Warsaw, Montreal, and the U.S. Department of Transportation: Consumer Protection for Forum Selection

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WARSAW, MONTREAL, AND THE U.S. DEPARTMENT OF TRANSPORTATION: CONSUMER PROTECTION FOR FORUM SELECTION?

JESSICA RAPOPORT*

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I. INTRODUCTION

"Any and all disputes arising under and in connection with this Contract shall be . . ."

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In Modern Times, this combination of words is placed in contracts to introduce what is known as a dispute resolution clause (DRC). DRCs often incorporate terms that specify the forum or fora in which claims arising under the contract must be brought, as well as the law that will be applied to resolve the dispute. Courts in virtually every country around the world recognize the validity of such clauses and the important role they play in modern commerce.¹

There are myriad reasons advanced for why courts should respect the dispute resolution terms agreed upon ex ante by contracting parties. Forum selection, in particular, is lauded for enabling parties to reduce litigation expenses, conserve judicial resources, and reduce the uncertainty in dispute outcomes by decreasing the risk that a dispute might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.² Such reduction in risk and expense also promotes domestic and international commerce, and ultimately benefits consumers in the form of lower prices.³

Recognizing this, U.S. federal courts have perpetuated a trend, expanding the enforcement of forum selection clauses (FSCs) over the past several decades.⁴ Increased enforcement of such clauses, however, has also incited serious consumer protection concerns when included in contracts of adhesion. A “contract of adhesion” is a standard form contract, prepared by one party to be signed by another party in a weaker position, usually a consumer. It is typically presented in a take-it-or-leave-it fashion, without an opportunity for the weaker party to negotiate the terms included. Examples include passenger airline or maritime cruise tickets, at-will employment contracts, and online merchandise purchases. Often included within the fine print of these contracts of adhesion are DRCs and FSCs that require consumers to bring their claim, should one arise, in a certain forum.

Many jurisdictions around the world, concerned over the unequal bargaining power between the parties, treat FSCs as void

⁴ See Kevin E. Davis & Helen Hershkoff, Contracting for Procedure, 53 Wm. & Mary L. Rev. 507 (2011).
unless the contract was individually negotiated. For example, a European Union directive requires member states to enact laws that ensure that unfair terms in consumer transactions, which have not been individually negotiated, are not binding on the consumer.

The United States has taken a different position. Generally, U.S. courts will enforce FSCs in contracts of adhesion, including consumer transactions. However, there are certain classes of consumers in the United States that receive special protection from contractual restrictions on forum selection. This article will focus on one of those classes—airline passengers—and the special protections conferred on that class by a new U.S. Department of Transportation (DOT) regulation, 14 C.F.R. § 253.10, and by two international treaties, the Warsaw Convention of 1929 and the Montreal Convention of 1999.

The article will begin by examining the general paradigm applied by U.S. courts to enforce FSCs and the arguments against enforcement. It will then discuss the enhanced protections conferred upon airline passengers and the mechanisms currently calling into question the true effect of these protections, including the common-law doctrine of forum non conveniens, the statutory power of the U.S. courts to transfer cases internationally and domestically under 28 U.S.C. §§ 1404(a) and 1406(a), and the corporate outsourcing of ticket sales. Finally, the article will conclude with recommendations to the DOT on how to achieve the intended degree of consumer protection.

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7 See, e.g., Carnival Cruise, 499 U.S. at 593–97.


II. GENERAL RECOGNITION AND ENFORCEMENT OFForum Selection Clauses in theUnited States

U.S. courts traditionally viewed FSCs "as agreements to oust" the courts from their proper jurisdiction and were, therefore, treated as "per se unenforceable." This view began to change in the 1940s and '50s, and by the 1970s, courts in most states recognized FSCs as "presumptively valid."

Today, courts confront issues pertaining to FSCs when litigants seek to dismiss, transfer, or remove an action to a contractually designated forum, using motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, or failure to state a claim. Courts address such motions in a two-part inquiry. First, they consider whether the FSC is mandatory or permissive.

A permissive FSC merely "authorizes jurisdiction in a designated forum without prohibiting litigation elsewhere." Permissive clauses will generally "not ... preclude another court of otherwise competent jurisdiction from entertaining [a] dispute." In contrast, a mandatory FSC will explicitly and unambiguously indicate that jurisdiction is only proper in the designated forum, and that the designated forum is "the sole forum in which the parties must enforce their rights under the

11 Gehring, supra note 5, at 637.
12 Id. (citing Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d 806, 808 (2d Cir. 1955), cert. denied, 350 U.S. 903 (1955); Krenger v. Pa. R. Co., 174 F.2d 556, 561 (2d Cir. 1949)).
15 See Memorandum from Elizabeth Culhane, Law Clerk for the Honorable C. Arlen Beam, on the Enforcement of Forum Selection Clauses in Federal Courts to the Drafting Comm. on the Hague Convention on Choice of Court Agreements (Oct. 7, 2008) [hereinafter Beam Memorandum].
16 See id. at 3 n.5 (citing Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997); Gita Sports Ltd. v. SG Sensortechnik GmbH & Co. KG, 560 F. Supp. 2d 432, 436 (W.D.N.C. 2008)).
contract." For example, a permissive clause might read, "The courts of Switzerland shall have jurisdiction for all disputes arising out of this Contract between the parties," whereas a mandatory clause would read, "All disputes arising under and in connection with this Contract shall be determined by the courts of Switzerland." In the former example, the clause merely states that Swiss courts are able to exercise jurisdiction. It does not specifically limit jurisdiction to Swiss courts, as in the latter example.

If the clause is permissive, the court will then determine whether or not to exercise jurisdiction. Reasoning that there are other appropriate forums available, the court will often entertain arguments on why, despite the plaintiff's choice of where to bring the claim, the court should dismiss the case to be adjudicated in another jurisdiction. The two major arguments advanced by parties seeking to change jurisdiction are the common-law doctrine of forum non conveniens and the statute-based transfer in the interest of justice. Permissive clauses and these arguments will be discussed further herein.

In contrast, if the FSC is found to be mandatory, the court will proceed to consider whether the clause is enforceable. The current federal standard of enforceability, announced by the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*, holds that an FSC is presumptively valid and must be enforced, unless the opposing party demonstrates that enforcement would be "unreasonable under the circumstances." The Supreme Court noted in *M/S Bremen* that such a standard promoted greater certainty in agreements between companies of different nations, judicial economy, notions of freedom of contract, and promotion of international commerce.

