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The Model Choice of Forum Act,[1] promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1968, was designed to set standards for the effectuation of contractual forum-selecting clauses, sometimes called "derogation" or "prorogation" clauses, while restricting their effectiveness to situations in which their operation would be fair to all concerned parties. The Commissioners chose not to draft the statute as a Uniform Act to be recommended for adoption by all the states, but rather as a Model Act setting out sound standards that might be followed not only by states drafting their own statutes on the subject but even by courts establishing common law rules affecting such contractual arrangements. It was the latter effect that was given to the Model Act in Chief Justice Burger's majority opinion in *The Bremen v. Zapata Off-Shore Co.*,[2] sustaining a forum-selecting clause in a maritime contract but

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1. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE 219 (1968) [hereinafter cited as NCCUSL HANDBOOK].

2. 407 U.S. 1 (1972), *rev'g In re* Unterweser Reederei, GMBH, 296 F. Supp. 733 (M.D. Fla. 1969), *aff'd*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing*, 446 F.2d 907 (5th Cir. 1971) (en banc). The Fifth Circuit decision rendered en banc on an 8-6 division of the sitting judges is discussed in Collins, *Forum-Selection and an Anglo-American Conflict—The Sad Case of The Chaparral*, 20 INT'L & COMP. L.Q. 550 (1971). Other comments on the case appear in Delaume, *Choice of Forum Clauses and the American Forum Patriae; Something Happened on the Way to the Forum: Zapata and Silver*, 4 J. MARITIME L. & COMM. 295 (1973); Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49 (1972); Nadelmann, *Choice-of-Court Clauses in the United States*, 21 AM. J. COMP. L. 124 (1973); 58 CORNELL L.Q. 416 (1973); 11 COLUM. J. TRANSNAT'L L. 449 (1972); 86 HARV. L. REV. 52 (1972); 13 VA. J. INT'L L. 272 (1972); 6 VAND. J. TRANSNAT'L L. 309 (1972). More comments can be anticipated.

announcing limitations beyond which choice-of-forum clauses would not be enforced.[3]

Professor Willis L.M. Reese of Columbia was the Reporter and draftsman for the Model Act.[4] He had previously participated in the drafting and promulgation of the "Convention on the Choice of Court" by The Hague Conference on Private International Law in 1964, a Convention that has not been adopted by the United States but that furnished the background for the NCCUSL Model Act project. Reese also prepared one of the series of studies[5] presented at the 1964 New York meeting of the American Foreign Law Association, which in effect accompanied the promulgation of The Hague Convention.

Several members of Reese's NCCUSL committee had to be educated at the beginning of their choice-of-forum drafting project. This was partly because forum-selecting contract clauses had not been used often in the interior American states, and partly because many lawyers had not thought much beyond the old legal chestnuts that "parties may not by agreement oust courts of their jurisdiction" and "jurisdiction is a matter of law not of contract." These traditional thought-precluding sets of senseless words have induced a number of courts in the United States to reject contractual choice-of-forum clauses virtually without analysis, or on vague and unspecific assertions of "public policy."[6] Other common law courts, however, after more specific analysis of the policy factors, have given effect to

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3. Chief Justice Burger's opinion cited the Model Choice of Forum Act in footnotes 13 and 18.

4. *See* Reese, *The Model Choice of Forum Act,* 17 AM. J. COMP. L. 292 (1969).

5. Nadelmann, *The Hague Conference on Private International Law and the Validity of Forum Selecting Clauses,* 13 AM. J. COMP. L. 157 (1964); Perillo, *Selected Forum Agreements in Western Europe, id.* at 162; Schwind, *Derogation Clauses in Latin-American Law, id.* at 167; Eek, *The Contractual Forum: Scandinavia, id.* at 173; Cowen & Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth, id.* at 179; Reese, *The Contractual Forum: Situation in the United States, id.* at 187. *See also* Lenhoff, *The Parties' Choice of Forum: Prorogation Agreements,* 15 RUTGERS L. REV. 414 (1961).

