

# Forum Selection Clauses: Different Regulations from the Perspective of Cruise Ship Passengers

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This paper represents a comparison between legal approaches to passenger protection in the United States and European Union. The author focuses on forum selection clauses in cruise passenger tickets and their treatment in proceedings following an accident related to the journey. In this context, the author analyses the case law available to passengers in the United States and suggests certain changes in the treatment of forum selection clauses. Moreover, this paper introduces legal instruments available to cruise passengers in the European Union and gives a detailed analysis of EU approach towards jurisdiction clauses. Most importantly, the author draws conclusions from the comparison between the two legal systems and their approach to consumer protection.

Keywords: forum selection clauses, jurisdiction clauses, cruise, ticket, passenger protection, consumer protection, Athens Convention, passenger rights, Brussels Regulation.

## A. Introduction

The purpose of this paper is to discuss the treatment of forum clauses and their effect on the rights of passengers cruising around the world, with special focus on the US law compared with the regulation in the European Union. Cruise ships often sail between several countries, and if a dispute arises between a cruise line and a passenger, the latter will often have a choice between several jurisdictions. This option is very frequently curtailed by forum clauses in the cruise passenger ticket contract which in advance designates a specific forum as an exclusive place for dispute resolution.

Although it seems very practical to agree in advance on the place where a potential law suit should be brought, the inequality of bargaining power and other reasons might raise the question whether such terms are fair. Naturally, a dilemma arises whether the law should protect a passenger who waived his right to bring a suit in jurisdiction of his choice or if the law should give protection to a cruise line which acts in accordance with the general principle *pacta sunt servanda*.

This problem is more actualized since the market in international transportation of passengers by sea has been increasing over the last decades, and the predictions are that it will increase even further in the future. In international perspective

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there is a 9.5% increase in the number of cruise passengers in 2005, out of which 59% are American and 29% European passengers.<sup>1</sup> The development of the cruise industry has led to a real concentration, creating three main players, which operate on a world wide basis: Carnival Group, Royal Caribbean and Star Cruises.<sup>2</sup> The combined volumes of the “Big Three” with their affiliated brands carry more passengers a year than the other 75 cruise operators.<sup>3</sup>

The cruise market’s main focus is by far the biggest in North America.<sup>4</sup> Cruise passenger traffic in the US is up 18.5 percent over the same period in 2003.<sup>5</sup> The US Maritime Administration has reported that for the first nine months of 2005, cruise passenger traffic in North America was 4.5 percent above the same period in 2004, despite the impact of hurricanes on Gulf port cruises.

Subsequently, the concentration of the cruise industry in North America deserves a closer look into the jurisdiction provisions and treatment of forum clauses in the US. The Supreme Court of the United States has addressed issues of personal jurisdiction of cruise passengers and decided to uphold forum clauses incorporated in cruise ticket contracts. This paper will discuss the arguments why cruise passengers should enjoy consumer protection by US courts, and contend that the current jurisdiction framework should be changed reflecting modern trends on the international level. The paper will discuss the need for uniform rules on a global level which will harmonize regulation of forum selection clauses in consumer contracts.

A jurisdiction dispute is in reality a dispute about liability, involving two types of cases: cases which challenge the jurisdiction in reliance on forum selection clauses and other cases challenging on the grounds of the *forum non conveniens* doctrine.<sup>6</sup> This paper will not discuss in detail the application of *forum non conveniens* in battles about jurisdiction; it will rather concentrate on the cases involving forum selection agreements.

<sup>1</sup> Statistics & Outlook 06, The Yearbook for Passenger and Ro-Ro Shipping, ShipPax Information, (May 2006), at 51; Cruise Industry Totals show a steady increase in the numbers of cruise passengers: 5.2% in 2002, 8.2% in 2003, 11.1% in 2004 and 9.5% in 2005.

<sup>2</sup> *Id.*; Carnival Group (94 ships), Royal Caribbean International (34 ships) and Star Cruises (21 ships).

<sup>3</sup> Statistics & Outlook 06, *supra* note 1, at 50.

<sup>4</sup> B. Kröger, Passengers carried by sea – should they be granted the same rights as airline passengers?, CMI Yearbook, Part II (2001), at 246.

<sup>5</sup> Maritime Administration of the US Department of Transportation, *Cruise Passenger Traffic Shows Continued Growth*, available at <http://www.dot.gov/affairs/marad0106.htm>, 5 January 2006; see also Cruise Passenger Travel Increases in 2003, <http://cruises.about.com/cs/officialinfo/a/MARADstats0603.htm>.

<sup>6</sup> M. Davies, *Forum Selection Clauses in Maritime Cases*, 27 Tulane Maritime Law Journal 367 (2002-2003), “Although we often speak of both kind of cases involving ‘challenges to jurisdiction’, that is imprecise. [...] It is also a mistake (although a common one) to confuse two types of cases, which are very different from one another.”

## I. The Outline of the Paper

In section B the paper briefly explains the role and significance of forum clauses, focusing on their practical application and inclusion in passenger ticket contracts.

Section C explores the rights of millions of passengers which embark cruises from the US, starting with a historic overview of the treatment of forum clauses in US courts. Next, this paper presents the landmark US Supreme Court decision<sup>7</sup> *M/S Bremen v. Zapata Off-Shore Co.* and the issues it raised in respect of *prima facie* enforceability of forum clauses in admiralty law. This was confirmed in the case *Carnival Cruise Lines, Inc. v. Shute* involving a jurisdiction clause in cruise ticket consumer contracts. The second part of section C includes a thorough discussion on those two most important cases dealing with forum clauses,<sup>8</sup> focusing on new standards for enforceability of such clauses and examining whether the courts should enforce those clauses in consumer adhesion contracts. The paper will provide argumentation why US law should be changed with respect to the enforceability of forum selection clauses in passenger ticket contracts.

Taking into account worldwide presence and operations of major cruise lines, section D of this paper introduces a completely different framework of jurisdiction; the one of the European Union, which has a consumer friendly approach towards the pre-selected forum clauses. The paper will examine how forum selection clauses are treated at present in the law of the European Communities. This is followed by the introduction of the jurisdiction provisions of different instruments on carriage of passengers by sea and recent developments in the harmonization endeavors by the International Maritime Organization. Moreover, the paper will give an overview of the attempts of the European Community to be a part of the international framework of the 2002 Athens Convention.

In conclusion, the article will summarize the examples of different approaches towards forum selection clauses and suggest how US law should treat such clauses in passenger ticket contracts in the future.

## B. Jurisdiction by Contract

### I. Forum Selection Clauses

Cruise shipping today involves much more than transportation from one exotic port to another. Cruise ships are floating hotels organizing activities ashore such as snorkeling, scuba diving, parasailing, touring etc.<sup>9</sup> During his voyage, a cruise passenger will be in contact with multiple fora, and a dispute might arise between the parties regarding a choice between multiple jurisdictions. Under

<sup>7</sup> W. W. Park, *International Forum Selection* 21 (1995).

<sup>8</sup> N. S. Shantar, *Forum Selection Clauses: Damages in Lieu or Dismissal?*, 82 *Boston University Law Review* 1066 (2002).

<sup>9</sup> T. A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 *Tulane Maritime Law Journal* 454 (2003-2004).

such circumstances a claimant often has a choice to select where to file the suit, which is bringing uncertainty and risk as to where a potential dispute will be resolved.<sup>10</sup>

Many cruise ticket contracts and other maritime contracts commonly include a forum clause, also called ‘exclusive forum selection clause’ or ‘jurisdiction clause’. The forum selection clause,<sup>11</sup> a contractual designation as to where any litigation that may occur in regard to the contract should take place,<sup>12</sup> is a simple and widely used concept.<sup>13</sup>

There are numerous ‘virtues’ of such clauses; most importantly they can serve private commercial interests by allowing a party to limit its expenses of defending a lawsuit in a distant forum.<sup>14</sup> Additionally, forum selection clauses reduce litigation expenses and conserve judicial resources, serving public interest of judicial economy and efficiency. A contractually designated forum helps the parties consider the costs of potential litigation when determining their rights and obligations under a contract.<sup>15</sup> Finally, such contractual terms reduce expenses and delay in the litigation, permitting the parties more promptly to focus on the merits of the case without expensive procedural distractions.<sup>16</sup>

Forum selection clauses give one or both parties to the contract important benefits.<sup>17</sup> Selection of a neutral forum is a desirable result, giving parties predictability and certainty about the outcome of the dispute. Particularly when coupled with a choice of law agreement, a forum selection clause removes uncertainties about jurisdiction, procedural rules and other matters.<sup>18</sup>

As Professor Park puts it, forum selection clauses operate in at least five different contexts: a) domestic or international dispute, b) tailor made clauses or clauses included in standard form contracts, c) agreement covering present or

<sup>10</sup> A. Gehringer, *After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 *Journal of Air Law and Commerce* 635 (2001).

<sup>11</sup> Black’s Law Dictionary (1999), at 655, defines forum selection clauses as “contractual provision[s] in which the parties establish the place (such as country, state, or type of court) for specified litigation between them.”

<sup>12</sup> D. H. Taylor, *The Forum Selection Clause: a Tale of Two Concepts*, 66 *Temple Law Review* 785 (1993).

<sup>13</sup> G. B. Born, *International Civil Litigation in United States Courts* 454 (1996). There is a distinction between exclusive and nonexclusive forum selection agreements. While the former require that the claims be filed only in the contractually determined forum, the latter agreement permits claims in a certain forum without precluding litigation in other fora.

<sup>14</sup> Taylor, *supra* note 12, at 785.

<sup>15</sup> *Id.*

<sup>16</sup> Born, *supra* note 13, at 372.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; In some circumstances, forum clause might be viewed as implicitly selecting the law of that place. An important distinction between choice-of-forum and choice-of-law agreements in the United States is that the first designates the proper forum, while the latter chooses the governing law. Choice-of-law and forum clauses are two different issues, which are often not distinguished by attorneys and courts. In Europe, choice-of-law is regulated by the Rome Convention of 1980 and choice-of-forum by the Brussels Regulation 44/2001.

future dispute, d) the designated court might be public court or arbitral tribunal and e) the forum selection agreement can be exclusive or non exclusive.<sup>19</sup>

There is a special need for forum selection agreements in international business transactions. Their role can hardly be overestimated; in such circumstances the predetermined jurisdiction assists businessmen in eliminating uncertainties about the venue, costs, procedure etc. of potential litigation. This management function of the choice-of-forum agreements is of a central importance, since companies have a special interest in limiting the number of fora where they are amendable to suit.<sup>20</sup>

One of the most significant forum agreements is the one between consumers and sophisticated businessmen or companies, often inserted in standard forms or general conditions of the contract. These boilerplate clauses are included without negotiations between the parties, and pre-dispute forum selection is tailored for the party with the stronger bargaining power.<sup>21</sup>

## II. Cruise Passenger Ticket Contract and Forum Clauses

When a passenger boards a cruise ship, he will most likely have a ticket contract<sup>22</sup> or will be provided with one prior to embarkation.<sup>23</sup> A ticket contract is a document containing five to seven typewritten pages,<sup>24</sup> consisting of terms and conditions which govern the relationship between the passenger and the cruise line.<sup>25</sup> The terms of the contract determine the rights and obligations of the parties and are crucial in the case of a lawsuit against the cruise line company. From the millions who board cruise ships, "it will be hard to find one who actually read all the contractual terms."<sup>26</sup> If vacations on board a cruise ship end without any mishaps, there is little support for criticism towards the passenger.

However, common travel problems experienced by cruise ship passengers include events ranging from falls, minor injuries, drowning and pool accidents

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<sup>19</sup> Park, *supra* note 7, at 11.

<sup>20</sup> Shantar, *supra* note 8, at 1081.

<sup>21</sup> Shantar, *supra* note 8, at 1081-1083; Listing several additional reasons why sophisticated parties have special interest in enforcement of forum clauses: forum clause will secure the venue with more favorable procedural law, they help avoid consumer oriented fora, forum clauses bring the dispute to the more partial judges in their local fora, they bring benefits from predetermining where their future claims will be litigated and subsequent reduction of administrative and legal expenses etc.

<sup>22</sup> Ticket contract is also called 'contract of passage', 'passage ticket contract' or 'passage contract'.

<sup>23</sup> N. G. W. Pieper & D. W. McCreadie, *Cruise Ship Passenger Claims and Defenses*, 21 (2) *Journal of Maritime Law and Commerce* 162 (1990), "The purchase of the ticket creates a contractual relationship between the cruise line and the passenger."

<sup>24</sup> G. E. Davidson & L. Naranjo, *Don't Fall Asleep on the Helm: Cruise Line Passenger Ticket Contracts and the Pitfalls of Personal Injury Litigation in US Courts*, 2 *International Travel Law Journal* 76 (1999).

<sup>25</sup> M. Pears, *Cruising-Meeting the Needs of All Involved*, 1 *International Travel Law Journal* 16 (1999); "Many charterers feel that ticket conditions are sacred and reprint them religiously on the back of the ticket wallets and other documentation."

<sup>26</sup> Davidson, *supra* note 24, at 76.

to assaults and food poisoning.<sup>27</sup> The passenger will be advised to revert to the terms and conditions of the ticket in order to determine where he may bring a suit against the cruise company. It would be logical to conclude that it is less expensive and more convenient for a passenger to hire an attorney and prosecute in a local court or at least at the court where the passenger embarked on the cruise. Most of the passengers will be surprised when they learn that the contract includes a provision specifying where a lawsuit must be filed.