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19 Id.
21 See Force, supra note 18, at 426–27.
22 See id. As aforementioned, the law has developed so as to allow certain choice-of-forum and choice-of-law provisions to be severed from the waiver of the right to seek remedy in court in favor of an arbitral tribunal, so long as the provisions are not an integral part of the agreement to arbitrate. See Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1286 (11th Cir. 2001) (citations omitted), vacated on other grounds, 294 F.3d 1275 (11th Cir. 2002); In re Salomon Inc. Shareholders' Derivative Litig. 91 Civ. 5500 (RRP), 68 F.3d 554, 561 (2d Cir. 1995); Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 332–34 (5th Cir. 1987).
23 See Force, supra note 18, at 434.
24 407 U.S. 1, 10 (1972); see also id. (citing AAR Int'l, Inc. v. Nimelias Enters., S.A., 250 F.3d 510, 524–25 (7th Cir. 2001), cert denied sub nom., 534 U.S. 995 (2001)).
In *M/S Bremen*, an American corporation contracted with a German corporation to tow its drilling rig from Louisiana to a point off the coast of Italy. The contract included a mandatory FSC that vested exclusive jurisdiction in the London Court of Justice. After damage to the rig in the Gulf of Mexico, the American corporation brought suit in Florida and the German corporation moved to dismiss on grounds of the forum clause.

The Supreme Court held that no showing of unreasonableness was made and centered this holding on four findings: (1) the executed contract was "an arm's-length negotiation by experienced and sophisticated businessmen"; (2) there was no showing of "fraud, undue influence, or overweening bargaining power"; (3) any possible difference in foreign remedy was "foreseeable [to the parties] at the time of contracting"; and (4) the contractual forum was not shown to "be so gravely difficult and inconvenient that" the party would "for all practical purposes be deprived of his [or her] day in court."

In the decades following the *M/S Bremen* decision, case law on FSCs was often intermingled and conflated with the enforceability of other DRC provisions, such as choice of law and mandatory arbitration. As a result, it is currently difficult, if not impossible, to distill the jurisprudence purely regarding the enforceability of mandatory FSCs. Therefore, for purposes of analysis, this article groups jurisprudence on the enforceability of mandatory FSCs into (1) cases in which it is argued that enforcement would infringe on a statutory right and (2) cases in which it is argued that the contractual forum is so gravely difficult and inconvenient that a party will "for all practical purposes be deprived of his [or her] day in court."

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26 *Id.* at 2. Although *M/S Bremen* was an admiralty case, the contract at issue was not regulated by federal law, which may be used to argue against enforcement of such a clause, as has been done in both maritime and aviation law. See *id.*

27 *Id.* at 2, 20.

28 *Id.* at 3–4.

29 *Id.* at 12–18.

30 See *id.* at 18. Another ground argued in certain states is unconscionability. Modern unconscionability doctrine is centered on Section 2-302 of the Uniform Commercial Code (UCC), which states that a court may refuse to enforce an unconscionable contract or clause, or may limit an unconscionable clause to avoid an unconscionable result. U.C.C. § 2-302 (2011). Courts recognize two types of unconscionability—procedural and substantive—and usually require the presence of both on a sliding scale in order to find a particular agreement unconscionable. In theory, courts balance procedural and substantive unconscionability and make an individual assessment; the stronger the procedural unconscionability component, the less the need for proof of substantive uncon-
III. WHERE A MANDATORY FORUM SELECTION CLAUSE WOULD INFRINGE ON A STATUTORY RIGHT OR REMEDY

A common argument against enforcement of a mandatory FSC is that such enforcement would infringe on a statutory right or remedy. One part of this argument is premised on the risk that the foreign forum would not honor a U.S. statute-based claim, as opposed to a claim arising out of breach of contract. However, in 1985, the U.S. Supreme Court held that this was not a bar to enforcement of an FSC. In *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, the Court enforced a foreign arbitration clause where one of the claims in the dispute was an antitrust claim based on the U.S. Sherman Act. The Court noted that Mitsubishi's counsel stipulated that the Japanese arbitration panel would apply American law to the Sherman Act claims, and the Court reasoned that:

>Soo long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function . . . . [except if] Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

What would Congress have to do to "evince[ ] an intention to preclude a waiver of judicial remedies for the statutory rights at issue," and thereby preclude enforcement of a foreign FSC? In a recent decision, *Smallwood v. Allied Van Lines, Inc.*, the Ninth Circuit found such a contrary congressional intention in the plain text of the Carmack Amendment that would preclude a waiver of the right to bring suit in U.S. courts. The Carmack Amendment states in pertinent part: "[W]hen suing the delivering carrier, '[a] civil action . . . may be brought . . . in a district court of the United States . . . in a judicial district . . . through

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32 Id. at 628–29.
33 Id. at 628, 637, 667.
34 See id. at 628.
35 660 F.3d 1115, 1124–25 (9th Cir. 2011).
which the defendant carrier operates . . . [or] in the judicial
district in which . . . loss or damage is alleged to have oc-
curred.'"\textsuperscript{36} The amendment also "mandates that motor carriers
offer arbitration to shippers of household goods shipped collect-
on-delivery . . . [but] must not require the shipper to agree to
utilize arbitration prior to the time that a dispute arises.\textsuperscript{37}

The Ninth Circuit found that the statutory scheme of the Car-
mack Amendment was "clearly intended to protect shippers
from being forced to submit to foreign arbitration as a condi-
tion of contracting with a carrier of household goods."\textsuperscript{38} Therefore,
this required that foreign arbitration clauses were
generally unenforceable because they necessarily involved limiting
shippers' guarantees to certain venues enumerated in the
statute.\textsuperscript{39}

In the context of a contract of adhesion, if a claim is based on
a U.S. statute, courts will generally enforce the FSC, so long as it
is uncontested that the foreign tribunal will apply U.S. law to
that claim and a U.S. court will retain jurisdiction to review the
foreign award. For example, in \textit{Thomas v. Carnival Corp.}, the
Eleventh Circuit refused to honor an arbitration clause, which
designated the Philippines as the situs and Panamanian law to
apply in an employment contract of a U.S. employee who was
injured while working on a cruise ship that flew a Panamanian
flag of convenience, with Carnival, a Panamanian corporation.\textsuperscript{40}
The Eleventh Circuit's decision not to enforce the arbitration
agreement was based on the fact that the choice-of-law clause