6. *E.g.,* Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed as improvidently granted,* 359 U.S. 180 (1959); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916); Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 66 N.E. 627 (1903). The cases are collected in Annot., 56 A.L.R.2d 300 (1957). *See* Comment, *Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts,* 10 LA. L. REV. 293 (1950).

the clauses.[7] English courts have regularly enforced them.[8] Section 80 of the *Conflict of Laws Restatement (Second)* approves court-selecting clauses, but not wholeheartedly: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."[9] At any rate, further study convinced the Reese committee, and ultimately most of the rest of the Commissioners, that a Model Act providing for enforcement of such clauses in appropriate circumstances was desirable.

Both the facts and the reasoning in *The Bremen* tie in excellently with the politico-economic theory that underlies the Model Choice of Forum Act. In *The Bremen*, defendant German corporation was the low bidder to plaintiff's public advertisement for bids. The German corporation submitted, at plaintiff Texas corporation's request, a proposed contract for towage of plaintiff's off-shore oil drilling rig from Venice, Louisiana, to the Adriatic Sea off Ravenna, Italy. The submitted contract contained in a prominent position the clause "[a]ny dispute arising must be treated before the London Court of Justice." An exemption from liability clause, exculpatory of defendant, valid under English law and apparently under Italian law but invalid under the law of the United States also appeared in the submitted contract. Plaintiff's Texas attorneys studied the contract and, after they changed some of the provisions but not the two clauses just mentioned, plaintiff signed the contract and returned it to defendant in Germany where it was completed by defendant's signature. The oil rig was wrecked while being towed by defendant during a storm on the Gulf of Mexico; it was then towed to Tampa, Florida, where plaintiff commenced an action, contrary to the choice-of-forum clause, for the damage to the rig allegedly caused by defendant's negligence. Separate actions were commenced by the German corporation in England (on the contract, jurisdiction accepted)[10] and in a Florida state court (to preserve limitations

7. *E.g.*, Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); Wm. H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806 (2d Cir. 1955), *cert. denied*, 350 U.S. 903 (1955); Reeves v. Chim Indus. Co., ____ Ore. ____, 495 P.2d 729 (1972); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965).

8. *E.g.*, The Eleftheria, [1970] P. 94; The Fehmarn, [1958] 1 W.L.R. 159 (C.A.). *See* Cowen & Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth, supra* note 5.

9. RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1971).

10. Unterweser Reederei G.M.B.H. v. Zapata Off-Shore Co. (The "Chaparral"), [1968] 2 Lloyd's List L.R. 158.

defenses) but neither of these actions controlled the result in the principal lawsuit brought by the Texas plaintiff. In the federal district court, the clause designating the English forum was held to be ineffectual, so that the Florida action could be maintained in spite of it.[11] In the Fifth Circuit this decision was affirmed.[12] The United States Supreme Court granted certiorari.[13] In reversing, the majority (Douglas dissenting) held that the forum-selection clause was binding unless plaintiff could show that its enforcement would be unreasonable and unfair. The presence of witnesses and the nearness of events, circumstances that might make the case a little more easily triable in Florida than in England, were held not to be, by themselves, enough to require that the contract be disregarded.

An item-by-item check of the facts and reasoning in *The Bremen* against the exact provisions of the Model Choice of Forum Act[14] will be illuminating. Fortunately, the Act is brief, so that its substantive sections can be quoted in full. They are as follows:

> Section 1. [*Definitions.*] As used in this Act, "state" means any foreign nation, and any state, district, commonwealth, territory or insular possession of the United States.
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> Section 2. [*Action in This State by Agreement.*]
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> (a) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if
>
> (1) the court has power under the law of this state to entertain the action;
>
> (2) this state is a reasonably convenient place for the trial of the action;
>
> (3) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and
>
> (4) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by registered [or certified] mail directed to his last known address.
>
> (b) This section does not apply [to cognovit clauses] [to arbitration clauses or] to the appointment of an agent for the service of process pursuant to statute or court order.
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> Section 3. [*Action in Another Place by Agreement.*] If the parties have agreed in writing that an action on a controversy shall be brought only in

11. *In re* Unterweser Reederei, GMBH, 296 F. Supp. 733 (M.D. Fla. 1969).