A common example of the forum selection clause designates the courts of, e.g., Miami, Florida as an exclusive venue for all future claims:

It is agreed by and between passenger and carrier that all disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated, if at all, in and before a court located in Miami, Florida, U.S.A., to the exclusion of the courts of any other state, territory or country. Passenger hereby waived any venue or other objection that he may have to any such action or proceeding being brought in any court located in Miami, Florida.<sup>28</sup>

Typically, the terms and conditions of the contract are preceded by a notice on the face page directing passenger's attention to the clauses limiting his rights, especially limitation of liability and forum selection clauses:

Important – Read all the clauses. Whether or not signed by Passenger, this ticket shall be deemed to be an undertaking and acknowledgement by the Passenger that he accepts on behalf of himself and all other persons traveling under this ticket, all the terms and conditions set out herein.<sup>29</sup>

Moreover, the size of the print of terms and conditions in passenger tickets are commonly so small that they are almost unreadable and invisible.<sup>30</sup>

A critical aspect of a ticket contract is that a form passenger ticket contract is a contract of adhesion, contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power.<sup>31</sup> In addition to the lack

<sup>27</sup> Dickerson, *supra* note 9, at 461; “[...] common travel problems include: 1) slips, trips, falls and minor injuries, 2) drownings and pool accidents, 3) flying coconuts, 4) stray golf balls, 5) discharging shot gun shells, 6) defective exercise equipment, 7) diseases, 8) rapes and sexual assaults, 9) assaults by crew members, 10) assaults by passengers, 11) malpractice by ship’s doctor, 12) fires, 13) collisions and striking reefs, 14) gastrointestinal disorders, sickness and fear, 15) heart attacks, 16) malfunctioning toilets, 17) pool jumping, [...] 25) torture and hostage taking, 26) being forced to abandon the ship [...]”

<sup>28</sup> Royal Caribbean International Cruise/CruiseTour Ticket Contract, [http://www.royalcaribbean.com/content/pdf/CTC\\_Not\\_For\\_BR.pdf](http://www.royalcaribbean.com/content/pdf/CTC_Not_For_BR.pdf), last visited 20 March 2006, Art. 11; *see also* Norwegian Cruise Line Passenger Ticket Contract, <http://www.ncl.com/more/contract.htm>, last visited 20 March 2006, Art. 22 etc.

<sup>29</sup> *Id.*; Royal Caribbean passenger ticket booklet includes a notice on the front of the ticket: “The tan pages of this booklet contain your cruise ticket contract. The cruise ticket contract governs and limits your rights. It is important that you read all of the terms of the contract and retain it for future reference.”

<sup>30</sup> Dickerson, *supra* note 9, at 478, “The microscopic terms and conditions in passenger tickets appear to be meant to be unreadable and invisible. In fact, maritime law, which governs the rights and remedies of cruise passengers, preempts all state laws requiring consumer contracts to be in a given type size.”

<sup>31</sup> 499 US 585 (1991), A.M.C. at 1708.

of bargaining between the parties, it is highly unlikely that the adhering party has actually read the contract. According to Professor Rakoff, such contracts share several characteristics:<sup>32</sup> 1) the form has been drafted by, or on behalf of, one party to the transaction, 2) the drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine, 4) the form is presented to the adhering party with the representation that the drafting party will enter into the transaction only on the terms contained in the document – this representation may be explicit or may be implicit in the situation, but it is understood by the adherent, 6) the adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party.

Accordingly, a passenger ticket contract, routinely used by the cruise line companies, is an example of an adhesion contract. As explained above, the passenger is typically not aware of the standard terms of the contract before he receives the ticket. Among those terms the jurisdiction clauses limiting the parties' right to bring a suit to a court of his choice stand most prominently, and this paper will examine them in more detail.

Next, we will turn to the regulation of forum selection clauses in the United States, while in section D this paper will examine their treatment in the European Union.

## **C. Regulation of Forum Selection Clauses in the United States: Unpredictability and Lack of Consumer Protection**

### **I. Introduction: Juridical Regulation of Jurisdictional Principles**

Before discussing the treatment of jurisdiction clauses, this section will briefly present the almost exclusive judicial development of jurisdictional principles<sup>33</sup> in the United States and its effect on enforceability of forum selection clauses.

Personal jurisdiction in the United States is an issue of constitutional law,<sup>34</sup> deducted from the due process clause of the fourteenth amendment.<sup>35</sup> The consequence of such treatment of jurisdictional issues is the fact that the Supreme Court is the direct regulator of jurisdiction. However, the Supreme Court's intervention has brought uncertainty and instability in the area of jurisdiction,<sup>36</sup>

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<sup>32</sup> T. D. Rakoff, *Contracts of Adhesion: An Essay of Reconstruction*, 55 *Harvard Law Review* 1174 (1983).

<sup>33</sup> P. J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 *The American Journal of Comparative Law* 122 (1992).

<sup>34</sup> Borchers, *supra* note 33, at 123.

<sup>35</sup> Borchers, *supra* note 33, at 122.

<sup>36</sup> *Id.*, "In an area in which stability and certainty are at a premium, the Court's intervention has produced a haphazard jurisdictional doctrine that has left matters in an unacceptable posture."

and a variety of different tests<sup>37</sup> have evolved over time as a result of the almost exclusive judicial development.<sup>38</sup> These ‘historical anomalies’ persist over time, forming the general jurisdictional basis that is considered exorbitant.<sup>39</sup> The Supreme Court has over the years been preoccupied with theoretical constructions of jurisdictional doctrine, creating an ‘erratic course’ incompatible with requirements of personal jurisdiction where predictability and certainty are of great importance.

The area of consensual jurisdiction in the United States is particularly controversial,<sup>40</sup> and the gradual change of the treatment of forum selection clauses will be discussed in the following sections.

## II. Forum Selection Clauses in US Maritime Law

### 1. Historical View of US Courts – Unenforceability

Forum agreements were historically viewed as unenforceable and US courts were hostile towards them, both in domestic and international disputes.<sup>41</sup> The rules governing enforceability of such clauses have altered significantly over the past few decades<sup>42</sup> and the prevailing opinion that private parties cannot “oust” courts of their jurisdiction<sup>43</sup> started to change.

Among other reasons for historic unenforceability of forum clauses were:<sup>44</sup> private parties cannot regulate judicial remedies in their contract, forum provisions allow the parties to ‘disturb the symmetry’ of the law, forum clauses burden the local citizen’s right to access the court, they disfavor consumers and individuals and lastly they are simply against public policy.

However, in the middle of the last century US courts started to abandon per se unenforceability of forum selection clauses and started enforcing them depending if they were ‘reasonable’. In some cases, it became obvious that the court should give effect to the parties’ jurisdiction clause and refrain from exercising its power. This shift towards recognition of forum clauses was acknowledged in the

<sup>37</sup> Tests such as: continuous and systematic contacts test (minimum contacts test), tag jurisdiction etc.

<sup>38</sup> Borchers, *supra* note 33, at 132, “The Supreme Court has evidenced great uncertainty [...] while steering an erratic course that confuses courts, counsel, academicians, and often the Justices as well.”

<sup>39</sup> Borchers, *supra* note 33, at 135.

<sup>40</sup> Borchers, *supra* note 33, at 149.

<sup>41</sup> 407 US 1 (1972); “Forum selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on ground that they were ‘contrary to public policy’, or that their effect was ‘to oust the jurisdiction’ of the court.”

<sup>42</sup> Born, *supra* note 13, at 373.

<sup>43</sup> Shantar, *supra* note 8, at 1067, “Allowing parties to change the venue of an action would ‘disturb the symmetry of the law’ by allowing the parties to shop for the most favorable forum. [...] the enforcement of forum selection clauses would deprive a court of its ‘jurisdiction [over a] particular action, [its] jurisdiction of a cause which it has the legal right to determine.’”

<sup>44</sup> Born, *supra* note 13, at 391.



Restatement (Second) of the Conflict of Laws, where such clauses were for the first time considered valid under some circumstances.<sup>45</sup>

## 2. Contemporary Treatment of Forum Clauses in US Maritime Law

Development of the treatment of forum selection clauses is best described through two controlling cases<sup>46</sup> within federal admiralty jurisdiction,<sup>47</sup> *M/S Bremen v. Zapata* and *Carnival Cruise Lines v. Shute*.<sup>48</sup> The subsequent cases and doctrine show that the findings of *The Bremen*<sup>49</sup> and *Shute* were applied in other contexts outside admiralty and thus created a broad impact on enforceability of the forum agreements.

In the following two sections the paper will examine facts of those two cases and illustrate the shift in treatment of forum clauses in the second part of the last century.

### a) *Decision: M/S Bremen v. Zapata Off-Shore Co.*

Only one year after the Restatement acknowledged that jurisdictional agreements will be enforced, the Supreme Court decided in the “leading contemporary US case on the enforceability of forum selection clauses”<sup>50</sup> *Bremen v. Zapata*.<sup>51</sup> There the Court said that the forum clauses “are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under circumstances.”<sup>52</sup> The immediate consequence of *The Bremen* is that most courts abandoned prohibition of jurisdictional agreements.

The facts of the case were that Zapata, a Delaware corporation located in Houston and a German corporation Unterweser, in November 1967 entered into a towage contract. Zapata’s drilling rig The Chapparral was supposed to be towed by Unterweser from Louisiana to the Adriatic Sea off Ravenna, Italy. The agreement had a clause regulating any disputes arising between the parties to be resolved in

<sup>45</sup> Restatement (Second) of the Conflict of Laws, 1971 with amendments 1986 in §80 states: “The parties’ agreement as to the place of the action will be given effect unless it is unfair or unreasonable.”

<sup>46</sup> M. J. Maloney, *Practical Guide to Analyzing Forum Selection Clauses in Personal Injury and Wrongful Death Claims Under Maritime Contracts*, 24 Tulane Maritime Law Journal 706 (2000).

<sup>47</sup> Park, *supra* note 7, at 22.

<sup>48</sup> The impact of these two decisions can be seen through a simple search in the Westlaw database: a query on ‘Bremen & Zapata’ produced 1295 results and a query on ‘Carnival & Shute’ produced 943 results.

<sup>49</sup> M. F. Sturley, *Strengthening the Presumption of Validity for Choice of Forum Clauses*, 23 (1) Journal of Maritime Law and Commerce 144 (1992); see R. A. Brand, *Reform and Development of Private International Law* (2002); R. A. Brand, *Essay: Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention*, in R. A. Brand, *Reform and Development of Private International Law* (2002), at 60 ; W. T. Johnson & A. G. Miller, *New Developments in Cruise Law*, 7 (1) U.S.F. Maritime Law Journal 137 (1994-1995).

<sup>50</sup> Born, *supra* note 13, at 377.

<sup>51</sup> *M/S Bremen vs. Zapata Off-Shore Co.*, 407 US 1 (1972), American Maritime Cases, Vol. L No.4, April 1972.

<sup>52</sup> 407 US 1 (1972), A.M.C. at 1414.

London.<sup>53</sup> In international waters in the Gulf of Mexico, a severe storm seriously damaged the rig which had to seek refuge. Zapata instructed that the damaged rig should be towed to Tampa, Florida, where after a few days Zapata commenced a suit in admiralty in the federal district court for negligence and breach of contract. Relying on the jurisdiction clause, Unterweser moved to dismiss for lack of jurisdiction, or alternatively on the basis of forum non conveniens. Both the District Court and Court of Appeals denied the motion to dismiss,<sup>54</sup> following the traditional American view that the forum clauses are unenforceable, while the Supreme Court reversed. At the same time, Unterweser commenced parallel action against Zapata in the contractual forum of London. Both the lower and the appellate court in London held that the forum selection clause shall be enforced. In its analysis, the Supreme Court of the United States resolved that forum clauses are *prima facie* valid and should be enforced.<sup>55</sup> In the first place, the Court addressed a historical approach towards forum selection clauses and discussed possible reasons for invalidating forum selection, such as 1) defects in formation of the contract (overreaching, undue influence or overweening bargaining power), 2) if the clause contravenes public policy of the forum or 3) if the enforcement of the clause would be unreasonable or unjust.

Firstly, regarding the question of defects in formation of the contract, the Court held that the case involved a “freely negotiated international commercial transaction”,<sup>56</sup> and listed fraud, duress, lack of assent and unconscionability<sup>57</sup> as some of the reasons for setting aside the forum clause. Secondly, forum selection can be challenged on the grounds of reasonableness, where the clause is “unreasonable under the circumstances.” In *The Bremen* the Court acknowledged §80 of the Restatement<sup>58</sup> where the agreement should be valid “unless it is unfair or unreasonable.” *The Bremen* established a very wide definition of what is reasonable,<sup>59</sup> and later other courts had different approaches in defining the term.<sup>60</sup> However, it is clear that it is for the party seeking to avoid forum clause to have a burden of proof that the contractual forum is inconvenient.<sup>61</sup>

<sup>53</sup> *Id.*, at 1408, “Any dispute arising must be treated before the London Court of Justice.”

<sup>54</sup> *Id.*, at 1412 “[...] forum selection clause will not be enforced unless the selected state would provide a more convenient forum than the state in which the suit is brought.”

<sup>55</sup> *Id.*, at 1414.

<sup>56</sup> *Id.*, at 1420, in addition the Court stated that “[t]he choice of that forum was made in an arms-length negotiation by experienced and sophisticated businessmen and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.”

<sup>57</sup> Born, *supra* note 13, at 395.