\textsuperscript{36} \textit{Id.} at 1121-22 (emphasis added) (quoting 49 U.S.C. § 14706(d)).
\textsuperscript{37} \textit{Id.} (citing 49 U.S.C. § 14708). At issue was an arbitration clause contained
in a contract between an American citizen and a United Arab Emirates (UAE)
shipping company, which mandated arbitration in accordance with the Dubai
Chamber of Commerce and Industry Commercial Conciliation and Arbitration
Regulation. \textit{Id.} at 1119. The case arose after the UAE carrier mistakenly shipped
the American's firearms and ammunition to the UAE, resulting in the Ameri-
can's arrest. \textit{Id.} at 1118.
\textsuperscript{38} \textit{Id.} at 1121.
\textsuperscript{39} \textit{Id.} at 1121-22. It is unclear whether or not this decision will stand, since it
could be argued to go against the Supreme Court's ruling in \textit{Kawasaki Kisen Kai-
sha Ltd. v. Regal–Beloit Corp}, where it held that the Carmack Amendment did not
apply to the inland rail segment of a shipment originating overseas governed by a
single through bill of lading, which was to be governed by the U.S. Carriage of
Goods by Sea Act (COGSA). 130 S. Ct. 2433, 2442 (2010). The facts are differ-
ent here, however, since the "receiving carrier" may be considered inside the
United States, and the arbitration clause was contained in a contract, entitled
"Acceptance of Quotation," which was not styled as a through bill of lading. \textit{Id.}
\textsuperscript{40} 573 F.3d 1113, 1115 (11th Cir. 2009).
and the FSC incorporated in the arbitration agreement would in tandem strip away the plaintiff’s rights under the U.S. Seaman’s Wage Act, 46 U.S.C. § 10313. The court emphasized that there would be no assurance of an “opportunity for review,” given that if the foreign court applied Panamanian law and Thomas received no award, which was “a distinct possibility given the U.S. based nature of his claim,” he would have nothing to enforce in U.S. courts.

However, in *Kote v. Princess Cruise Lines, Ltd.*, a federal district court in Florida upheld an arbitration clause in a cruise employment contract that mandated binding arbitration, held in Bermuda and subject to Bermuda law, where Princess waived the exclusive application of Bermuda law and stipulated to the application of U.S. law. The plaintiff, Kote, was an Indian employee of defendant Princess Cruise Lines, Ltd., a Bermuda corporation, on its ship, the Ruby Princess, which was flagged in Bermuda as well. Kote brought a claim under the Jones Act in federal district court, and Princess filed to compel arbitration, which the court granted.

Another part of the argument that enforcement of an FSC would infringe on a statutory right or remedy is predicated on the fact that several U.S. statutes prohibit the lessening of liability under the statute, yet many foreign jurisdictions have statutory limits on liability and caps on damages. For example, the U.S. Carriage of Goods by Sea Act (COGSA)—the United States implementing legislation of the Hague Rules—declares that “any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods . . . or lessening such liability otherwise than as provided in this [a]ct, shall be null and void.

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41 Id.
42 *Id.* at 1123–24.
44 *Id.*
45 *Id.*
Arguably, if a COGSA claim was brought in the United States and a foreign forum had a statutory limit on liability, enforcement of an FSC mandating that forum would seem to violate the statute. However, U.S. courts have not come to the same conclusion.

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, a New York fruit distributor chartered the M/V Sky Reefer, a vessel owned by a Panamanian company and at the time operated by a Japanese carrier, to transport fruit to the United States. The contract for the charter transportation (called a bill of lading) specified that the contract was to be governed by Japanese law, and any dispute arising from it was to be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC), in accordance with the rules of TOMAC. During shipment, the cargo was damaged and the fruit distributor and its marine cargo insurer brought suit against the Panamanian owner in Massachusetts. The fruit distributor argued that such use of the foreign arbitration clause in effect lessened liability, and therefore was invalid. The Supreme Court rejected this argument, and upheld the foreign arbitration clause, holding that while COGSA does not permit explicit limitations on liability, it does not regulate the procedure for enforcing statutory guarantees or the forum in which applicable liability principles are to be vindicated. The Supreme Court stressed the importance of uniformity in the interpretation of a statute based on a multilateral treaty, and since none of the parties to the Hague Rules had interpreted them to prohibit arbitration clauses, the Court declined to deviate from this. The Court rejected the allegation that arbitrators in Japan would apply the Japanese version of the Hague Rules in a manner less advantageous to plaintiffs, and noted that the district court would "have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the... laws ha[d] been addressed."
Although the Court held that it was not necessary that the foreign court apply COGSA itself, its opinion suggested that "a COGSA-like result must be reached." The Court also noted that if there was no subsequent opportunity for review and the terms of the arbitration agreement "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . [the Court] would have little hesitation in condemning the agreement as against public policy."

The *Sky Reefer* decision was thought to overturn *Indussa Corp. v. S.S. Ranborg*, in which Judge Friendly opined that merely dismissing the case and requiring the plaintiff to assert his claim in a distant court would impermissibly lessen liability, particularly when the claim was small, because "[s]uch a clause puts 'a high hurdle' in the way of enforcing liability, and thus is an effective means [to secure lower settlements]."

Enforcement was further expanded in *Fireman's Fund Insurance Co. v. M.V. DSR Atlantic*, in which the Ninth Circuit found that even though the FSC was a contract of adhesion and its enforcement, which would mandate litigation in Korea, would prevent the parties from proceeding in rem, "the mere unavailability of in rem proceedings [would] not constitute a lessening of the specific liability imposed by [COGSA] . . . [Rather it would present a] question of the means . . . of enforcing that liability . . . [and therefore would not] reduce the carrier's obligations . . . below what COGSA guarantees."

**IV. WHERE A MANDATORY FORUM SELECTION CLAUSE WOULD DEPRIVE PARTIES OF A REMEDY**

Another argument used to challenge enforcement of an FSC is that the forum is so gravely inconvenient that a party will for all practical purposes be deprived of its day in court. To the

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56 *Sky Reefer*, 515 U.S. at 540.


best of the author’s knowledge, a party who has negotiated a contract at arm’s length has never pleaded this argument successfully.

