
1. Post-war yearning for deparochialisation and the siren of free trade: *The Bremen v. Zapata Off-Shore Co.*

1.1 CASE BACKGROUND

This first case expresses a post-war yearning for deparochialisation. At stake was the legal effect of a forum-selection clause in an international maritime contract. Decided by the United States Supreme Court in 1972, it marks the beginning of a process of liberalisation of contractual choice of forum, that would extend progressively from adjudication to arbitration. One might say that the siren of free trade lures international jurisdiction into the nets of party autonomy.

The dispute arises from a towage contract between an American corporation (Zapata) and a German corporation (Unterweser), in which the main obligation was to move an oil rig from Louisiana to the Adriatic Sea. The contract contained the following forum-selection clause: 'Any dispute arising must be treated before the London Court of Justice.'

Unterweser's deep-sea tug Bremen departed Louisiana on 5 January 1968, however, during transportation a severe storm arose while the Bremen was in international waters. The rig was damaged and was towed to Tampa, Florida, the nearest port of refuge. Despite the contractual provisions, on 12 January, Zapata commenced a suit in admiralty in the United States District Court at Tampa, seeking damages against Unterweser *in personam* and the Bremen *in rem*, alleging negligent towage and breach of contract. Unterweser invoked the forum clause and moved to dismiss for lack of jurisdiction or on *forum non conveniens* grounds.

Alternatively, the German corporation requested to stay the action pending submission of the dispute to the London Court of Justice. Unterweser commenced an action in the High Court of Justice in London, as the contract provided, and Zapata showed before that court to contest jurisdiction. The English court ruled that it had jurisdiction under the contractual forum provision.

In its turn, the United States District Court at Tampa relied on the prior decision of the Court of Appeals in *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 ('agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy, and will not be enforced') and denied Unterweser's motion to dismiss or stay Zapata's initial action. The Court of Appeals affirmed that the forum-selection clause was unenforceable.

Unterweser sought review in Supreme Court on certiorari and it was granted. The U.S. Supreme Court held that the forum-selection clause is binding on the parties unless the party seeking to avoid it could meet the high burden of showing it to be unreasonable, unfair, or unjust.

Case: *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)

1.2 BACK TO *THE BREMEN* (1972): FORUM SELECTION AND WORLDMAKING

Jacco Bomhoff

1. REVISITING A CLASSIC

Going back to *The Bremen*, means recounting one of the classic origin stories in the modern conflict of laws canon. That story – part of a well-known broader narrative of the rise of party autonomy – goes like this.

US courts were historically hostile to forum-selection clauses agreed between private parties. This hostility, as the Court of Appeals for the Fifth Circuit put it in a 1958 decision, reflected ‘the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced’.¹ This so-called ‘ouster doctrine’ was applied ‘with almost boring unanimity’,² until the Supreme Court abruptly changed course in its 1972 decision in *The Bremen v. Zapata Off-Shore Co.* Overturning another Fifth Circuit decision, the Supreme Court now held that the party resisting enforcement of a clause stipulating litigation in a foreign court would have to show that trial abroad would be ‘so manifestly and gravely inconvenient’ that they would ‘be effectively deprived of a meaningful day in court’. In reaching this conclusion, Chief Justice Burger’s opinion for the court invoked the following stirring lines, often cited later:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.³

This familiar, conventional, history becomes puzzling when looked at more closely, from two directions. First, if *today* party autonomy in international commercial litigation is so widely accepted and so thoroughly normalised, how could it have taken until the 1970s for the US Supreme Court to fully affirm the validity of forum selection clauses? Secondly, though, if *before The Bremen* party autonomy was so widely and stridently rejected – ‘with almost boring unanimity’ – how can it be that all these earlier judicial objections seem to have disappeared so completely since the case was decided. How, in other words, could there have been such a rapid and decisive shift

¹ *Carbon Black Export Inc. v. The Monrosa*, 254 F. 2d 297 (1958), petition for certiorari dismissed, 359 U.S. 180 (1959).

² F.K. Juenger, ‘Supreme Court Validation of Forum-Selection Clauses’ (1972) 19 *Wayne L Rev* 49, 52, quoting ‘Comment: Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts’ (1950) 10 *La L Rev* 293.

³ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). All further unattributed quotations are taken from Chief Justice Burger’s opinion for the court in this case.

from forum-selection clauses as ‘against public policy’, to party autonomy as the new orthodoxy?

The first of these two questions invites us to revisit the longer history of jurisdictional party autonomy in the US. Revisionist work in this vein has shown that federal courts had been giving effect to forum selection clauses long before *The Bremen*, not only in admiralty cases, but also as part of *forum non conveniens* assessments in land-based courts.⁴ The case of *The Bremen* itself only went to the Supreme Court, after all, because of a persistent conflict between the Second and Fifth Circuit Federal Appeals Courts. On this revised view, the decision remains interesting as a rhetorically rousing endorsement, and as a useful practical confirmation of the validity of forum selection clauses at the Supreme Court level. But if in reality the battle for jurisdictional party autonomy was a much longer lasting, much more gradual, affair, then the case becomes somewhat less relevant as a matter of either normative principle or doctrinal change.

This revised history is important, but it is not complete. Contemporary writers did, after all, see *The Bremen* as an important case. The decision was widely commented on in law journals, not only in the US but also in England. And it was expected that the court’s ruling could well ‘substantially affect counseling and drafting practices’.⁵ This suggests that there were still, by the early 1970s, real issues of principle and doctrine to be settled.

What about our second question, on limitations on party autonomy in the period *since* 1972? Later Supreme Court decisions have been striking, notably, for how they made *The Bremen* ‘stand for the broadest possible principle that its language [could] support’.⁶ The Bremen’s reasonableness test was ‘watered-down’, and its policy extended also to consumer contracts.⁷ More generally, this Supreme Court case law was clearly only one strand in a much broader wave of projects – of Conventions, Restatements, and model legislation – expanding party autonomy in interstate and international commercial dealings, not just in the US but also in Europe and elsewhere.⁸ And so, while *The Bremen* was, in 1972, still seen by some as ‘a most

⁴ D. Marcus, ‘The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts’ (2008) 82 *Tulane L Rev* 973.

⁵ Juenger (n 2), 50.

⁶ E.A. Purcell, Jr., ‘Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court’ (1992) 40 *UCLA L Rev* 423, 429.