<sup>58</sup> Restatement (Second) of the Conflict of Laws, 1971, §80.

<sup>59</sup> Taylor, *supra* note 12, at 818.

<sup>60</sup> Park, *supra* note 7, at 25.

<sup>61</sup> 407 US 1 (1972), A.M.C. at 1420, “In such circumstances it should be incumbent of the party seeking to escape his contract to show that the trial in the contractual forum will be so gravely difficult and inconvenient that he will be for all practical purposes be deprived of his day in court.”

In *The Bremen*, the Court named several reasons to support its ruling that the forum clauses should be *prima facie* valid, among them: certainty by agreeing in advance in international trade,<sup>62</sup> judicial economy<sup>63</sup> and right of the parties to freely regulate contractual provision.<sup>64</sup>

The contract between Unterweser and Zapata involved two experienced and sophisticated international corporations which included a freely negotiated forum selection clause in their contract.<sup>65</sup> The Supreme Court limited its holding to the cases in admiralty<sup>66</sup>, leaving other contracts without uniform approach for enforcement of jurisdictional clauses.<sup>67</sup> Relatively broad language in *The Bremen* left uncertain<sup>68</sup> whether enforceability of forum clauses is applicable in all maritime contracts; the ruling did not make a distinction between contracts governed by federal maritime law like passenger tickets and bills of lading and maritime contracts that are not otherwise governed by federal law. The Court addressed those issues in decision *Carnival Cruise, Inc. v. Shute* and refined *The Bremen* regarding forum clauses in passenger ticket contracts.

*b) Decision: Carnival Cruise Lines, Inc. v. Shute*

The second example illustrating the change in treatment of forum clauses is an admiralty case<sup>69</sup> governed by federal law<sup>70</sup> *Carnival Cruise Lines, Inc. v. Shute*<sup>71</sup> where the Court extended its acceptance of forum selection clause included in adhesive contract.

The facts of the case were that Eulala and Russel Shute, residing in Washington State purchased a ticket for a seven day cruise between Los Angeles and Mexico through a travel agent in Washington.<sup>72</sup> After forwarding the Shutes' payment

<sup>62</sup> *Id.*, at 1417, "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."

<sup>63</sup> *Id.*, at 1415, recognizing that historical resistance to "reduce power and business of a particular court [...] has little place in an era when all courts are overloaded [...]."

<sup>64</sup> *Id.*, at 1417, stating that enforcement of jurisdictional clauses "accords with ancient concepts of freedom of contracts."

<sup>65</sup> *Id.*, at 1416, among other, the Court gave several "[...] reasons why a freely negotiated private international agreement [...] such as that involved here, should be given full effect." The Court continued "Thus, in light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."

<sup>66</sup> *Id.*, at 1414, "We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty."

<sup>67</sup> Park, *supra* note 7, at 19, stating that outside of admiralty "[t]he enforceability of jurisdiction clause will be controlled by what one federal court called 'the totality of the circumstances measured in the interest of justice'."

<sup>68</sup> Gehringer, *supra* note 10, at 639.

<sup>69</sup> Taylor, *supra* note 12, at 841; "*Shute* presented the Court with a forum selection clause in an action in admiralty, thereby implicating the standard of enforcement of *The Bremen*."

<sup>70</sup> 499 US 585 (1991), A.M.C. at 1700.

<sup>71</sup> *Carnival Cruise Lines, Inc. v. Eulala Shute, et vir*, 499 US 585 (1991), American Maritime Cases, Vol. LXIX No.5, May 1991.

<sup>72</sup> 499 US 585 (1991), A.M.C. at 1698; The Shutes relation with Carnival (reservation, payment and receipt of the tickets) were conducted entirely through a Washington travel agent.

to Carnival's headquarters in Miami, the cruise line sent the Shutes their tickets containing twenty-five paragraphs of boilerplate terms on the back.<sup>73</sup> The face of each ticket included a warning:<sup>74</sup>

SUBJECT TO THE CONDITIONS OF CONTRACT ON LAST PAGES  
**IMPORTANT! PLEASE READ CONTRACT ON LAST PAGES 1, 2, 3.**

The following appeared on 'contract page 1' of each ticket:

TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET [...]

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket. [...]

8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.<sup>75</sup>

While in international waters off Mexico, Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley.<sup>76</sup> The Shutes brought a negligence suit for Mrs. Shute's injuries and Mr. Shute's loss of consortium against Carnival Lines to the District Court for the Western District of Washington.<sup>77</sup>

Importantly, the Shutes based their argument to invalidate the forum selection clause on the Limitation of Vessel Owner's Liability Act,<sup>78</sup> arguing that the forum clause effectively weakened their right to a trial by court of competent jurisdiction.<sup>79</sup>

However, Carnival contended that the forum clause in the ticket required the suit to be filed in the State of Florida, and alternatively, that the corporation's contacts with the State of Washington were insufficient for the court to exercise personal jurisdiction over the Carnival Cruise Lines.<sup>80</sup> The District Court granted the motion, but the Court of Appeals reversed. This Court concluded that Carnival Cruise Lines has "purposely availed" itself to the Washington law by conducting business there, thereafter creating personal jurisdiction of the courts in Washington.<sup>81</sup> After looking into the formation considerations as the exceptions to the enforcement stated in *The Bremen*,<sup>82</sup> appellate court determined that forum selection clause should not be enforced because of the parties' disparity in bargaining power and concluded that the enforcement of the clause would

<sup>73</sup> *Id.*

<sup>74</sup> 499 US 585 (1991), ticket is reproduced as an Appendix to the Court's decision.

<sup>75</sup> 499 US 585 (1991), A.M.C., at 1698.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 46 U.S.C. §183c.

<sup>79</sup> 499 US 585 (1991), A.M.C., at 1707.

<sup>80</sup> *Id.*, at 1699.

<sup>81</sup> *Shute v. Carnival Cruise Lines, Inc.*, 863 F.2d 1437 (1988), A.M.C., at 309.

<sup>82</sup> See text accompanying *supra* note 56.

excessively inconvenience the Shutes and deprive them of their day in court.<sup>83</sup> The court acknowledged that the ticket and its provisions were presented to the passenger on a take or leave basis, distinguishing the case from *The Bremen* where sophisticated businessmen with equal bargaining power had an opportunity to change the forum clause.<sup>84</sup>

Nonetheless, when the case reached the Supreme Court, the majority reversed and held the clause enforceable, refining *The Bremen* analysis to the factual circumstances of the passenger ticket contract.<sup>85</sup> Although the Court noted that key factual differences preclude the automatic application of the general principles of *The Bremen*,<sup>86</sup> it announced that those principles were controlling.<sup>87</sup>

The Supreme Court did not say that jurisdiction clauses are enforceable,<sup>88</sup> but that a reasonable forum clause in a form contract may be permissible subject to judicial scrutiny for fundamental fairness. The Court discussed the reasonableness of the forum clause, concluding it would be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form.<sup>89</sup> In addition, the Court listed several factors supporting its findings,<sup>90</sup> while maintaining that “forum-selection clauses contained in form passenger contracts are subject to judicial scrutiny for fundamental fairness.”<sup>91</sup> The majority found that the cruise company did not insert forum clause in the contract to discourage passengers from pursuing their claims,<sup>92</sup> and found no evidence of fraud or overreaching in the contract

<sup>83</sup> 499 US 585 (1991), A.M.C., at 1699.

<sup>84</sup> *Shute v. Carnival Cruise Lines, Inc.*, 863 F.2d 1437 (1988), A.M.C., at 306.

<sup>85</sup> 499 US 585 (1991), A.M.C., at 1703, the Court applied the standards of *The Bremen* stating “[b]oth petitioner and respondent argue vigorously that the Court’s opinion in *The Bremen* governs the case.”

<sup>86</sup> *Id.*, at 1701.

<sup>87</sup> Sturley, *supra* note 49, at 135; see also H.L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 Willamette Journal of International Law and Dispute Resolution 194 (2004), “The Supreme Court applied *The Bremen* rule to a case involving a domestic forum selection clause [...] in *Carnival Cruise* [...] Although the Court did not address whether its holding would extend to foreign forum selections, subsequent cases have viewed the decision as precedential in the international context.”

<sup>88</sup> Park, *supra* note 7, at 23.

<sup>89</sup> 499 US 585 (1991), A.M.C., at 1702; the Court also stated: “Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”

<sup>90</sup> *Id.*, at 1703; “First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. [...] Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended [...] Finally, [...] passengers who purchase tickets containing a forum clause [...] benefit in the form of reduced fares reflecting the savings that cruise line enjoys by limiting the for a in which it may be sued.” See text accompanying *infra* note 156 *et seq.*

<sup>91</sup> *Id.*, at 1704.

<sup>92</sup> *Id.*

formation. Moreover, the Court concluded that the Shutes had a reasonable notice of the forum provision, and thereafter the “option of rejecting the contract with impunity.”<sup>93</sup>

On the other hand, two Justices argued in their dissent that forum selection clauses in cruise ticket contracts are unenforceable under admiralty law.<sup>94</sup> Justice Stevens who wrote the dissent noted that only the most careful passenger will notice such a clause in the fine print on the back of the ticket.<sup>95</sup>

Firstly, the Justices confirmed that courts traditionally held exculpatory clauses in passenger tickets unenforceable because of disparity in bargaining power between the carrier and the passenger.<sup>96</sup> Secondly, they reiterated the traditional view that forum selection clauses deprive the courts of their jurisdictions. Moreover, Justice Stevens disagreed with the majority view that the principles of *The Bremen* can be applied to the dispute about stipulations printed on the back of passenger tickets.<sup>97</sup> He concluded that “the prevailing rule is still that the forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy.”<sup>98</sup>

### 3. New Standards for Enforceability of Forum Clauses

*The Bremen* and *Shute* have established new grounds for not enforcing jurisdiction agreements.<sup>99</sup> Here the paper will examine those grounds, namely: reasonable communicativeness test, defects in formation of the contract, fundamental fairness, unreasonableness and public policy.

Firstly, the court deciding about the validity of the contractual provisions has to determine whether the forum selection clause forms a part of the contract. Particularly in cases of passage ticket contracts,<sup>100</sup> the courts consider whether the ticket reasonably communicates the existence and importance of the ticket’s limiting conditions to the passenger.<sup>101</sup> The reasonable communicativeness test, a longstanding rule in maritime law,<sup>102</sup> requires that the cruise lines employ reasonable means to warn the passenger that the terms and conditions were an important matter of contract affecting his legal rights.<sup>103</sup> Typically, a warning or incorporation clause on the face page of the contract directing the passenger’s attention to the limitation clauses in the body of the contract is sufficient.<sup>104</sup>

<sup>93</sup> *Id.*, at 1703.

<sup>94</sup> *Id.*, at 1706.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*, at 1709, “That case involved the enforceability of a forum-selection clause between two large corporations.”

<sup>98</sup> *Id.*

<sup>99</sup> Born, *supra* note 13, at 404.

<sup>100</sup> *Id.*, “[...] courts have occasionally refused to enforce the forum selection clauses that were buried in pages of finely printed boilerplate or on the back of the form contracts – particularly in consumer case.”

<sup>101</sup> 407 US 1 (1972), A.M.C., at 1407.

<sup>102</sup> Gehringer, *supra* note 10, at 644.

<sup>103</sup> Davidson, *supra* note 24, at 79.

<sup>104</sup> *Id.*

Attempts to dispute enforcement of forum clauses on the grounds that the print is too small and unreadable or that the cruise line intentionally disguised the terms limiting the passenger's rights, have generally been rejected by the courts.<sup>105</sup> Most importantly, when assessing whether a passenger had a reasonable notice, the court will focus not on whether the passenger actually read the clauses, but on whether the passenger had the opportunity to do so.<sup>106</sup>

In *Carnival Cruise v. Shute* the Shutes conceded that they had a sufficient notice of forum clause before entering the contract.<sup>107</sup> However, Justice Stevens in his dissent in *Shute* contested that passengers were fully notified about the contractual provisions.<sup>108</sup> He argued that many passengers will not have an opportunity to read forum clause until they have actually purchased the ticket.<sup>109</sup>

Secondly, the court has to check whether there were any defects in formation of the contract,<sup>110</sup> such as standards set in *The Bremen*: undue influence, overweening bargaining power or overreaching.<sup>111</sup> In other words, a forum selection made fraudulently or under duress can be a basis for resisting of the enforcement of forum agreement.<sup>112</sup> In addition, showing of the unfair use of unequal bargaining power or total absence of bargaining could be a ground for nonenforcement.<sup>113</sup>

Thirdly, forum selection clause will be scrutinized for fundamental fairness, as the Court emphasizes in *Shute*.<sup>114</sup> In that case the Court did not find that Florida is an inconvenient forum representing a disadvantage for the Shutes to pursue their claim.<sup>115</sup>

Next, in the same line of reasoning as fundamental fairness, the courts hold that a forum clause which is unreasonable doesn't merit enforcement.<sup>116</sup> Among other, factors such as "inability of plaintiff to obtain effective relief in the

<sup>105</sup> Davidson, *supra* note 24, at 80.

<sup>106</sup> Pieper, *supra* note 23, at 171, "If the passenger has possession of the ticket, it is immaterial that the passenger lacks actual knowledge of the provision [...] It is misleading to focus on whether the passenger actually read the contract; rather the proper focus is on whether the passenger had the opportunity to read it."