For example, in *Baker v. Adidas America, Inc.*, the Fourth Circuit upheld an FSC where the plaintiff who made this argument was a college student, without a source of income, and the clause required her to litigate in Amsterdam.\(^6\) The case arose after a young tennis player, who was a resident of North Carolina, and a sports apparel and footwear manufacturer, headquartered in the Netherlands, had executed an endorsement agreement that included an FSC mandating venue in Amsterdam.\(^6\) The tennis player brought an action in a U.S. court against the manufacturer, alleging that the shoes selected by the manufacturer pursuant to her endorsement agreement caused her foot injuries and ended her tennis career, and argued that the FSC would deprive her of her day in court because, as a college student without a source of income, she “[would not be able to] afford the extraordinary expense of traveling to Amsterdam and paying for attorneys there to prosecute these claims.”\(^6\)

Regardless, the Fourth Circuit upheld the FSC and dismissed the case on grounds of improper venue, because the plaintiff did not demonstrate that these burdens were unforeseeable to her when she ratified the agreement.\(^6\) The court emphasized that the endorsement agreement had been a freely negotiated commercial agreement and the plaintiff was presumably compensated for this burden by way of the consideration she received under the contract.\(^6\) The Seventh Circuit held similarly in *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*.\(^6\)

But what about a gravely inconvenient forum designated in a contract of adhesion? In light of the decisions in *Carnival Cruise Lines v. Shute* and *Effron v. Sun Line Cruises, Inc.* discussed below, this argument would seem likely to fail, regardless. At the time of publication, the only two situations in which the argument of inconvenience has proven successful was where the claim was a

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\(^6\) 335 F. App’x 356, 361 (4th Cir. 2009) (per curiam) (unpublished opinion).
\(^6\) Id.
\(^6\) Id.
\(^6\) Id.
\(^6\) See *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 758 (7th Cir. 1992)).
civil rights issue or where the claimant was severely handicapped.

_Carnival Cruise Lines v. Shute_ was an admiralty case in which a cruise company embedded a choice-of-forum provision granting Florida courts exclusive jurisdiction in a lengthy cruise line ticket, and delivered the ticket to the plaintiff after she had both planned and paid for her trip. The Supreme Court upheld the FSC, despite the fact that the plaintiff both lived and bought her ticket in the state of Washington, her cruise left the port in California, and her personal injury occurred on the cruise ship off the coast of Mexico. The Court found that requiring the plaintiff to travel cross country to litigate was not fundamentally unfair, and was not unreasonably inconvenient under _M/S Bremen_, because Florida was not a “remote alien forum,” nor was the “dispute an essentially local one inherently more suited to resolution in Washington than in Florida.”

An even more severe holding was reached by the Second Circuit in _Effron v. Sun Line Cruises, Inc._, in which the court upheld an FSC in a passenger cruise ticket that designated Athens, Greece as the exclusive forum. In that case, Ms. Effron, a seventy-four-year-old resident of Florida, purchased a South American vacation package from Sun Line Cruises, a New York firm, through a Florida-based travel agent. The transportation of passengers and baggage was provided solely by Sun Line Greece Special Shipping Co., a Greek company. The ticket informed

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67 See Walker v. Carnival Cruise Lines, 107 F. Supp. 2d 1183 (N.D. Cal. 2000) (case in which one plaintiff suffered from severe chronic-progressive Multiple Sclerosis, relied upon a wheelchair for mobility, and was bowel and bladder incontinent, and the other plaintiff was a quadriplegic with limited muscle control who also suffered from incontinence).


69 Id. at 595–96.

70 Id. at 594. It is interesting to note that on Monday, December 12, 2011, American Airlines was charging $341.00 for a round-trip flight from Seattle, Washington to Miami, Florida. The Courtyard Marriot hotel in downtown Miami was charging $249.00 per night. For each trip that the plaintiff would have to make to Miami, she would have to spend an average of at least $570.00, which does not include food, transportation, or lost wages.

71 67 F.3d 7 (2d Cir. 1995).

72 Id.

73 Id. at 8.
passengers that the carrier with whom they were contracting was Sun Line Greece and listed the company’s Greek address and phone number on the front of the ticket. The ticket also mandated Athens, Greece as the exclusive forum. Ms. Effron was subsequently injured on the cruise and brought suit against Sun Line Cruises and Sun Line Greece in New York. The U.S. District Court for the Southern District of New York refused to enforce the FSC, holding that Ms. Effron had met her burden to show that filing suit in Greece would be an unreasonable inconvenience; however, the Second Circuit reversed, stating that “a forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel.” The court held that the costs of litigating in Greece, “being but the obvious concomitants of litigation abroad, do not satisfy [the M/S Bremen] inconvenience standard.”

What would satisfy the M/S Bremen inconvenience standard? It is currently unclear. A recent study showed that after cases were dismissed because of a foreign FSC, a large number and percentage of the cases just disappeared, and that the cases that did settle did so at a discount, i.e., at a lower amount than they would have settled for if the court had denied the motion to dismiss. The main reason for this is the fact that suing in another forum, especially a foreign one, entails significant costs, such as hiring a foreign lawyer, obtaining the services of an interpreter, and being subjected to different laws and procedures, which may include exposure to liability for costs, including attorney fees, if the claimant is unsuccessful because of the absence of contingency fee arrangements abroad. These costs

74 Id.
75 The forum-selection provision of the passage contract read as follows: “Notwithstanding anything to the contrary contained herein, any action against the [carrier] must be brought only before the courts of Athens[,] Greece to the jurisdiction of which the [passenger] submits himself formally excluding the jurisdiction of all and other court or courts of any other country or countries which court or courts otherwise would have been competent to deal with such action.” Id.
76 Id.
77 Id. at 10.
78 Id. at 10–11. The court further suggested that the problem of transporting witnesses to Greece might be resolved by a commission rogatoire, whereby Greek courts may request American courts to take testimony.
79 See Force, supra note 18, at 404–05.
80 See id. at 404.
constitute what was recognized as the "high hurdle" of foreign litigation in 1967 by Judge Friendly in *Indussa.*

V. THE UNIQUE PROTECTIONS CONFERRED ON AIRLINE PASSENGERS

U.S. consumers of airline tickets uniquely escape the aforementioned traditional FSC enforcement and unconscionability analyses. As a class of consumers, they have been afforded explicit consumer protection by a new U.S. Department of Transportation (DOT) regulation—14 C.F.R § 253.10—as well as by the Warsaw Convention and the Montreal Convention on air carrier liability, to both of which the United States is a party. This consumer protection comes in the form of provisions that prohibit air carriers from limiting a consumer’s choice of forum, via clauses in airline tickets, for claims arising thereunder.

