First Funds, LLC*[232] owned and operated a small cycling business in California that had taken out loans from a company based in New York.[233] When the plaintiff sued the lender in federal court in California, the defendant moved to transfer the case to New York based on a New York forum selection clause.[234] The plaintiff argued that if he had to litigate the case in New York, he would be forced to either close his business or abandon the case.[235] The plaintiff further argued that he could not travel to New York to litigate the case because his six-year-old son had special needs and his wife could not care for him without assistance.[236] The court

222. *See supra* notes 41–42 and accompanying text.

223. Joint Appendix, *supra* note 100, at 12, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (No. 89-1647) (Declaration of Eulala Shute).

224. *See supra* notes 100–02.

225. 961 F. Supp. 2d 819 (N.D. Tex. 2013).

226. *Id.* at 824.

227. *Id.*

228. *Id.* at 834.

229. *Id.*

230. *Id.*

231. Email from Daryl K. Washington, Plaintiff's Counsel, The L. Off. of Daryl K. Washington P.C., to author (May 2, 2023) (on file with author).

232. No. ED CV 11-00598 (DTBx), 2011 U.S. Dist. LEXIS 66981 (C.D. Cal. June 22, 2011).

233. *Id.* at *2–3.

234. *Id.* at *3.

235. *Id.* at *8.

236. *Id.* at *9.

rejected these arguments. It stated that although plaintiff's "alleged financial difficulties and familial situation might make litigation in New York more difficult, nothing suggests that it is impossible or so gravely difficult and inconvenient that plaintiff will for all practical purposes be deprived of his day in court."[237] Again, I was troubled when I first read this decision. Again, I subsequently discovered that the litigation had continued after the case was transferred to New York.[238]

These and other cases suggest that there is sometimes a gap between rhetoric and reality when it comes to claims of financial hardship and inconvenience.[239] If a significant number of judges believe that plaintiffs routinely exaggerate the expense or difficulty of litigating in the chosen forum, they may respond by discounting all such arguments. The fact that plaintiffs sometimes exaggerate, however, is not a valid basis for holding that the plaintiff's financial circumstances are always irrelevant.

D. *Conserving Judicial Resources*

It is no easy thing to determine whether litigating in the chosen forum is so inconvenient that it will deprive a particular plaintiff of his day in court. Among other things, a judge has to assess the resources available to the plaintiff, the expected costs of litigating in the chosen forum, and the availability of contingency fees as a tool of litigation financing.[240] As forum selection clauses have proliferated, some courts have concluded that it is simply too time consuming to audit every plaintiff arguing that financial hardship makes it impossible to litigate in the chosen forum.[241] In place of an individualized inquiry into the financial status of the plaintiff, the courts have adopted a set of bright-line rules (financial hardship is largely irrelevant, contingency fees are immaterial) that enable them to resolve these cases more quickly.[242]

237. *Id.* at *11.

238. Cycles US LLC v. First Funds LLC, No. 11 Civ. 04553 (AJN), 2012 WL 13388867 (S.D.N.Y. Sept. 17, 2012).

239. See, for example, the Southern District of New York concluded:

> Finally, plaintiff attempts to avoid the forum selection clause on grounds of inconvenience. To this end, she has submitted an affidavit setting forth various physical and financial hardships she will face if compelled to litigate in Florida. Plaintiff, however, has failed to satisfy her 'heavy burden of proof.' Any claim of inconvenience is belied by the fact that plaintiff commenced an identical suit in the United States District Court for the Southern District of Florida, and has actively pursued her claim in that forum.

Cooper v. Carnival Cruise Lines, No. 91 Civ. 5930, 1992 WL 137012, at *2 (S.D.N.Y. June 11, 1992) (citations omitted).

240. *See infra* note 243 and accompanying text.

241. *See infra* notes 242–44.

242. *See supra* Part II.

Consider the following passage from a case where the California Court of Appeal listed the practical difficulties of an individualized approach to this issue:

> Are we to parse the enforceability of the forum selection clause, then, based on the economic value of the particular claim in issue, so that the clause can be enforced some of the time (depending on the value of the claim), but not all of the time? If so, should trial courts use an objective standard, or consider the proclivities of the individual claimant who may not feel litigation in the selected forum is worth it? How should trial judges calculate the costs of litigation? Should they consider the extent to which the selected forum allows for the recovery of costs, including travel-related expenses? Should courts compute the extent to which extraordinary costs in enforcing contractual rights are included in the consideration paid for the goods or services purchased? As can be seen . . . practical problems . . . will ensnare trial courts in endless proceedings during which these factors would be argued and weighed.[243]

If a court is required to consider the financial circumstances of every plaintiff who argues that a forum selection clause is unenforceable, so the argument goes, then the resulting proceedings will drag on, thereby undermining the ability of these provisions to streamline litigation proceedings. To avoid this outcome, some courts simply choose to ignore these circumstances in determining whether a clause is enforceable.[244]