⁷ *Ibid.*

⁸ See, e.g., the 1955 Hague Convention on the Law Applicable to International Sales of Goods; the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ratified by the U.S. on 30 September 1970); the 1968 Model Choice of Forum Act adopted by the U.S. National Conference of Commissioners on Uniform State Laws; the Restatement (Second) of Conflict of Laws (adopted in 1971); and, in Europe, the 1980 Rome Convention on the Law Applicable to Contractual Obligations (work on which had begun in 1967).

internationally minded decision',⁹ that openness has since not only been expanded – it has become commonplace.¹⁰

2. A WORLD OF 'WORLD MARKETS', REAL AND IMAGINED

So how are we to understand the place of *The Bremen* in the broader history of modern private international law? In this comment, I suggest an alternative reading of the case, as not simply a doctrinal step or as a mere statement of principle, but as an instance of 'worldmaking'.¹¹ Chief Justice Burger's opinion is an exceptionally striking and momentous instance of what the anthropologist Clifford Geertz in his work on law has called 'imagining the real'.¹² The opinion, quite explicitly, imagines a world – a particular *kind* of world – and in so doing helps bring that world into being. When the Chief Justice situates the case in 'an era of expanding world trade and commerce', or when he refers to the ostensible needs of 'trade and commerce in world markets', for example, these statements have to be understood as not merely descriptive, but also as generative and constitutive. The decision participates in the construction of one among many possible 'world versions' – in this case, one revolving around a fear of 'parochialism' and concern for 'the future development of international commercial dealings by Americans'. The Supreme Court's decision in *The Bremen*, I want to argue, is ultimately most important for its imaginative construction and description of this world, and – still following Geertz – for its part in the 'organized effort to make the description correct'.¹³

The world imagined in *The Bremen*, moreover, is of a particular character. It is, or at least is projected to be, distinctly *modern*. This is suggested by a number of aspects of the symbolic and technical resources manipulated in the opinion and the surrounding scholarly commentary. Take for example the uses of history. At the Fifth Circuit, the dissenting judge was concerned that the majority of this normally 'forward-looking court' was taking 'a backward step' which had 'no place in a shrinking world'.¹⁴ This

⁹ G.A. Zaphiriou, 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements' (1978) 3(2) *Maryland J of Int'l L* 311, 321.

¹⁰ P. Nygh, *Autonomy in International Contracts* (Oxford, OUP 1999) (freedom of parties to international contracts to choose their forum and their applicable law 'today [in 1999] almost universally acknowledged'). See also: G. Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in E. Gottschalk, R. Michaels, G. Rühl, J. von Hein (eds.), *Conflict of Laws in a Globalized World* (Cambridge, CUP 2007).

¹¹ Cf. N. Goodman, *Ways of Worldmaking* (Indianapolis, Hackett 1978). See also D. Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Abingdon, Routledge 2010); C. Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York, Basic Books 1983) 167. For an application of these ideas in the field of constitutional law, see M. Loughlin, 'The Constitutional Imagination' (2015) 78(1) *Mo L Rev* 1.

¹² Geertz (n 11) 173.

¹³ *Ibid.* 174.

¹⁴ Circuit Judge Wisdom, dissenting in *In The Matter of the Complaint of Unterweser Reederei, GmbH. Zapata Off-Shore Co. v. M/S Bremen and Unterweser Reederei, GmbH.*, 446 F.

judge was also keen to emphasize how '[t]he towing of an oil rig across the Atlantic was a new business'; another reason for a modern approach to its legal context.¹⁵ At the Supreme Court, the theretofore powerful 'ouster doctrine' was relegated to a realm of 'vestigial legal fiction'. In this way, a clear break is suggested with a pre-modern past still in thrall to 'taboos', 'word magic', and the 'hypnotic power of the phrase "oust the jurisdiction"'.¹⁶ This process of deliberate forgetting enables the construction of a new, modern world. At the same time, the Supreme Court is concerned to give forum-selection-clause enforcement a firm footing in another modernity: that of the liberal tradition, when it notes how its new approach 'accords with ancient concepts of freedom of contract'. The decision, in short, sets up a clear victory, of forward-looking sensitivity to new business needs combined with liberal principle, on the one hand, over mere 'unthinking adherence to spurious precedent', on the other.¹⁷

3. MATTERS OF SCALE

Here, though, I want to focus on one other particularly striking aspect of the way the decision in *The Bremen* imagines – and contributes to the construction of – a world it purports merely to describe. This is the manipulation of the symbols and techniques of scale. Chief Justice Burger's opinion produces a shift towards a 'global' sphere, as the natural and appropriate level at which jurisdictional conflicts such as those at issue in the case ought to be negotiated. *Worldmaking*, in short, carries a particular literalness here. A comparison between Burger's opinion and the decision of the majority at the Fifth Circuit can help clarify what this shift entailed.

The outlook of the Court of Appeals was distinctly *inter-national*, in a classical sense. This is to say that for the Fifth Circuit, geography, national jurisdictional boundaries, and the interests of States were still the natural points of reference. In this court's reasoning *local connections* were still of primary significance. This was true, firstly, for connections to the US. Note how the Fifth Circuit describes what happened: 'Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous States, the flotilla [that is: the towing tug Bremen, and the rig Chaparral] never escaped the Fifth Circuit's *mare nostrum*, and the casualty occurred in close proximity to the district court'.¹⁸ But it was also true for connections to other States. As the court set out the position: 'The only other nation having significant

2d 907 (28 June 1971), quoting 'Comment, Application of the Forum Clause to Commercial Contracts' (1971) 8 *Houston L Rev* 739, 752.

¹⁵ Judge Wisdom, quoted in Chief Justice Burger's opinion, at fn. 14.

¹⁶ 'Taboo' was Learned Hand's term (see *Krenger v. Pennsylvania R. Co.*, 174 F.2d 556 (1949), quoted in *The Bremen*); 'hypnotic power' was Jerome Frank's (see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984 (1942)); 'word magic' was Friedrich Juenger's (see Juenger (n 2) 53).

¹⁷ Juenger (n 2) 53.