12. *In re* Unterweser Reederei, GMBH, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing*, 446 F.2d 907 (5th Cir. 1971) (en banc).

13. 404 U.S. 937 (1971).

14. NCCUSL HANDBOOK 219 (1968).

another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless

(1) the court is required by statute to entertain the action;

(2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;

(3) the other state would be a substantially less convenient place for the trial of the action than this state;

(4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or

(5) it would for some other reason be unfair or unreasonable to enforce the agreement.

As a starter, the Model Act in section 1 makes no distinction between international and interstate cases. If the Act were in force, or if its rules were being followed as a common law matter, it would apply whether the forum selected by the parties was in another state or in another country. On that point *The Bremen* and the Model Act are clearly in accord.

Section 2 was not directly involved in the Florida action, since the section relates only to proceedings brought in the state selected by the contract as forum. The English court, however, by accepting jurisdiction in the action brought on the contract by the German firm,[15] did what section 2 would have required that it do. The High Court of Justice in London, in which the suit was filed, had power (jurisdiction) under English law to hear such controversies, and service was secured on the Texas corporation in a manner that not only complied with English law but also would satisfy the "fair play and substantial justice" requirements of the United States Constitution's due process clause.[16] The other provisions of section 2 match corresponding provisions in section 3, applicable to any forum in which action is brought in violation of the contractual clause, and will be noted in the following paragraphs. The conclusion must be that the Model Act, if it were in effect, would have authorized the High Court of Justice in London to hear the case.

Section 3 is the part of the Model Act that deals with the situation in Florida actually passed on by the Fifth Circuit and by the United States Supreme Court. It provides that on facts such as those found in *The Bremen* the court must dismiss the action (or stay it, if that be more appropriate) "unless" certain opposing conditions are found to be present.

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15. *See* note 10 *supra* and accompanying text.

16. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Pennoyer v. Neff, 95 U.S. 714 (1878).

The first of these conditions, involving an inescapable jurisdiction conferred by local law on the court, clearly was not present in *The Bremen.* The Florida court's obligation to exercise jurisdiction was no more absolute in *The Bremen* than in any other proceeding brought on an extrastate transitory cause of action. Florida might have enacted a statute requiring its courts to hear such cases regardless of party agreement to the contrary, but Florida had no such statute, and it is unlikely that any other American state would enact one. It is conceivable, however, that a state might invalidate forum-selecting clauses in connection with particular types of claims in which the state was especially interested or in which special protection for plaintiffs was needed.[17]

As to the second condition, much turns on what is meant by the plaintiff's inability to "secure effective relief in the other state." In *The Bremen,* the exculpatory clause in the parties' contract, substantially reducing if not eliminating much of plaintiff's claim, probably would be sustained and effectuated in England,[18] but would be invalid under the United States law that might be applied if the case were tried in Florida.[19] In other words, plaintiff would probably win his case, by invalidation of the contractual exculpatory clause, if it were tried in Florida, but will lose his case, or most of it, in England. The difference grows out of conflicts rules on choice of governing law. Is this second Model Act condition designed to assure plaintiffs of trial in a forum where they will win their cases? It is difficult to believe that this is the meaning of the condition. Rather, the condition would seem to assure plaintiffs of the ability to get into court for a fair trial on the evidence and under the law, including conflicts law, of the agreed forum. Certainly, that was what the majority in *The Bremen*

17. This is the effect given to the conferral of jurisdiction on both state and federal courts by the Federal Employers' Liability Act. Boyd v. Grand Trunk W. Ry., 338 U.S. 263 (1949) (forum-limiting contract made after cause of action arose). But a court may refuse to hear a FELA case for *forum non conveniens* reasons. Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950). Special protection to defendants, by forbidding the bringing of suits in other states, would be ineffectual. Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Atchison, T. & S.F. R.R. v. Sowers, 213 U.S. 55 (1909).