The Warsaw and Montreal Conventions are international treaties governing the liability of airline carriers for harm that occurs during international flights. Among other things, it introduced uniform rules for transportation documentation, such as passenger tickets, and specifically included a permissive FSC, which provided that a claim arising out of an international flight could be brought in: (1) the domicile of the carrier; (2) the carrier’s principal place of business; (3) the carrier’s place of business through which the contract for travel was made; or (4) the place of destination.

This list of forums did not include the passenger’s domicile or permanent residence, the so-called “fifth forum,” which meant

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81 Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 203 (2d Cir. 1967).
84 Article I(1) of the Warsaw Convention states that it applies to "all international carriage of persons, luggage or goods performed by aircraft for reward . . . [and] equally to gratuitous carriage by aircraft performed by an air transportation undertaking." Warsaw Convention, *supra* note 9, art. 1(1). Article I(1) of the Montreal Convention states its application "to all international carriage of persons, baggage or cargo performed by aircraft for reward." Montreal Convention, *supra* note 10, art. 1(1).
86 *Id.* art. 28(1). With respect to the rules of jurisdiction, the Warsaw Convention makes no difference between passenger contracts and contracts for the transportation of goods.
that in certain circumstances U.S. citizens were forced to file their claims in foreign courts, even if the air carrier had otherwise sufficient contacts with the United States to be subject to personal jurisdiction. U.S. commentators, practitioners, and government officials were concerned that this could be very disadvantageous to U.S. citizens due to inherent differences between U.S. and foreign litigation, including pro-plaintiff juries, the availability of contingency fee arrangements, attorney fee-shifting provisions, broad discovery proceedings, and dramatically higher damage awards.

In May 1999, the United States addressed this concern when it signed the Montreal Convention, which entered into effect on November 4, 2003. In addition to the four forum selection options previously mentioned, Article 33 of the Montreal Convention enables the plaintiff to seek legal recourse within the "fifth" forum:

[I]n respect of damage resulting from the death or injury of a passenger, an action may be brought . . . in the territory of a [s]tate [p]arty in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air.

Beyond simply enumerating certain jurisdictions where a claim could be brought, both conventions disallow air carriers from limiting ex ante a plaintiff's jurisdictional options via an FSC. Article 32 of the Warsaw Convention and Article 49 of the Montreal Convention state, in pertinent part:

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this

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89 Montreal Convention, supra note 10.

90 Id. art. 33(2). Article 33(3)(b) defines "principal and permanent residence" as "the one fixed and permanent abode of the passenger at the time of the accident," and notes that "[t]he nationality of the passenger shall not be the determining factor in this regard." Id. art. 33(3)(b).
Which convention to apply, if either, is determined by considering which convention(s) both the countries of departure and destination (as listed on the international flight ticket) have adopted. For example, if both have adopted the Montreal Convention, then the Montreal Convention applies, and the same with the Warsaw Convention. However, if one country has adopted both the Montreal and Warsaw Conventions, like the United States, and the other country has only adopted one, then the one that both countries have in common will apply. If both countries have adopted both conventions, the Montreal Convention, being the most recent, will apply. Finally, if the countries do not have an adopted convention in common, neither convention will apply.

In addition to these treaties, which apply only to international flights, on April 25, 2011, the DOT published a series of new air-carrier regulations pertaining to similar airline-passenger protections on domestic flights within the United States. Entered into effect on August 23, 2011, Title 14, Section 253.10 of the Code of Federal Regulations provides:

No [air] carrier may impose any contract of carriage provision containing a choice-of-forum clause that attempts to preclude a passenger, or a person who purchases a ticket for air transportation on behalf of a passenger, from bringing a claim against a carrier in any court of competent jurisdiction, including a court within the jurisdiction of that passenger's residence in the United States (provided that the carrier does business within that jurisdiction).

Under this regulation, airline tickets may not contain clauses that limit passengers from bringing a claim in the U.S. jurisdiction of their choice, provided that the air carrier solicited business and sold airline tickets in that jurisdiction. Interestingly, this provision directly contradicts and conflicts with what was held permissible for maritime cruise tickets at issue in the Carnival and Effron cases, as discussed herein.

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91 Id. art. 49; Warsaw Convention, supra note 9, art. 32.
93 Id.
94 Id.
It is an interesting question why neither the DOT nor the U.S. Federal Maritime Commission has adopted regulatory safeguards in maritime law similar to those adopted in aviation. It is a question to which there is yet to be an explanation. However, this is beyond the scope of this article.

The DOT regulation does contain some important limitations. First, the DOT commentary in the Federal Register states that the regulation applies only to contracts of carriage for domestic flights. It also expressly recognizes that contracts for international flights are to be governed by the Warsaw and Montreal Conventions, as applicable. The commentary also exempts charter flights, recognizing that such terms "can be [negotiated and] addressed in the individual contracts between the charter operator and the participant."

The title of the regulations promulgated—"Enhancing Airline Passenger Protections"—along with language of the regulation and commentary, evidence a strong intent and a concerted effort by the DOT to afford airline passengers a right to bring suit in the jurisdiction where they reside. However, despite this intent and the similar intent in the Warsaw and Montreal Conventions to protect passengers' choices of forum, the actual protection conferred is subject to some question due to the doctrine of forum non conveniens, the statutory power of U.S. courts to transfer cases internationally and domestically under 28 U.S.C. § 1404(a) and § 1406(a), and the corporate outsourcing of ticket sales.

VI. ISSUES POSED BY FORUM NON CONVENIENS

Generally, where a contract includes an FSC that is exclusive, U.S. courts will apply the reasonability and unconscionability analyses discussed above. If the court finds that the clause is reasonable, it will enforce it, either by dismissing the case or transferring it to the forum specified. However, for claims arising under the Warsaw and Montreal Conventions, U.S. courts use a different analysis. Because both conventions provide several jurisdictions for a plaintiff to choose from in deciding
where to bring a claim, U.S. courts treat the plaintiff's choice of the United States as stemming from a permissive FSC. The court, reasoning that there are other appropriate forums available, will often entertain arguments on why, despite the plaintiff's choice, the court should dismiss the case and authorize it to be adjudicated in another jurisdiction.  

One such argument presented to the court by a party wishing to change jurisdictions is the common-law doctrine of forum non conveniens. This doctrine maintains that the strong presumption in favor of the plaintiff's choice of forum can and should be rebutted when the private and public interest factors clearly point toward trial in an alternative foreign forum.  The modern analysis is conducted as a three-part inquiry. First, the court must identify the degree of deference accorded to the plaintiff's choice of forum. Second, the court must determine if an adequate alternative forum exists. Third, the court must weigh the private and public interest factors to see if they favor transfer to the alternative jurisdiction.