¹⁸ Circuit Judge Gerwin, *In The Matter of the Complaint of Unterweser Reederei, GmbH. Zapata Off-Shore Co. v. M/S Bremen and Unterweser Reederei, GmbH.*, 428 F.2d 888 (19 June 1970).

contacts with, or interest in, the controversy is Germany. England's only relationship is the designation of her courts in the forum clause'.¹⁹

At the Supreme Court, these understandings of proximity and interest undergo a remarkable shift. The precise location of the accident no longer matters. It is as if the Court wants to give immediate practical relevance to its more rhetorical declaration that '[t]he barrier of distance that once tended to confine a business concern to a modest territory no longer does so', by disqualifying such geographical connections as 'mere fortuities'. The fact that the claimant was a United States citizen, whose rights would be affected if the dispute were to be litigated in England, also is no longer a relevant factor. Similarly, the potential 'interests' of England or Germany are no longer mentioned. Neither, strikingly, is any specific interest of the United States as a whole, on which more below. In the approach taken by the Supreme Court, connections to particular localities are only taken into account in attenuated form, as part of an overall 'reasonableness' inquiry. And so, instead of attention to geographical proximity or concern for local governmental interests, we see deference to the expectations of private parties. Private parties, moreover, of a particular kind: those businesses 'once essentially local', but now operating 'in world markets'.²⁰

This escalation of what Mariana Valverde has called 'the spatial scale of governance',²¹ to a global level, is facilitated by a parallel elevation in terms of the sources for the court's authority. Part of this is a greater willingness to look to foreign judicial practice on this issue, in particular 'the approach followed in other common law countries, including England'. But even more important is the source of the Court's authority within US law itself. Recall that *The Bremen* concerned claims brought in admiralty. Chief Justice Burger's opinion contains no statements on the basis or the intended scope of the Court's new ruling. It would therefore have been entirely plausible to read the Supreme Court's validation of forum-selection clauses as confined to admiralty litigation. But contemporary commentators were not content to read the judgment in such a limited way. Instead, they argued that the Court had in fact done something it does only comparatively rarely: it had laid down a rule of federal common law, based on a federal interest in 'maintaining an effective climate in which to conduct international commercial activity'.²² After all, any 'lack of predictability created by a diversity of rules on the validity of forum-selection clauses', one writer noted, would 'impinge on the nation as a whole, not only those States that might decide to refuse enforcement'.²³ More generally, '[t]he limited political context' in which state-level decision-makers operated, would be 'an inappropriate one in which to make a policy judgment concerning the importance of effective forum selection by the parties to international commercial dealings'.²⁴ Determining the validity of forum-selection

¹⁹ Ibid.

²⁰ Cf. J.R. Paul, 'The Transformation of International Comity' (2008) 71 *Law & Contemporary Problems* 19.

²¹ M. Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon, Routledge 2015) 33.

²² H.G. Maier, 'The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law' (1973) 6 *Vanderbilt J of Transnat L* 387, 394. See also Juenger (n 2) 59.

²³ Maier, *ibid.*

²⁴ *Ibid.* 396.

clauses, then, was not a matter that could be safely left to state law. *The Bremen* had to be read as laying down a rule of federal common law, applicable not just in admiralty but – at least – also to all other international transactions.

Now, it could well be thought, certainly from today's perspective, that describing these apparently simple manipulations of scale as 'worldmaking', is reading too much into the court's decision. All this might amount to, after all, could be some random judicial references to 'world trade and commerce' and 'world markets', and some rhetorical flourishes of a court concerned to show it is mindful of 'the expanding horizons of American contractors who seek business in all parts of the world'. But if we place this rhetoric in context, such a deeper significance may well appear less far-fetched. The court's terminology, and the outlook it signaled were, in effect, largely new at the time. It was during the few years leading up to the decision in *The Bremen*, that economists, political scientists and international relations scholars, began to address both the need for 'transnational' or 'global' perspectives in their fields, and for increased recognition of the role of corporations at such 'transnational' or 'global' levels. *American Business Abroad*, published in 1969, for example, saw MIT economist Charles Kindleberger arguing that the nation state was 'just about through as an economic unit'.²⁵ In *The Tortuous Evolution of the Multinational Corporation* (also 1969), Howard V. Perlmutter coined the neologism 'geocentric', to describe a new breed of super-sized 'world oriented' firms having lost 'all special ties to one or two particular States'.²⁶ And a Harvard Business School study on *The Role of U.S. Enterprise Abroad* (again 1969), cautioned that the identity of multinational corporations was 'likely to become more and more ambiguous in national terms' over time.²⁷ An early, and especially grand, statement of this new mood can be found, finally, in a 1966 book entitled *World Politics: The Global System* by Herbert Spiro, professor of political science at the University of Pennsylvania. 'Today for the first time in history,' Spiro began his book, 'a global community of mankind exists or, at any rate, is coming into existence in the consciousness of human beings': 'Today there is one global political system of which all national and other smaller political systems are component parts'.²⁸

These references of course cannot, without more, *prove* anything. But they do at least suggest that thinking in 'world'-terms was both prevalent, and to some extent new, at least in scholarly circles, at precisely the time Chief Justice Burger wrote his opinion in *The Bremen*, where he adopted a very similar outlook, and cast it in very similar language.

²⁵ C. Kindleberger, *American Business Abroad* (New Haven, Yale 1969), 207.

²⁶ See H.V. Perlmutter, 'The Tortuous Evolution of the Multinational Corporation' (1969) 4(1) *Columbia Journal of World Business* 9–18, quoted in: J.S. Nye, Jr., R.O. Keohane, 'Transnational Relations and World Politics: An Introduction' (1971) 25(3) *International Organization* 329. For an overview with extensive further sources, see J.F. Galloway, 'World-wide Corporations and International Integration: The Case of INTELSAT' (1970) 24(3) *International Organization* 503.

²⁷ R. Vernon, 'The Role of U.S. Enterprise Abroad' (1969) 98(1) *Daedalus* 129.

²⁸ Quoted in G. Modelski, 'The Promise of Geocentric Politics (Book Review)' (1970) 22(4) *World Politics* 617, 623.

As Mariana Valverde, Boaventura de Sousa Santos, and others have argued, questions of scale matter for the character of governance projects. *The Bremen*, in an important sense, introduced a ‘global’ perspective for the resolution of jurisdictional conflicts, to replace a more conventional *inter*-nationalist comparison of contacts and interests of specific local jurisdictions. Is it too far-fetched to say that in doing so, the decision participated in a remaking of the world – or at least of those aspects of the world concerned with the demarcation of public authority and private autonomy? One noted political science scholar commented in 1968 that, given the role of corporations as important actors ‘in present and future international systems ... their political functions as structural components of systems of world politics [could] only be neglected at our peril’.²⁹ In this light, recall once more the assertion at the heart of Chief Justice Burger’s case for party autonomy: ‘[w]e cannot have trade and commerce in world markets and international waters exclusively on *our* terms, governed by *our* laws and resolved in *our* courts’ (emphases added). This statement, for all its intended obviousness, leaves many questions unanswered. ‘Why not?’ is one. ‘Perhaps not “exclusively”, but surely still commonly, or regularly?’ is another. And even more importantly: ‘Who are “we” in this statement?’. In whose name is Chief Justice Burger speaking here? Can the interests of American businesses operating internationally simply be assumed to be congruent with some general public interest? Or is the court going even further, and taking into consideration not only such American business interests, but also those of some nascent global business community?