The problem with this approach is that it conflates the issue of whether the claim has *economic value* in the chosen forum with the issue of whether the plaintiff can *afford to litigate* in that forum. U.S. courts have long held that the prospect of a smaller damages award in a particular court is not itself a reason to decline to enforce a forum selection clause selecting that court.[245] The question of damages and costs is, however, different from the question of affordability. It is easy to imagine a scenario where a legal claim has a positive expected value but the plaintiff lacks the resources to hire a lawyer in the chosen forum. This is particularly true in cases where the chosen forum does not allow for contingency fees. When the argument is properly presented, the courts can and should consider whether the plaintiff can afford to bring the case in the chosen forum. In most cases, this analysis will not require the court to put a

243. Am. Online, Inc. v. Super. Ct., 180 Cal. Rptr. 2d 699, 713–14 (West's California Reporter 2001); *cf.* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 536 (1995) ("It would be unwieldy and unsupported by the terms or policy of [the Carriage of Goods by Sea Act] to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.").

244. *See supra* Part II.

245. *See, e.g.*, Vandermast v. Wall & Assocs., No. 20-3831, 2022 WL 164307, at *2 (2d Cir. Jan. 19, 2022) ("The possibility that a damages award will be lower in the designated jurisdiction does not justify overriding an applicable forum-selection clause.").

number on the value of the claim. It will merely require them to assess whether the plaintiff has access to the necessary resources to bring the claim in the chosen forum. This inquiry is unlikely to consume significant judicial resources.

E. *Workarounds and Technological Advances*

Courts sometimes point to the availability of cost-saving workarounds to explain why the expenses associated with bringing the suit will not deprive the resisting party of his day in court. If witness testimony is taken by deposition, for example, there is no need to physically transport the witness to the chosen forum.[246] If a foreign country permits cases to be tried in part at a consulate in the United States, there is no need to travel to the chosen forum.[247] If a foreign country does not require a plaintiff in a civil suit to appear physically, or allows a designee to attend hearings on the plaintiff's behalf, then there is no need to incur the time and expense of traveling abroad.[248] These workarounds are routinely invoked by courts to explain why enforcing a clause will not deprive the plaintiff of his day in court.[249]

It is also common for the courts to invoke modern technology as a means of overcoming any inconvenience stemming from financial hardship. One court observed that "with modern conveniences of electronic filing and videoconferencing, a plaintiff may have his day in court without ever setting foot in a courtroom."[250] Another pointed out that "technological advancements

246. *See, e.g.*, Cleveland v. Kerzner Int'l Resorts, Inc., 657 F. App'x 924, 927 (11th Cir. 2016); Kent Direct, Inc. v. Bluegreen Vacations Unlimited, Inc., No. 4:16-cv-00364, 2016 WL 11522603, at *3 (D.S.C. June 29, 2016). For a critique of the idea that depositions are equivalent to in-person testimony:

> This court is concerned that enforcing the forum selection clause would leave Madoff without any guarantee that he could present his liability case in an effective manner. Possibly, some Hawaii witnesses might agree to travel to Colorado for trial, but if those witnesses changed their minds or ran into conflicting work or family obligations, Madoff would have no means of compelling their attendance at trial in Colorado. . . . Madoff would instead be relegated to presenting almost his entire liability case through depositions or by video. Not only are depositions far less likely to engage a jury than live testimony, depositions are subject to a number of other disadvantages.

Madoff v. Bold Earth Teen Adventures, No. 12-00470, 2013 WL 1337337, at *8 (D. Haw. Mar. 28, 2013).

247. The courts in Florida have noted the existence of this workaround in several cases where the forum selection clause required disputes to be resolved in the Bahamas. Sabino v. Kerzner Int'l. Bah. Ltd., No. 12-22715-CIV, 2014 WL 7474763, at *6 (S.D. Fla. Jan. 10, 2014).

248. *See* Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 327 (9th Cir. 1996).

249. Turner v. Costa Crociere S.P.A., 488 F. Supp. 3d 1240, 1251 (S.D. Fla. 2020).

250. Calix-Chacon v. Glob. Int'l Marine, Inc., 493 F.3d 507, 515 (5th Cir. 2007) (quotation marks omitted); *see also* Petersen Energia Ingersora S.A.U. v. Arg. Republic, No. 15 Civ. 2739, 16 Civ. 8569, 2020 WL 3034824, at *11 (S.D.N.Y. June 5, 2020); Matthews v. Tidewater, Inc., 108 F.4th 361, 368 (5th Cir. 2024) ("[P]laintiffs may remotely litigate in foreign forums because of modern technology.").

have mitigated the necessity for in person proceedings."[251] Still another downplayed the significance of having to litigate a case in another state by pointing out that it was possible that the plaintiff could "attend most if not all pretrial hearings by telephone."[252] The increased availability of remote proceedings is also sometimes invoked by judges to cast doubt on the notion that the costs of litigating in another jurisdiction are quite as onerous as plaintiffs claim.[253]

These arguments are not frivolous. There is no question that technological advances have reduced the costs of litigating cases in distant fora. One must be cautious, however, to recognize the limits to these arguments. Modern technology may make it easier to find a lawyer in the chosen jurisdiction. It may reduce the need for the plaintiff to travel back and forth to that jurisdiction and to transport evidence and documents. Modern technology does not, however, make it any less expensive for a plaintiff to *hire a lawyer* in the chosen jurisdiction. If the plaintiff lacks significant financial resources, and if the chosen jurisdiction does not allow contingency fees, then the suit may well be abandoned notwithstanding the technological developments discussed above. Although technology is capable of many magical things, it cannot induce a lawyer in the chosen jurisdiction to litigate a case for free.