18. This "fact" of foreign (English) law was established in the Florida case by affidavit.

19. Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). These cases invalidated exculpatory clauses as applied to negligence on inland waters, and it is not certain that the same law would be applied when the loss occurs in international waters. Plaintiff, however, was counting on that application.

thought the law ought to be, and it is what the parties contracted for, with the towage price presumably reduced in consideration of the reduced likelihood of liability. To interpret section 3(2) of the Model Act to mean that a plaintiff can avoid his forum-selection contract whenever trial at the selected place, as viewed after the dispute arose, would be less advantageous to him than trial at another place selected by him will be to make the Act meaningless as an upholder of such contracts. That was not the purpose of the Act.

The third condition set out in section 3 also requires sensible interpretation. It does not call for an exact weighing of the conveniences of trial at one place and the other. The contract would be disregarded only if trial at the selected place would be "substantially less convenient." Chief Justice Burger in *The Bremen* employed the same test, on this point, as does the Act.[20] It was true, of course, that the plaintiff Texans and some of the witnesses who participated in the Gulf of Mexico catastrophe were closer to Florida than to London, but it was equally true that the German defendant and some of its witnesses were closer to London. The London court had been selected in the first place because it was on neutral ground, between the parties' headquarters. As the situation was viewed beforehand when the contract was signed, it was as convenient a place as could be agreed on. The inconvenience that the Act looks for is that of both parties and of the court as well and not just the inconvenience of the party to the contract that becomes the plaintiff.

Furthermore, the inconvenience specified by the Act is not identical with the inconvenience that might give rise to a *forum non conveniens* refusal to hear the lawsuit, nor to a section 1404(a)[21] transfer of the trial from one federal district court to another. A forum-selecting clause denied effect as a valid part of the parties' contract might still be added, however, to the other inconveniences of trial at a different forum to justify a *forum non conveniens* dismissal of the action there in favor of trial at the place named in the contract.[22] That would achieve the same result as was reached in *The Bremen* and as is called for by the Model Act, though the justification would be the converse of that set out in the Model Act's section 3(3). It would

20. "[I]t 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." 407 U.S. at 18.

21. 28 U.S.C. § 1404(a) (1970).

22. In Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951), a choice-of-forum clause was given this effect as a make-weight to help in sustaining a *forum non conveniens* decision.

achieve a roundabout and partially undercover effectuation of the forum-selection clause. This theory might serve as a halfway stage in the abandonment of old rules in states that are not yet quite ready to accept choice-of-forum clauses as contractually valid. But if the contract clause is held valid, it will control on facts under which *forum non conveniens* might be unavailable.

The fourth condition is the most important of all those prescribed in section 3, though it was substantially irrelevant in the *The Bremen* decision. There was no room for contention on the facts that selection of the English forum was obtained by misrepresentation, duress, the abuse of economic power or other unconscionable means. The parties enjoyed equality in bargaining power, and exercised it. Although defendant prepared the contract in the first place, it was not on a "take-it-or-leave-it" basis. Plaintiff made a number of changes, although not in the forum-selecting clause, before signing the contract. The clause in question was prominent in the document, not obscure in a boilerplate segment. In no sense was this a mere adhesion contract as far as plaintiff was concerned. This is of major significance, because forum-selecting clauses are as susceptible to inclusion in adhesion contracts, with all the evils of overreaching and general unfairness that inhere in such contracts, as are any of the other self-serving clauses that are too often included in form contracts offered to uninformed and unsuspecting members of the public. Forum-designating clauses in adhesion contracts ought to be as readily avoidable by the adhering party as are any other onerous clauses in such contracts.[23] It is the purpose of the Model Act to go at least that far, and perhaps farther than some states would otherwise go, in making these clauses voidable at the option of the adhering party.