U.S. courts have almost uniformly held that the language of the Warsaw and Montreal Conventions does not preempt a forum non conveniens defense, reasoning that forum non con-

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100 See supra note 22 and accompanying text.
104 Id. at 257. The private interest factors to be weighed include: the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. See Gilbert, 330 U.S. at 508. In examining the relative ease of access to sources of proof and the availability of witnesses, the district court must scrutinize the "substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action." Van Cauwenbergh v. Biard, 486 U.S. 517, 528 (1988). The public interest factors to be weighed include: the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. Gilbert, 330 U.S. at 508-09. In evaluating the public interest factors, the district court must "consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum." Van Cauwenbergh, 486 U.S. at 528.
veniens is an essential and integral part of U.S. civil procedure and, as such, the law of the forum.105

In the first step of forum non conveniens analysis, U.S. courts look to citizenship and residency of the plaintiff to determine the degree of deference to accord the plaintiff’s choice of forum. Where the plaintiff is a U.S. citizen or resident, the U.S. court will accord more deference than if the plaintiff is a non-resident.106 U.S. courts will not usually allow a forum non conveniens defense to defeat a claim brought by a plaintiff who is a U.S. citizen.107 In contrast, where the plaintiff is not a resident of the United States, courts have regularly granted forum non conveniens transfers to foreign jurisdictions.108

In 1981, the U.S. Supreme Court, in Piper Aircraft v. Reyno, upheld a district court’s dismissal of a foreign plaintiff’s case to Scotland based on forum non conveniens, and explicitly stated that a foreign plaintiff’s choice of forum “deserves less deference.”109 At issue were wrongful-death tort actions brought in a U.S. district court against a U.S. aircraft manufacturer (Piper) and a U.S. propeller manufacturer, arising out of a small plane crash in the Scottish highlands during the course of a charter flight from Blackpool to Perth.110 The actions were brought by

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105 See In re Air Crash Disaster Near New Orleans, La., on July 9, 1982, 821 F.2d 1147, 1161-62 (5th Cir. 1987) (en banc) (holding that Article 28(1) of the Warsaw Convention did not prevent a district court from considering and applying the doctrine of forum non conveniens to remove actions filed on behalf of Uruguayan passengers killed in an airline crash); Newvac, 584 F.3d at 1058 (holding that U.S. courts could entertain forum non conveniens defense to a claim brought under the Montreal Convention).

106 See, e.g., Piper, 454 U.S. at 255-56.

107 Id. at 255. However, this is not to say that it will never happen again. See, e.g., Connolly v. Kinay, No. 11 Civ. 606(RJS), 2012 WL 1027231, at *5, 12 (S.D.N.Y. Mar. 27, 2010) (dismissing a case on forum non conveniens grounds even though some of the plaintiffs were U.S. citizens and most of the plaintiffs had a connection to the U.S. forum).

108 See Delta Air Lines, Inc. v. Chimet, S.p.A., 619 F.3d 288, 300-01 (3d Cir. 2010) (dismissing the case on grounds of forum non conveniens to Italy because the plaintiff was Italian); Newvac, 584 F.3d at 1057-58 (removing the case on grounds of forum non conveniens to Martinique where the plaintiffs, who were residents of Martinique, brought action in Miami, Florida, against a Colombian airline and a Florida-based travel agency for claims arising when an airplane crashed in Venezuela en route from Panama to Martinique, killing all passengers aboard). However, this is not a blanket rule, and courts do reject forum non conveniens defenses, even where the plaintiff is a foreigner. See, e.g., Rozanska v. Princess Cruise Lines, Ltd., No. 07-23355-CIV, 2008 WL 8883868, at *1, 6 (S.D. Fla. Aug. 5, 2008).

109 454 U.S. at 256.

110 Id. at 238–39.
the representative of the estates of several Scottish citizens killed in the crash because Scottish law did not recognize strict liability in tort, and only permitted wrongful-death actions when brought by a decedent's relatives, which were further limited to recovery for "loss of support and society."\textsuperscript{111} The Supreme Court nevertheless upheld the district court's dismissal of the case to Scotland, noting that "[a]lthough the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly."\textsuperscript{112}

More recently, in 2009, the Eleventh Circuit, in \textit{Pierre-Louis v. Newvac Corp.}, dismissed a claim under the Montreal Convention brought by Martinique citizens against a Colombian airline and Florida-based travel agency for claims arising from an airplane crash on a flight from Panama to Martinique, killing all passengers aboard the plane.\textsuperscript{113} The Florida-based travel agency, Newvac, had contracted with West Caribbean Airways (WCA) to use a WCA plane for round-trip charter flights between Martinique and Panama.\textsuperscript{114} Newvac then contracted with a Martinique travel agency to sell vacation packages, with flights aboard the WCA plane, to individual customers in Martinique.\textsuperscript{115} After

\textsuperscript{111} \textit{Id.} at 258.

\textsuperscript{112} \textit{Id.} at 255. It is interesting to note that a dismissal on the grounds of forum non conveniens is argued, in certain circumstances, to resemble the near equivalent of an outright dismissal with prejudice, which operates as an adjudication on the merits under the U.S. Federal Rules of Procedure. See David W. Robertson, \textit{Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"}, 103 L.Q. Rev. 398, 418–20 (1987). In a mail survey of 180 international cases dismissed on grounds of forum non conveniens, eighteen were not pursued in the alternative forum, twenty-two were settled for less than half the estimated value, and in twelve, U.S. attorneys had lost track of the case. \textit{Id.} at 418–19. Moreover, only three went to trial, and none of the reporting cases succeeded on their claim in the alternative court. \textit{Id.} at 419. There are numerous practical obstacles responsible for such a result, including the fact that the cost of re-filing in the plaintiff's own country after dedicating resources to a U.S. forum is too high, or not worth the lower potential recovery. See Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 n.6 (Tex. 1990) (Doggett, J., concurring) (noting that the cost of one plane trip from Houston to Costa Rica exceeded potential recovery for sterilization under Costa Rica's tort cap of $1,080), \textit{cert. denied}, 498 U.S. 1024 (1991). On the other hand, it may be argued equally persuasively that U.S. courts should not be used to compensate or make up for the inadequacy of foreign law and foreign courts in those circumstances.

\textsuperscript{113} 584 F.3d at 1057–58.

\textsuperscript{114} \textit{Id.} at 1055.