F. *Pleading and Proof*

In some cases, the plaintiff seeking to invalidate a clause fails to carry his burden of proof. In one instance, the court commented that the plaintiffs had provided "no evidence of their financial means or how the distance to New York burdens them."[254] In another, the court noted that the plaintiff's proof of inconvenience consisted of just a single conclusory sentence: "[F]iling my case in Oregon is [a] heavy burden for me since I don't have the financial ability to hire a lawyer or to travel to and from Oregon."[255] The courts have rightly refused to invalidate clauses in such cases. The Supreme Court has made clear that the party resisting enforcement bears a "heavy" burden of proof in establishing that the clause should not be given effect.[256] In these cases, the

251. *Turner*, 488 F. Supp. 3d at 1251–52.

252. Schwarz v. Sellers Mkts., Inc., 812 F. Supp. 2d 932, 938 (N.D. Ill. 2011).

253. *See Petersen Energia Ingersora S.A.U.*, 2020 WL 3034824, at *11 ("Indeed, sure to be one of the enduring lessons of the ongoing COVID-19 pandemic is that we can accomplish far more remotely than we had assumed previously."). *See generally* Christabel Narh, *Zooming Our Way Out of the Forum Non Conveniens Doctrine*, 123 COLUM. L. REV. 761, 786 (2023) ("Some aspects of the forum non conveniens analysis—especially the private factors and the deference to domestic plaintiffs—may be rightfully obsolete in light of the increased use of videoconferencing hearings.").

254. Cream v. N. Leasing Sys., Inc., No. 15-cv-01208, 2015 WL 4606463, at *7 (N.D. Cal. July 31, 2015).

255. Ziya v. Glob. Linguist Sols., LLC, No. CV10-2021, 2011 WL 5826081, at *3 (D. Ariz. Nov. 18, 2011) (quotation marks omitted).

256. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972).

plaintiffs failed to present sufficient evidence that they lacked the financial resources to litigate in the chosen jurisdiction.

In other cases, the plaintiffs have failed to meet their burden by not offering any evidence about the costs of litigating in the chosen jurisdiction. In one case, for example, the court referenced several recent cases where the plaintiff had "complain[ed], in general terms and without submitting sufficient proof, of the expense of litigation in the selected forum."[257] In another case, the court noted that:

> Plaintiff filed an affidavit containing the general averment that she receives no income, does not have the financial means to hire an attorney in the Bahamas and could not afford the cost of litigating in the Bahamas. Therefore, she concludes, if the forum selection clause is upheld, she will be unable to seek redress for her injuries. *Plaintiff does not contend that she has inquired about hiring legal counsel in The Bahamas and found she could not do so, or that she discussed with any Bahamian attorneys the procedures, and expected costs, for undertaking this lawsuit in The Bahamas*.[258]

Similar concerns about the sufficiency of the evidence relating to the costs of litigation have been cited by other courts in other cases as a reason to enforce a clause over the plaintiff's objections.[259]

257. Garcia v. Fid. ATM, Inc., No. M-06-130, 2006 U.S. Dist. LEXIS 70069, at *14 (S.D. Tex. Sept. 27, 2006).

258. Sabino v. Kerzner Int'l. Bah. Ltd., No. 12-22715-CIV, 2014 WL 7474763, at *6 (S.D. Fla. Jan. 10, 2014) (emphasis added); *see also* Whipple Indus., Inc. v. Opcon AB, No. CV-F-05-0902, 2005 WL 2175871, at *8 (E.D. Cal. Sept. 7, 2005) ("Mr. Whipple's declaration lacks specific facts from which the court could conclude that convenience strongly favors Fresno. . . . Whipple does not aver that it would be wholly unable to prosecute the case if the forum selection clause is enforced."); Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 11 (2d Cir. 1995) ("This agreement should not be negated unilaterally by plaintiff's conclusory assertions that she cannot afford to travel to Greece, that she would be afraid to stay at a strange city, that she does not know any Greek lawyers."); Gurung v. MetaQuotes Ltd., No. 1:23-CV-06362, 2024 WL 3849460, at *6 (E.D.N.Y. Aug. 16, 2024) (concluding that plaintiff had "not sufficiently alleged that enforcing the Cypriot forum selection clause would be so inconvenient so as to deny [her of] her day in court" notwithstanding claims that she "lacks the requisite funds to litigate in Cyprus" and "that she would have to secure Cypriot counsel and Greek translation services").