4. WORLDMAKING BEFORE CRITIQUE: *THE BREMEN* AND LEGAL MODERNISM

Even if this worldmaking perspective sounds plausible generally, why go back to *The Bremen today*? Surely all that can be said about this decision of almost 50 years ago, has been said already? Perhaps surprisingly, one important reason for asking these questions today, is that they simply could not be raised, or at least not in this way, at the time. Recall that the case was argued and decided at the very beginning of the 1970s. This means that Chief Justice Burger’s opinion arrived just before a range of major disciplinary innovations in a number of highly relevant domains – from Foucauldian studies of governmentality, to geography and critical legal studies. ‘In the 1960s the world changed ... In the 1970s the disciplines changed’, David Delaney has written in his overview of the relationship between law and space – a theme of great salience to the case.³⁰ Even if it is true that no single idea is ever entirely new, looking at social phenomena, such as social space or the distinction between private freedom and public authority, *as constructed*, was greatly facilitated through the use of

²⁹ G. Modelski, ‘The Corporation in World Society’ (1968) *Yearbook of World Affairs* 78, quoted in Galloway (n 26) 505.

³⁰ Delaney (n 11) 9–10. See also Valverde (n 21) 48 (‘legal geography did not exist as a field in the 1980s’).

conceptual and normative tools introduced in disciplinary innovations that took place largely later, over the course of the 1970s and then during the 1980s.³¹

It is true that still today, the constructive, structuring and meaning-making dimensions of party autonomy are not often addressed explicitly in conflict of laws scholarship. There are of course exceptions.³² One notable example is the argument developed by the legal historian Edward Purcell, that the Supreme Court's later, post-*The Bremen* case law on forum-selection clauses resembles its early twentieth-century 'liberty of contract' jurisprudence, in '[p]rivileging a particular view of the bases of national economic power and assuming the innocence of private social power'.³³ But the position of *The Bremen* itself is particularly interesting, still today, because it offers us a glimpse of worldmaking *before critique* – of a time when fewer tools were readily available to unpack ideas on, say, 'the expansion of American business and industry', or on how – exactly – it would be 'parochial' to insist on local law or courts, and on why – exactly – that would be problematic. Intriguingly, the decision also came just before the ascendancy of another external perspective from which it could have been subjected to scrutiny, albeit most likely with radically different implications: the analysis of efficiency in US law and economics scholarship.³⁴ Again, crucial assumptions in the decision that went untested at the time – such as the suggestion that this was an era in which 'all courts' were 'overloaded' – would most probably have been scrutinized to a greater degree, had the case been decided ten years later.³⁵

Partly because of simple timing, then, *The Bremen* could be – and, to some extent, was – an exercise in construction without critique, in worldmaking without self-reflection. Its faith in freedom for commercial actors, in internationalism, and in 'reasonableness', all mark the decision as an instance of modernist legalism, and perhaps even as one of its high points. This is true in particular of the confidence in the force of sheer rationality that surrounded the court's reasoning. As Friedrich Juenger noted at the time, speculation as to whether the court's new rule on forum selection would also bind state courts – a question simply not addressed in *The Bremen* – was likely to be irrelevant: after all, now that the court had concisely set out 'the reasons for upholding party autonomy ... it would be difficult for a state court to escape its

³¹ Sceptics might point to the early twentieth-century scholar Robert Hale, and argue that many of these ideas had been around for a while. And they had been, to a degree, and in a form. But it is intriguing to note that even Hale's work had to be 'rediscovered' later, and that, again, much of this rediscovery occurred only after the early 1970s. See, e.g., W.J. Samuels, 'The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale' (1973) 27 *U Miami L Rev* 261.

³² For an illuminating exception, see Fleur Johns, 'Performing Party Autonomy' (2008) *Law & Contemporary Problems* 253 (adopting a focus on 'the background-structuring effects of the notion of party autonomy').

³³ Purcell (n 6) 507.

³⁴ The seminal early event here is the 1973 publication of Richard Posner's 'Economic Analysis of Law'.

³⁵ See, e.g., the vast literature on the so-called 'litigation explosion' in the US, emerging from the second half of the 1980s.

logic'.³⁶ Using only such logic and law, and overcoming 'taboos' and 'parochialism', the US Supreme Court in *The Bremen* helped build a modern world of party autonomy – all without mentioning that term once. The tensions and paradoxes inherent in this world, between private and public freedom, perhaps could not readily have been expressed and analysed in these terms at the time.³⁷ But they are certainly still with us today. And one of these paradoxes still stands as perhaps the starkest monument to Chief Justice Burger's modern, internationalist optimism. It would not be possible, Burger wrote, to have world commerce on exclusively American terms. That is why party autonomy was said to be *necessary*. But that is also, in the decades since *The Bremen*, largely what party autonomy *has produced*, as New York and English law, and the New York and English courts, have become the default choices for international contracting in 'world markets'. The impulse of internationalism, then, and the effect of hegemony, have turned out to be merely two sides of the same coin.

1.3 FORUM SELECTION CLAUSES IN A BRAVE NEW WORLD: OPTING OUT OF PAROCHIALISM?

Agatha Brandão de Oliveira and Lucia Bíziková

1. INTRODUCTION

The Bremen v. Zapata Off-Shore Co. 407 U.S. 1 (1972) (*The Bremen*) is a landmark case in the construction of contemporary private international law. By allowing contractual choice of jurisdiction, the United States Supreme Court opened the era of party autonomy in international commercial relations. *The Bremen* was arguably the first legal stone in the framing and facilitating of private globalised trade relations and, correlatively, a symptom of a disembedded economy. It questions the essence of 'legal borders' and sets the tone for later challenges to the very notion of jurisdictional limits, while simultaneously heralding the age of private economic governance through contract.