\textsuperscript{115} \textit{Id.}
the Martinique citizens brought claims in the United States, Newvac asserted a forum non conveniens defense.\textsuperscript{116} The court found the public and private interests to weigh in favor of litigation in Martinique, reasoning that "over a hundred decedents and their beneficiaries," "all of the witness and documentary evidence regarding damages, as well as all or virtually all of the non-party factual witnesses, [were] located in Martinique, beyond the compulsory process of the district court," and their live testimony in U.S. court would have had to be translated should they have willingly assumed the expense and burden to be present.\textsuperscript{117}

This holding is congruent with one of the main concerns that prompted the development of the doctrine—the deterrence of forum shopping by foreign plaintiffs in U.S. courts.\textsuperscript{118} Accordingly, forcing a foreign plaintiff to litigate a claim arising under the Montreal or Warsaw Conventions in another proper jurisdiction outside the United States would seem appropriate where few, if any, of the facts and circumstances giving rise to the claim were in any way connected with the United States. This is especially important considering the burden and costs such litigation would impose on the U.S. judicial system. However, it is also important to consider that dismissal or transfer of such claims may also risk denying plaintiffs of legal redress altogether, as illustrated recently by a decision of the high court of France—the Cour de Cassation.\textsuperscript{119}

After the Newvac case was dismissed from the U.S. district court, the same plaintiffs also brought an action in French trial court in Martinique, arguing that the Martinique court should

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 1060–66. In contrast, the designated French court did not entertain live testimony. Id. at 1061. It is interesting to note that in a products liability case arising out of the same crash, a U.S. district court refused to dismiss on grounds of forum non conveniens where Colombian crewmembers brought a products liability claim against U.S. manufacturers. See In re W. Caribbean Crew Members, 632 F. Supp. 2d 1193, 1205 (S.D. Fla. 2009). The court emphasized that the aircraft was in the control of such manufacturers for nineteen years and was only overseas for one month prior to the crash, and therefore, although there was some evidence located abroad, the majority of the evidence pertaining to the construction, maintenance, and repair of the aircraft and its engine parts was most likely located in the United States. Id. at 1204–05.


not acknowledge the U.S. district court's dismissal.\textsuperscript{120} While France does not possess a doctrine similar to forum non conveniens, a three-judge lower court in Martinique upheld the right of U.S. courts to apply the forum non conveniens doctrine under the Montreal Convention of 1999.\textsuperscript{121} This decision was subsequently affirmed by a French Cour d'Appel.\textsuperscript{122} Nevertheless, and without any discussion of either of the two prior U.S. court decisions or the two prior decisions of the French lower courts in the case, the French Supreme Court (Cour de Cassation), on December 7, 2011, refused to recognize the ability of U.S. courts to use the doctrine of forum non conveniens to dismiss claims arising under the Montreal Convention.\textsuperscript{123} The Cour de Cassation peremptorily ruled that no French court had authority to adjudicate the plaintiffs' claims because the jurisdictional choices available to the plaintiffs under Article 33 of the Montreal Convention did not permit the dispute to be adjudicated by a jurisdiction other than the one chosen by the plaintiffs.\textsuperscript{124}

It is unclear what will follow, since the Cour de Cassation's decision requires adjudication of the plaintiffs' claims in the United States—their chosen forum—yet the Eleventh Circuit upheld the district court's dismissal under forum non conveniens.\textsuperscript{125} Currently, these plaintiffs seem to have been deprived of legal redress. Regardless of whether the plaintiffs are permitted to re-file in the United States, the Cour de Cassation's ruling is likely to have a substantial effect on future forum non conveniens analysis of U.S. courts, given the risk posed by dismissing such claims.\textsuperscript{126}


\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}


\textsuperscript{124} \textit{Id.}

\textsuperscript{125} For more information, see Allan I. Mendelsohn & Carlos J. Ruiz, \textit{Forum Non Conveniens in Jeopardy}, SKYWritings (July 20, 2012), http://clients.criticalimpact.com/newsletter/newslettercontentshow1.cfm?contentid=11255&id=1275.

\textsuperscript{126} In his keynote speech given on February 7, 2012, before the IATA Annual Legal Symposium, held in Shanghai, China, Professor Allan I. Mendelsohn referred to the Cour de Cassation's decision as "one of the most judicially irresponsible and judicially unprofessional decisions [he had] seen in many years of
VII. ISSUES POSED BY SECTION 1404 TRANSFER

Historically, forum non conveniens was used extensively by U.S. courts to transfer cases to other U.S. jurisdictions better suited to adjudicate the claim or claims through what is referred to as a transfer of venue. In 1948, Congress codified this power to transfer venue to a more convenient forum in 28 U.S.C. § 1404(a). Its current version provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." This statutory power of transfer further restricts a plaintiff's choice of the city or state in which to bring a claim.

In 2007, the U.S. Supreme Court clarified that where a party seeks to transfer a case to a foreign forum, the doctrine of forum non conveniens applies, but where it seeks transfer to a different U.S. jurisdiction, relief must be sought under 28 U.S.C. § 1404 or § 1406. Section 1404 governs if the original venue is proper and Section 1406 governs if the original venue is improper. Because jurisdiction in the United States will be proper for the issues discussed herein, the article will focus on Section 1404. Section 1404 traces the same analysis as forum non conveniens, requiring proof of an adequate alternative forum and a balancing of private and public interests; however, unlike forum non conveniens, Section 1404 is generally thought to require less of a showing by the party seeking to transfer.

U.S. courts have often granted motions to transfer claims brought under the Montreal and Warsaw Conventions, where appropriate. For example, in 2002, in *Chukwu v. Air France*, a federal district court in the Northern District of Illinois granted a Section 1404 transfer to the Northern District of California where a Nigerian plaintiff, who was also a permanent resident of California, filed a suit in Illinois against Air France in regard to practicing law. *Allan I. Mendelsohn, Keynote Speech at the IATA Annual Legal Symposium (Feb. 7, 2012).*

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128 Id.
harm occurring during a flight between Lagos, Nigeria, and San Francisco, California. The court noted that the “[p]laintiff’s choice of forum is entitled to substantial weight, particularly when it is also her home forum. . . . [b]ut the [p]laintiff’s choice is not, however, conclusive,” and therefore granted the Section 1404 transfer.