259. Gehrmann v. Knight-Swift Transp. Holdings Inc., No. C20-6002, 2021 WL 1090793, at *3 (W.D. Wash. Mar. 22, 2021) ("[Plaintiff] declares that he would not be able to afford to hire an attorney in Arizona, but he has not made a specific showing that he has contacted potential counsel in Arizona and counsel is unaffordable or unwilling to work on a contingent basis."). The *Sintel* court found that

> Defendant has provided conclusory statements that, as a pro se Defendant, his costs would be "astronomical." Therefore, because Defendant did not provide more information about costs he allegedly will be forced to incur or his financial ability to handle those costs, the Court finds that he has failed to overcome the presumption that the forum selection clause is valid and reasonable.

Sintel Sys., Inc. v. FroyoWorld Allston, No. CV 16-03091, 2016 WL 11535897, at *7 (C.D. Cal. Aug. 25, 2016) (citation omitted).

Plaintiffs also sometimes fail to present evidence relating to the nonavailability of contingency fees in the chosen forum. In one case, for example, the Fifth Circuit observed:

> The [plaintiffs] maintain that they will be prevented from having their day in court if forced to return to a Peruvian forum, because they cannot obtain contingency-fee counsel in the Peruvian courts and cannot afford to pay a Peruvian lawyer in advance. Therefore, they will be barred from litigating their claim in those courts. *The record contains no information about the [plaintiffs'] inability to obtain counsel to represent them in the Peruvian courts. Accordingly, we will not consider that matter.*[260]

The plaintiff bears a heavy burden of proving that enforcing the clause will deprive him of his day in court. When plaintiffs do not present sufficient evidence relating to (1) their financial resources, (2) the costs of litigating in the chosen forum, and (3) the nonavailability of contingency fees in that forum, they cannot reasonably expect that a court will decline to enforce a clause on the basis of financial hardship. While courts frequently state that they are "sympathetic" to the plaintiffs in these cases, the fact remains that the plaintiffs bear the burden of persuading the court to set aside the clause.[261]

* * *

That the lower federal courts have misread key Supreme Court decisions, developed strong views about the desirability of enforcing forum selection clauses, expressed concerns about exaggerated claims, sought to conserve judicial resources, and assigned a great deal of significance to recent

260. Afram Carriers, Inc. v. Moeykens, 145 F.3d 298, 304 (5th Cir. 1998) (emphasis added).

261. Pratt v. Silversea Cruises, Ltd., Inc., No. C 05-0693, 2005 WL 1656891, at *4 (N.D. Cal. July 13, 2005) ("[W]hile this Court is *sympathetic* to plaintiff's condition and the inconvenience of traveling to Florida, plaintiff has not met the heavy burden of demonstrating that enforcement is so inconvenient that she would effectively be deprived of her day in court." (emphasis added)); Messmer v. Thor Motor Coach, Inc., No. 3:16-cv-1510-J, 2017 WL 933138, at *4 (M.D. Fla. Feb. 28, 2017) ("Although the Court is *sympathetic* to the inconvenience and additional cost that Plaintiffs will likely experience by having this case transferred, the law is clear that the case must be transferred." (emphasis added)); Lightfoot v. MoneyonMobile, Inc., No. 18-cv-07123, 2019 WL 2476624, at *8 (N.D. Cal. June 13, 2019) ("[W]hile the Court is *sympathetic* to plaintiff's health condition and the difficulties of litigating in another state, plaintiff has not met the 'heavy burden' of demonstrating that enforcement of the forum selection clause would deprive him of his day in court." (emphasis added)); Sick Kids (Need) Involved People of N.Y., Inc. v. 1561599 Ont., Inc., No. 15 Civ. 3756, 2015 WL 5672042, at *5 (S.D.N.Y. Sept. 25, 2015) ("While SKIP is certainly a *sympathetic* plaintiff, that status, without more, is insufficient to invalidate the clause contained within the contract it bargained for." (emphasis added)); Wolfe v. CareFirst of Md., Inc., No. 4:09–CV–492, 2010 WL 1998290, *5 (E.D. Tex. Apr. 27, 2010) ("Although the Court is *sympathetic* with Plaintiff's argument, the inconvenience of traveling from Texas to Maryland does not prevent the enforcement of a forum selection clause." (emphasis added)); K & V Sci. Co. v. Bayerische Motoren Werke Aktiengesellschaft, 164 F. Supp. 2d 1260, 1271 (D.N.M. 2001) ("The Court is not without *sympathy* for K&V, but does not believe that the company has met its 'heavy burden' of proof." (emphasis added)).

technological advances in no way constitutes a valid basis for simply ignoring the test laid down in *The Bremen*. When a plaintiff fails to submit sufficient evidence on the issue of financial hardship, to be sure, the courts can and should enforce the clause over the plaintiff's objections. In many U.S. jurisdictions, however, the courts never reach the evidentiary question. If the financial resources available to the plaintiff are irrelevant to the inquiry, then no amount of evidence will suffice to carry the plaintiff's heavy burden of proof.