The circumstances that gave rise to this important ruling reveal the complex nature of the dispute and the legal issues it raises: it is not about an ordinary contract between two local (American) companies doing regular business, but an international commercial transaction freely negotiated between a German and an American corporation; it is not the type of transaction that States alone can regulate, but belongs to a very specific realm of admiralty issues in which private actors have considerable influence; it is not an activity that falls neatly within the realm of one jurisdiction, but rather is intrinsically international (here, on the maritime route between the Gulf of Mexico and

³⁶ Juenger (n 2) 59. See also the 1971 'Comment', cited in Judge Wisdom's dissent in *The Bremen* (arguing that it was 'difficult to imagine any court long rejecting a criterion which is universally referred to as the "reasonableness" test').

³⁷ For the notion of 'public freedom', see G.E. Frug, 'The City as a Legal Concept' (1980) 93(6) *Harvard L Rev* 1057.

the Adriatic Sea). The occurrence of the problem materialised in international waters, where sovereignty has no reach.

Indeed, to contextualise *The Bremen* in space is to recall the notion of *mare liberum*: ‘the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all’.³⁸ The sea represents the main venue for trade in all times – and therefore involves a considerable variety of public and private interests, from the claims of empires to the convenience of merchants, from the protection of nature as a global public good to geopolitical strategies. To reach a decision affecting this ecology is always a sensitive matter, particularly for a domestic judge.

Moreover, to place *The Bremen* in time is to acknowledge that those events inevitably happened in a period of transition – and unforeseen expansion – of international trade on a much larger scale. Back in the 1970s, the setting was composed by the Post-World War II ‘golden age of capitalism’³⁹ and the apex of the Cold War. For the first time, we inserted the words ‘transnational’⁴⁰ and ‘global’ in our dictionaries. The decision rendered by the Supreme Court gave concreteness to this reality and set a new vision for the world: here comes the global turn!

Professor Jacco Bomhoff raises the point in this volume that this new world is built upon the dual facet of internationalism and hegemonism.⁴¹ This does not constitute a paradox: in *The Bremen*, the Supreme Court deliberately took a non-parochial avenue.⁴² Instead, the Supreme Court espoused a new cause – the creation of a legal market.⁴³ Liberalising international choice of forum clauses was just the beginning of a large window of opportunity for governance through informal arrangements by non-State actors.

By setting a pace in which private transactions across continents were ‘unbounded’, competition between jurisdictions (forum shopping) and methods of dispute resolution (arbitration clauses) was encouraged.⁴⁴ In the new global market for judicial services, the creation of judicial ‘business partners’ as a by-product is also noteworthy; under

³⁸ Hugo Grotius, *The Freedom of the Seas* (first published in 1609, New York, Oxford University Press 1916) 7.

³⁹ Cf. S.A. Marglin, J.B. Schor, *The Golden Age of Capitalism* (Oxford, Clarendon Press 1992).

⁴⁰ See the original source of the word in Phillip C. Jessup, *Transnational law* (New Haven, Yale University Press 1956) 2: ‘... the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly into such standard categories.’

⁴¹ Please refer to the last page of Bomhoff’s contribution, 1.2 above.

⁴² For further studies on the subject, cf. Neil Walker, *Intimations of Global Law* (Cambridge, Cambridge University Press 2014).

⁴³ As a market, of course, it can be monopolized. See Part III of this book.

⁴⁴ This reflected some decades later on the jurisprudence of the European Court of Justice, discussing *lis pendens*, ‘Italian torpedo’ and anti-suit injunctions: Case C-281/02 *Owusu v. Jackson* [2002] ECR, Case C-116/02 *Gasser v. Misak* [2002] ECR, Case C-159/02 *Turner v. Grovit* [2002] ECR. Regarding to arbitration, see Case C-536/13 *Gazprom OAO v. Lietuvos Respublika* [2013] ECR, Case C-185/07 *Allianz SpA v. West Tankers* [2007].

The Bremen's 'deferral policy', British courts are endorsed as 'experienced and capable in the resolution of admiralty litigation'.⁴⁵

This commentary will focus, firstly, on how party autonomy is asserted in *The Bremen*. Secondly, we will attempt to assess its direct and indirect legal effects. This is important for understanding the 'post-*Bremen*' legal panorama as it unfolds throughout the rest of this volume.

2. THE NORMATIVE MAZE

A narrative of a global world could not prosper without a foundational myth – or a hypothetical norm to justify its development.⁴⁶ Without naming the principle, the Supreme Court in *The Bremen* effectively described what would be the foundation of post-modern private international law: party autonomy.⁴⁷ In its economic avatar, the whole discipline has been built on two main pillars: free choice of law (*substantive facet* of party autonomy) and free choice of forum (*procedural facet*). The former allows parties to determine the substantive law applicable to their transaction; the latter grants parties the right to identify the court competent to hear and resolve disputes arising from their relationship. The encompassing foundation of this private empowerment is freedom of contract.

A. What's in a Choice?

Quasi-unrestricted choice to suit the parties' needs has been widely promoted since *The Bremen*.⁴⁸ Today, a whole series of reasons justify the choice to draft a forum selection clause.⁴⁹ Thus, firstly, it can help parties avoid a costly and parasitic trial: a fight over

⁴⁵ See *The Bremen*, p. 17. In its turn, it is fair to say that the deferral policy created a legitimate expectation that the same respect would be given to uphold choice of forum clauses in favour of US courts. However, what meant to be 'global', was indeed focused on national terms and the mutual recognition principle. It sets the limits of what is a 'remote alien forum' and what is a 'friendly jurisdiction'.

⁴⁶ Cf. Hans Vaihinger, *The Philosophy of As If: A System of the Theoretical, Practical and Religious Fictions of Mankind* (Hamburg, Meiner 1911). See also Michel Troper, 'The modern State and the concept of authority' in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Cheltenham, Edward Elgar 2016): 'An assumption that we know is not true but is nevertheless indispensable. ... Already in earlier works, he [Kelsen] had written that it was an assumption that every lawyer made unconsciously. The role of the pure theory was therefore to bring to consciousness this unconscious assumption.'

⁴⁷ For a critical analysis of this principle, see Horatia Muir Watt, "'Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' [2010] *ERCL* 250.

⁴⁸ There is still some limitation to choose rules of law as the law governing the contract. Cf. Luca Radicati di Brozolo, 'Non-national rules and conflicts of laws: reflections in light of the UNIDROIT and Hague Principles' [2012] *Rivista di diritto internazionale privato e processuale* 840.