<sup>107</sup> 499 US 585 (1991), A.M.C., at 1700, "The respondents do not contest the incorporation of the provisions not that the forum selection clause was reasonably communicated [...]."

<sup>108</sup> *Id.*, at 1706.

<sup>109</sup> *Id.*

<sup>110</sup> Born, *supra* note 13, at 395 also states that defects mentioned in *The Bremen* and Restatement (Second) of the Conflict of Laws are invoked particularly often.

<sup>111</sup> 407 US 1 (1972), A.M.C., at 1416, *see also* Restatement (Second) of the Conflict of Laws, 1971 with amendments 1986 in §80 stipulates: "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable."

<sup>112</sup> Born, *supra* note 13, at 402.

<sup>113</sup> Born, *supra* note 13, at 403.

<sup>114</sup> 499 US 585 (1991), A.M.C., at 1704.

<sup>115</sup> *Id.*

<sup>116</sup> Unreasonableness was an issue both in *The Bremen* and *Shute*; 407 US 1 (1972), A.M.C., at 1414 states "[...] such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." and 499 US 585 (1991), A.M.C., at 1701 states "[...] the Court discussed a number of factors that made it reasonable to enforce the clause at issue in *The Bremen* and that, presumably, would be pertinent in any determination whether to enforce a similar clause."

contractual forum”<sup>117</sup> and if contractual forum is “a substantially less convenient place for the trial” determine whether the clause is reasonable or not.<sup>118</sup> The right of a party in the US to bring a case to a court of law is viewed as fundamental, and the party showing that he will be deprived of his day in court will most likely succeed in challenging the choice-of-forum provision.<sup>119</sup> A defense based on unreasonableness is difficult to satisfy, and it is for the party who ‘attacks’ the forum clause on this basis to clearly show that the clause is unreasonable.<sup>120</sup>

Finally, public policy is still an exception<sup>121</sup> which can be invoked to challenge the forum selection clause.<sup>122</sup> Albeit often disliked and considered too broad,<sup>123</sup> the concept of public policy exception changed gradually over the years and can still be a ground for dismissal of the forum clause “if it violates a forum’s statutory norms or offends a forum’s basic notions of justice and morality.”<sup>124</sup> This exception requires argumentation showing more than the fact that substantive rules of chosen forum differ from US law.<sup>125</sup>

### III. Discussion

#### 1. Introduction: Surveys on Forum Selection

Before discussing effects of *The Bremen* and *Shute* on enforceability of forum selection clauses, this section will examine a recent survey on what happens after the court ordered a dismissal or stay on the grounds of a foreign forum selection or arbitration clause.<sup>126</sup> The survey included various maritime cases, and although

<sup>117</sup> Born, *supra* note 13, at 406; *see also* 407 US 1 (1972) “[...] trial in contractual forum would be so gravely difficult and inconvenient that he would for all practical purposes be deprived of his day in court.”

<sup>118</sup> *Id.*

<sup>119</sup> With regard to the burden of showing that the enforcement would be unreasonable or unjust *see Marique v. Fabbri*, 493 So. 2d 440 (Fla. 1986), where the court said: “The test of unreasonableness is not mere inconvenience or additional expense [...] It should be incumbent on the party seeking to escape his contract to show that the trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.”

<sup>120</sup> 407 US 1 (1972), A.M.C., at 1421.

<sup>121</sup> M. M. Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 Duq. L. Rev. 1013 (1995-1996); “It is hard to find a legal doctrine, such as public policy, which has endured extensive criticism and survived.”

<sup>122</sup> *Cf.* text accompanying *infra* note 140 *et seq.*

<sup>123</sup> Karayanni, *supra* note 121, at 1055, *see also* 407 US 1 (1972), A.M.C., at 1418, “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.”

<sup>124</sup> Karayanni, *supra* note 121, at 1016.

<sup>125</sup> Born, *supra* note 13.

<sup>126</sup> R. Force & M. Davies, *Forum Selection Clauses in International Maritime Contracts*, in M. Davies (Ed.), *Jurisdiction and Forum Selection in International Maritime Law – Essays in Honor of Robert Force* 1-58, at 8-11 (2005).



it does not attempt to have a statistical precision and it does not have immediate relation to the forum provisions in passenger ticket contracts, it gives evidence of the effect of such clauses on contracts between the sophisticated parties.

The results of the survey show that only 8.8% of the cases were actually brought before the foreign forum after the court ordered dismissal and transfer to the venue designated in the forum clause.<sup>127</sup> Not surprisingly, 44.1% of the cases were settled and a very high percentage of 26.5% were completely abandoned after the forum clause was enforced. Albeit the survey notes that most of the cases that were settled would have settled anyway, it indicates that the dismissal to the foreign forum had a crucial impact on the settlement. The survey shows that it is unrealistic to expect that the claim will proceed to trial in the chosen foreign forum after the dismissal from the court in the US. In conclusion, the high percentage of settled or abandoned cases indicates that even business parties with access to substantial financial resources choose not to pursue their legal rights in a distant forum, and that in case of enforcement of forum provision in an adhesion consumer contract the outcome of the survey would be similar.

Moreover, another survey on clauses in maritime contracts classified whether the court enforced a domestic forum clause or not.<sup>128</sup> The survey includes 46 court decisions made by various US courts between years 2000 and 2003. Out of that number, in seven cases the courts considered whether it should give the effect to the forum clause in the contract accompanying the passengers' cruise ship ticket. Not surprisingly, in six out of seven cases the court granted the dismissal and the cases were transferred to the contractual forum.

## 2. Analysis of Contemporary View of US Courts

To construct a standard for enforcement of forum selection clauses has proven extremely difficult.<sup>129</sup> There is also "substantial confusion surrounding the procedural aspects of enforcing a forum selection clause."<sup>130</sup> As Professor Park

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<sup>127</sup> *Id.*, at 11.

<sup>128</sup> R. Preston, *Forum Selection Clauses Survey 2002-2003*, 27 *Tulane Maritime Law Journal* 723 (2003), see also an older research in international context: D. W. Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 *Law. Q. Rev.* 398, at 418-420 (1987); where a research showed that when a case is dismissed and a forum clause enforced, a large number of plaintiffs suing for personal injury either abandoned the case or settled for much less than they would have anticipated in the original forum.

<sup>129</sup> Taylor, *supra* note 12, at 788; see also "Outside the admiralty venue, American courts have taken no uniform approach to enforcement criteria" and "Judges and commentators today tend to characterize forum clauses [outside admiralty venue] by terms such as presumptively valid, given effect, enforceable unless unfair or unreasonable and recognized if freely negotiated.", Park, *supra* note 7, at 19.

<sup>130</sup> Buxbaum, *supra* note 87, at 196; "Litigants are often unsure of how to move for enforcement, and the courts order relief on a number of different basis, from improper venue to lack of subject-matter jurisdiction."

notes, there is as yet no ‘Zapata motion’<sup>131</sup> in the Federal Rules of Civil Procedure to compel respect for jurisdiction clauses.<sup>132</sup>

The rulings in *The Bremen* and *Shute* have been criticized by legislators and scholars,<sup>133</sup> who called it “bad law”<sup>134</sup> and urged for a change. However, the position of the United States Supreme Court on forum selection clauses remains unchanged, and these cases still have a direct effect on validity and enforceability of forum agreements in US courts.<sup>135</sup>

After *Shute*, the forum selection clauses became a powerful tool for sophisticated parties to use against non sophisticated consumers.<sup>136</sup> Read together, *The Bremen* and *Shute* suggest that forum selection clauses, especially in maritime contracts are *prima facie* valid and will be enforced unless proved that the contract was formed by undue influence, overreaching and fraud or unequal bargaining power<sup>137</sup> or if there are some other grounds for not enforcing mentioned in section C.II.3.

Surprisingly, this has produced little certainty and the courts in different parts of the United States have given different weight to the forum agreements.<sup>138</sup> Standards vary significantly ranging from unenforceability in some states to the enforcement of almost all choice-of-forum agreements.<sup>139</sup> There are still seven states that, contrary to the contemporary trends, have enacted legislation expressing a strong public policy against enforcement of forum clauses.<sup>140</sup> However, a recent case in Idaho, *Fisk v. Royal Caribbean Cruise Lines*,<sup>141</sup> which like *Shute* involved an injury to a passenger off the coast of Mexico, indicates a change. In this case the plaintiff argued that the Idaho statute is not in conflict with federal maritime law; relying on *The Bremen* and its reference that a forum selection clause could be denied enforcement if it contravened a strong public policy of the forum state.<sup>142</sup> Nevertheless, the Idaho Supreme Court found holding in *The Bremen* that forum clauses are *prima facie* enforceable was extended in *Shute*, which removed the requirement of *The Bremen* that such clauses are valid only if they were freely negotiated. Consequently, the highest court of Idaho decided that the state’s public policy against enforcement of out-of-state forum selection clauses

<sup>131</sup> ‘Zapata motion’ refers to the case *Bremen v. Zapata*, 407 US 1 (1972), and implies a motion which would be based in Federal Rules of Civil Procedure and which would require a court to honor a forum selection clause as such.

<sup>132</sup> Park, *supra* note 7, at 33; See also that on the federal level, there is no choice-of-forum treaty or statute similar to New York Arbitration Convention or United States Federal Arbitration Act which supersedes inconsistent state laws, in Park, *supra* note 7, at 34.

<sup>133</sup> Park, *supra* note 7, at 23.

<sup>134</sup> L. S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 Texas International Law Journal 325 (1992).

<sup>135</sup> Force, *supra* note 126, at 4.

<sup>136</sup> Shantar, *supra* note 8, at 1077.

<sup>137</sup> Maloney, *supra* note 46, at 711.

<sup>138</sup> Born, *supra* note 13, at 378.

<sup>139</sup> *Id.*

<sup>140</sup> *State Supreme Court Rules Statute Invalidating Forum Selection Clauses Preempted in Maritime Cases*, Cruise & Carrier Legal Update, Kaye, Rose & Partners LLP, July 2005, at 8.

<sup>141</sup> 108 P. 3d 990 (2005).

<sup>142</sup> 407 US 1 (1972), A.M.C., at 1418.

has to be replaced by a federal law requiring enforcement of such provisions.<sup>143</sup> This recent case shows that forum clauses might be enforced even in states that have legislation holding that choice-of-forum contravenes a strong public policy of that state.

Indeed, despite of the existence of multiple approaches, forum clauses outside admiralty venue are very often enforced.<sup>144</sup> *The Bremen* has established *prima facie* enforceability of clauses which had been freely negotiated<sup>145</sup> in an arm's length negotiations by experienced and sophisticated businessmen<sup>146</sup> while *Shute* did not consider that the absence of bargaining is a reason for not enforcing a forum clause and concluded that in any case a ticket will not be subject to negotiations and that the passenger will not have bargaining parity with the cruise line.<sup>147</sup> When it enforced the forum clause in *Shute* which was a part of an adhesive consumer contract, the Court gave its "approval to forum selection clauses generally as a method for establishing jurisdiction."<sup>148</sup> Taking into account that "[u]nder general principles of contract law in the United States, there is no rule that the parties either negotiate or read every term of their agreement,"<sup>149</sup> it is understandable why the abuse of economic power is not given a significant weight when enforcing the forum clauses.

As explained above in section B.I., there are numerous benefits of freely negotiated forum selection clauses; however in this case the question is whether the Court should have taken a different approach when a forum clause is the "product of the sophisticated party's *unilateral* selection of the most convenient forum."<sup>150</sup>

Subsequently, the essential question in *Shute* forum selection dispute was whether the interest of passengers as consumers should prevail over the interest of a multinational cruise line company.<sup>151</sup> As Justice Stevens noted in his dissent,<sup>152</sup> most of the passengers will be unaware of the contractual provisions until they receive the ticket. After that point they are bound by the terms and conditions of the contract without the possibility to get any refund,<sup>153</sup> and will most likely accept the forum clause instead of cancelling their cruise trip at the last minute.

<sup>143</sup> 108 P. 3d 990 (2005), the court said that forum clause would not be enforced if there were evidences of inconvenience depriving a plaintiff of his day in court, fraud or overreaching.

<sup>144</sup> Buxbaum, *supra* note 87, at 199; "Surveys of decisions addressing the contracts that contain forum selection clause suggest that litigation is steered toward the chosen forum in the great majority of cases."

<sup>145</sup> 407 US 1 (1972), A.M.C., at 1416.

<sup>146</sup> *Id.*

<sup>147</sup> 499 US 585 (1991), A.M.C., at 1702.

<sup>148</sup> Mullenix, *supra* note 134, at 325, *see also* Sturley, *supra* note 49, at 139; "*Carnival Cruise Lines* sends a clear message that in admiralty cases, at least, almost every choice of forum clause will be enforceable."

<sup>149</sup> Born, *supra* note 13, at 404.

<sup>150</sup> Shantar, *supra* note 8, at 1080.

<sup>151</sup> Sturley, *supra* note 49, at 132.

<sup>152</sup> 499 US 585 (1991), A.M.C., at 1706.

<sup>153</sup> *Id.*; reference to the passage ticket contract paragraph 16(a), which provides that "[t]he Carrier shall not be liable to make any refund to passengers in respect of ... tickets wholly or partly not used by a passenger."