IV. MAKING BETTER PREDICTIONS

While it is difficult to predict the future, some events are obviously easier to predict than others. One can confidently predict, for example, that the sun will rise tomorrow or that water will boil if warmed to a temperature of 100 degrees Celsius. One can make only educated guesses, however, as to the place and time of the next earthquake. When the task of prediction is challenging, forecasters should seek out the best possible information to make the most accurate prediction possible. To date, courts in the United States have consistently failed to do this in cases involving forum selection clauses. They have adopted a rule which requires them to ignore a fact—the financial status of the plaintiff—that is clearly relevant to the inquiry.

Since the courts have chosen to ignore this information, it should come as no surprise that many of their predictions are later proven wrong. What is needed—and what is currently missing from the scholarship—is better information about when plaintiffs will and will not abandon lawsuits due to financial constraints on their ability to continue the lawsuit in the chosen forum.

This information is not easy to come by. In theory, one could obtain it by reviewing electronic dockets to ascertain whether a lawsuit was refiled after being transferred or dismissed. In practice, this approach is unworkable for two reasons. First, it is impossible to access the electronic dockets of courts in most foreign countries and in many states in the United States.[262] Second, even if these electronic dockets were available, there is no way of knowing why a lawsuit was never refiled. The dockets do not distinguish between suits that are settled and suits that are abandoned. Nor do they provide any insight into whether a suit was abandoned due to financial hardship or to some other reason.

262. Adam B. Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. 1449, 1497 (2024) (observing that "public access to state supreme court dockets is extremely limited"); Elizabeth A. Rowe, *Unpacking Trade Secret Damages*, 55 HOUS. L. REV. 155, 167 (2017) (observing that state court dockets are "less standardized" and "more difficult to search"); Nancy Leong, *Civil Rights Liability for Bad Hiring*, 108 MINN. L. REV. 1, 44 n.216 (2023) ("The Bloomberg database does not include comprehensive coverage of state court dockets."); Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527, 1563 (2022) ("State court dockets are notoriously opaque, which usually makes it difficult to say much of anything about the composition of cases brought.").

The only sure way to ascertain why the litigation was discontinued is to contact the lawyers involved in these cases and ask them what happened.

And so this is precisely what I did. I identified every published federal decision between 2018 and 2020 where a court enforced a forum selection clause over the plaintiff's objections. I then contacted the lawyers who were involved in each of these cases to ask whether the suit was refiled in the chosen forum after it was transferred or dismissed and, if not, why not. I ultimately interviewed forty lawyers. Over the course of these conversations, it became clear that there was one variable that played an outsized role in determining whether a plaintiff abandons a claim due to financial constraints. That variable was the location of the chosen court. When a clause selected a court in a foreign country, the suit was frequently abandoned. When a clause selected a court in the United States, the suit was almost never abandoned. The information gleaned from these interviews supports the common-sense intuition that litigating abroad is more costly and inconvenient than litigating in the United States.

This part summarizes the information gleaned from these interviews. It then draws upon that information—along with insights developed in prior parts—to suggest a framework for how U.S. courts should address financial hardship in future cases.

A. *Litigating at Home and Abroad*

When a forum selection clause chooses a court in another U.S. state, there is a good chance that the attorney who represented the plaintiff in the initial proceeding can continue this representation in the new forum. In some cases, the attorney may already be admitted to practice in the chosen state. In other cases, the attorney may be a partner at a law firm that has an office in that state. If all else fails, an attorney not otherwise licensed to practice in the chosen jurisdiction can always ask to be admitted on a pro hac vice basis.[263] A pro hac vice admission allows a lawyer to practice law in a state where the lawyer is not otherwise admitted so long as the lawyer partners with local counsel.[264] While most states impose limits on the number of times an attorney may move to be admitted pro hac vice, out-of-state attorneys are routinely admitted on this

263. *See* Laurie Del Grosso, *Pro Hac Vice*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/pro_hac_vice [https://perma.cc/D3YH-BEW3] (providing an overview of pro hac vice admissions in the United States).

264. JACOB A. STEIN & ANDREW M. BEATO, THE LAW OF LAW FIRMS § 11:2 (2d ed. 2024) ("By tradition, attorneys can seek temporary admission to a bar for a particular case. This is generally known as pro hac vice admission.").

basis.[265] In many cases, therefore, the plaintiff's original attorney can continue to represent him in the U.S. court named in the forum selection clause so long as local counsel agrees to assist with the case.[266]

Lawyers report that the task of finding local counsel is straightforward.[267] Over the years, the plaintiffs' bar in the United States has developed a network of attorneys who know each other through conferences, advocacy groups, and professional organizations.[268] In the overwhelming majority of cases, the need to partner with local counsel will not meaningfully constrain an attorney's ability to represent the plaintiff in that jurisdiction. Although it may be inconvenient to litigate in a different U.S. state, and although it may prove more costly due to the need to bring in local counsel, these expenses in most cases will not lead a plaintiff to abandon the lawsuit.[269] Instead, the original lawyer will continue to litigate in the chosen jurisdiction with the assistance of local counsel.