⁴⁹ An interchangeable term for this clause is choice of forum agreement, since it represents an agreement inside an agreement, with separability aspects (a choice of forum agreement is to

the place to fight.⁵⁰ Secondly, it empowers each of them to determine, strategically, the court with the most favourable procedural and evidentiary rules. Last but not least, it can prevent the risk of having a dispute determined by a forum with a random or arbitrary connection to the case.

However, party autonomy can serve its purpose when the contracting parties understand the implications that this double prerogative entails. Freedom to choose is not always straight-forward. The way through the normative maze is through astute drafting: the relevant clauses must be carefully tailored to the needs of the parties and to the scope of the transaction. Thus together, choice of law and choice of forum enable parties to submit their transaction to *one* (national or municipal) legal order. The question is whether this means that a forum-selection clause entails the designation of the law of the selected forum? In *The Bremen*, the purport of the clause was not clear in this respect. One of the controversies stemmed from the fact that Unterweser towage contracts ordinarily provided for exclusive German jurisdiction and application of German law; however, in the process of negotiations, Zapata contested this⁵¹ and the choice of London courts prevailed. The issue arose as to whether it was also appropriate for English law to govern the contract. It was held that

while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.

B. The Quest for Legal Certainty

By essence, cross-border trade is a hazardous activity. To minimize the potential risks, parties often seek mechanisms to promote legal certainty – choice of forum is precisely one such device. In *The Bremen*, the Supreme Court stated that the ‘selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction’. Moreover, it remarked upon the need for foreseeability in international contracts – where parties must be held to their bargain when a dispute arises. Therefore, issues relating to the appropriateness of the chosen forum must be addressed at the time the contract is being discussed.

A particular feature of *The Bremen* is the focus on the economic aspect of this choice – uncertainty is ‘bad for business’ and efforts must be allocated to minimise the potential discrepancies or miscommunications between parties of different nationalities

be considered as separate from the remainder of a contract). Forum-selection clauses are *prima facie* valid. The same logic is valid for arbitration clauses.

⁵⁰ This argument is based on an economic analysis of law, see Péter Cserne, ‘Freedom of Contract (and Economic Analysis)’ in Jürgen Backhaus (ed), *Encyclopedia of Law and Economics* (Berlin, Springer 2015). See also Giesela Ruhl, ‘Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency’ in Eckart Gottschalk, Ralf Michaels, Giesela Ruhl, Jan von Hein (eds), *Conflict of Laws in a Globalized World* (Cambridge, Cambridge University Press 2011).

⁵¹ The choice of forum clause then assumed an ‘overriding importance’: see *In re Unterweser Reederei GmbH*, 428 F.2d 888 (5th Cir. 1970), at 907.

in respect of the nature and location of the forum to which they might find themselves subjected:

*The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations...*⁵²

C. Issues of Scope and Status

The Bremen was distinguished from previous precedents such as *Carbon Black Export Inc. v. The Monrosa*,⁵³ notably because of the way in which the choice of forum clause was formulated. The language of the forum selection clause in the towage contract was ‘clearly mandatory and all-encompassing, ... providing that any dispute must be litigated before the High Court of Justice in London, England.’⁵⁴

Nevertheless, even with a clear choice of forum clause, the interpretation of this provision was challenged – specifically on the terms of whether the jurisdiction agreement designated a single, exclusive forum.⁵⁵

In upholding the clause, the Supreme Court relied mainly on the fact that the agreement was ‘freely entered into between two competent parties’. It highlighted two criteria in the latter respect: (i) conscious acquiescence; (ii) equal bargaining power. In short, to contest the binding nature of the agreement, the opposing party would have to present evidence of alleged fraud, and not simply allege that ‘no specific negotiations concerning the forum clause took place’. The Court remarked on the innovative character of this specific contract for the towing of an oil rig across the Atlantic, which did not use a ‘boilerplate’ language present in other contracts. Furthermore, the fact that Zapata made other alterations to the contract demonstrated that it must have been aware of, and not opposed to, the clause. According to the filings of the case, ‘the forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties’ signatures’. Zapata, therefore, could not prove that it had not consented to the choice of forum agreement.

Of course, party autonomy operates within a certain policy framework. Here, the limits of its operation were set as follows: ‘a contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.’ This is how the Supreme Court justified that in many cases, the forum clause is not

⁵² See *The Bremen* at 14. Emphasis added.

⁵³ *Carbon Black Export Inc. v. The Monrosa*, 254 F. 2d 297 (1958).

⁵⁴ See *The Bremen* at 21.

⁵⁵ For a contemporary analysis addressing the main legal framework on the subject, see Mukarrum Ahmed and Paul Beaumont, ‘Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT’ [2017] *J Priv Int'l L* 386.

upheld. However, in *The Bremen* there was no valid reason for refusing to enforce the choice of forum clause in favour of British courts.⁵⁶

3. BEYOND *THE BREMEN*: EXPANDING THE SCOPE OF CHOICE OF FORUM CLAUSES

When giving reasons for its decision, the Supreme Court noted that '[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts'. Even more significantly, the Supreme Court famously acknowledged that '[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts'.⁵⁷ Increasing awareness of a common interest of the community of liberal States in international trade and commerce is the key reason why the courts throughout the Western world became less hesitant in upholding the choice of forum clauses.⁵⁸ If *The Bremen* is particularly significant, it is because historically, American courts held a particularly unfavourable approach towards choice of forum clauses in both domestic and international contracts.⁵⁹

But it does not follow that parties to international commercial agreements give in without a proper 'jurisdictional fight' for the sake of promoting the very international trade in which they are engaged. More often than not, challenges to the choice of forum and choice of law clauses are a decisive part of contemporary transnational commercial litigation. This is because the parties will usually do everything possible to litigate in a different forum than the one chosen in the clause, if this allows them to obtain a tactical advantage, or to strip the other of a strategically better position. Consequently, it is no secret that private 'war over jurisdiction'⁶⁰ tends to determine the overall outcome of the case. It is for this very reason that enforcing the agreement and respecting the parties' autonomy over choice of forum is seen as a cornerstone of international trade by reason of the foreseeability and stability that it injects into complex commercial arrangements.

But, this policy is not limited to commercial litigation only; a similar discourse exists in the context of international arbitration, even if arbitral tribunals tend to uphold choice of forum clauses (usually referred to as arbitration clauses or agreements) more readily. Indeed, the economic incentive structure of arbitration and litigation are clearly different on this point, insofar as arbitrators have every interest in upholding party

⁵⁶ *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boyd v. Grand Trunk W. R. Co.* 338 U.S. 263 (1949).