It is not clear whether the Shutes have actually read the ticket, but as explained in the previous sections, that is irrelevant for the purposes of contract law. On the other hand, it is clear that the transfer of the venue to Florida was particularly burdensome for the Shutes, both financially and physically.<sup>154</sup>

In *Shute* the Court did not specifically address the key issue of forum shopping and non-existing balance between consumers (passengers) and sophisticated parties (cruise lines). The Supreme Court rather performed some kind of socio-economic analysis and gave four reasons why a forum clause in cruise ticket contract should be held reasonable and enforced. First, the Court said that forum selection clause limits the places where the cruise line could be sued, which is of the interest of the cruise company that conducts business in multiple fora.<sup>155</sup> Second, such provision limits litigation costs that might result from jurisdictional disputes and at the same time eliminates confusion over the place of litigation. Third, it is of the interest of judicial economy to enforce forum clauses, since they contribute to conservation of judicial resources. And fourth, the passenger who purchased the ticket containing the forum provision will benefit in the form of reduced fares reflecting the savings that the cruise line enjoys.

Here we will shortly examine each of these arguments raised by the Supreme Court. It will become clear that read together those arguments are contradictory, vague, illogical and that they do not give a sound basis for holding the forum clauses *prima facie* valid.

Firstly, it is true that cruise ships visit many ports during their journeys and that cruise lines have the interest of limiting the number of fora where a potential suit can be brought. However, it is not understandable why a sophisticated party would have a special right to securing advantage over consumers, when the fact that today's cruise lines have access to substantial financial resources that already gives them important advantage over passengers.<sup>156</sup>

Next, the Court brought an argument that forum selection clauses have a function in securing certainty of the place of litigation for each of the cruise ship passengers. This rationale holds no ground and this paper has shown that a cruise passenger is in most cases unaware of the forum clause in small print included in the ticket and will most likely challenge its enforceability in his local court. "The validity of forum selection clauses is now one of the most frequently litigated jurisdictional issues in the lower federal courts,"<sup>157</sup> which is making the argument about elimination of confusion and reduction of litigation costs redundant.

Thirdly, the Courts raised a similar argument from the perspective of the court system. Here the Supreme Court said that the forum clauses conserve judicial resources and contribute to judicial economy. The Court decided to view the forum selection as beneficial from the community's point of view, without taking

<sup>154</sup> Mullenix, *supra* note 134, at 332.

<sup>155</sup> 499 US 585 (1991), A.M.C., at 1703.

<sup>156</sup> Mullenix, *supra* note 134, at 342, "[...] why it is any better or fairer to force an injured plaintiff to be haled into some distant court of the defendant's pre-arranged choosing, or forego the right to sue altogether."

<sup>157</sup> *Id.*; "Moreover, because unsuspecting plaintiffs will invariably be caught unaware of a fine print provision, this trend to litigate over forum-selection clauses will continue unabated."

into consideration that the dispute in *Shute* went through six courtrooms of the state and federal court system.<sup>158</sup> This paper has presented that a passenger who has been unaware of the forum clause will most likely challenge its *prima facie* validity on numerous grounds, further consuming judicial resources with the jurisdiction dispute unrelated to the merits of the underlying lawsuit.

Finally, the last argument that the passengers benefit from enforced forum clause through a reduction of the cruise fare is very frequently raised by cruise line companies.<sup>159</sup> To verify this argument of the Court it would be necessary to perform an economic and social survey, but even without such survey it is disputable whether the reduction of the cost effectively benefits the passenger compared to the loss of their right to bring the claim to a chosen forum.<sup>160</sup>

When balancing the competing interest of the passengers and cruise companies, the Supreme Court failed to address the issue of forum shopping and did not give any weight to the goal of consumer protection. The Court noted that the cruise passenger contract is the contract of adhesion. Nevertheless, the Court “seemed to hold that the existence of an adhesion contract is an argument in favor of upholding the validity of a forum selection clause.”<sup>161</sup>

#### IV. Conclusions

After examining the case-law and new enforceability standards, we can conclude that in *Shute* the Supreme Court made a policy choice and decided not to burden multinational companies but rather passengers who are forced to pursue their claim in distant forums. The cruise companies continue successfully to enforce forum clauses in their ticket contracts, maintaining that “[m]anifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur.”<sup>162</sup>

The decision in *Shute* left room for future challenges of forum clauses on the grounds of reasonableness and fundamental fairness. However, as shown above, most of the courts held the reasoning in *Shute* extended *prima facie* enforceability of forum provisions in *The Bremen* to the adhesive passenger ticket contracts.<sup>163</sup> Subsequent case law proves that such contractual provisions are repeatedly enforced despite admitted inequality of bargaining power and particular financial and physical burden for the passengers.

At this point it is interesting to note that *The Bremen* strongly relied on international principles, in particular on the approach of common law

<sup>158</sup> Mullenix, *supra* note 134, at 332.

<sup>159</sup> Mullenix, *supra* note 134, at 343, “[...] the Court’s fourth justification [...] added embarrassing insult to the injury of the plaintiff’s loss of the right to choose a forum.”

<sup>160</sup> Taylor, *supra* note 12, at 850; “It is difficult to accept that whatever, if any, reduction in the price [...] was a fair trade for being prevented from pursuing compensation for her injuries.”

<sup>161</sup> Gehringer, *supra* note 10, at 645.

<sup>162</sup> 407 US 1 (1972), A.M.C., at 1416.

<sup>163</sup> Taylor, *supra* note 12, at 850; “*Shute* demonstrates the danger of removing judicial discretion from the standard of enforcement. The reasonableness standard for enforcement from *The Bremen*, now “refined”, allowed for enforcement that was contrary to the interest of justice [...]”

countries, which have traditionally enforced forum clauses made in ‘arms length negotiations’.<sup>164</sup> Reliance on international principles was not followed in *Shute*,<sup>165</sup> since the enforcement of forum clauses in passenger ticket contract is explicitly prohibited by the two international conventions in this area, Brussels Convention<sup>166</sup> and Athens Convention.<sup>167</sup> Regulation of forum clauses under different international instruments from the perspective of cruise ship passengers will be discussed in the next chapter.

The question remains whether a legislative approach by the US Congress would bring more certainty and consumer protection in this area. In absence of the participation by the US in the global framework for passenger protection,<sup>168</sup> numerous commentators are calling for a consumer friendly statute protecting passengers from exclusive forum clauses. It is almost unanimously accepted that this protection should at least render clauses designating foreign forum unenforceable. A comprehensive jurisdictional statute applicable both to state and federal courts would be a preferred approach, especially when we note the success of UN Arbitration Convention and US Arbitration Act, which mitigates all uncertainties.

Unfortunately, under the current US regime, Judge Dickerson’s article entitled *Twenty-First-Century Ships, Nineteenth-Century Rights*<sup>169</sup> most vividly depicts the contemporary treatment of cruise passengers’ rights.

#### **D. The European Approach: Protecting the Weaker Contractual Party**

In general, treatment of forum selection clauses in international venue, especially in international conventions on jurisdiction and maritime law, is particularly diverse from their treatment in the US.<sup>170</sup> In Europe, one aspect is distinctively different – the jurisdictional framework of the European Community gives protection to the weaker contractual parties due to their procedural position, due to their socio-economic position and due to the fact that the parties might be unaware of a jurisdiction clause incorporated in a contract by the other party.<sup>171</sup>

In this section we will examine legal remedies that a cruise ship passenger in the European Union has to ‘fight’ against a pre-selected forum clause included in

<sup>164</sup> 407 US 1 (1972), A.M.C., at 1415.

<sup>165</sup> Sturley, *supra* note 49, at 139.

<sup>166</sup> Brussels Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea of 29 April 1961.

<sup>167</sup> Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, done at Athens 13 December 1974.

<sup>168</sup> *See infra*, section D.III.1.

<sup>169</sup> Dickerson, *supra* note 9, at 447-517.

<sup>170</sup> Gehringer, *supra* note 10, at 667.

<sup>171</sup> A. Pontier and E. Burg, EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters – According to the Case Law of the European Court of Justice 118 (2004).

his ticket. This section will concentrate on the remedies available on the EU level and will not discuss national statutes in this area.<sup>172</sup> After examining the articles of the Brussels Regulation on jurisdiction,<sup>173</sup> the paper will pose a question whether the cruise is a package within the meaning of the Package Travel Directive.<sup>174</sup> As an additional remedy for consumer protection, the paper will present the EC Directive on unfair terms in consumer contracts.<sup>175</sup> This is followed by an introduction to the Athens Convention<sup>176</sup> which might be a future framework for some passenger claims in the EU.

## I. Introduction: Brussels Regulation 44/2001

The European approach towards the regulation of jurisdictional issues through conventions and legislation substantially differs from the approach in the United States.<sup>177</sup> The goal was “[...] to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities [...]” by creating “[...] measures relating to judicial co-operation in civil matters which are necessary for the sound operation of the internal market.”<sup>178</sup>

Jurisdictional legislation was until 2001 contained in the Brussels Convention<sup>179</sup> and a parallel Lugano Convention,<sup>180</sup> a treaty extending the provisions of the Brussels Convention to the nations that belong to the European Free Trade Association. Originally, the Brussels Convention was an instrument signed by only six states. Since then, a dramatic change was made by the recent Regulation 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters (Brussels Regulation),<sup>181</sup> which is binding and directly applicable in all Member States of the Community.<sup>182</sup> The Brussels Regulation has no official

<sup>172</sup> For more see Proposal for a Council Directive on unfair terms in consumer contracts of 3 September 1990, COM(1990)322 final, at 13 *et seq.*

<sup>173</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, OJ 2001 L12/1; some sources call this instrument Judgments Regulation, but for practical purposes we will hereinafter call it Brussels Regulation; the Regulation entered into force 1 March 2002.

<sup>174</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L158, hereinafter Package Travel Directive.

<sup>175</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29, hereinafter Unfair Terms Directive.

<sup>176</sup> Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

<sup>177</sup> Park, *supra* note 7, at 143.

<sup>178</sup> Recital 1 and 2 in the Preamble to Brussels Regulation, *supra* note 173.

<sup>179</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done in Brussels on 27 September 1968, as amended by Conventions on the Accession of the New Member States to the Convention; hereinafter Brussels Convention. Convention and amendments are supplemented by Expert Reports which have great weight in interpretation of the Convention. Brussels Convention still applies in relation to Denmark.

<sup>180</sup> Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988; hereinafter Lugano Convention. Convention applies in relation to Iceland, Norway, and Switzerland.

<sup>181</sup> Brussels Regulation, *supra* note 173.

<sup>182</sup> On the accession of ten new Member States to the EU in 2004, the Regulation became directly

commentary but its Preamble confirms the continuity between the Brussels Convention and the Brussels Regulation and continuity in the interpretation of the Brussels Convention by the European Court of Justice.<sup>183</sup>

The Brussels Regulation is applicable to all civil and commercial matters in regard the material scope<sup>184</sup> and all proceedings instituted after the Regulation entered into force in regard to its temporal scope.<sup>185</sup> Initial jurisdiction allocation is regulated in Article 2 which consists of the main rule of the Regulation, governing that the defendant is to be sued in the courts of the country where the defendant is domiciled.<sup>186</sup> That commonly accepted rule *actor sequitur forum rei* is applied to the extent that the Regulation does not allocate jurisdiction differently.<sup>187</sup>

The most important exception from the domicile rule is Article 23 which gives the parties autonomy to agree on which court will have jurisdiction to settle any dispute in connection with their legal relationship.<sup>188</sup> The formal requirements are that such an agreement is in writing or evidenced in writing, or in a form which accords with practices which the parties have established between themselves, or for agreements in a particular trade or commerce in a form widely known or regularly observed by the parties to the contract.<sup>189</sup> An agreement which complies with the requirements of Article 23 shall create exclusive jurisdiction unless the agreement provides otherwise. The European Court of Justice has persisted to view the forum selection clause, which was subject to consensus between the parties and which is included in an agreement in writing, as truly consensual and therefore enforceable and valid.<sup>190</sup> Article 23 only regulates in which country the dispute is to be settled, while the internal rules of the country determine which local court has jurisdiction.<sup>191</sup>

However, the rule of party autonomy has certain exceptions, in particular in form of exclusive jurisdiction<sup>192</sup> and in matters relating to consumer contracts, insurance contracts and contracts of employment.<sup>193</sup> A passenger on board a cruise ship would be especially interested in provisions of Section 4 that renders protection to consumers, giving them special rules of jurisdiction which are more

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applicable in these states as *acquis communautaire*; A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (2005), at 7.

<sup>183</sup> Recital 19 in the Preamble to Brussels Regulation, *supra* note 173.

<sup>184</sup> Brussels Regulation, Article 1.

<sup>185</sup> Brussels Regulation, Article 66.

<sup>186</sup> Brussels Regulation, Article 2.

<sup>187</sup> J. S. T. Øren, *International Jurisdiction and Consumer Contracts – Section 4 of the Brussels Jurisdiction Regulation*, Complex nr. 5/2004, Institutt for rettsinformatikk, Oslo, (2004), at 31.

<sup>188</sup> Brussels Regulation, Article 23, "If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or that courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

<sup>189</sup> Brussels Regulation, Article 23(1).

<sup>190</sup> Briggs, *supra* note 182, at 131.

<sup>191</sup> Øren, *supra* note 187, at 31.

<sup>192</sup> Brussels Regulation, Article 22.

<sup>193</sup> Brussels Regulation, Articles 8-21.



favorable than the general rules provide for.<sup>194</sup> Consumer protection in the EU has been frequently present on the agenda over last twenty five years<sup>195</sup> and different consumer protection legislations have developed over the years.<sup>196</sup>

### 1. Contracts of Transport: Do Cruise Passengers Enjoy the Consumer Protection of the Brussels Regulation?

The provisions of Articles 15 to 17 assume that disparity in financial resources and unequal negotiating power between consumer and seller or supplier is of such a large extent that the consumer should not be forced to sue in a foreign state.<sup>197</sup> Article 15 stipulates that the consumer is a person who can be regarded as being outside his trade or profession.