Interestingly, the court also held that dismissal on grounds of forum non conveniens was not warranted because Air France failed to demonstrate both that Nigeria was available and adequate as an alternative forum, and that the private and public factors favored Nigeria. The court afforded significant weight to the plaintiff’s choice of forum, considering that she resided in California, rather than Nigeria. The court also recognized that “while the attendant costs of transporting witnesses and documents [were] indeed significant, in the absence of evidence to the contrary . . . [the] defendant airline [was] better equipped to confront that challenge than plaintiff.”

In September 2011, in Lipnick v. United Air Lines, Inc., a federal district court in California granted a Section 1404 transfer of a claim arising under the Montreal Convention to a Virginia district court, where a Virginia resident filed a claim against United Air Lines for injuries he sustained in Germany, while embarking on a United flight destined for Dulles International Airport in Virginia. In granting the transfer, the court emphasized that because the flight’s destination was in Virginia, a Virginia court had a greater interest in resolving the dispute than a California court; moreover, all of plaintiff’s identified witnesses lay outside of the California court’s reach but within the subpoena power of Virginia courts.

The aforementioned cases evidence that not only can individual plaintiffs be denied their choice of country in which to adju-

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133 Id. at 989.
134 Id. at 988.
135 Id.
136 Id. However, in 1996, prior to enactment of the DOT regulation, in Ratnaswamy v. Air Afrique, a federal district court in the Northern District of Illinois refused to grant a Section 1404 transfer to the Southern District of New York to the defendant, Air Afrique. No. 95 C 7670, 1996 WL 507267, at *13 (N.D. Ill. Sept. 4, 1996). The plaintiffs, who were residents of Illinois, had purchased flight tickets in Illinois for a roundtrip from Illinois to Senegal and the alleged injury occurred in the Senegal airport. Id. at *1–2.
138 Id. at *2.
dicate claims in the United States under the Warsaw and
Montreal Conventions, they can also be denied their choice of
city. Although 14 C.F.R. § 253.10 aims to protect such a choice
for plaintiffs with claims arising out of domestic flights within
the United States by prohibiting air carriers from limiting jurisdic-
tional choice ex ante, the regulation expressly recognizes
that contracts for international flights are to be governed by the
Warsaw and Montreal Conventions, as applicable.

The reach of the protection is also limited for domestic flights
where more than one plaintiff is suing (for example, after a
crash involving multiple casualties). The case will usually be
subject to the multi-district litigation provisions, which allow a
so-called multi-district panel to select a district in which all of
the actions, regardless of when they were filed, may be consoli-
dated for purposes of judicial efficiency.

**VIII. ISSUES POSED BY CONTRACTING OUT TICKET SALES**

Another reality calling into question the true effect of the pro-
tections contemplated by Section 253.10 is posed by the con-
tracting out of ticket sales to internet travel booking companies,
such as Orbitz and Kayak, given that the regulation, on its face,
only applies to “air carriers.” Therefore, it is unclear whether
airlines will be able to evade the requirements of Section 253.10
by contracting out airline ticket sales to such companies that are
presumably not subject to the regulation. It is important to note
that almost all internet travel booking websites have a click-wrap
agreement, a type of contract of adhesion, to which a customer
assents by clicking or checking an “I accept” box. This agree-
ment then becomes the governing contract between the parties.
Frequently, click-wrap agreements will contain DRCs and exclu-
sive FSCs. Such click-wrap agreements are generally held by
U.S. courts to be valid and enforceable.

A Maryland federal district court recently decided a case aris-
ing out of an airline ticket purchased from the internet ticketing
company Vayama. In *Fusha v. Delta*, the plaintiff (Fusha), a Ma-
ryland resident, used www.vayama.com (Vayama), to book round-trip flights between Washington, D.C. and Albania in July

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In purchasing the tickets, she clicked the "I agree" box on the website and assented to Vayama's listed terms and conditions, one of which happened to be an exclusive FSC that granted jurisdiction and venue to the state and federal courts located in Santa Clara County, California.142 Fusha traveled on a Delta flight from Dulles International Airport to John F. Kennedy International Airport in New York and then on an Alitalia flight, operated by Delta, to Rome, Italy.143 The conduct that gave rise to her claim occurred during a connection in the Fiumicino airport in Rome.144

She brought suit in federal court in Maryland against the operator of Vayama, Delta Airlines, and Alitalia.145 However, finding that the FSC contained in the click-wrap agreement with Vayama was valid and enforceable, the court granted Vayama's motion to transfer venue to California.146 The court followed a traditional FSC analysis and found that despite the arguments of unequal bargaining power and financial difficulty in litigating in California, Fusha had not met the "heavy burden" required under M/S Bremen to invalidate it.147 The court neither mentioned the new DOT rule, nor the Montreal Convention, both of which would have presumably voided such an FSC as invalid in a contract with an air carrier. Concededly, the transfer was based on the plaintiff's contract with Vayama, not an air carrier. However, by granting the motion, the court allowed Delta and Alitalia to escape litigation in the jurisdiction where the plaintiff used her computer to purchase her ticket and where she lived.

The repercussions of this decision, if upheld by the appellate court, may well prove significant. Should air carriers be permitted to contract out their ticket sales to online travel booking companies, thus evading the DOT regulation, any consumer protection intended by the DOT rule and the Montreal and Warsaw Conventions would be called into question.

IX. RECOMMENDATIONS

In order to identify what should be done in light of the foregoing items that call in question the true protections accorded

142 Id. at *2.
143 Id. at *1.
144 Id.
145 Id.
146 Id. at *4.
147 Id. at *3.
to airline passengers, the scope of desired protection for such consumers must first be clarified.

If the goal is to protect the ability of U.S. citizens and residents to file claims in their jurisdictions of choice against any air carrier for a domestic flight, the DOT would need to amend its regulation so as to make it applicable to internet travel booking companies in addition to air carriers. It would also need to speak through regulation or official guidance as to the impropriety of courts' use of Section 1404 transfer in certain situations.

On the other hand, if the goal is to protect U.S. citizens' and residents' choices of forum in the United States for airline accidents that occur abroad, Congress would likely need to pass legislation that disallows transfer and prohibits the use of forum non conveniens in such cases, with an exception for multi-district litigation (discussed herein). One commentator suggested a statute entitled "Section 1404.5" to effectuate such a result. In doing this, Congress would still be able to preserve the ability of U.S. courts to use the forum non conveniens doctrine to transfer and dismiss claims brought by foreign plaintiffs so as to prevent forum shopping by tailoring the statute accordingly.

Regardless of which goal is chosen, it behooves the DOT and Congress to take some action to ensure their intended protections are not undermined by the courts or by private industry actors.