The fifth condition in section 3 of the Act is the same as the ultimate emphasis in *The Bremen.* Assuming no fraud or overreaching, "the correct approach," said Chief Justice Burger, would be "to enforce the forum clause specifically unless [plaintiff can] clearly

23. *See* Arbittier, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract,* 111 U. PA. L. REV. 1197 (1963); Bolgar, *The Contract of Adhesion: A Comparison of Theory and Practice,* 20 AM. J. COMP. L. 53 (1972); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach,* 50 VA. L. REV. 1178 (1964); Oldfather, *Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking,* 16 KAN. L. REV. 303 (1968); Wilson, *Freedom of Contract and Adhesion Contracts,* 14 INT'L & COMP. L. Q. 172 (1965); Note, *Contract Clauses in Fine Print,* 63 HARV. L. REV. 494 (1950). *See also* Ehrenzweig, *Adhesion Contracts and the Conflict of Laws,* 53 COLUM. L. REV. 1072 (1953).

show that enforcement would be unreasonable and unjust . . . ."[24] "Absent [such showing] there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."[25] The burden is on the party who seeks to avoid the contract.[26] This fifth condition in the Model Act is essentially a catch-all that includes all of the three preceding conditions plus other unanticipated good reasons for disregarding the contract clause. That is the sense in which the Supreme Court uses the same language in summing up its holding. It is fair to say, on the basis of this analysis, that the Supreme Court has accepted, for the international transactions on which *The Bremen* stands as precedent, the tests and standards prescribed by the Model Choice of Forum Act. The case can almost be taken as an unofficial application and interpretation of the Act.

There remain, however, some parts of the Act that were not involved in the case, and some parts of the opinion that may have bearing on the Act, that should be noted.

Section 2(b) of the Act expressly declares that the Act has no application to the appointment of an agent for service of process pursuant to statute or court order. The implication is that the Act does apply when an agent for service is designated by the parties' agreement, apart from statute or court order. This approach is borne out by Chief Justice Burger's statement in *The Bremen* that the decision sustaining forum-selection clauses not shown by the resisting party to be "unreasonable" "is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent*[27] . . . that . . . a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction."[28] Such consent to service will often be necessary if forum-selecting agreements are to be effective practically, and may appear in the agreement itself. The same test of "reasonableness" is appropriate to both types of consent. Absent "reasonableness," neither type of consent should be sustained. That conclusion is in keeping with the Supreme Court's current treatment of cognovit

24. 407 U.S. at 15.

25. 407 U.S. at 18.

26. On this issue, the placement of the burden of proof will ordinarily determine which party prevails. *See* Note, 58 CORNELL L. REV. 416, 418 (1973).

27. 375 U.S. 311 (1964).

28. 407 U.S. at 10.

clauses,[29] to the effect that they are not unconstitutional on their face and will be sustained when knowingly agreed to by parties of equal bargaining power. The Court's treatment thus leaves open the probability that cognovit clauses will not be sustained when they operate unreasonably and unfairly, as between parties of unequal economic status and bargaining power.[30] The Model Act, by its use of the bracketing device in section 2(b) leaves the cognovit clause problem up to the individual states so that an enacting state may exclude cognovit clauses from the operation of the Act, or not, as it pleases. At the same time the bracketing serves to warn courts that use the Act as a guide to common law principles that cognovit clauses present a special problem.

The question of the validity of choice-of-forum clauses has often been analogized to that of the validity of arbitration clauses, which in an earlier time were frequently deemed void because they operated to "oust the court of its jurisdiction." The old-time notion that it was "the first task of a judge to expand his jurisdiction," particularly if his pay depended on fees in the cases filed before him, has long since faded out, and is no longer either a motive or a reason for invalidating these clauses.[31] Very nearly the same reasons support both choice-of-forum and arbitration clauses, but there are enough differences in their operative effects to require that they be looked at separately. Most of the five conditions set out in section 3 of the Model Act would be inappropriate as conditions to the enforcement of arbitration contracts, and nothing in the Model Act is applicable to them.[32]

Choice of forum is almost inevitably bound up with choice of law. Choice-of-forum clauses often include a choice-of-law provision as well, the stated choice of governing substantive law being more often than not that of the state chosen as forum. Even in the absence of a specific choice of the forum's law, such a choice favoring forum law may be implied. When the chosen forum is neutral, unconnected with

29. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (cognovit clause sustained); Swarb v. Lennox, 405 U.S. 191 (1972) (validity depends on specific facts).