The consumer may bring the proceedings either to the court where the other party (service provider) is domiciled or in the court of the place where the consumer is domiciled, while the proceedings against the consumer may be heard in the courts of the Member State in which the consumer is domiciled.<sup>198</sup>

Jurisdiction over consumer contracts applies to contracts listed in Article 15,<sup>199</sup> which also specifies that “this Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.”<sup>200</sup> In other words, all transport contracts are excluded<sup>201</sup> except where the contract covers both travel and accommodation of an all-in-price (package holidays).<sup>202</sup>

Previously, when the Brussels Convention still regulated jurisdiction between EC Member States,<sup>203</sup> a very similar Article 13 of the Convention<sup>204</sup> stipulated that jurisdiction over consumer contracts of the Convention “shall not apply to contracts of transport.” This was explained in the Schlosser Report to the Brussels Convention which explicitly states that “[t]he reason for leaving contracts of transport out of the scope of the special consumer protection provisions in the 1968 Convention is that such contracts are subject under international agreements to special sets of rules with very considerable ramifications, and the inclusion of

<sup>194</sup> Brussels Regulation, Article 1(13).

<sup>195</sup> Green Paper on European Union Consumer Protection, presented by the Commission, COM(2001)531 final, at 3.

<sup>196</sup> See Consumer Affairs of European Commission, at <http://ec.europa.eu/consumers/>.

<sup>197</sup> Øren, *supra* note 187, at 39.

<sup>198</sup> Brussels Regulation, Article 16.

<sup>199</sup> Brussels Regulation, Article 16, lists the following contracts: contract for the sale of goods on an installment credit plan, contract for a loan repayable in installments, and contract concluded with a person pursuing business activities in the consumer’s Member State.

<sup>200</sup> Brussels Regulation, Article 15(3).

<sup>201</sup> “[...]most maritime claims therefore fall outside the ambit of these provisions. [...]contracts of transport are specifically excluded and therefore fall within the general convention provisions. This renders the consumer provisions of even more restrictive relevance to the enforcement of maritime claims.” D. Jackson, *Civil Jurisdictions and Judgments – Maritime Claims* 92 (1987).

<sup>202</sup> Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 July 1999, COM(1999) 348 final, at 16.

<sup>203</sup> See text accompanying *supra* note 179.

<sup>204</sup> Cf. Brussels Regulation, Article 15(3) and Brussels Convention, Article 13(3).

those contracts in the 1968 Convention purely for jurisdictional purposes would merely complicate the legal position.”<sup>205</sup> Article 58 of the Brussels Convention<sup>206</sup> allowed conventions governing jurisdiction in relation to particular matter such as transport to take precedence over jurisdictional allocation of the Brussels Regulation. In that respect, contracts of transport of goods are covered by the widely accepted Hague Rules,<sup>207</sup> the Visby Amendments to the Hague Rules<sup>208</sup> and the Hamburg Rules.<sup>209</sup> On the other hand, contracts of transport of passengers do not enjoy similar uniform regulation,<sup>210</sup> and there is no international instrument governing jurisdiction in sea passenger contracts, which left passengers without consumer protection of the Brussels Convention.

Accordingly, several commentators tried to correct this injustice by concluding that the service element in a cruise ticket contract is of such importance that a cruise ticket is a contract for the supply of services and not a contract of transportation.<sup>211</sup> Based on the observation that the transport during a cruise trip is not a mere transportation between two ports and that it is combined with numerous additional services like hotel accommodation on board, various restaurants, different sport activities, entertainment and much more, those commentators suggested that the services offered on board are viewed as predominant compared to the transportation. If this ‘stretched’ approach were to be applied, most of the forum selection clauses in cruise tickets would be invalidated according to consumer protection provisions in Section 4 of the Brussels Convention.

However, it would be wrong to reach such a conclusion. Section 4 of the Convention applied only to the contracts listed in Article 13(1). In any case, out of that list, contracts of transport can only fall within the scope of Article 13(1)(3) where the Brussels Convention refers to “any other contract for the supply of goods or a contract for the supply of services [...]”. Contracts of transportation are expressly exempted from protection rendered to consumer parties in the

<sup>205</sup> P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its Interpretation by the Court of Justice, section 160.

<sup>206</sup> “This Regulation shall not affect any conventions to which the Member States are or will be parties and which in relation to particular matters, govern jurisdiction or recognition or enforcement of judgments.” Art. 57 Brussels Convention.

<sup>207</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, done in Brussels 25 August 1924.

<sup>208</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, done in Brussels 23 February 1968.

<sup>209</sup> United Nations Convention on the Carriage of Goods by Sea, done in Hamburg 31 March 1978.

<sup>210</sup> See *infra* section D.III.2; Only six Member States have ratified the 1974 Athens Convention, and for all practical purposes most passengers in the EU cannot use its provisions when challenging a forum clause in a cruise ticket. Additionally, the EC has not acceded to the 2002 Athens Convention and it is not likely that its Member States will ratify it soon.

<sup>211</sup> Gehringer, *supra* note 10, at 680, referring to the German articles: E. Jayme, *U.S. Supreme Court: Zur Wirksamkeit grenzüberschreitender Gerichtsstandsklauseln in Verbraucherverträgen*, 1993 IPRax 42-43 and K. Thorn, *Verbrauchsgerichtsstand nach EuGVÜ und örtliche Zuständigkeit*, 1994 IPRax 426.

contracts for the supply of services. It would be illogical to conclude that some contracts (like cruise trips) which include services additional to transportation are not exempt from Section 4 of the Regulation, since it would mean a negation of the initial exception of transport contracts.

Regardless, the new Brussels Regulation has an exception from the general exclusion of contracts of transport in Article 15(3). This exception did not exist in the previous Brussels Convention and it is an amendment to the Brussels Regulation.<sup>212</sup>

The exclusion of contracts of transport does not apply where the contract covers both travel and accommodation for all-in-price,<sup>213</sup> which is regulated by the Directive on package travel, package holidays and package tours.<sup>214</sup> This article does not mention the Directive specifically and it is possible to interpret it in different ways.<sup>215</sup> The Directive applies to 'packages'— a pre-arranged combination of at least two of the following services: transport, accommodation and other tourist services. A package has to be sold or offered for sale at an inclusive price and it has to cover a period of more than twenty four hours or include overnight accommodation.<sup>216</sup> The Directive applies to consumers<sup>217</sup> who purchase the packages in the territory of the Community.<sup>218</sup> In brief, the Directive gives important protections with regard to the package such as: obligation of the retailer to provide essential information, protections in case of changes and cancellation, it imposes liability upon the retailer, and protects the consumer in case of insolvency of the retailer etc.<sup>219</sup>

The cruise trip is a contract of transportation, but can it be regarded as a package within the meaning of the Package Travel Directive? The answer to that question has to be divided in two parts. First, we will focus on standard multi-day cruises and second, we will look into daily cruises, such as organized sightseeing

Although the purpose of the Directive was to regulate 'conventional' package holidays, the scope of the definition of package goes far beyond what is conventional.<sup>220</sup> Regardless, the cruise which lasts several days or weeks is not unconventional, and it is commonly viewed as a package.<sup>221</sup> Taking into consideration that the cruise trip clearly includes transportation services,

<sup>212</sup> Proposal for Regulation on jurisdiction COM(1999)348 final, *supra* note 202, at 16.

<sup>213</sup> Proposal for Regulation on jurisdiction COM(1999)348 final, *supra* note 202, at 16.

<sup>214</sup> Package Travel Directive 90/314/EEC, *supra* note 174, *see also* Proposal for Regulation on jurisdiction COM(1999)348 final, *supra* note 202, with reference to footnote 13.

<sup>215</sup> *See* text accompanying *infra* note 232 *et seq.*

<sup>216</sup> Package Travel Directive 90/314/EEC *supra* note 174, Article 2(1).

<sup>217</sup> Package Travel Directive 90/314/EEC *supra* note 174, Article 2(4).

<sup>218</sup> Package Travel Directive 90/314/EEC *supra* note 174, Article 1.

<sup>219</sup> D. Grant & S. Mason, *Holiday Law* (2003), at 68 *et seq.*

<sup>220</sup> *Id.*, at 32-33, listing several travel and holiday arrangements which disputably come within definition of the package: overnight ferry trips, sleeper accommodation on the railways, business travel etc.

<sup>221</sup> Based on my research of the treatment of cruise trips by the major travel agents. Finally, this view was confirmed by Professor David Grant from the Travel Law Centre of Northumbria University.

the accommodation in a cabin on the cruise ship “creates a package because the consumer is being accommodated whilst being taken on a pre-arranged itinerary.”<sup>222</sup> Indeed, the majority of cruises are sold as package holidays.<sup>223</sup>

This creates an important remedy for cruise ship passengers in comparison to their rights under Article 13 of the Brussels Convention.<sup>224</sup> Since the multi-day cruise is a package within the meaning of the Package Travel Directive, jurisdictional allocation of Section 4 of the Brussels Regulation is applicable to cruise passenger ticket contracts. Accordingly, a passenger can take legal action either in the state where he is domiciled or in the state where the cruise line has its principle place of business, but he can only be sued in the state where he is domiciled.<sup>225</sup>

Most importantly, consumer protection drastically limits the parties’ autonomy to enter into a jurisdiction agreement. Such agreement, provided that it complied with the formal requirements of Article 23,<sup>226</sup> is valid only if: a) it is entered into after the dispute has arisen; or b) the forum agreement allows the consumer to bring proceedings in courts other than those indicated in other rules of Section 4; or c) jurisdiction is conferred upon the courts of a Member State, and both parties were domiciled or resided in that Member State at the time of conclusion of the contract and the choice-of-forum agreement was lawful according to the law of that Member State.<sup>227</sup> In conclusion, a choice-of-forum agreement will have a very limited effect in consumer contracts.<sup>228</sup>

On the other hand, there is a question how to treat cruises which do not cover a period of more than twenty-four hours or include overnight accommodation<sup>229</sup> and which are at present excluded from the field of application of Brussels Regulation.<sup>230</sup> How are day cruises, boat sightseeing tours and excursions to cultural or sport events etc. regulated under the Brussels Regulation?

It was mentioned above<sup>231</sup> that some authors have contended that provisions excluding transportation contracts from Section 4 did not exclude cruise travel from the scope of the same Section because of the extensive service element accompanying every cruise. Accordingly, one day cruises would also enjoy the consumer protection of Section 4. However, there are several arguments against such a conclusion.

<sup>222</sup> Grant, *supra* note 219, at 44, citing guidelines endorsed by the Department of Trade and Industry of the United Kingdom.

<sup>223</sup> Pears, *supra* note 25, at 16.

<sup>224</sup> *Cf. supra* note 204.

<sup>225</sup> Brussels Regulation, Article 16.

<sup>226</sup> *See text accompanying supra* note 189.

<sup>227</sup> Brussels Regulation, Article 17.

<sup>228</sup> Briggs, *supra* note 182, at 106.

<sup>229</sup> Package Travel Directive 90/314/EEC *supra* note 174, Article 2(1).

<sup>230</sup> One day cruises are exempt from the Package Travel Directive which has effect on the application of Section 4 of Brussels Regulation on such cruises. Report on the Implementation of Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic Legislation of EC Member States, SEC(1999)1800 final, [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/pack\\_trav/pack\\_trav02\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/pack_trav/pack_trav02_en.pdf), at 10.

<sup>231</sup> *Cf. text accompanying supra* note 211 *et seq.*

Firstly, Section 4 of the Regulation applies only to the contracts listed in Article 15(1), specifically Article 15(1)(3), which regulates contracts concluded with a person who pursues commercial or professional activities, and among those are predominant contracts for the supply of services. As we concluded above for the Brussels Convention,<sup>232</sup> the inclusion of one day cruises to the protection rendered to consumer parties in the contracts for the supply of services would mean a negation of the express exemption of contracts of transport from Section 4 of Brussels Regulation.

Next, the wording of Article 15(3) does not mention the Package Travel Directive. This could be interpreted that the cruises, which do not provide for a combination of travel and accommodation are automatically excluded, and one day cruises commonly do not provide for accommodation. Similarly, one commentary to the Brussels Convention concludes that “[a] package tour is not a contract of transport within the meaning of Article 13(3)”<sup>233</sup> which is also an argument against application of Section 4 to the one-day cruises.

In conclusion, the new wording of Article 15(3)<sup>234</sup> covers cruise travel within the meaning of ‘package’ under the Package Travel Directive. The remainder of the cruise passengers can rely only on the general prorogation of jurisdiction clause in Article 23 of the Brussels Regulation and not the consumer friendly Section 4 of the Regulation.<sup>235</sup>

## II. Another Instrument for Protection of Passengers in Europe: the Unfair Terms Directive

At EU level, a common element in all transactions in which a natural person acts for the purposes which are outside his trade, business or profession<sup>236</sup> is a strong protection those persons enjoy as consumers.

The previous section has shown that it is possible for some forum clauses to survive the scrutiny of Article 17 of the Regulation.<sup>237</sup> In those cases the EC Unfair Terms Directive of 1993<sup>238</sup> will render not only exclusion clauses, but also all unfair contractual terms<sup>239</sup> not binding on the consumer.