In cases where the original counsel was hired on a contingency basis—a relatively common occurrence—that person's continued involvement in the

265. VICTOR E. SCHWARTZ, PATRICK W. LEE & KATHRYN KELLY, GUIDE TO MULTISTATE LITIGATION § 4:5 (2024 ed.) ("Use of regional counsel for trial purposes generally requires their pro hac vice admission in local jurisdictions in their region. Pro hac vice (*for this occasion*) admission of out-of-state counsel is available almost everywhere as a matter of routine, so long as local counsel is affiliated as well.").

266. In *Zaklit*, for example, the translators were represented by the same counsel in the California proceedings and in the subsequent Virginia proceedings. *See* Zaklit v. Glob. Linguist Sols., LLC, No. CV 13-08654, 2014 WL 12521725, at *1 (C.D. Cal. Mar. 24, 2014); Zaklit v. Glob. Linguist Sols., LLC, 53 F. Supp. 3d 835, 842 (E.D. Va. 2014). Similarly, the owners of the motorhome in *Parks* were represented by the same counsel in both Virginia and Indiana. *See* Parks v. Newmar Corp., No. 3:19-CV-352, 2020 WL 265870, at *1 (E.D. Va. Jan. 17, 2020); Answer at 8, Parks v. Newmar Corp., No. 3:20-cv-00070 (N.D. Ind. filed Jan 23, 2020).

267. Telephone Interview with Att'y, Small Ga. L. Firm (Sept. 12, 2022) (notes on file with author) ("We just Googled lawyers in Kansas and read the websites and found the person most qualified to talk to them and then set up a conversation.").

268. Telephone Interview with Att'y, Small Va. L. Firm (July 5, 2022) (notes on file with author) (explaining that it was easy to find local counsel through trial lawyer associations); Telephone Interview with Att'y, Small Ill. L. Firm (July 6, 2022) (notes on file with author) ("We are union-side lawyers. There's a big network of union-side lawyers in the country that we have easy contacts with. It's not hard for us to reach out to these other attorneys. So long as there are no conflicts, it's usually no problem.").

269. A federal court in Washington once observed that:

> Gehrmann declares that he would not be able to afford to hire an attorney in Arizona, but he has not made a specific showing that he has contacted potential counsel in Arizona and counsel is unaffordable or unwilling to work on a contingent basis. And as [defendants] highlight, Gehrmann's current counsel could seek pro hac vice admittance in Arizona to represent him. Gehrmann may have to hire local counsel, but this burden does not foreclose him from pursuing a remedy.

Gehrmann v. Knight-Swift Transp. Holdings Inc., No. C20-6002, 2021 WL 1090793, at *3 (W.D. Wash. Mar. 22, 2021).

lawsuit in the new forum means that they will continue to finance it.[270] In these situations, the financial resources available to the plaintiff are irrelevant because the plaintiff is not bearing the costs of litigation. In cases where the litigant is proceeding pro se, a different calculus applies. If a plaintiff was unable to find a lawyer to represent him in the court where the suit was originally filed, then it is unlikely that the plaintiff will be able to find a lawyer to represent him in the court named in the forum selection clause. When pro se plaintiffs come forward with evidence suggesting that they lack the financial resources to litigate in the chosen forum, therefore, the courts should take that argument seriously regardless of the location of the chosen court.[271] To require someone with no formal legal training to bring a lawsuit in a different U.S. jurisdiction without the assistance of counsel will, in almost all cases, serve to deprive that person of their day in court.[272]

When a forum selection clause selects a court in a foreign country, by contrast, the task of engaging a lawyer is more complicated. Only a tiny percentage of U.S. attorneys are licensed to practice abroad.[273] Most plaintiff-side U.S. law firms do not have foreign offices.[274] And foreign countries do not admit U.S. attorneys on a pro hac vice basis.[275] This means that if the suit is

270. Telephone Interview with Att'y, Small Tex. L. Firm (July 7, 2022) (notes on file with author) ("When I'm on contingency, you don't want to hire local counsel. In ninety-nine percent of the cases, the local counsel wants to be paid by the hour.").