⁵⁷ See *The Bremen* at 21. Emphasis added.

⁵⁸ Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' [2008] *VJTL* 394.

⁵⁹ Gary Born, *International Civil Litigation in United States Courts* 3rd edn (Alphen aan den Rijn, Kluwer Law International 1996) 385.

⁶⁰ As a term coined by Claire R. Kelly, 'The War on Jurisdiction: Troubling Questions About Executive Order 13303' [2004] *Ariz. St. L.J.* 483.

choice and asserting jurisdiction whereas, arguably, courts might have every interest in keeping the disputes out of the courtroom and thereby reducing the workload. Be that as it may, the contemporary pro-arbitration approach is the consequence of a gradual process that faced its own unique challenges, including the issue of arbitrability of disputes touching on public regulatory interests.⁶¹ Nonetheless, parallels between the courts' arbitration-friendly attitude and their favourable treatment of forum clauses is not mere coincidence; they are closely intertwined.

Thus, only two years after *The Bremen* was decided, the Supreme Court faced yet another case where it had to decide on the parties' freedom to designate the forum for their dispute. In *Scherk v. Alberto-Culver*, it had to consider whether the reasoning applicable to the forum selection clauses could be extended to arbitration clauses.⁶² Like *The Bremen*, *Scherk* was a case that arose from an international contract of sale between German and American parties. The contract contained an arbitration clause whereby the parties agreed to refer any eventual dispute between them to arbitration in Paris, subject to the laws of Illinois. However, Alberto-Culver disregarded the clause and filed suit in Illinois federal court, claiming that Scherk had violated US securities law.

In the end, the court upheld the arbitration clause and said that

[a]n agreement to arbitrate before a specific tribunal is, in effect, *a specialized kind of forum-selection clause* ... [and] the invalidation of the arbitration clause in the dispute before us would not only allow the respondent to repudiate its solemn promise but would, as well, *reflect a parochial concept that all disputes must be resolved under our laws and in our courts.*⁶³

By refusing to follow its 1953 decision in *Wilko*, where the Supreme Court held that securities disputes were non-arbitrable, it endorsed its more recent reasoning in *The Bremen*. This is significant as it meant that the ratio from *The Bremen* was no longer limited to admiralty law only, and potentially encompassed areas of public regulatory law. This was further confirmed by lower courts, who promptly extended the reasonableness test from *The Bremen* to other areas.⁶⁴

⁶¹ For example, the Federal Arbitration Act ('FAA'), which imposes the requirement for enforcement of arbitration clauses for interstate or foreign commerce was enacted by Congress in 1925. Despite this, some courts remained reluctant to uphold arbitration clauses and some adjustment time was necessary before they stopped relying on the ouster doctrine. The application of the FAA itself was controversial in the context of securities disputes, mostly after the 1930s recession. The Supreme Court addressed this question again in 1953 in *Wilko v. Swan*. It was held that the public interest in securities market outweighed the parties' interest in having their dispute arbitrated. For more on this topic, please see James T. Jr. Brittain, 'Foreign Forum Selection Clauses in the Federal Courts: All in the name of International Comity' [2001] *HJIL* 305.

⁶² *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

⁶³ See *Scherk* at 507. Emphasis added.

⁶⁴ Linda S. Mullenix provides a complete picture of the most important developments during 15 years after Bremen in her article 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court' (1988) 57(3) *Fordham Law Review* 291.

The Supreme Court subsequently cemented its pro-arbitration approach further in the landmark 1985 case *Mitsubishi v. Soler Chrysler–Plymouth*. It affirmed that even disputes arising out of statutory antitrust provisions could be resolved by arbitration provided that the claim arose from an international transaction.⁶⁵ By referring to *Scherk*, the Supreme Court held that ‘it will be necessary for the national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration’.⁶⁶ While both *Scherk* and *Mitsubishi* followed the reasoning in *The Bremen*, we cannot examine these cases in isolation from the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) that had entered into force in the United States in 1970.⁶⁷ The Supreme Court in *Scherk* even referred to this (at that time) recent development explicitly, when distinguishing *Wilko*.⁶⁸

It is remarkable that there is no comparable treaty governing the enforcement of judgments in foreign courts. This is not to say that there have been no such attempts – with the Hague Judgments Conventions being the best illustration of the insuperable difficulties of legal culture that prevent the emergence of a similar worldwide legal framework. Consequently, the New York Convention remains the sole reference, reinforcing the idea that choice of public and private fora are twin expressions of the same foundational principle.

4. TESTING THE LIMITS OF CHOICE OF FORUM CLAUSES

Nonetheless, when *Scherk* and *Mitsubishi* were decided, there were still important qualifications to the courts’ upholding of arbitration clauses. For example, both *Scherk* and *Mitsubishi* distinguished between domestic and international contracts, with domestic contracts being subject to more scrutiny when it comes to assessing the public interest. While permitted in the international context, statutory and regulatory conflicts arising from securities and antitrust law remained outside the purview of domestic arbitration.⁶⁹ This binary approach was overturned only in the early 1990s in another famous case that contributed to the shaping of the US legal market.⁷⁰

Further important distinction between the choice of forum clauses in international commercial litigation and arbitration lies in the question as to who has the jurisdiction to decide on the validity of the forum selection clause. This is a highly contentious issue in transnational litigation, with different courts adopting fundamentally different

⁶⁵ *Mitsubishi v. Soler Chrysler–Plymouth*, 473 U.S. 614 (1985).

⁶⁶ See *Mitsubishi* at 639. The *Mitsubishi* case raises a number of novel legal issues that are addressed in depth in other parts of this book. Please see George Bermann and Giuditta Cordero-Moss, ch. 4.

⁶⁷ Richard A. Nagareda, ‘The Litigation-Arbitration Dichotomy Meets the Class Action’ [2011] *Notre Dame L. Rev.* 1098.

⁶⁸ See *Scherk*, at 520.

⁶⁹ Thomas Carbonneau, ‘The Exercise of Contract Freedom in the Making of Arbitration Agreement’ [2003] *VJTL* 1197.