30. *See* Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit,* 29 U. CHI. L. REV. 111 (1961); *cf.* Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

31. Judge Wisdom made this point in his dissent in *The Bremen* in the Fifth Circuit. 428 F.2d at 899.

32. No such conditions are imposed under the Uniform Arbitration Act, promulgated in 1955 and since adopted in several of the states. 9 UNIFORM LAWS ANN. 76 (1957); 9 UNIFORM LAWS ANN. 39 (Supp. 1967).

the physical facts of the transaction contracted about, as was the case in *The Bremen*, there will usually be no choice-of-law provision, but the conflict of laws rules at the chosen forum are apt to favor substantive rules similar to its own law, if similar rules are to be found in the law of any state substantially connected with the transaction.[33] That was the dire assumption of the plaintiff in *The Bremen*, who apparently took it for granted (as did the United States Supreme Court) that the English court would hold valid the contract's exculpatory clause, as it would be under English law and under the laws of some of the other countries through whose waters the oil rig was to be towed, even though it would be void by United States law.[34] If England's bases for choice-of-law decision included an above-the-table preference for "the better law,"[35] which they do not, an English court might conclude overtly that the rule sustaining exculpatory agreements as furthering free enterprise in international trade is "better law" than the opposite rule in the United States. That could have been another reason for the conflicts decision that an English court would reach on the substantive choice-of-law problem, though it would not be the reason stated by the English court,[36] as English conflicts law stands today. Nevertheless, it must be realized that the Model Choice of Forum Act says nothing about the validity of choice-of-law clauses or about the effect of choice-of-forum clauses on choice of law. And *The Bremen* treats the relation between the two matters as being of neglible importance, at least to the extent of holding that potential differences in choice-of-law decisions do not defeat an otherwise valid choice-of-forum clause in the parties' contract. The effect of the Act, and inferentially of the decision, in

33. R. LEFLAR, AMERICAN CONFLICTS LAW 218, 224 (1968). The late Professor Brainerd Currie has summarized the governmental interest analysis as a choice-of-law guide: "5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states." W. REESE & M. ROSENBERG, CASES ON THE CONFLICT OF LAWS 523-24 (6th ed. 1971).

34. Correspondingly, it was assumed that the United States court in Florida would determine the validity of the exculpatory clause by United States law, and hold it invalid. *See* note 19 *supra.*

35. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 254 (1968).

36. Similarly, a stated or unstated preference for what it regards as "the better law" might to some extent explain why the federal court would apparently have selected United States law as governing.

the direction of encouraging party autonomy in choice-of-law determination[37] is incidental, not specific.

The explicit precedential effect of *The Bremen* apparently is limited to admiralty cases involving contracts for international transactions. Within that area it is like a common law decision by the area's highest American court. Even though it is technically not a common law decision, it has all the normal characteristics of one. Similarly, though the Model Choice of Forum Act has the form of a statute rather than of a common law rule, in actual effect it suggests a rule (the bundle of subsections in the Model Act really adds up to one total rule) that could well be accepted, like a Restatement section, by any common law court. Considered together, *The Bremen* and the Model Act afford strong and excellent authority for such an acceptance by state common law courts, and for forum-selecting clauses in all sorts of contracts. By the same token, if the concept of federal common law is to be extended to the mass of international transactions and problems (to which the application of fifty or more state and territorial rules can produce contradictory confusion harmful to the national interest), as it undoubtedly should be extended,[38] then *The Bremen* decision and the Model Act afford an excellent statement of what the new federal common law rule should be. It may fairly be hoped that, together, they set out the substance of future American law on the effectiveness of choice-of-court agreements, for both interstate and international litigation.

37. *See* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 44, 179 (1967); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186, 187 (1971); Yntema, *"Autonomy" in Choice of Law*, 1 AM. J. COMP. L. 341 (1952); Note, *Party Autonomy: Past and Present*, 12 S. TEX. L. J. 214 (1970).

38. *Cf.* Zschernig v. Miller, 389 U.S. 429 (1968).