271. *See* Jelcich v. Warner Bros., Inc., No. 95 CIV. 10016, 1996 WL 209973, at *2–3 (S.D.N.Y. Apr. 30, 1996) (refusing to enforce California forum selection clause against unemployed pro se plaintiff financing the litigation with funds withdrawn from her 401K account). *But see* Grivesman v. Carnival Cruise Lines, No. 00 C 2091, 2001 WL 62580, at *3 (N.D. Ill. Jan. 25, 2001) ("Plaintiffs have not submitted any affidavits in support of this hardship argument, but they proceed *pro se* so we give them the benefit of the doubt. Even so, expense and inconvenience of the order described by plaintiffs are not enough to nullify the forum selection clause."); Sharani v. Salviati & Santori, Inc., No. C 08-03854, 2008 WL 5411501, at *3 (N.D. Cal. Dec. 29, 2008) (enforcing United Kingdom forum selection clause against pro se plaintiff notwithstanding claims of financial hardship).

272. J. Brian Beckham, *Forum Selection Clauses in Clickwrap Agreements*, 14 U. BALT. INTELL. PROP. L.J. 151, 168 (2006) (questioning whether "forcing potential plaintiffs, many of whom seek to proceed *pro se* . . . to travel to foreign jurisdictions" is "legally conscionable").

273. As an attorney at a law firm in Louisiana firm put it:

> I'm not admitted England. And they're not going to allow a U.S. lawyer to stand beside the barrister. There are going to be new court rules, new regulations, and new processes to learn. The procedural difficulties alone virtually eliminate the possibility of bringing a suit there. The clause made it almost impossible to try the case. Think of the time delays. Gotta find an English lawyer. Gotta go to England.

Interview with Att'y, Small La. L. Firm (July 14, 2022) (notes on file with author).

274. John E. Coyle, *Financial Hardship and Forum Selection Clauses*, TRANSNAT'L LITIG. BLOG (Nov. 15, 2023), https://tlblog.org/financial-hardship-and-forum-selection-clauses/ [https://perma.cc/A73P-M6FP].

275. Telephone Interview with Att'y, Small Fla. L. Firm (July 21, 2022) (notes on file with author) ("People aren't going to sue companies in the Caribbean. They don't have the resources. And we're not admitted there.").

going to be brought in the chosen jurisdiction, the plaintiff is going to have to hire a lawyer who is based in that foreign country.

Finding an attorney in another country is, as a rule, more difficult than finding an attorney in another U.S. state.[276] While there are networks that connect lawyers across national borders, these networks are less robust than domestic networks.[277] Even if the plaintiff is successful in locating foreign counsel, moreover, there arises the question of payment. As one U.S. attorney put it:

> A foreign forum selection clause can preclude you from pursuing the foreign party. You have to retain counsel there. While U.S. lawyers charge a lot of money, I've seen law firms in Oslo and Copenhagen will charge fees that make you blush. They know they have you. There are only so many attorneys who do the work. And they demand fees to be commensurate with that.[278]

Another U.S. lawyer explained that "the reality is that no Swiss lawyer will lift a pencil unless you pay them up front. There are financial constraints on all this."[279] Still another U.S. lawyer observed that a decision to enforce a foreign forum selection clause generally brought the litigation to a close:

> Once we win on a ground such as [a forum selection clause], the plaintiffs don't pursue it in a foreign country. Laws are confusing and unfamiliar. It's expensive. And you have to retain a foreign attorney. This is typically

276. Whytock, *supra* note 134, at 163 ("Domestic legal measures that can make legal representation more affordable—such as contingent fee arrangements and procedures for claim aggregation or collective redress—do not exist in all States, and States that provide legal aid to their citizens do not necessarily provide it to foreign parties."). Reich articulated the problem thusly:

> The problem lies in the fact that the local lawyer, who serves as a kind of entrepreneur for filing the class action, has no interest in filing it in the foreign forum, in compliance with the forum selection clause because such a lawyer is usually licensed only locally and cannot act in the foreign forum. Local lawyers do not want to share their fee with a foreign lawyer, and this deters them from pursuing a class action in a foreign jurisdiction. At the same time, local consumers have difficulty reaching a foreign lawyer who works in the foreign jurisdiction to file the lawsuit for them. . . .

Arie Reich, *Should Forum Selection Clauses in International Websites Be Enforced?–A Proposed New Model*, 33 IND. INT'L & COMP. L. REV. 129, 160 (2023).

277. Telephone Interview with Att'y, Small N.D. L. Firm (Aug. 2, 2022) (notes on file with author) ("Despite having gone to law school with multiple Canadians, I'm not sure what's going on up there.").