<sup>232</sup> See *supra* note 211.

<sup>233</sup> K. Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention* 202 (1998).

<sup>234</sup> See text accompanying *supra* note 213 *et seq.*

<sup>235</sup> See also *supra* note 210.

<sup>236</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L95/29, Article 2(b); hereinafter Unfair Terms Directive.

<sup>237</sup> Briggs, *supra* note 182, at 106.

<sup>238</sup> In this case, since provisions of Section 4 of the Brussels Regulation are not applicable, the term can be challenged on the basis of the Unfair Terms Directive. The Directive itself regulates in Article 1(2) that if there is any domestic or international law covering the jurisdiction allocation over consumer contracts (such as the Brussels Regulation which is mandatory in EC Member States), the Directive will not apply. See further Proceedings of the Conference The “Unfair Terms Directive”: 5 years on – 1-3 July 1999, [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/unf\\_cont\\_terms/event29\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/event29_en.htm), at 113 *et seq.*

<sup>239</sup> Grant, *supra* note 219, at 148.

The Directive covers all contractual terms which have not been individually negotiated<sup>240</sup> between consumers and professionals.<sup>241</sup> The term is considered unfair if “it causes significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” and that such significant imbalance is “contrary to the requirement of good faith.”<sup>242</sup>

The Directive represents a milestone in consumer policy<sup>243</sup> and effectively protects consumers from abuse of power by the suppliers of services. The Annex to the Directive includes an indicative and non-exhaustive list of terms which might be regarded as unfair.<sup>244</sup> The list suggests that the forum selection clause contained in general terms and conditions of a cruise ticket “irrevocably binds the consumer to the terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”<sup>245</sup> Such a term is also “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy [...]”<sup>246</sup>

However, the contractual terms listed in the Annex are not automatically unfair.<sup>247</sup> The assessment of the unfairness of the specific contractual term depends on the test according to the standards set in Article 4(1) of the Directive: the nature of goods and services, the circumstances attending the conclusion of the contract and the dependence of the term suspected to be unfair to the terms of the same or other contract connected with it.<sup>248</sup> If the forum clause in cruise ticket is found unfair, the Unfair Terms Directive will deprive such clause of the effect.<sup>249</sup>

A good example of the effect of the Directive on exclusive jurisdiction clause between a consumer and supplier is the joined case *Océano Grupo Editorial*.<sup>250</sup> The ruling confirms that the term conferring jurisdiction on the courts of a place in which none of the defendants are domiciled but where the plaintiffs have their principal place of business, satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive.<sup>251</sup> In addition, the European Court of Justice concluded that the national courts are entitled to determine on its own motion whether a term in a contract is unfair.<sup>252</sup>

<sup>240</sup> Unfair Terms Directive 93/13/EEC, *supra* note 175, Article 3(1).

<sup>241</sup> Unfair Terms Directive 93/13/EEC, *supra* note 175, Article 1(1).

<sup>242</sup> Unfair Terms Directive 93/13/EEC, *supra* note 175, Article 3(1).

<sup>243</sup> Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000) 248 final, at 5.

<sup>244</sup> Unfair Terms Directive 93/13/EEC, *supra* note 175, Article 3(3).

<sup>245</sup> Unfair Terms Directive 93/13/EEC, *supra* note 175, Annex 1(i).

<sup>246</sup> Unfair Terms Directive 93/13/EEC, *supra* note 175, Annex 1(q).

<sup>247</sup> Proceedings of the Conference The “Unfair Terms Directive”, *supra* note 238, at 136 and 139.

<sup>248</sup> Proceedings of the Conference The “Unfair Terms Directive”, *supra* note 238, at 134.

<sup>249</sup> Briggs, *supra* note 182, at 70.

<sup>250</sup> *Océano Grupo Editorial SA v. Roció Murciano Quintero*, Joined Cases C-240/98 to C-244/98, [2000] ECR I-04941.

<sup>251</sup> *Id.*, point 16 and 21.

<sup>252</sup> *Id.*, point 29.

### III. The European Community as Part of an International Framework for Passenger Protection

For some passengers claims there are international instruments on the European level, which might in the future render special protection to sea travelers. If the 2002 Athens Convention becomes part of EC Law, its jurisdictional allocation will supersede the Brussels Regulation<sup>253</sup> for the claims for death of or personal injury to a passenger or loss of or damage to luggage.<sup>254</sup> In this section the paper will discuss international conventions on carriage of passengers by sea and their treatment of forum selection clauses.

#### 1. International Conventions Concerning the Carriage of Passengers

Maritime transport has always had a very international profile and for a long time it has been acknowledged that there should be a uniform set of rules regulating it.<sup>255</sup> Subsequently, international conventions have been established in numerous areas of maritime transportation, and treatment of passengers and their luggage during the carriage by sea has been extensively debated over the last decades. The role of two international organizations needs to be mentioned which promoted uniformity and which convened the conferences creating several multilateral treaties. The former is private, the Comité Maritime International (CMI), based in Antwerp, and the latter is the International Maritime Organization (IMO),<sup>256</sup> a specialized agency of the United Nations situated in London.

The first multilateral instruments regulating the area of passenger transport by sea were two separate conventions, one concluded in 1961 concerning the carriage of passengers<sup>257</sup> and another concluded in 1967 regulating the carriage of passengers' luggage.<sup>258</sup> Neither of the conventions received a wide acceptance; however, it is interesting to note that their jurisdiction provisions declared all forum selection clauses in passenger contracts null and void.<sup>259</sup>

The next step towards unification was the international conference under the auspices of the IMO which convened in Athens in 1974. The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea<sup>260</sup> was passed to

<sup>253</sup> E. Røsæg, *EU Rules on Jurisdiction and Recognition and Enforcement of Judgments – A Maritime Law Perspective: How Will Maritime Judgments Be Affected?*, 330 *Marlus* 205 (2005).

<sup>254</sup> 2002 Athens Convention, Article 3.

<sup>255</sup> Gehringer, *supra* note 10, at 667.

<sup>256</sup> Originally IMCO (Inter-Governmental Consultative Organization); IMO is an UN specialized organization (among other, responsible “safer shipping and cleaner oceans”) has 166 member states, 37 inter-governmental and 61 non-governmental organizations with a consultative status, <http://www.imo.org>, last visited 07 July 2006.

<sup>257</sup> International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea, done in Brussels 1961; ratified by 11 states.

<sup>258</sup> International Convention for the Unification of Certain Rules Relating to Carriage of Passengers' Luggage by Sea, done in Brussels 1967; the Convention never entered into force.

<sup>259</sup> Article 9 of the 1961 Convention, *supra* note 257 and Article 13 of the 1967 Convention, *supra* note 258.

<sup>260</sup> Hereinafter 1974 Athens Convention.

create a uniform liability regime in the carriage of passengers. The Convention entered into force in April 1987, and although widely accepted, it has not been ratified by the United States.<sup>261</sup> Otherwise, the Athens 1974 regime was incorporated into the national laws of some states even without the official ratification<sup>262</sup> and until the present represents the principal international convention governing the liability of carriers of passengers by sea.

The 1974 Athens Convention imposed a fault based liability regime, and has within its scope<sup>263</sup> claims for loss suffered as a result of death of or personal injury to a passenger and the loss of or damage to luggage.<sup>264</sup>

The Convention provided in Article 17(1) a list of options for the passenger to file suit: a) the court of the place of the permanent residence or principal place of business of the defendant, b) the court of the place of the departure or that of destination according to the contract of carriage, c) a court of the state of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that state or d) a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State. Most importantly, Article 18 declared invalid all the provisions restricting the choices of forum and limiting the rights of a passenger.<sup>265</sup> The jurisdiction provisions of the 1974 Athens Convention refer to Contracting Parties, therefore leaving to the country's internal law to govern passengers' forum clause within that country.<sup>266</sup>

Some countries held the limitations imposed by the 1974 Athens Convention too low, and under their influence the 1990 Protocol to the Athens Convention has been passed in the IMO. Eventhough it brought a large increase of the liability limits,<sup>267</sup> the Protocol never entered into force,<sup>268</sup> primarily because most of the countries held that the compensation set in it is not adequate.<sup>269</sup>

<sup>261</sup> Summary of Conventions as at 31 May 2006, <http://www.imo.org>; the 1974 Athens Convention was ratified by 32 states representing 38.64% of the world tonnage.

<sup>262</sup> B. Soyer, *Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage at Sea 1974*, 33(4) *Journal of Maritime Law and Commerce* 1 (2002); some states have incorporated the 1974 Athens Convention even with higher limits.

<sup>263</sup> The 1974 Athens Convention, Article 2 stipulates that the Convention applies to international carriage if the ship flies the flag of a Contracting State and the place of departure and place of destination either in a single state with a stop in an intermediary port of another state or if those places are in two different states.

<sup>264</sup> The 1974 Athens Convention, Article 3.

<sup>265</sup> The 1974 Athens Convention, Article 18: "Any contractual provision concluded before the occurrence of the incident [...] having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void."

<sup>266</sup> Gehringer, *supra* note 10, at 673.

<sup>267</sup> Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, Article II.

<sup>268</sup> Summary of Conventions as at 31 May 2006, <http://www.imo.org>, the 1974 Athens Convention was ratified by only 3 states representing 0.93% of the world tonnage.

<sup>269</sup> *Liability limits for ship passengers raised with new Athens Convention, compulsory insurance introduced*, IMO Newsroom, <http://www.imo.org/newsroom>.



In the meantime, the review of the Warsaw Convention of 1929<sup>270</sup> resulted in a new Convention adopted by a conference convened by the International Civil Aviation Organization in Montreal in 1999.<sup>271</sup> The Convention covers loss of life or personal injury to airline passengers, and was a primary impetus for a new amendment to the Athens Convention.<sup>272</sup> The major feature of the Montreal Convention is unlimited liability, in addition to the prohibition of restrictions to the plaintiffs' option to sue in different fora.<sup>273</sup> Regardless of analogies between sea and air transport, there are numerous differences between them, affecting the respective liability regime. Subsequently, there are differing estimates of potential risks between a passenger on board a ship circulating freely and an air passenger sitting with his seatbelt fastened during the whole flight.<sup>274</sup> For example, in addition to transport the cruise ship market sector provides numerous services to the passengers who are basically living aboard. Indeed, when we make a comparison between these two modes of transport, we should also acknowledge their special operational differences.

There was a wide-spread feeling that the 1974 Athens regime was outdated<sup>275</sup> and that a uniform approach to maritime liability is necessary.<sup>276</sup> Negotiations on a comprehensive insurance and liability convention<sup>277</sup> started at the seventy-fourth session of the IMO Legal Committee in 1996 and led to the establishment of a Correspondence Group.<sup>278</sup> After the seventy-seventh sessions of the Legal Committee, it was decided to concentrate only on the revision of the 1974 Athens Convention.<sup>279</sup> The process was concluded with a diplomatic conference, held in London in October/November 2002 and attended by 73 states,<sup>280</sup> which passed a substantially revised Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.<sup>281</sup>

<sup>270</sup> Convention for the Unification of Certain Rules Relating to International Transport by Air of 1929.

<sup>271</sup> Convention for the Unification of Certain Rules for International Carriage by Air, done in Montreal 28 May 1999, hereinafter Montreal Convention.

<sup>272</sup> Soyer, *supra* note 262, at 18.

<sup>273</sup> Montreal Convention, *supra* note 271, Article 33.

<sup>274</sup> Kröger, *supra* note 4, at 245.

<sup>275</sup> "Many features of the Athens Convention as it stands are outdated and fail to meet expectations of citizens traveling on passenger ships [...]." Communication from the Commission on the enhanced safety of passenger ships in the Community of 25 March 2002, COM(2002)158 final, at 10.

<sup>276</sup> E. Røsæg, *News Under the Athens Sun: New Principles and Lost Opportunities of the Athens Convention 2002*, 46 *Scandinavian Studies in Law* 156 (2004).

<sup>277</sup> *Id.*; However, the Legal Committee abandoned this strategy and from its seventy-sixth session concentrated on the revision of the Athens Convention.

<sup>278</sup> Professor Erik Røsæg from Oslo was elected Chairman of the Correspondence Group.

<sup>279</sup> IMO Secretary-General said that "For some time now it has been recognized that the limits of liability in the 1974 Convention are no longer adequate to meet the needs of the international community." *Liability limits for ship passengers raised with new Athens Convention, compulsory insurance introduced*, IMO Newsroom, <http://www.imo.org/newsroom>.

<sup>280</sup> DipCon documents, International Conference on the Revision of the Athens Convention Relating to the Carriage of Passengers by Sea, 1974, London, 2002.

<sup>281</sup> 2002 Athens Convention, Article 15 stipulates that the Convention and the Protocol shall be

Like its predecessor, the 2002 Athens Convention has a scope limited to the claims for loss suffered as a result of the death of or personal injury to a passenger or for loss of or damage to luggage.<sup>282</sup> The new instrument introduced increased limits of liability for passenger claims,<sup>283</sup> establishing a strict liability system<sup>284</sup> and requiring from the carrier to take compulsory insurance or other financial security covering potential claims.<sup>285</sup>

The new Convention's jurisdiction provision is very similar to the provisions in the 1974 Athens Convention, giving the passenger the right to choose<sup>286</sup> between four fora to bring an action arising from the Convention.<sup>287</sup> It also nullifies all provisions that restrict the options of the claimant in Article 17 if the term was concluded before the occurrence of an incident covered by the Convention.<sup>288</sup> However, it leaves it up to the domestic law of each State Party to govern the allocation of proper forum within those states. At one point the Legal Committee considered adding a fifth jurisdiction, for a claim from the state where the carrier provides services for carriage of passengers if the claimant has residence or domicile in that state,<sup>289</sup> but this amendment was later deleted from the proposal.<sup>290</sup> On the other hand, significant change to jurisdiction provision was brought in form of a direct action against the provider of financial security<sup>291</sup> in any of the fora where the carrier could be sued otherwise.<sup>292</sup>

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read and interpreted as a single instrument, constituting a new consolidated instrument under new name Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

<sup>282</sup> 2002 Athens Convention, Article 3.