⁷⁰ See *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), which expressly overruled *Wilko v. Swan*, 346 U.S. 427 (1953).

approaches. This often leads to complex legal arguments on forum *non conveniens*, parallel claims and antisuit injunctions, especially in common law jurisdictions.⁷¹ On the other hand, in arbitration, it is the tribunal itself that has the authority to decide whether it has jurisdiction to hear a particular dispute. This is known as the competence-competence principle and, together with the doctrine of separability, whereby the arbitration clause survives the invalidity, ineffectiveness and even the non-existence of the main contract, it has become one of the most widely accepted principles of international arbitration. Today, jurisdictional questions have been displaced almost exclusively to the arbitration tribunal.⁷²

But the impact *The Bremen* has had on the contemporary understanding of the choice of forum clause goes far beyond the issue of arbitrability. The decision has proved to be timeless, insofar as, since it was decided in 1972, the Supreme Court went on to extend its scope considerably. Perhaps this is best illustrated by *Carnival Cruise v. Shute*.⁷³ The facts of this case are quite peculiar: The Shutes purchased tickets for a cruise from a local travel agent. The tickets contained general conditions, including a forum selection clause for the courts of Florida, which was the location of the Carnival Cruise's headquarters. During the trip Mrs Shute sustained injuries due to the negligence of Carnival Cruise and she brought a claim against them before the District Court of Washington, which was the place of her residence. Carnival Cruise opposed her claim on the grounds that the agreement contained in the ticket provided for the jurisdiction of the courts of Florida. The case went all the way up to the Supreme Court, which sided with Carnival Cruise on the issue of jurisdiction, quashing Mrs Shute's case.

The Supreme Court rejected the argument that forum selection clauses were valid only if they had been subject to actual negotiation. This was the case even if the parties did not have equal bargaining power. In addition, the Court applied the reasonableness test from *The Bremen* and held that including a forum selection clause in a ticket contract would reduce the risk of litigating in multiple fora and was therefore permissible. The inconvenience of the parties to litigate in the selected jurisdiction was not sufficient to displace the valid forum selection clause. Indeed, the Court made it clear that forum selection clauses will be valid even in standardised form contract viewed as adhesion contracts.⁷⁴

The impact of such a broad application of *The Bremen* has been significant, and remains so until this day. While the conclusion of standardised contracts was already a fairly common practice in the 1990s when *Carnival Cruise* was decided, in recent years characterised by the digital revolution of virtually all aspects of social, economic and private life, the practice of standard form contracts has risen to a new level. Contracting

⁷¹ *Owusu v. Jackson* is probably the most famous example on the forum *non conveniens* debate in the context of the 'Brussels regime' applicable in disputes between the EU Member States. For more details, see Christelle Chalas' and Richard Fentiman's analysis in this book.

⁷² Julian D.M. Lew, 'Achieving the Dream: Autonomous Arbitration' [2006] *Arbitration International* 197.

⁷³ *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

⁷⁴ Joseph A. Grundfest and Kristen A. Savelle, 'The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic and Political Analysis' [2013] *The Business Lawyer* 384.

became a routine reality (one would be almost tempted to say *banality*) of our everyday life. They are present when we accept arduous terms and conditions on accessing social networks, authorise use of our private data,⁷⁵ shop online, experiment with blockchain and generate ‘smart contracts’, but also in the commercial sphere, in the form of bills of lading, insurance policies, charter-parties or contracts of sale in commodity markets. And for better or worse, *The Bremen* has left a footprint even in the context of internet transactions. In *CompuServe v. Paterson*, the 6th Circuit Court of Appeals upheld the parties’ choice of forum (and law) clause despite the fact that it was concluded in a transaction that was almost entirely electronic.⁷⁶ Standard form contracts have become the usual way people and companies manage their legal relationships. The question as to whether the weaker party has any *actual* choice how and where to solve its problems when things go wrong is a true elephant in the room – addressed at least in part by EU law and the protective provisions of the Brussels Regulation (Brussels I recast). To click or not to click, and accept the terms and conditions imposed in most transactions taking place in the ‘virtual space’, is an everyday dilemma in the digital age...

This is not to say that the current legal and policy challenges linked to choice of forum agreements are limited to the little explored aspects of contracting in a digital age. Legal practitioners and academics alike are discussing other peculiar aspects of choice of forum clauses.⁷⁷ In this sense, the debate revolving around asymmetric jurisdiction agreements pours oil on water. Asymmetric agreements, which are a fairly common practice in the banking industry, are seen in some jurisdictions (like France) as problematic as they allow a stronger party, usually a bank, to choose a forum to pursue the other, weaker party, usually a creditor, who does not have such a choice. Yet, other (mostly common law) jurisdictions adopt a more nonchalant approach. The argument goes that the bank should have the right to pick the right forum according to the location of its creditor’s assets, while obliging the creditor to sue in one exclusive forum guarantees legal certainty.⁷⁸ Additionally, the application of forum selection clauses in the context of mass claims is another debate worth following, as is the extension of choice of forum clauses to disputes that do not arise directly from the contractual obligations between the parties, such as discrimination.⁷⁹

⁷⁵ The problem of data in itself is a fascinating topic of private international law, albeit not the purpose of this article. It is addressed elsewhere in this book, see the US Supreme Court cases *Yahoo! v. LICRA* and *Microsoft Ireland*. On the Old Continent, protection of private data is the main focus of one of the most important developments of EU law in 2018 – the General Data Protection Regulation (GDPR) which entered into force on 25 May 2018.

⁷⁶ *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

⁷⁷ Mary Keyes and Brooke Adele Marshall, ‘Jurisdiction Agreements: Exclusive, Optional and Asymmetrical’ [2015] *J Priv Int’l L* 345.

⁷⁸ For more on this issue, see Louise Merrett, ‘The Future of Enforcement of Asymmetric Jurisdiction Agreements’ [2018] *ICLQ* 37.

⁷⁹ This is one of the issues that are dealt with in depth in the *Airbnb* case. Please refer to David Restrepo-Amariles and Gregory Lewkowicz’s analysis in this book.

5. CONCLUSION

The Bremen is a product of its time as it suggests that law must constantly adjust to its object – here the ever-changing field of international trade. More indirectly, it points to the fact that cross-border activity may induce a disembedded, or deterritorialised, understanding of law itself. By turning its back on pre-War parochialism, it paved the way for a new, post-modern paradigm for private international law.⁸⁰ Unsurprisingly, it continues to be relevant today. What, then, does the future hold? Whereas *The Bremen*'s catchall ratio has been constantly extended over the years and has migrated to other parts of the world, the question to be asked today is whether the move has taken the courts too far in the direction of unbridled party choice, and how, other than through a return to provincialism, they may take back control in the name of the global public good?

⁸⁰ In the words of Jessup (n 40) 6, 'to envisage the applicability of transnational law it is necessary to avoid thinking solely in terms of any particular forum.'