278. Telephone Interview with Att'y, Small N.J. L. Firm (July 28, 2022) (notes on file with author).

279. Telephone Interview with Att'y, Medium N.Y. L. Firm (July 15, 2022) (notes on file with author).

> the end of the road. Plaintiff's counsel doesn't want to deal with the Hague. They don't want to spend time or money to figure it out.[280]

If the plaintiff's original lawyer in the United States took the case on a contingency basis, and if contingency fees are not permitted in the foreign jurisdiction, then it will in many cases prove impossible for a plaintiff to hire an attorney in a foreign jurisdiction.[281]

This state of affairs helps to explain why Ally Baker abandoned her suit against Adidas; she could not afford to hire an attorney in the Netherlands.[282] It explains why Robert Keenan threw in the towel in his suit against Louis Berger; he could not afford to hire counsel in Qatar.[283] It explains why Rita Robb gave up her suit against the Atlantis Resort; she could not afford to engage an attorney in the Bahamas.[284] It explains why the Sharanis dropped their suit against the negligent shipping company; they could not afford to litigate in England.[285] Had the courts hearing each of these cases inquired as to whether these plaintiffs would realistically be able to hire an attorney to represent them in the foreign jurisdiction, they may well have been decided differently.[286]

B. *Rethinking Financial Hardship*

In *The Bremen*, the Supreme Court clearly stated that the plaintiff's individual circumstances should be considered in deciding whether enforcement will deprive the plaintiff of his day in court.[287] With this mandate in mind, the courts should adopt the following analytical framework to evaluate claims of financial hardship.

First, the courts should acknowledge that financial hardship is relevant to the inquiry as to whether a forum selection clause should be enforced. To the extent that prior decisions have held the contrary, they should be overruled.

Second, the party resisting enforcement should bear the burden of establishing that a forum selection clause should not be enforced because of financial hardship. When that party fails to come forward with evidence relating

280. Telephone Interview with Att'y, Medium Ga. L. Firm (Aug. 8, 2022) (notes on file with author).

281. Telephone Interview with Att'y, Medium Mont. L. Firm (Aug. 2, 2022) (notes on file with author) ("It's a huge bummer to see where people are losing hundreds of thousands of dollars because they can't afford to go to China.").

282. Baker v. Adidas Am., Inc., 335 F. App'x 356, 361 (4th Cir. 2009).

283. Keenan v. Berger, No. CIV-18-584-R, 2019 WL 1590589, at *3 (W.D. Okla. Apr. 12, 2019).

284. Robb v. Island Hotel Co., No. 18-cv-60544, 2018 WL 11466939, at *5 (S.D. Fla. Oct. 31, 2018).

285. *See supra* notes 165–74 and accompanying text.

286. *See, e.g.*, Petersen v. Boeing Co., 715 F.3d 276, 282 (9th Cir. 2013) (directing district court to conduct an "evidentiary hearing to determine whether enforcement of the [Saudi Arabian] forum selection clause at issue here would effectively preclude [the pro se plaintiff's] day in court").

287. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 19 (1972).

to (1) the financial resources available to them, (2) the costs of litigating in the chosen forum, and (3) the presence or absence of litigation financing options in that forum, the court should enforce the clause unless there exists some other basis for nonenforcement.

Third, when plaintiffs come forward with evidence that they lack the financial resources to litigate in a particular forum, the court should pay careful attention to the location of that forum. If the court is located in a foreign country, the data suggest that many plaintiffs will in many cases be deprived of their day in court if the clause is enforced.[288] This danger is particularly acute in foreign jurisdictions that do not allow contingency fees. In these cases, the court should generally not enforce the clause barring exceptional circumstances. If the court is located in the United States, by contrast, the available evidence suggests that lawsuits will generally continue in the chosen jurisdiction if the clause is given effect so long as the plaintiff is not proceeding pro se.[289] In these cases, the court should generally enforce the clause barring exceptional circumstances.

To be clear, the framework outlined above does not purport to replace the general test for enforceability laid down in *The Bremen*. That test remains the controlling precedent. It does, however, provide a better—and better informed—way of thinking about how courts should apply that test when they are presented with credible claims of financial hardship.

CONCLUSION

A legal right is meaningless if the person holding that right cannot access the civil justice system.[290] More than fifty years ago, this insight prompted the U.S. Supreme Court to hold that forum selection clauses should not be given effect when "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court."[291] In the ensuing decades, the lower federal courts have steadily chipped away at this rule. In case after case, these courts held that there is no need to consider the plaintiff's financial resources, or the availability of alternative sources of litigation funding, when deciding whether enforcement would deprive the plaintiff of his day in court. The end result has been a stream of predictions—some right, some wrong—made on the basis of limited information.

288. *See supra* Part II.

289. *See supra* Section IV.A.

290. Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1314 (2012).

291. *Bremen*, 407 U.S. at 18.

This state of affairs is troubling for two reasons. First, it is a mistake for any court tasked with predicting the future to consciously disregard facts relevant to the inquiry. Second, it is difficult to make predictions in this area without knowing what happened to the plaintiffs in prior cases. This Article sought to address both issues. It first identified and critiqued the rule that financial hardship is irrelevant to the enforceability inquiry. It then drew upon dozens of lawyer interviews to better understand when lawsuits dismissed or transferred on the basis of a forum selection clause were likely to be refiled in the chosen jurisdiction. With the insights from these interviews in mind, this Article urged the courts to reimagine the role that financial hardship should play in the enforceability inquiry. While forum selection clauses have a role to play in contemporary litigation, they should not be used to immunize defendants from liability when the plaintiff cannot afford to litigate in the chosen forum.