<sup>283</sup> 2002 Athens Convention, Article 7.

<sup>284</sup> 2002 Athens Convention, Article 3.

<sup>285</sup> 2002 Athens Convention, Article 4bis.

<sup>286</sup> "The claimant can choose between these fora to his or her advantage; in other words do the forum shopping."; Røsæg, *supra* note 253, at 205.

<sup>287</sup> 2002 Athens Convention, Article 17(1) stipulates:

An action arising under Articles 3 and 4 of this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums: (a) the Court of the State of permanent residence or principal place of business of the defendant, or (b) the Court of the State of departure or that of the destination according to the contract of carriage, or (c) the Court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or (d) the Court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

<sup>288</sup> 2002 Athens Convention, Article 18.

<sup>289</sup> Soyer, *supra* note 262, at 17.

<sup>290</sup> Consideration of a draft Protocol of 2002 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, submitted by the European Commission, 18 July 2002, LEG/CONF.13/7, *see also* Report of the Legal Committee on the work of its eighty-third session, International Maritime Organization, LEG 83/14, 23 October 2001, at 13.

<sup>291</sup> 2002 Athens Convention, Article 4bis.

<sup>292</sup> 2002 Athens Convention, Article 17(2).

## 2. The Athens Convention and the European Community

Surprisingly, there is no Community legislation in the field of carriage of passengers by sea, and the level of passenger protection varies significantly between the Member States.<sup>293</sup> The European Commission has confirmed that their ‘key concern’ is fully harmonized rules providing adequate legal protection to passengers.<sup>294</sup> The 1974 Athens Convention has been ratified by only six of the ‘old’ Member States<sup>295</sup> (Belgium, Greece, Ireland, Luxembourg, Spain and United Kingdom) and only three ‘new’ Member States that joined the EU on 1 May 2004 (Estonia, Latvia, and Poland).<sup>296</sup> In addition, the Nordic States apply the substance of the Convention but with the limitation levels of the 1990 Protocol to the Athens Convention. The consequence of such a divergent system is that compensation amounts vary significantly between the Member States.

The Commission insisted that the current regime needs to be updated and “strengthened in favor of passengers.”<sup>297</sup> During the negotiations for the 2002 Athens Convention, the European Community was represented by the European Commission.<sup>298</sup> The Commission had a mandate to negotiate certain parts of the Athens Protocol on behalf of the Community,<sup>299</sup> especially focusing on the possibility that the European Community as a whole becomes a party to the Protocol.

The Brussels Regulation<sup>300</sup> transferred the competence to assume obligations on jurisdiction to the Community.<sup>301</sup> In this respect, EU law prevails over national law and all matters related to jurisdiction in civil and commercial matters were brought into the realm of “Community interests.”<sup>302</sup> Article 71 of the Brussels Regulation states that “[...] Regulation shall not affect any conventions to which the Contracting States are Parties and which in relation to particular matters govern the jurisdiction [...]”, effectively preventing EU Member States

<sup>293</sup> Proposal for a Council Decision concerning the conclusion by the European Community of the Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, of 24 June 2003, COM(2003)375 final, at 3.

<sup>294</sup> *Id.*, at 3.

<sup>295</sup> “The main reason for the relatively low number of ratifications among EU Member States is that the convention limits are considered to be too low.”, Communication on the enhanced safety COM(2002)158, *supra* note 275, at 9.

<sup>296</sup> Status of conventions on 31 May 2006, www.imo.org, last visited on 1 July 2006.

<sup>297</sup> Communication on the enhanced safety COM(2002)158, *supra* note 275, at 10.

<sup>298</sup> Røsæg, *supra* note 276, at 164.

<sup>299</sup> Proposal for conclusion by the European Community of the Protocol of 2002 to the Athens Convention COM(2003)375, *supra* note 293, at 2.

<sup>300</sup> Brussels Regulation, *supra* note 173.

<sup>301</sup> Consideration of a draft Protocol to the Athens Convention European Commission, *supra* note 290, at 2.

<sup>302</sup> H. Ringbom, *Jurisdiction, Recognition and Enforcement of Maritime Judgments: the Dimension of EU External Relations Law*, 330 *Marlus* 161 (2005), “This follows from so-called AETR doctrine from the early 1979’s, whereby the [European Court of Justice] ruled that as soon as subject matter is being regulated at EU level competence is transferred to the Community and Member States have to abstain from any action on international level [...]”

from negotiating new conventions on an international level.<sup>303</sup> In this context, jurisdiction provisions in Article 17 of 2002 Athens Convention affect the exclusive Community competence under the Brussels Regulation.

As a result of negotiations, this was resolved through Article 19 of the 2002 Athens Convention which provides for membership of the Regional Economic Integration Organizations,<sup>304</sup> giving an option to the European Community to become a Contracting Party to an IMO instrument for the first time.<sup>305</sup> The main purpose of this provision is “to avoid a situation of conflict between two systems of law for EU Member States (EU law and international law).”<sup>306</sup> However, this extensive and unclear provision does not well-define the rights and obligations of the Community as a party to the Convention.

In addition, soon after the adaptation of the new Convention, the European Community confirmed its determination to ratify the 2002 Athens Convention and incorporate it into Community law.<sup>307</sup> The intention was that when the 2002 Athens Convention becomes part of EC law, it would apply as *lex specialis* and replace the forum provisions applicable under the Brussels Regulation.<sup>308</sup> The idea was that Community regime would form part of an international framework, creating a harmonized maritime passenger liability regime.<sup>309</sup>

However, almost four years after the Conference in London, there are no decisions on the Community’s conclusion of the 2002 Convention and it is uncertain if the Member States will accept such an obligation.<sup>310</sup> From the beginning, the Commission considered a regional solution on Community level

<sup>303</sup> However, the Regulation does not abrogate pre-existing treaties to which Member States are parties, such as the 1974 Athens Convention, and jurisdiction according to Article 71 of Brussels Regulation prevails over other general rules of the Regulation. Briggs, *supra* note 182, at 64 *et seq.*

<sup>304</sup> 2002 Athens Convention, Article 19; According to this article, when ratifying or acceding to the Convention, the European Community will submit a list of matters over which it has compliance. For these matters the Community will have a number of votes equal to the number of Member States which are Parties to the Convention.

<sup>305</sup> Proposal for conclusion by the European Community of the Protocol of 2002 to the Athens Convention COM(2003)375, *supra* note 293, at 3.

<sup>306</sup> Consideration of a draft Protocol to the Athens Convention European Commission, *supra* note 290, at 2.

<sup>307</sup> “It is therefore proposed that the Community becomes a Contracting Party to the Athens Protocol the earliest possible moment and that the member states shall do likewise before the end of 2005.” Proposal for conclusion by the European Community of the Protocol of 2002 to the Athens Convention COM(2003)375, *supra* note 293, at 3 *et seq.*

<sup>308</sup> Røsæg, *supra* note 253, at 205. In the case that the 2002 Athens Convention becomes part of EC law its jurisdiction provisions in Article 17 would take precedence over other Community legislation, *see* Brussels Convention Article 57 and Brussels Regulation Article 71.

<sup>309</sup> “An international solution would have a number of advantages, not least from the practical and procedural perspective, given that passenger claims by their nature are susceptible to govern disputes involving potentially many different parties and many different States’ legal systems.” Communication on the Enhanced Safety, COM(2002)158, *supra* note 275, at 14.

<sup>310</sup> Ringbom, *supra* note 302, at 180. The implementation problem whether the Community should ratify the Convention before all its Member States have ratified it, should be resolved by deferring the Community’s ratification until all EU Member States notify that they ratified or acceded to the new Convention.

in case of impediments to the implementation of the 2002 Athens Convention.<sup>311</sup> It seems that the Commission envisaged such a situation in its Communication, reminding that there is no legislation in this mode of transport at Community level, and therefore a Community-wide regime adequately compensating for death and personal injury of passengers should be proposed. Moreover, in the case that the Community becomes a party to the 2002 Athens Convention, the jurisdiction provision of Article 17 will be available only for claims for losses covered by the Convention, namely death of or personal injury to a passenger or for loss of or damage to luggage.<sup>312</sup> In that respect, we have seen that a cruise ship passenger is exposed to a wide range of problems<sup>313</sup> which are not within the scope of the Athens Convention and the provisions of Section 4 of the Brussels Regulation will still be applicable.

## E. Conclusions

This brief look at the treatment of forum clauses in the United States and European Union demonstrates the fundamental differences between two approaches. After examining different provisions of US law, EU law and international conventions, the conclusion can be drawn that different traditions and concepts in consumer protection present a long lasting impediment in cross-border transactions, and a uniform set of rules is a necessity for the resolution of conflicts between different jurisdictions.<sup>314</sup>

This paper has compared approaches towards forum clauses in the United States and the European Union: the former is juridical, overwhelmed with different tests, with uncertain outcome and without consumer protection; and the latter is legislative, predictable, with means to protect the weaker contractual party.

Indeed, the paper has shown that EU law has achieved the goal of uniformity and consumer protection. According to EU law jurisdiction agreements are generally prohibited in consumer contract. The principle of the protection of the weaker party is incorporated in all legislations of the European Communities, having as a consequence adequate defenses for the party that might be unaware of a jurisdiction clause incorporated in a contract by the other party.<sup>315</sup> As demonstrated above, a cruise ship passenger in Europe enjoys effective remedies against one-sided clauses in the ticket contract.

On the other hand, in most cases in the United States the passengers have no option to bring the claim to their home jurisdiction. As Professor Borchers

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<sup>311</sup> Communication on the Enhanced Safety, COM(2002)158, *supra* note 275, at 14, Cf. *supra* note 282.

<sup>312</sup> 2002 Athens Convention, Article 3.

<sup>313</sup> See *supra* note 27.

<sup>314</sup> W. Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: the Effect of Jurisdictional Rules and Recognition Practice*, 26 *Houston Journal of International Law* 364 (2003-2004).

<sup>315</sup> Pontier, *supra* note 171, at 139.

wrote 14 years ago, “Americans have a lot to learn about personal jurisdiction”<sup>316</sup> from the European approach, especially towards consumers as a group in need of special protection. Unfortunately, up to the present the US Supreme Court holds that forum clauses *prima facie* merit enforcement. American doctrine does not make a distinction between consumer and regular commercial contracts. This results in deficiency of both predictability and fairness of US jurisdictional practices.<sup>317</sup>

Taking into consideration the need for uniformity and predictability, there were several projects to create an international instrument regulating jurisdiction. The most recent attempt to create a truly global convention on jurisdiction was through the Hague Conference on Private International Law. Interestingly, negotiations were initiated by the US, with the support of major economic ‘powers’.<sup>318</sup> However, the proposed comprehensive Judgment Convention<sup>319</sup> was rejected by the Americans<sup>320</sup> and in 2005 the Conference passed only a partial Convention on Choice of Court Agreements which does not apply to consumer contracts<sup>321</sup> and carriage of passengers.<sup>322</sup>

In addition to its opposition to uniform jurisdiction conventions, the US is not a party to any international instrument for the protection of passengers at sea, and it is very unlikely that the US will become a party to the 2002 Athens Convention.<sup>323</sup> Although the jurisdiction provisions of the Athens Convention represent a balanced set of rules similar to those of the Brussels Regulation, it should not come as a surprise that the American cruise industry vigorously opposes the accession and maintains that suits should be brought in the jurisdiction where the cruise line has its principle place of business.

It is agreed by scholars and practitioners that there is a need for a revision of the decisions in *The Bremen* and *Shute* cases, and that forum clauses should be regulated by a uniform statute passed by the US Congress, binding for federal and state courts and compatible with contemporary principles of consumer protection. With this in mind, strong argumentation should be made for bringing the US jurisdictional practice in line with principles accepted worldwide. In conclusion, this paper has proved the starting premise that the treatment of forum clauses in the US should change.

<sup>316</sup> Borchers, *supra* note 33, at 121.

<sup>317</sup> Borchers, *supra* note 33, at 156.

<sup>318</sup> W. E. Jr O’Brian, *The Hague Convention on Jurisdiction and Judgments: The Way Forward*, 66 (4) *The Modern Law Review* 492 (2003).

<sup>319</sup> Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, drawn up by Peter Nygh and Fausto Pocar, 11 August 2000.

<sup>320</sup> J. D. Kovar, Letter from US Assistant Legal Adviser, to J.H.A. van Loon, Secretary General of the Hague Conference on Private International Law, 22 February 2000.

<sup>321</sup> Convention on Choice of Court Agreements, Concluded 30 June 2005, Hague Conference on Private International Law, [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98), Article 2(1a).

<sup>322</sup> *Id.*, Article 2(2f).

<sup>323</sup> Maritime Law Association of the United States Position Paper on the proposed Protocol to the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 16 July 2001, [www.mlaus.org](http://www.mlaus.org).